

**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, AND
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

Respondents

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There are 62 active programs under consideration for this process. I have separated these into 5 groups:

- 1) 35 have capacities confirmed by QA
- 2) 8 have capacities reported by provider because there hasn't been a site visit yet
- 3) 7 have capacities reported by the provider that are higher than QA because the capacity was lower at the time of the assessment
- 4) 9 have capacities reported by the agency that are higher than QA for unknown reasons - I have flagged these as requiring a call to the agency before Monday to confirm that they measured using 2m and have confirmed the bed spacing meets the Directive
- 5) 3 require follow-up by QAT for DOS sites

Gord – I think based on our discussion with Kirsten we also need to call the providers in groups 2) and 3) to confirm that they used a 2m measurement rather than 6ft to come up with their capacity since we have not verified that with a site visit. If so, I would suggest that perhaps the QA team can offer some help in making those calls if needed.

- Laural Raine, Director, Service Planning & Integrity Unit, to Gordon Tanner, Anabella Wainberg, Heath Priston, Brad Boucher, Morag Perkins; email dated June 12, 2020, 5:46pm¹

“I know that everyone wants this to disappear, but I feel like we are pushing a bit too hard to finalize today and it could leave us vulnerable. My team has not begun any of the work listed in Laural's email so we will definitely be rushed to complete.”

- Brad Boucher, Manager, Operations & Support Services, to Gordon Tanner, Laural Raine, Anabella Wainberg, Heath Priston, Morag Perkins; email dated June 15, 2020, 7:37am

“I assured Mary Anne [Bédard, General Manager, SSHA] this would be our last progress report. Please do what you can to have the team complete their assigned work today. Our QA visits will continue as we move forward in the spirit of continuous improvement.”

- Gordon Tanner, Director, Homeless Initiatives & Prevention Services, to Brad Boucher, Laural Raine, Anabella Wainberg, Heath Priston, Morag Perkins; email dated June 15, 2020, 8:50am

“I agree that if we can confirm these 9 locations today under #4, we can continue with the rest of the QA work ongoing. One addition is can you please also please add Evangeline on the list to confirm by phone today? Of the ones that have not had a site visit yet due to outbreak, all others are well under their capacity except for Evangeline and I think we will get questioned about this location in particular so will need to confirm this is the correct target capacity using 2m.”

- Laural Raine to Gordon Tanner, Anabella Wainberg, Heath Priston, Brad Boucher, Morag Perkins; email dated June 15, 2020, 9:39am²

¹ Brief of Excerpts from UTs, Tab 15B, p. 167: Email “Confirmed capacities.msg”.

² Brief of Excerpts from UTs, Vol. 2, Tab 15C, p. 273: Email “RE Confirmed capacities AW1.msg”.

“Hi: Could you double back with Mauricio and ask about Evangeline as well. Confirm they have measured for the 80, and also for the 2 additional emergency beds. As there has been no QA on site yet because of the outbreak, we want to be sure they have measured.”

- Brad Boucher, to Morag Perkins, Housing Consultant; email dated June 15, 2020, 9:45am

“Evangeline is currently at 80, so I have asked them to deactivate those 2 beds at least. The average distance is 4.4 feet. They have erected one wall in one of the bedrooms (full drywall, floor to ceiling, but not wall to wall)”

- Morag Perkins to Brad Boucher; email dated June 15, 2020, 9:54am

“HI Morag: So this means they measured but are not in compliance?”

- Brad Boucher to Morag Perkins; email dated June 15, 2020, 12:20pm

“Correct. I think all the SA specific moves started and they were probably planned to move some women and then they went into outbreak. I'm not sure where they can be relocated to now.”

- Morag Perkins to Brad Boucher; email dated June 15, 2020, 12:48pm³

“Hi There. This is not great news as a number of these providers either used the 6.0 feet or admitted they never measured at all. Let me know what might be needed at this point.”

- Brad Boucher to Gordon Tanner, Laural Raine, Anabella Wainberg, Heath Priston, Morag Perkins; email dated June 15, 2020, 3:46pm⁴

“A good number of those revised capacity figures put those sites over capacity. I will need direction as to whether I should use these new figures in the progress report. I'm also waiting on direction on how to handle the Seaton House numbers. Laural, what is our deadline to deliver to legal?”

- Heath Priston, Manager, Business Intelligence, to Gordon Tanner, Laural Raine, Anabella Wainberg, Brad Boucher, Morag Perkins; email dated June 15, 2020, 3:57pm

“Can I suggest we jump on a call at 5 or 5:30 to sort this out. I am not following where we are at.”

- Gordon Tanner to Laural Raine, Anabella Wainberg, Brad Boucher, Morag Perkins, Heath Priston; email dated June 15, 2020, 4:00pm⁵

³ Exh 16 to the Continued Cross-Examination of Mr. Alan Gordon Tanner, dated September 10, 2020 (“Tanner Cross, Sept 10”), Applicant’s Supplementary Brief of Transcripts (“Supp Brief of Transcripts”), at Tab 16, p. 763.

⁴ Brief of Excerpts from UTs, Vol. 2, Tab 15L, p. 299: Email “RE Progress Reporting AW.msg”.

⁵ Brief of Excerpts from UTs, Vol. 2, Tab 15M, p. 303: Email, “RE Progress Reporting.msg2.msg”.

“Dear Counsel, Attached please find our letter of today's date and the final weekly Progress Report dated June 15, 2020.”

- Counsel for the City to Counsel for the Applicants; email dated June 15, 2020, 9:49pm⁶

“By the June 15 Progress Report, in addition to all sites meeting the target capacities, we had also completed 100% of the first point in time verification that the sites were in compliance...”

Based on the QA Team work as detailed below, we are confident that the service providers verified their compliance with physical distancing based upon the 2m standard and not 6ft...

In all of these cases, prior to delivering the June 15 Progress Reports, SSHA staff called the service providers and requested that they verify through actual measurement of their beds that they have achieved 2m of lateral spacing between beds. In all cases, the service providers did so and verified to us that their facility met the physical distancing requirements at their target capacities. This information was shared with the Applicants when we delivered the June 15 Progress Report.”

- Affidavit of Gordon Tanner dated July 8, 2020, paragraphs 61, 69, 75

⁶ Exh P to Second Affidavit of Sahar Talebi, sworn July 3, 2020 (“Second Talebi Affidavit”), Applicant’s Motion Record dated September 22, 2020 (“App MR”), at Tab 4; see also Exh V to Second Talebi Affidavit, App MR, at Tab 4, Letter from City’s counsel dated June 15, 2020: “We advise that the final movement of spaces required to achieve 100% physical distancing within the shelter system have been completed.”

PART I - OVERVIEW

1. The Applicants seek declaratory and equitable relief arising out of the City's failure to discharge its obligations under the Interim Settlement Agreement concluded May 15, 2020.
2. Although it was under no requirement to do so by a particular point in time, for its own reasons, the City determined to assert that it had achieved compliance with Physical Distancing Standards on June 15, 2020, despite actual knowledge that it had not in fact done so. The City's affidavit material filed in response to this motion made numerous false and misleading claims concerning the nature and extent of the Quality Assurance process on which its assertion of compliance was said to rely. These assertions are belied by the records produced following the refusals motion, which include reports from shelter service providers of significant and sustained non-compliance with Physical Distancing Standards, now known to be in the City's possession as of June 15. These records confirm the insufficiency of its verification and implementation efforts.
3. The City's efforts to shield these and other unhelpful but highly relevant facts from scrutiny during the course of the delivery of the Progress Reports continued in its response to this motion, including in the form of improper refusals which necessitated a refusals motion to be answered.
4. The Applicants seek declaratory relief that the City had not reached compliance, as of June 15 or any date prior to the hearing of this motion, with its obligations under the Agreement, and that the Agreement remains in force pursuant to its terms. In addition to the failure to implement Physical Distancing Standards as required under paragraph 2(a), the City has also failed to comply with its obligation to make beds available to Clients, in violation of paragraph 2(b).
5. Resolution of the issues on this motion requires the Court's guidance by way of declaratory relief as to the correct interpretation of what the Agreement requires. The guidance sought on this

motion includes a rejection of the concept of “longitudinal” spacing – a concept introduced by the City in an apparent attempt to define away a significant source of non-compliance with the “lateral separation of at least 2 metre between beds” standard agreed to by the parties. The City has also incorrectly and narrowly construed the definition of Clients to whom it is obliged to provide sufficient beds pursuant to paragraph 2(b) of the Agreement.

6. The pattern of this public authority’s lack of candour in discharging its contractual obligations, and in its dealings with this Court, is extraordinary. The City’s conduct in this matter cries out for this Court’s declaration that it has not complied with the good faith duty of honest performance of contractual obligations, and amply justifies exercise of the Court’s equitable jurisdiction. The Applicants seek additional protections designed to ensure the sufficiency of the City’s efforts, and the reliability of the information provided by the City to the Applicants and to the Court, in discharging its continuing obligations to comply with the terms of the Agreement.

PART II - THE FACTS

A. The City of Toronto’s homelessness services

7. Prior to the onset of the COVID-19 pandemic, the City’s Shelter, Support & Housing Administration (“SSHA”) oversaw the operation of 53 homeless shelters programs and 7 respite programs operated by 32 community non-profit agencies, and directly operated 11 homeless shelter programs.⁷ The pre-COVID capacity of the shelter and respite system was approximately 7,700 beds, divided into sectors serving different portions of the population of people experiencing homelessness (i.e., single adult shelters (male, female and mixed), family, youth).⁸

⁷ Affidavit of Sahar Talebi, dated May 4, 2020, (“First Talebi Affidavit”), App MR, Tab 3, para. 8; Affidavit of Gordon Tanner, affirmed July 8, 2020 (“Tanner Affidavit”), at para. 15.

⁸ Tanner Affidavit, at paras. 13, 102.

8. Shelters operating in Toronto’s shelter system must meet minimum service standards set out in the Toronto Shelter Standards.⁹ The current version of the Standards was adopted in 2015, and is a City by-law.¹⁰ The Shelter Standards prescribe minimum standards for bed spacing and for personal space allowance, “to decrease the transmission of communicable diseases and conflict between clients”.¹¹ Pre-COVID, the standards set in the Shelter Standards were:

- “3.5 m.² (37.7 ft.²) of personal space per client in sleeping areas”, and
- “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”.¹²

9. Conditions in the respite sites are governed by the 24-Hour Respite Site Standards, a directive approved by the General Manager of SSHA.¹³ While the Respite Standards mandate that “[a]s much as possible, resting spaces will be arranged in a manner that... reduces the transmission of communicable diseases”, the specific minimum spacing standards set out in the Shelter Standards are made applicable to respite sites only “when required by SSHA”.¹⁴ As of mid-March 2020, no minimum bed spacing requirements applied to respite sites.

B. The City’s early response to COVID within the shelter system

10. Beginning in mid-March 2020, SSHA opened additional sites in hotels, community centres and other locations, to allow for additional physical distancing in existing shelter and respite

⁹ The Shelter Standards were first enacted in 1992 “to ensure that services are delivered in a consistent manner across the shelter system”: Exh G to First Talebi Aff., App MR, Tab 3, Preamble. See also, Cross Examination of Mr. Tanner, dated July 11, 2020 (“Tanner Cross, July 11”), Brief of Transcripts, Tab A, p. 14, lines 3-8; Tanner Aff., at para. 16.

¹⁰ Exh G to First Talebi Affidavit, App MR, at Tab 3: Toronto Shelter Standards, Preamble. See also Exh H to First Talebi Affidavit, App MR, at Tab 3: City Council minutes dated Sept 30, 2015 adopting the Shelter Standards; see also Exh I to First Talebi Affidavit, App MR, at Tab 3: City of Toronto By-Law No. 1053-2015.

¹¹ Exh G to First Talebi Affidavit, App MR, at Tab 3: Toronto Shelter Standards, s. 9.3, p. 59.

¹² Exh G to First Talebi Affidavit, App MR, at Tab 3: Toronto Shelter Standards, s. 9.3.1(c) and (e), p. 59.

¹³ Exh J to First Talebi Affidavit, App MR, at Tab 3: 24-Hour Respite Site Standards, and Exh K to First Talebi Affidavit, App MR, at Tab 3: City of Toronto webpage regarding 24-Hour Respite Site Standards.

¹⁴ Exh J to First Talebi Affidavit, App MR, at Tab 3: 24-Hour Respite Site Standards, s. 7.3.1(e), 7.3.1(h), 7.3.1(i).

sites.¹⁵ As of mid-April, the City had opened 11 new sites (with 472 spaces), and secured 11 hotels with 1020 rooms, seven of which were operational with 490 people having been moved into hotel rooms.¹⁶ The City also converted one existing shelter into an isolation/recovery site, and opened a second isolation/recovery site in a hotel in early April.¹⁷

11. On March 30, 2020, Toronto Public Health (“TPH”) issued guidance to shelter providers to prevent infections through physical distancing. TPH’s Fact Sheet stated:

Place mats/cots/beds at least 2 metres apart. If not possible, consider staggering sleeping arrangements to increase the physical distance between client/participant faces as much as possible while sleeping.¹⁸

12. On April 1, 2020, at a City press conference providing daily briefings, in response to a media question “why is a single homeless person still sleeping within six feet of another homeless person in the city shelter as of last night?”, Dr. de Villa, the City’s Medical Officer of Health, stated “we are very cognizant of the fact that those experiencing homelessness in our community are at high risk of negative impact associated with COVID-19... our colleagues are working as expeditiously as they can to remedy the situation.”¹⁹

13. On April 8, TPH revised its interim guidance for Homelessness Service Settings: “Place mats/cots/beds at least two metres/six feet apart for all clients at the settings, and do not use bunk beds.”²⁰ Nevertheless, on April 8, Dr. de Villa indicated that TPH had no intention to mandate

¹⁵ First Talebi Affidavit, App MR, at Tab 3, at para. 8.

¹⁶ Exh E to First Talebi Affidavit, App MR, at Tab 3: Backgrounder: City of Toronto COVID-19 Response for People Experiencing Homelessness; Exh C to Tanner Affidavit.

¹⁷ Exh E to First Talebi Affidavit, App MR, at Tab 3: Backgrounder: City of Toronto COVID-19 Response for People Experiencing Homelessness; Exh C to Tanner Affidavit.

¹⁸ First Talebi Affidavit, App MR, Tab 3, para 54; Exh GGGG to First Talebi Affidavit, App MR, at Tab 3.

¹⁹ First Talebi Aff., App MR, Tab 3, at para. 58. On April 2, Mary-Anne Bédard stated that “SSHA has conducted a comprehensive space analysis to determine how much capacity has to be reduced, on a site-by-site basis, to achieve 6ft of physical distancing.” Ms. Bédard declined to issue a mandatory order or directive which would apply across the shelter system: First Talebi Aff., App MR, Tab 3, at para. 59.

²⁰ First Talebi Affidavit, App MR, Tab 3, at para. 65; Exh QQQ to First Talebi Affidavit, App MR, Tab 3.

minimum physical distancing requirements for the shelter system, stating: “at this stage there doesn't appear to be any merit or need for an Order to be given, and as you've heard us say from this table many times that effective public health measures are best done on a voluntary basis.”²¹

14. In late March and throughout April, journalists and homelessness advocates documented the crowded conditions within numerous City's shelter and respite sites.²² The pace of relocation of clients was worryingly slow: between the opening of the hotel program on or about March 24 and April 19 (the first publicly reported data), 665 shelter clients were relocated into hotel spaces; during the following week (ending April 26), only 198 clients were moved.²³

C. The Applicants' application and injunction motion

15. The Applicants were concerned about the crowded conditions within the shelter and respite system, as well as the slow pace of relocations to reduce density within these settings and the absence of binding minimum standards for physical distancing for this sector. On April 24, 2020 the Applicants filed an application challenging the bed spacing provisions in the Shelter Standards and the 24-Hour Respite Site Standards. The Applicants maintained that in the context of the COVID-19 pandemic, the Shelter and Respite Standards were inconsistent with the *Charter* and the Ontario *Human Rights Code* because they failed to require a minimum of 2 metres lateral separation between beds and did not prohibit the use of bunk beds, the minimal standards set by prevailing public health guidance in order to mitigate the risk of COVID-19 transmission.²⁴

16. On May 4, 2020, the Applicants filed for an interim injunction restraining the City from

²¹ First Talebi Affidavit, App MR, Tab 3, at para. 64.

²² Affidavit of Doug Johnson Hatlem dated May 4, 2020, App MR, Tab 7, at paras. 21-23, 25, 28-33, 35, 49 and associated Exhs.

²³ Exhs XXXX and YYYY to First Talebi Affidavit, App MR, Tab 3.

²⁴ Notice of Application dated April 24, 2020.

continuing to permit the operation of sites within the City's shelter system with less than 2 metres lateral separation between beds and/or with bunk beds in use.²⁵ The Applicants filed voluminous material in support of the interim injunction, including expert evidence, relied upon in support of this motion, regarding the important role of physical distancing in mitigating the risks of COVID-19 transmission in congregate homeless shelters.²⁶ This is the only properly-qualified expert evidence regarding these issues before the Court, which has never been contradicted by the City.

D. The Interim Settlement Agreement

17. On May 15, 2020, the Applicants and the City agreed to adjourn the Applicants' injunction motion *sine die* pursuant to terms set out in the Agreement. The key provision of the Agreement consists of substantive commitments by the City to "use best efforts" to:

- Achieve without delay and thereafter sustain, across the shelter system, Physical Distancing Standards of "(a) lateral separation of at least 2 metres between beds or alternative sleeping arrangements; and (b) no use of the upper bunks of bunk beds";
- Provide shelter to Clients, broadly defined as anyone who has received any kind of support services from the shelter system since March 11, 2020, by making available such Beds as is necessary to achieve Physical Distancing Standards across the shelter system;
- Continue to publish certain data about shelter system capacity and occupancy online.²⁷

18. In aid of the City's substantive commitments, the Agreement also provides for information-sharing and engagement between the parties. Under the Agreement, the City is required to provide weekly Progress Reports and answer the Applicants' relevant and proportionate questions with respect to any matters arising out of the Progress Reports. These reporting and question-answering obligations continue on a weekly basis until the City achieves compliance with its substantive

²⁵ Notice of Motion, dated May 4, 2020.

²⁶ Affidavit of Dr. S. Monty Ghosh affirmed May 4, 2020, App MR, Tab 5, para. 12; Affidavit of Dr. Tim O'Shea affirmed May 4, 2020, App MR, Tab 6, paras. 44-47.

²⁷ Exh A to Second Talebi Affidavit, App MR, Tab 4: Interim Settlement Agreement, at para. 2.

commitments under the Agreement, including compliance with Physical Distancing Standards across the shelter system; after that, the City must deliver two further monthly Progress Reports.²⁸

19. The City's substantive obligations under paragraph 2 and reporting obligations under paragraphs 3-7 cease when the City has achieved compliance with Physical Distancing Standards and sustained that compliance for two months ("Termination Date"). The Agreement provides that the Applicants will abandon their injunction motion within one week of the Termination Date.²⁹

20. The parties' negotiations regarding the Agreement's definition of "Physical Distancing Standards" are the subject of an Agreed Statement of Facts. The Applicants' first draft proposed a definition for this term requiring "two metre distancing in all directions between beds, mats, and cots".³⁰ In response, the City took the position that the definition of "Physical Distancing Standards" must use the terminology "lateral separation", as this was the terminology employed in the Shelter Standards. The Applicants acceded to the City's position on this point, and the definition of "Physical Distancing Standards" in their next draft tracked precisely the text of s. 9.3.1(e) of the Shelter Standards.³¹ In adopting the terminology "lateral separation" within the definition of "Physical Distancing Standards" in the Agreement, the parties' common intention was to invoke and reference the concept employed in the Shelter Standards. This common intention is confirmed by the reference to the Shelter Standards in the preamble of the Agreement.

E. City's Activities from May 15 to June 15

21. When it signed the Agreement on May 15, the City had been engaged in efforts to develop

²⁸ Exh A to Second Talebi Affidavit, App MR, Tab 4: Interim Settlement Agreement, at paras. 3, 5, 6, 7.

²⁹ Exh A to Second Talebi Affidavit, App MR, Tab 4: Interim Settlement Agreement, at paras. 1(e), 11, 12.

³⁰ Agreed Statement of Facts dated Sept 8, 2020 ("ASF"), App MR, Tab 2, para. 4; Exh C to ASF, App MR, Tab 2.

³¹ ASF, App MR, Tab 2, paras. 6-7 and Exh D; Exh G to First Talebi Affidavit, App MR, Tab 3: Toronto Shelter Standards, s. 9.3.1(e), p. 59.

and implement a plan for physical distancing within existing shelter and respite sites for approximately two months. Understandably, these early efforts proceeded on the basis of estimates: the City moved forward with relocations in order to reduce density at certain sites, even before it had completed the work of assessing and confirming target capacities on-the-ground at each site. Similarly, and again understandably, the City began the process of relocating clients when it had not yet settled on a measure as to what the minimum standard for physical distancing within the City's shelter system would be in the context of the COVID-19 pandemic.³²

22. By virtue of the Agreement, the City committed itself to binding standards with respect to the measure of physical distancing applicable to beds and alternative sleeping arrangements within the shelter system, while the Agreement remained in force. In signing the Agreement, the City also committed to make "best efforts" to achieve without delay and sustain compliance with these binding Physical Distancing Standards, while the Agreement remained in force. Notwithstanding these commitments, the evidence revealed through the City's productions following the refusals motion shows that the Agreement had little if any impact on SSHA's internal processes. The City continued to develop and implement its plans with studious disregard for its obligations under the Agreement. The circumstances described in the subsections below exemplify this pattern.

(i) The City did not communicate the Agreement internally and lacked systems and processes to assess and implement its obligations under the Agreement

23. The City generally did not communicate the existence of the Agreement or the City's obligations thereunder to managerial staff at SSHA who were responsible for developing and implementing the City's plans for physical distancing within the shelter system. At the time of

³² Tanner Affidavit, at paras. 34, 41-52, 54-59.

their cross-examinations in mid-July, key managerial staff at SSHA remained unaware that the Agreement contained commitments that bore directly on their areas of responsibility.³³ SSHA did not undertake any internal process to assess what its obligations under the Agreement might require, or to determine whether its existing processes and plans might require modification in light of the signing of the Agreement.³⁴ Rather, the City continued developing and implementing its plans for physical distancing in the shelter system without reference to the Agreement.

(ii) The City’s actions exacerbated confusion about “2 metres / 6 feet”, and its minimal efforts to correct this confusion were belated and insufficient

24. The City’s initial estimates of the number of clients to be relocated were based on “theoretical calculations” determined by dividing the square footage of the sleeping space at each site by an allocation of 74.3 square feet per client. Based on the target capacities identified through this 73.4 square foot “proxy” calculation, the City estimated that 2000 additional spaces were required to achieve physical distancing in existing shelter and respite sites.³⁵ In-person QA visits

³³ See Schedule C for organizational chart of SSHA. For example, Cassandra Decker (Manager, Streets to Homes) and Carol McDonald (Manager, Central Intake) were both unaware of the City’s obligation under the Agreement to provide beds to all individuals who had received services from the shelter system since March 11: see Decker Transcript, Brief of Transcripts, Tab E, at p. 11, QQ. 18-20; McDonald Transcript, Brief of Transcripts, Tab C, at p. 68-9, Q. 204. Atul Medhekar (Manager (Acting), Information Technology) was unaware of the City’s obligations to continue to publish certain data online: see Medhekar Transcript, Brief of Transcripts, Tab C, at p. 57, Q. 177.

³⁴ Tanner Cross, July 11, Brief of Transcripts, Tab A, at pg. p. 71-74; City’s UT Chart dated July 21, 2020, Brief of Excerpts from UT, Vol. 1, Tab 1, answers to Tanner questions Summons #1, Summons #6, Summons #17 and answer to McDonald Q363. See also: City’s UT Chart dated Sept 4, 2020, Brief of Excerpts from UT, Vol. 1, Tab 2, at answers to UT13, UT55, p. 70 and 83-4. The only procedure that was developed by SSHA in response to the obligations set out in the Agreement – namely, the Call-Back and Service Queue Closeout Procedure for Central Intake – was introduced for the first time on July 2, only after the Applicants had indicated their intention to challenge the City’s assertion of compliance as of June 15: see Tanner Cross July 11, Brief of Transcripts, Tab A, p. 255-259; Tanner Affidavit, at paras. 120, 128; McDonald Transcript, Brief of Transcripts, Tab C, at p. 80. Moreover, the instructions for this new procedure are in fact materially inconsistent with the City’s obligations under the Agreement, in that priority is only given to Clients who received bedded services in the shelter system between March 11 and May 15.

³⁵ Tanner Affidavit, at para. 42, 45. The City has refused to divulge the basis for its use of 74.3 square feet as a proxy to estimate target capacities consistent with physical distancing. The Applicants’ evidence demonstrates that for larger dormitory spaces, an allocation of 74.3 square feet of personal space will predictably yield a target capacity estimate that greatly exceeds the number of beds that can in fact be accommodated while maintaining 2m spacing; see Affidavit of Pooya Baktash, dated July 27, 2020 (“Baktash Affidavit”), App MR, at Tab 15, at para 6 and Exh E.

began in mid-April,³⁶ and QA had already visited dozens of sites when the Agreement was concluded on May 15.³⁷ Many QA visits through April and May relied on a “benchmark” for physical distancing, based on prevailing public health guidance, that referred interchangeably to “2m / 6ft”.³⁸ In these visits, QA staff used a measure of 6 ft to judge compliance with physical distancing guidelines.³⁹ Although QA staff were aware that 2m and 6ft were not in fact equivalent measures⁴⁰ – a fact also known to Mr. Tanner⁴¹ – SSHA provided no clear directions on this point.

25. With the Agreement signed on May 15, the City committed itself to 2m as the measure by which compliance was to be assessed. Yet this commitment was disregarded at every turn. SSHA did not review the readily-available QA documentation to identify those sites for which QA visits had proceeded on the basis of a 6ft measure; this simple verification exercise was apparently only undertaken in August 2020, after the Applicants compelled production of the QA documentation.⁴² Moreover, QA continued to use 6 feet as an acceptable distance between beds *after* May 15.⁴³

26. On May 21, 2020 the City issued Directive 2020-01 (the “**Directive**”) to shelter providers, amending s. 9.3.1(e) of the Shelter Standards and s. 7.3.1(i) of the Respite Standards to require all providers to maintain a lateral separation of “at least 2.0 m (6.0 ft)” between beds or resting

³⁶ The first QA visit was to Margaret’s 323 Dundas on April 14: See Exh 1 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 1, at p. 493.

³⁷ Exh 1 to Tanner Cross, Sept 10, Supp Brief of Transcripts, at Tab 1.

³⁸ Tanner Affidavit, at para. 48.

³⁹ Exh 1 to Tanner Cross, Sept 10, Supp Brief of Transcripts, at Tab 1. See also attached Schedule D.

⁴⁰ Anabella Wainberg, the Manager of QA, came to the realization that 6 feet was not equivalent to 2 metres in late April and advised her director, Laural Raine, of the discrepancy and the confusion that might result from concurrently referring to 2 metres and 6 feet: Wainberg Transcript, Brief of Transcripts, Tab B, at p. 36-7; City’s UT Chart dated July 21, 2020, Brief of Excerpts from UT, Vol. 1, Tab 1, at p. 53, Q. 64. Members of the QA team were also aware of the difference between these imperial and metric measures in April and May, prior to the Agreement: Emails “FW Augusta - Physical Distancing (Lateral Separation)”, Brief of Excerpts from UT, Vol. 1, Tab 6H, at p. 199.

⁴¹ Tanner Cross, July 11, Brief of Transcripts, Tab A, p. 78, Q. 199-200.

⁴² City’s UT Chart dated Sept 4, 2020, Brief of Excerpts from UT, Vol. 1, Tab 2, at Answer in respect of UT18; Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at QQ 609-613.

⁴³ See attached Schedule D setting out examples of QA staff referring to 6 feet in assessing the sufficiency of physical distancing and in correspondence with site providers.

spaces.⁴⁴ SSHA consciously selected the “2.0 m (6.0 ft)” terminology for inclusion in the Directive even though it was aware that the two measures were not equivalent and generated confusion; it did so on the basis that this was the terminology determined by public health officials.⁴⁵

27. The continuing reliance on the 6ft measure by QA staff and service providers was thus not an isolated error or accidental oversight; rather, this was an approved and considered practice.⁴⁶ In correspondence within QA on June 1, Eden Amare sought Ms. Wainberg’s approval to advise providers that “we encourage Providers to aim for the beds to be 2m apart as much as possible to air [sic] on the side of caution. However, beds that are 6ft apart will also be scored as compliant”. Ms. Wainberg replied, “Your approach is very reasonable (2m or 6ft) whatever the provider has calculated.”⁴⁷ Confronted with this email in cross-examination, Mr. Tanner initially defended Ms. Wainberg’s advice, on that basis that it was consistent with the direction provided in Directive 2020-01 as it stood as of June 1.⁴⁸ When reminded about the City’s commitment to a 2m measure within the Agreement, signed on May 15, Mr. Tanner conceded that Ms. Wainberg’s advice “did not reflect the commitments that we made in that agreement”.⁴⁹

28. SSHA had notified all service providers about the Directive, through a general memo dated

⁴⁴ Second Talebi Affidavit, App MR, at Tab 4, at para 16 and Exh H; see also File “TSS Directive 2020-01 Physical Distancing Standards FINAL,” Brief of Excerpts from UT, Vol. 2, Tab 10, at p. 257.

⁴⁵ Exh 27 to Tanner Cross, Sept 10, Supp Brief of Transcripts, at Tab 27: Email from Amare to Wainberg, June 1, 2020, (“I know we discussed this issue when the Directive was developed and decided to use the measurements determined by TPH.”); Tanner Cross, July 11, Brief of Transcripts, Tab A, at p. 82, Q. 210. See also Exh R to Second Talebi Affidavit, App MR, at Tab 4: Letter from City’s Counsel dated June 2, 2020: “Directive 2020-01 was developed to be consistent with the direction and guidance from Ontario Ministry of Health contained in the Guidance for Homeless Shelters which suggested that beds should be spaced “2m/6ft” apart. It is appropriate that the Directive reflected this medical guidance.”

⁴⁶ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at QQ617-619.

⁴⁷ Exh 27 to Tanner Cross, Sept 10, Supp Brief of Transcripts, at Tab 27; See also Exh 8 to Tanner Cross, Sept 10, Supp Brief of Transcripts, at Tab 8: Email from Amare to QA team, June 15, 2020, 3:57pm “And to the QAAs, if you used 6ft instead of 2m, we understand. Especially given that the directive stated 6ft was okay at the time.”

⁴⁸ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at Q627.

⁴⁹ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at Q628-632, especially p. 224 at lines 16-18.

May 21, 2020 followed by individualized letters dated May 22, 2020.⁵⁰ The individualized letters were accompanied by a survey; both the letter and the survey referred repeatedly to the Directive's requirement of "a minimum of 2.0 meters or 6.0 feet of lateral separation between beds, measured from edge to edge".⁵¹ Service providers were required to complete, sign and return the survey to SSHA, thereby attesting that the "the undersigned confirms that the information above related to compliance with Directive 2020-01 has been verified through a review of on-site conditions, including measurements of the lateral spacing between beds or alternate sleeping arrangements".

29. On June 4, SSHA issued a revised version of Directive 2020-01, in which reference to 6 ft as a permissible measure no longer appeared. The City maintains that this revision occurred because provincial guidance had been updated to remove reference to 6 ft, and not because of any inconsistency between the Directive and the City's obligations under the Agreement.⁵² Following this revision of the Directive, SSHA did not undertake a new survey or otherwise request individualized confirmation from service providers that they remained in compliance if the measure of 2m was employed. Mr. Tanner stated in his affidavit that SSHA advised service providers of the revised Directive on June 4, but this did not in fact occur.⁵³ The existence of the

⁵⁰ Exh BB to Second Talebi Affidavit, App MR, at Tab 4: SSHA Memo dated May 21, 2020; Tanner Aff., at para. 67.

⁵¹ Many of the individualized letters and the survey responses sent to and received from service providers are included within Exh 1 to the Tanner Cross, Sept 10, Supp Brief of Transcripts, at Tab 1, See for example: letter and survey response for Dixon Hall – 351 Lakeshore, at p. 36-38 of Exh 1.

⁵² Tanner Affidavit, at para. 64; Tanner Cross, July 11, Brief of Transcripts, Tab A, at p. 82, Q. 210; Exh R to Second Talebi Affidavit, App MR, at Tab 4: Letter from City's Counsel to Applicants' Counsel dated June 2, 2020. The revised provincial guidance referenced by the City is a document issued by the Ministry of Health and entitled "COVID-19 Guidance: Congregate Living for Vulnerable Populations" (Exh J to Second Talebi Affidavit, App MR, at Tab 4). The guidance document begins with the following statement: "This guidance document provides basic information and is not intended to take the place of medical advice, diagnosis or treatment, legal advice or requirements." It should be noted that the Applicants had formally objected to the reference to 6ft within the Directive, prior to its revision: see Exh Q and S to Second Talebi Affidavit, App MR, at Tab 4.

⁵³ Tanner Affidavit, at para. 69; City's UT Chart dated July 21, 2020, Brief of Excerpts from UTs, Vol. 1, Tab 1, at answers in respect of Tanner questions Summon #38 and Q269; City's UT Chart dated September 17, 2020, Brief of Excerpts from UTs, Vol. 1, Tab 4, at answer in respect of UT13.

revised Directive was communicated to service providers via general e-mail on June 12; the reference to the revision was buried on the second page of one of 17 documents attached to the email.⁵⁴ The day before, the amended Directive was mentioned in a Powerpoint presentation delivered to site providers, without identifying the nature of the amendment or its significance.⁵⁵

(iii) The City was determined to assert compliance before the Phase 1 QA process was completed, and when the Phase 2 QA process was still outstanding

30. The QA process that was already underway when the Agreement was signed on May 15 was described internally as “Phase 1”. Within QA, there was no expectation that the Phase 1 assessments involved determination of ‘final’ or even accurate target capacities, even for site visits occurring after May 15. Often, the QA assessors observed that a given site could not accommodate the stated capacity while complying with 2m spacing, and provided an estimate of the number of spaces to be decanted, while noting that further verification and measurement would be required to confirm that the resulting target capacity could actually be accommodated in the space.⁵⁶ QA always expected to conduct follow-up visits as part of “Phase 2”, to further assess the different sites and their layouts, and to confirm that the target capacities estimated in Phase 1 could in fact be implemented on the ground in a manner that complied with physical distancing requirements.

⁵⁴ Brief of Excerpts from UTs, Vol. 2, Tab 17A, Email “COVID-19 Response Update to Homeless Service Providers - June 12 2020.msg”, and associated attachments at Tabs 17B-K. See specifically attachment at p. 241, “Memorandum to Homeless Service Providers dated June 12 2020”, Tab 17G: “The Directive has now been updated to align with new guidance from the Ministry of Health clarifying the lateral distance required from edge to edge between beds is 2 meters. Previous guidance stated the distance as 2m/6ft.”

⁵⁵ Brief of Excerpts from UTs, Vol. 1, Tab 7, at p. 241: PowerPoint presentation “Homelessness Covid-19 Response - 2020_06_11_final,”.

⁵⁶ See examples in Exh 1 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 1: Cornerstone Place, 351 Lakeshore, 1A Strachan, HFS - Savard’s, HFS - Scarborough, Willowdale Welcome Centre, Junction Place, Margaret’s 21 Park Rd and 323 Dundas, Na-Me-Res, SA: Evangeline, Gateway, Islington, New Hope, Scarborough Village Residence, Seaton House: Hostel Program, SHARC 129 Peter, Sistering, Sojourn House - 101 Ontario and 250 Queen St E, 25 Augusta, 69 Fraser, Street Haven, Toronto Community Hostel, Turning Point, Women’s Residence, YWCA First Stop; see also Schedule E referring to a number of these sites including Seaton House.

31. The City's limited expectations regarding the accuracy of the Phase 1 QA process are confirmed by the communications of the QA staff internally and with service providers. QA and site providers were told they were conducting an "initial" assessment. Ms. Wainberg, the QA manager, described the Phase 1 visits as "an initial walk-through for most sites", that involved QA "estimat[ing] a capacity that will meet requirements for initial decanting"; she noted that "[f]urther work will be required to refine measurement and determine final capacity."⁵⁷ When a question arose from a site provider, Ms. Wainberg assured her team "We're expected to do a second round anyway and they would be on the list. So this is just getting to a first set of capacities in phase 1."⁵⁸

32. The QA team had not concluded its Phase 1 visits as of June 15. A number of sites (or programs within sites) had not been visited at all.⁵⁹ Several sites had been assessed by QA only by way of a provider self-report conducted over the telephone.⁶⁰ QA had not conducted follow-up visits at sites inspected prior to May 15, and had not reviewed its records to identify which sites had been assessed based on a measure of 6 ft. Even where visits had occurred and where assessments had been conducted on the basis of the 2m measure, the target capacities reported by QA were frequently estimates, intended to be verified through follow-up visits after decanting occurred. As of June 15, the vast majority of these follow-up visits had not occurred. In fact, the

⁵⁷ Brief of Excerpts from UTs, Vol. 2, Tab 15DD, at p. 351, see also Vol. 1, Tab 6E, at p. 175.

⁵⁸ Exh 3 to Tanner Cross, Sept 10, Supp Brief of Transcripts, at Tab 3, p. 705. The difference in expectations of the QA process between Phase 1 and Phase 2 is apparent in a June 4 e-mail from Ms. Wainberg instructing her QA team to conduct an assessment of Willowdale Welcome Centre which had received considerable media coverage because of an outbreak. Wainberg sent her staff floor plans of the site and stated, "This is one site you'll need to take your time and be sure of your measurements. More of a phase 2 than phase 1 visit.": HFS Willowdale, Email RE 5800 Yonge13 AW.msg, Brief of Excerpts from UTs, Vol. 1, at Tab 6D, p. 169.

⁵⁹ These sites are: 545 Lakeshore Respite, Warden Woods 705 Progress, Seaton House – Annex/Infirmary, Long Term and O'Neill, Salvation Army Maxwell Meighen, St. Vincent de Paul – Amelie, Elisa, Mary's and St. Clare. See: City's UT chart dated July 21, 2020, Brief of Excerpts from UTs, Vol. 1, Tab 1, at answer to Q. 299, p. 29.

⁶⁰ These sites are: St. Vincent de Paul – Amelie, Elisa, Mary's and St. Clare. See Exh 1 to the Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 1, for QA Forms and Responses for these sites.

planning for Phase 2 was begun only after the City asserted compliance on June 15: as Ms. Wainberg wrote that day, “anything after today is phase 2”.⁶¹

(iv) The City sought to download responsibility for compliance with physical distancing standards to service providers

33. The May 22 survey of service providers is a cornerstone of the City’s approach to the management of its obligations under the Agreement. Even though the QA processes undertaken through April and May had yielded target capacities that for many sites were provisional at best, and even though the City knew that the accurate determination of target capacities involved substantial work, the City nevertheless required service providers to provide written confirmation that their sites were compliant with Directive 2020-01 at identified target capacities.⁶² In this way, the City sought to divest itself of responsibility, creating the conditions to enable it to rely instead on the confirmations received from service providers. Mr. Tanner thus attested in his affidavit “Service Providers are the operators of their own facilities and they are responsible for ensuring that all standards are met pursuant to the terms of the Operating Agreements with the City”.⁶³

F. The Applicants’ attempts to engage with the City from May 15 to June 15

34. From May 19 to June 15 when the City asserted compliance, the City consistently refused to provide the Applicants with information in the City’s possession which would allow the Applicants to assess whether the target capacities determined by the City were actually consistent

⁶¹ Brief of Excerpts from UTs, Vol. 2, Tab 15FF, p. 353; Email RE TIME SENSITIVE CAPACITY CONFIRMATION THAT SITE MEETS PHYSICAL DISTANCING STANDARD_EA6.msg (Post Sept 10 productions).

⁶² Many of the individualized letters and the survey responses sent to and received from service providers are included within Exh 1 to the Tanner Cross, Sept 10, Supp Brief of Transcripts, at Tab 1, See for example, letter and survey response for Dixon Hall – 351 Lakeshore, at p. 36-38 of Exh 1.

⁶³ Tanner Affidavit, at para. 66; Tanner Cross, July 11, Brief of Transcripts, Tab A, at Q. 220, p. 86.

with Physical Distancing Standards, and to avert to the City's non-compliance.⁶⁴

(i) City's misrepresentations and refusals to engage with the Applicants about the nature of the QA process and its limitations

35. The Applicants' Questions sought to understand the basis for the target capacities reported by the City, the QA team's instructions and methodology, and the instructions provided in the site provider verification survey. The City refused these requests as improper, and repeatedly informed the Applicants, incorrectly, that all target capacities were verified by QA using 2 metres.⁶⁵

36. The Applicants also informed the City of their concern that the 74.3 sq. ft. standard employed in the spreadsheets provided by the City on May 7 was inadequate to ensure compliance with Physical Distancing Standards in large dormitory-style site settings and asked the City for the basis of its reliance on this standard. The City refused, and informed the Applicants, incorrectly, that 74.3 was used only as a "proxy", and that target capacities were always verified by obtaining further information from site providers *and* through QA visits.⁶⁶

37. Thereafter, however, the City refused to provide the Applicants with instructions to site providers or to the QA team. On May 28 and again on June 8 the Applicants expressed their concern that a site provider verification survey used by SSHA had erroneously referred to 6 feet. Requests for copies were again refused.⁶⁷ On June 8 the Applicants informed the City they had now reviewed the survey independently, which confirmed that the prior erroneous reference to 6

⁶⁴ The City's improper refusals to produce information include: the basis of the 74.3 square feet measure the City had initially used as a "proxy" to determine target capacity; the basis of the target capacities reported in each Progress Report (whether it was the 74.3 square feet proxy, a QA visit, information from site provider, or some other source); copies of site provider verification surveys given to shelter providers; instructions from SSHA to QA teams performing site visits; and, layouts or physical dimensions for sites producible pursuant to paragraph 5(a) of the Agreement.

⁶⁵ Exh G, I, M, to Second Talebi Affidavit, App MR, Tab 4.

⁶⁶ Exh G to Second Talebi Affidavit, App MR, Tab 4.

⁶⁷ Exh H to Second Talebi Affidavit, App MR, at Tab 4.

feet undermined the entire validity of the survey as a verification exercise. Again, the City refused to answer questions, and maintained that QA was verifying compliance through site visits or by confirming with the site provider that results were based on the 2m standard.⁶⁸

38. Given that the City's compliance verification process efforts hinged on the QA visits, the Applicants were concerned about the adequacy of visits that occurred in mid-April.⁶⁹ The City refused to provide the QA instructions or identify whether specific target capacities were based on QA site visits, the 74.3 "proxy," site provider surveys, or other sources, and repeated that QA was using the 2m standard.⁷⁰ It assured the Applicants that "the SSHA QA Team, has been and continues to verify physical distancing by measuring 2m of lateral space between beds or cots and this continues to be the standard by which SSHA measures compliance with physical distancing."⁷¹

(ii) The City misrepresented to the Applicants whether it had layouts and physical measurements for sites

39. Paragraph 5(a) of the Agreement obliges the City to provide "layout and physical measurements for each site... where that information is maintained and is readily available to the City with respect to that site." The May 7 spreadsheets produced by the City did not include 7 shelter sites, or any of the respites and COVID-19 response sites. On June 4, the Applicants reiterated requests from prior Questions arising from Progress Reports and asked the City to provide layout and physical measurements for the 7 missing shelter sites as well as all the respites (including the three Sprung sites) and the COVID-19 response sites, or confirm that the information was not maintained or readily available to the City.⁷²

⁶⁸ Exh M to Second Talebi Affidavit, App MR, at Tab 4, at Answers 4-5.

⁶⁹ Exh L to Second Talebi Affidavit, App MR, at Tab 4.

⁷⁰ Exh M to Second Talebi Affidavit, App MR, at Tab 4.

⁷¹ Exh I to Second Talebi Affidavit, App MR, at Tab 4.

⁷² Exh T to Second Talebi Affidavit, App MR, at Tab 4.

40. On June 12, the City advised the Applicants that it did not have layout or physical measurements for any of the respites sites (including the three Sprung sites).⁷³ In fact, QA staff were in possession of layouts and physical measurements for all of the Sprung sites.⁷⁴ The City was also in possession of layouts and/or physical measurements for three other respites.⁷⁵ Mr. Tanner confirmed, in answers to undertakings, that the Applicants' request for layouts for these respite sites had been rebuffed by the City without making any internal inquiries.⁷⁶

(iii) The City misrepresented target capacities

41. The City regularly reported target capacities in Progress Reports which are now shown to far exceed the target capacity determined by QA visits, as set out in Schedule E. The City frequently selected and reported target capacities which do not accord with either QA's assessment or information reported by site providers, yet took no steps to correct or explain how such errors could have occurred. The record strongly supports an inference that in many cases, the target capacities disclosed to the Applicants were not based on information derived from QA visits or received from site providers, as the City repeatedly insisted, but rather that these target capacities were decided upon by directors within SSHA, in order to support claims of compliance.

G. The City had actual knowledge of widespread non-compliance on June 15

42. Upon delivery of its June 15 Progress Report, the City asserted that it had achieved compliance with Physical Distancing Standards across the system, and that pursuant to the terms

⁷³ Exh U to Second Talebi Aff., App MR, at Tab 4. See also Exh M at Answer 3.

⁷⁴ Tab 18A, "Floor Plan of Sprung Structures.pdf," Vol 2, Brief of Excerpts to UTs, p. 470-3; Exhibit 33 to Tanner Sept 10 Cross, Vol 3, Supp Brief of Transcripts, p. 843. The City also had spreadsheets with the 74.3 "proxy" analysis for these sites, produced on April 19, 2020: Tab 18B, "Personal Space Analysis_Sprung Structures_V1_19April2020.xlsx," Vol 2, Brief of Excerpts to UTs, p. 474.

⁷⁵ See Exh 34 (Margaret's 323 Dundas St. E.) and Ex 35 (St. Felix's 25 Augusta Ave) to Tanner Sept 10 Cross, Tabs 34-5, Vol 3, Supp Brief of Transcripts, pp. 845-8; Tab 15YY (Margaret's 21 Park), Email "FW Measurement.msg," Vol 2, Brief of Excerpts to UTs, p. 402-5.

⁷⁶ City's UT Chart dated September 17, 2020, Brief of Excerpts to UTs, Tab 4, at Answers to UT 15, p. 120-1.

of the Agreement, it was no longer required to report on a weekly basis.⁷⁷ The letter from the City's counsel accompanying the June 15 Progress Report stated:

We advise that the final movement of spaces required to achieve 100% physical distancing within the shelter system have been completed.

All service providers have confirmed that they have complied with Directive 2020-01. We have updated the Directive and new literature and posters depicting the 2m lateral separation guidance have been made available. All service providers have been advised that they are required to maintain compliance with the updated Directive.

The SSHA Quality Assurance team verification is on-going and site visits to 87% of the sites have been completed. The QA team has not been able to perform on-site verification of 8 sites. Compliance with physical distancing at these sites has been verified with the service provider.⁷⁸

43. These assertions were factually false and/or materially misleading, in several ways. Compliance with Physical Distancing Standards had not in fact been achieved at all shelter sites.⁷⁹ All service providers had not in fact confirmed that they were in compliance with Directive 2020-01.⁸⁰ As noted above, the QA visits conducted as of June 15 had in fact yielded only estimates of the target capacity that could be accommodated while complying with Physical Distancing Standards that remained to be verified.⁸¹ In response to follow-up done by SSHA staff on June 15, some service providers had indicated that they were not in compliance with Physical Distancing Standards, or that they could not confirm compliance.⁸² Some service providers advised that they would only complete remaining moves to reach compliance with target capacity later in the evening of June 15 or the following day,⁸³ which was scored as compliant for the purposes of the June 15 Progress Report, despite the Effective Date of June 14. Most importantly, the true state of

⁷⁷ Exh P to Second Talebi Affidavit, App MR, Tab 4: Email from City's Counsel dated June 15, 2020 attaching Progress Report; Exh A to Second Talebi Affidavit, App MR, Tab 4: Interim Settlement Agreement, at para. 7.

⁷⁸ Exh V to Second Talebi Affidavit, App MR, Tab 4, at p. 1879: Letter from City's Counsel dated June 15, 2020.

⁷⁹ See examples in Schedules E and F.

⁸⁰ See examples such as Evangeline Residence and 69 Fraser in Schedules E and F.

⁸¹ For examples, see Schedules E and F.

⁸² See, for example Evangeline Residence and Cornerstone Place in Schedule F.

⁸³ See Schedules E and F for examples.

affairs and the falsity of these assertions underpinning the June 15 Progress Report were all known to senior SSHA managers.

44. The documents obtained following the refusals motion reveal that the City had decided in advance, well ahead of June 15, that it would assert compliance as of that date. Mr. Tanner agreed in cross-examination that nothing required the City to assert compliance as of June 15,⁸⁴ or any particular date. Nevertheless, the direction to assert compliance on June 15 came from Mr. Tanner and Mary-Anne Bédard, the General Manager of SSHA, and the pressure to achieve this milestone was communicated to SSHA staff.⁸⁵

45. During the preceding week, Brad Boucher, the manager of Operations & Support Services (OSS), made special arrangements with the two youth shelter sites that had been identified as over-capacity in the June 8 Progress Report, to ensure that these sites would be in compliance as of June 15 (notwithstanding that the effective date of June 14).⁸⁶ Mr. Boucher noted in his email to one shelter that there was an “immense pressure” for the sites to complete their remaining moves by June 15.⁸⁷ In an email to the other shelter, Mr. Boucher stated that the “blame for this situation” should be placed “squarely where it belongs with the advocates who decided they should use the courts to force this on us”.⁸⁸

46. On Friday June 12, SSHA senior management met to discuss the upcoming Progress

⁸⁴ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at Q. 296, p. 110.

⁸⁵ See Brief of Excerpts to UTs, Tab 15C, p. 273: Email, RE Confirmed capacities AW1.msg. In cross-examination, Mr. Tanner denied that he exerted pressure on SSHA staff to assert compliance as of June 15: Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, p. 112-113. The Applicants received production of Mr. Tanner’s email dated June 15 (“RE Confirmed capacities AW1.msg”) only after the Sept 10 cross-examination. It is submitted that in light of this email, Mr. Tanner’s denial is not credible.

⁸⁶ Exhs 9-11 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tabs 9-11, pp. 739-744.

⁸⁷ Exh 9 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 9.

⁸⁸ Exh 10 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 10, p. 742.

Report, and determined that follow-up was required with various shelter sites, including 8 sites that had not yet had a QA visit and 9 sites for which the capacities reported by the provider were higher than that determined by QA “for unknown reasons”.⁸⁹ This follow-up work was begun in the morning of June 15. Mr. Boucher expressed concern that “we are pushing a bit too hard to finalize today and it could leave us vulnerable”, but was overruled by Mr. Tanner and Ms. Raine.⁹⁰

47. In the end, SSHA staff followed up with 14 sites on June 15: the 9 identified sites for which the provider reported capacities higher than that determined by QA, plus Evangeline, Junction Place, Scarborough Village Residence, Women’s Residence and Seaton House.⁹¹ Follow-up with Evangeline revealed that the site was clearly not in compliance - its beds were an average of 4.4 feet apart, as reported to and acknowledged by Mr. Boucher.⁹² Mr. Boucher reported on the results of the follow-up inquiries with the 9 sites to Mr. Tanner, Ms. Raine and the others at 3:46pm, noting in his covering email: “This is not great news as a number of these providers either used the 6.0 feet or admitted they never measured at all”.⁹³ At Mr. Tanner’s suggestion, it was agreed that a conference call would be held to “sort this [the Progress Report] out”.⁹⁴

48. The record now shows that substantial information was known to SSHA managers

⁸⁹ Brief of Excerpts to UTs, Tab 15B, p. 267: “Email Confirmed capacities.msg”.

⁹⁰ Brief of Excerpts to UTs, Tab 15C, p. 274: Email RE Confirmed capacities AW1.msg.

⁹¹ Selected records relating to these follow-up contacts are excerpted in Brief of Excerpts to UTs, Tabs 6 and 15. It should be noted that contrary to Mr. Tanner’s assertion in his affidavit, the follow-up contacts undertaken on June 15 did not include all 8 sites that had not yet been visited in person by QA: see Tanner Affidavit, at para. 74-75.

⁹² Exh 16 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 16, p. 763. Mr. Tanner claimed in cross-examination that Mr. Boucher did not inform him of this information concerning Evangeline’s non-compliance, on June 15 or afterwards, and that he was unaware of these facts until he reviewed the City’s planned productions in August: Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at Q. 375, p. 133; Q. 403, p. 140; Q. 569, p. 200; Q. 573, p. 202; Q. 585, p. 206-7; See also City’s UT Chart dated September 4, 2020, Brief of Excerpts from UTs, Tab 2, at Q. 252, p. 75 and City’s UT Chart dated September 17, 2020, Brief of Excerpts from UTs, Tab 4, at p. 114-118.

⁹³ Brief of Excerpts from UTs, Tab 15L, p. 299: Email - RE Progress Reporting AW.msg. Mr. Tanner claimed in cross-examination that he was unaware, on June 15 or prior to the signing of his affidavit on July 8: Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at QQ 582-3, p. 205-6.

⁹⁴ Brief of Excerpts from UTs, Tab 15M, p. 303: Email - RE Progress Reporting.msg2.msg.

regarding non-compliance at various sites, prior to and on June 15 and in the following days. This information is summarized at Schedules E and F. Nevertheless, the City proceeded to assert compliance in the June 15 Progress Report, and to maintain that position in its July 15 and August 15 Progress Reports.⁹⁵

H. SSHA's convenient and belated re-assessment of the meaning of "lateral separation"

49. SSHA's records clearly establish that through April, May and early June, QA site visits proceeded on the basis that "2m lateral separation (edge to edge)" (the phrase included on all QA forms, as of late April) meant two metres of spacing in all directions, from any edge of one bed to the next closest bed. The form and report prepared in respect of every QA visit undertaken during this period expressly designated as "non-compliant" any beds 2m apart in a head-to-toe or toe-to-toe arrangement.⁹⁶ QA staff were apparently instructed to note the number of beds arranged in this manner, and frequently described this as a "mitigating" technique.⁹⁷

50. Contemporaneous correspondence within the QA team, as well as communications between QA and service providers, confirm that spacing-in-any-direction was the prevailing interpretation of "lateral separation" throughout May and early June. For example:

- QA wrote to Women's Residence on April 28: "[W]e (QAT) are still asking all Providers to think about strategies to provide all clients with at least 2m of physical space between the closest edges of beds, if possible".⁹⁸

⁹⁵ Exh E to ASF, App MR, Tab 2: July 15 PR; Exh H to ASF, App MR, Tab 2: August 15 Progress Report.

⁹⁶ Exh 1 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 1. The QA form states "Number of cots/beds not in compliance with 2m lateral separation (edge-to-edge)," "Non-compliant beds (less than 2m apart) that have a barrier between them (e.g. large piece of furniture, a locker or partition)", and "Non-compliance beds (less than 2m apart) are arranged in a head-to-toe arrangement or toe-to-toe arrangement." See also Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at Q. 64-67, pp. 26-28.

⁹⁷ See for example, Exh 1 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 1, at p. 314, 396, 570, 588. See also, Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at Q. 94, p. 38-39; and Exh 36 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 36, p. 850.

⁹⁸ Brief of Excerpts from UTs, Tab 15 BB, p. 347: Email - FW Follow-up and Thank you AW.msg.

- With respect to Dixon Hall – Heyworth, a QA assessor wrote on May 11: “Heyworth House went from 95 to 40. That number may change now with our better understanding of 2m from all edges and no diagonal 2m separation”.⁹⁹
- The QA report prepared following a visit to Junction Place on May 29 stated: “The distance between each frame to the next closest bed frame (edge to edge) is not 6ft. The size of the room prevents additional separation. Some beds are arranged head-to-toe to mitigate (exact number to be verified)”.¹⁰⁰
- In a June 1 email to Scott Mission, QA stated: “As you know the QAT team has been tasked with assessing whether agencies have reduced capacity sufficiently to meet new physical distancing standards (at least 2m between all sides of beds)”.¹⁰¹
- The service provider at 545 Lakeshore W. reported by email on June 16: “We have completed the new layouts at 545 Lakeshore and we are now fully in compliance with the new 2 meter all around directive”.¹⁰²
- The QA report prepared following a visit to Evangeline on June 16 stated: “All of the non-compliant beds are in rooms/areas of rooms with 2 beds. The beds are spaced on average 3-4 feet apart 36’-48’ apart) but are not separated the full 2m (78.74’). The beds are however in a head-to-toe arrangement.”¹⁰³

51. The QA records indicate that QA was awaiting determination as to whether head-to-toe or toe-to-toe arrangements with less than 2m spacing would be approved; until that determination was made, these beds were scored as “non-compliant”. Through May and early June, direction had not yet been received by QA on this issue.¹⁰⁴ Thus, on May 26, Ms. Wainberg advised:

As for the h2t, t2t issue. It is not yet clear which way it will go. Ultimately it will be up to directors and TPH, that’s why we need to stick to our methodology and record when compliance [non-compliance] is due to this issue...¹⁰⁵

52. Oblique references to possible approval of head-to-toe or toe-to-toe arrangements with less than 2m spacing appear for the first time in internal SSHA emails on June 15, during the flurry of

⁹⁹ Brief of Excerpts from UTs, Tab 6B, p. 153: Email - Re PDSA Dixon Hall Heyworth House MJ.msg.

¹⁰⁰ Exh 1 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 1, p. 479.

¹⁰¹ Exh 4 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 4, p. 710.

¹⁰² Exh 26 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 26, p. 820.

¹⁰³ Exh 1 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, p.220.

¹⁰⁴ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at pp. 42-3 and pp. 53-60.

¹⁰⁵ Exh 3 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 3, p. 705. See also: Exh 27 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 27, p. 822: Email dated June 1, 2020 at 4:43pm: “She also asked about head-to-toe and partitions. I mentioned that we are waiting for input from TPH”.

follow-up activity that day. Thus, a QA assessor reported on June 15, “Based on my notes from the visit [to the Islington Seniors site], it looks like each room could accommodate 2 clients if head-to-toe/toe-to-toe arrangements are permitted” and “Determining the best configuration would require a follow-up once h2t/t2t is finalized”.¹⁰⁶ Up to and including June 15, any approvals of head-to-toe or toe-to-toe arrangements with less than 2m spacing occurred on a discretionary, shelter-by-shelter basis by Mr. Tanner.¹⁰⁷ QA had not, as of June 15, received a general direction that head-to-toe/toe-toe-toe spacing of less than 2m was to be considered compliant.¹⁰⁸

53. Mr. Tanner has been unable to identify precisely when SSHA purported to make a general decision that “lateral separation” was to be interpreted to refer exclusively to “side-edge-to-side-edge” spacing, and to be distinguished from “longitudinal separation” (the distance between head-to-toe and toe-to-toe edges).¹⁰⁹ Most likely, this decision occurred after June 17, the date when QA’s PowerPoint presentation titled “Physical Distancing Measurement Proposal and Bed/Resting Space Arrangements” was finalized.¹¹⁰ This is consistent with the fact that the first mention of “longitudinal” spacing is in internal QA emails dated June 17.¹¹¹

54. Mr. Tanner’s assertion¹¹² that a restrictive interpretation of “lateral separation” had

¹⁰⁶ Brief of Excerpts from UTs, Tab 15X, p. 334: Email - Re Quick Check AW4.msg.

¹⁰⁷ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, p. 56-57.

¹⁰⁸ Exh 31 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 31, p. 835: Thus, in a discussion about Evangeline on June 16, Wainberg used the future tense in respect of the proposal to approve H2T spacing of less than 2m, stating “As for the H2T issue, there is nothing we are going to propose that changes the 1st requirement of 2m lateral separation” (emphasis added).

¹⁰⁹ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, pp. 42-44; Brief of Excerpts from UTs, Tab 5, p. 130: Email from Kirsten Franz dated September 18, 2020 re correcting answer to UT1 in September 17, 2020 chart.

¹¹⁰ Exh 5 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 5, p. 712-721: PowerPoint presentation titled “Physical Distancing Measurement Proposal and Bed/Resting Space Arrangements COVID-19”, prepared by QA Team (June 2020); Exh 6 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 6, p. 722: Screen capture of the file property information for the PowerPoint presentation. The file properties indicate that the PowerPoint presentation file was first created on June 10, and was last edited on June 17 at 6:49pm.

¹¹¹ See Exh 31 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 31, p. 835: in which “longitudinal” spacing is contrasted with “our originally [sic] criteria (2m on all sides)”.

¹¹² Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at p. 77.

“always” been in use is flatly contradicted by the records. No reference to “longitudinal” spacing, and no restrictive clarification of the meaning of “lateral separation”, has appeared in any SSHA document generated for non-internal use. The concept of “longitudinal” spacing and the narrow interpretation of “lateral separation” were developed belatedly by the City, after June 15, in an effort to justify their prior assertion of compliance.

55. Following the direction approving the use of “longitudinal” spacing and a restrictive interpretation of “lateral separation”, Ms. Wainberg instructed the QA team to develop three “scenarios”: scenario A with 2m spacing in all direction, scenario B with 2m “lateral” spacing and 1m “longitudinal” spacing, and scenario C with 2m “lateral” spacing and 0.75m “longitudinal” spacing.¹¹³ QA initially described scenario C as “non-compliant”, but Ms. Raine instructed that scenario C should instead be described as the “minimum standard”, with scenario B the “preferred standard” and scenario A the “optimal standard”.¹¹⁴ Mr. Tanner confirmed in cross-examination that the longitudinal measure of 0.75m was selected as the “minimum standard” because this was the minimum spacing measure set out in the Shelter Standards.¹¹⁵

56. The Phase 2 QA visits undertaken to date have relied on these three capacity scenarios.¹¹⁶ Mr. Tanner stated that SSHA currently considers Scenario B target capacities to be the preferred standard, but that if circumstances of demand for shelter beds so required it in coming months, SSHA could well approve target capacities based on Scenario C layouts, or indeed based on

¹¹³ Exh 36 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 36, p. 725. See email dated June 25, 2020 at 12:57pm from Eden Amare to Laural Raine: “Anabella shared that QAT should report three capacity options from these three lenses.”

¹¹⁴ Exh 36 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 36, p. 725.

¹¹⁵ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, Q. 201, p. 74.

¹¹⁶ See Exh 1 to Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab 1, at pp. 335-7, 398-9, 541-3 and 590-2: the QA Reports and Forms for Maxwell Meighen, 69 Fraser, 1A Strachan and 351 Lakeshore; See also Brief of Excerpts from UTs, Tab 22, p. 487-91: PDSA Phase 2 Draft Procedure for Calculating Capacity.docx.

longitudinal spacing of less than 0.75m.¹¹⁷ Mr. Tanner affirmed repeatedly that in his view, this approach was consistent with Directive 2020-01 and with the requirements of the Agreement.¹¹⁸

I. SSHA's continued pattern of disregard for the truth in its response to this motion

57. In response to the Applicants' motion, the City filed sworn evidence defending its position that compliance with Physical Distancing Standards had been achieved as of the June 15 Progress Report. The City represented to this Court that QA always used 2 metres rather than 6 feet,¹¹⁹ that by June 15 the City had completed 100% of verification of Physical Distancing Standards and 100% of service providers had completed the service provider surveys and verified they met the requirements of the Directive, and that by the June 15 Progress Report, all sites had reached Physical Distancing Standards at their target capacities. Tanner specifically affirmed that when QA could not visit a site due to an outbreak (which was the case at Evangeline), the service provider verified the site had achieved Physical Distancing Standards.¹²⁰ As described above, these statements in Mr. Tanner's affidavit are factually false, as Mr. Tanner has admitted.¹²¹

58. Under cross-examination on September 10, Mr. Tanner maintained that when he swore his affidavit on July 8, he did not know that these portions of his evidence were factually false. He claimed that he had not been informed of the true facts by his staff who were aware of them, including Mr. Boucher and Ms. Wainberg.¹²² The productions provided by the City following September 10 cast significant doubt on the credibility of Mr. Tanner's assertion in this regard. The records demonstrate conclusively that Mr. Tanner was advised by Mr. Boucher, on June 15, that a

¹¹⁷ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at p. 44-48.

¹¹⁸ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, p. 46 at Q. 117 and p. 50 at Q 127.

¹¹⁹ Tanner affidavit, at para 71.

¹²⁰ Tanner affidavit, at para 75.

¹²¹ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, pp. 198-201.

¹²² Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at QQ 582-3, p. 205-6.

number of sites had reported that day that they measured using 6ft or had not measured at all.¹²³

59. Ms. Wainberg was cross-examined on July 10, and the Applicants' request for a continuation of that Rule 39.03 examination was not granted. Ms. Wainberg stated, in answers to undertakings provided following the refusals motion, that as of June 14 she was unaware of any sites in the shelter system where 2m lateral separation between beds or sleeping mats was not achieved.¹²⁴ In response to the Applicants' request for clarification, the City advised on September 9 that "On July 10, 2020, Ms. Wainberg did not recall any sites where beds or sleeping mats had lateral separation of less than 2 metres as at June 14, 2020, and that would have been her answer on the date of the examination". Ms. Wainberg noted that her memory had since been refreshed by review of the records within the City's productions.¹²⁵

60. There is ample evidence to support a finding that the evidence provided under oath by Mr. Tanner and Ms. Wainberg on these questions is not credible. Mr. Tanner and/or Ms. Wainberg either knowingly provided false evidence, or instead had forgotten at the point of their testimony the information about non-compliance that they had in fact received mere weeks earlier. Regardless, it cannot be disputed that senior managers within SSHA, including Mr. Boucher and Ms. Wainberg, had actual knowledge of significant non-compliance across a number of sites, as of June 15. Perhaps this actual knowledge was shared by these managers with Mr. Tanner and Ms. Raine during the conference call that occurred at 5:30pm on June 15; perhaps it was not. Either way, it is clear that the City proceeded to assert compliance in its June 15 Progress Report when senior management staff were aware that this was not true. The City took no steps to correct is

¹²³ Brief of Excerpts from UTs, Tab 15L, p. 299: Email - RE Progress Reporting AW.msg.

¹²⁴ City's UT Chart dated September 4, 2020, Brief of Excerpts from UTs, Tab 2, p. 93, at UT87.

¹²⁵ City's UT Chart dated Sept 17, 2020, Brief of Excerpts to UTs, Tab 4, p. 122, at UT18.2.

misstatements and false evidence until forced to produce its records following the refusals motion.

J. City did not maintain the capacity of the shelter system as required under para. 2(b)

61. The available evidence suggests that the City has not discharged its best efforts to ensure that beds are made available to Clients, as required. Despite the plain wording of the Agreement,¹²⁶ the City adopted an interpretation of Clients that has only recognized an obligation to individuals who had been in a shelter's bedded program between March 11 and May 15.¹²⁷ This interpretation improperly excludes from the scope of "Clients" any individuals who received other support services such as meals, or who received support services after May 15.¹²⁸

62. The City took no steps between May 15 and June 15 to ensure its obligation under paragraph 2(b) was implemented – it simply assumed that capacity in the system would be sufficient to ensure that Clients were able to access beds.¹²⁹ On July 2,¹³⁰ the City created a priority queue for some Clients within Central Intake's existing call-back procedure.¹³¹ There was admittedly no reason Central Intake could not have implemented the priority call-back procedure prior to July 2 and no explanation has been offered for why it did not do so.¹³²

¹²⁶ The Shelter Standards (Exh G to First Talebi Affidavit, App MR, Tab 3) define 'Support Services' as: "Any program or service offered by a shelter provider or service provider to help clients meet their goals or needs including, but not limited to a shelter's bedded program, meal program, housing help services, employment program, etc. (related term: Service Plan)". Paragraph 1(a) of the Agreement defines the Shelter System to include all bedded programs, drop-in sites funded or operated by the City of Toronto, isolation/recovery sites, the Streets to Homes temporary housing program, and any other sites established or funded by the City.

¹²⁷ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, p. 19-20, at Q. 35S: Tanner agreed on cross-examination that the concept of support services is not limited to a shelter's bedded program.

¹²⁸ Tanner Cross, July 11, Brief of Transcripts, Tab A, p. 259, Q. 709 and 710.

¹²⁹ Tanner Affidavit, at para. 112.

¹³⁰ The priority for Clients under the Agreement was first implemented after the City had asserted compliance on June 15, and after the Applicants informed the City on June 22 they would be seeking a case conference to schedule an urgent enforcement motion. See Exh W to Second Talebi Affidavit, App MR, at Tab 4, for Applicants' correspondence to City seeking a motion to enforce the Agreement.

¹³¹ Exh 2 to Cross-Examination of Carol McDonald, Brief of Exhs, Tab C, p. 191. This priority queue meant when a bed became available, Central Intake staff were instructed to first call "clients who resided in shelters between March 11, 2020 and May 15, 2020," as identified in the queue before calling other individuals.

¹³² Tanner Cross, July 11, Brief of Transcripts, Tab A, p. 259, at Q. 708.

63. The shelter system was facing significant pressures and strains on its capacity around June 15. The Applicants' evidence shows that on multiple nights between June 14 and July 4, individuals generally, including Clients within the meaning of the Agreement, were unable to access beds despite repeatedly calling the City's Central Intake.¹³³ The City was not providing beds to Clients within the meaning of the Agreement.

64. The data produced by the City is of limited utility in assessing whether the City has maintained the capacity of each of the sectors within the shelter system since March 11.¹³⁴ The occupancy and capacity data produced by the City for May 15 to June 15 shows a steady decline in capacity over this period, which corroborates the evidence from frontline workers regarding difficulties in finding shelter beds for clients around June 15.¹³⁵ Over this period, capacity in the singles sector decreased by 568 beds, reflecting declining capacity in each of the mixed adult, men's, women's, youth, and respite sectors.¹³⁶ On June 14, the women's sector was nearly 95% occupied, suggesting that beds were not available to women as of the date the City asserted it had achieved compliance. The true capacity of the City's shelter system is likely even lower.¹³⁷

¹³³ Second Affidavit of Doug Johnson Hatlem dated July 3, 2020, App MR, Tab 8, at paras. 7-36; Affidavit of Kathleen Smith dated July 2, 2020, App MR, Tab 9, at paras. 4-7; Second Affidavit of Thomas Taylor dated July 3, 2020, App MR, Tab 11, at paras. 13-19; Second Affidavit of Alan Beattie dated July 3, 2020, App MR, at Tab 13, at paras. 3-5; Third Affidavit of Alan Beattie dated July 5, 2020, App MR, Tab 14, at paras. 3-5.

¹³⁴ The City refused to produce information and data regarding the total number of individuals who received beds in the shelter system, or information regarding the number of individuals who received beds at each shelter, or in each category of clients served (i.e. men, women, mixed adult, youth, and family). The record contains a site-by-site breakdown of the City's capacity figure for only one point in time (June 15 - see Brief of Excerpts from UTs, Tab 19, p. 475), and no comparable breakdown information about the capacity as of March 11. In the Refusals Motion, this Court ordered that the information from May 15 to June 15 was directly relevant and proportionate, and therefore, no information regarding the capacity of the system as a whole has been produced for June 15 onwards or for prior to May 15: *Sanctuary et al v. Toronto (City) et al.*, 2020 ONSC 4708, paras. 103-107.

¹³⁵ Brief of Excerpts from UTs, Tab 11, File "2020 08 08 Beds Online MAY 15 JUNE 15 LEGAL" and Tab 12A, File "2020 08 28 rev. Client Counts MAY 15 JUN 15 LEGAL".

¹³⁶ The data demonstrates that the capacity of the 'singles sector' fell from 2,915 on May 15 to 2,347 on June 15, and fell from 329 to 254 over that same period in respites.

¹³⁷ The City's capacity data does not account for beds in sites which are temporarily unavailable (Tanner Cross, July 11, Brief of Transcripts, Tab A, p. 37, Q. 87 and p. 38, Q. 92-3), or for the fact that unoccupied shelter beds of clients

PART III - ISSUES AND THE LAW

65. The issues to be determined on this motion are:

- a) What are the principles that apply to the Applicants' motion to enforce the Interim Settlement Agreement?
- b) Whether the City achieved compliance with Physical Distancing Standards on June 15, 2020 pursuant to paragraph 7 of the Interim Settlement Agreement, as it has claimed.
- c) Whether the City has achieved compliance at any point since June 15, 2020.
- d) Whether the City failed to produce information to the Applicants and to meaningfully engage, as required by the Interim Settlement Agreement.
- e) Whether the City discharged its obligations pursuant to 2(b) of the Interim Settlement Agreement.
- f) Whether the City has breached the duty of good faith in discharging its obligations under the Interim Settlement Agreement.

A. THE APPLICABLE PRINCIPLES

(i) Motions to Enforce Settlement Agreements

66. An agreement to settle all or part of a claim is a contract. Where parties to a proceeding have reached a settlement, and one party subsequently fails to comply with its terms, the court may order judgment in accordance with the terms of the settlement agreement.¹³⁸

A two-step analysis is to be followed when considering a request to enforce a settlement. The first step is to consider whether an agreement to settle has been reached. If so, the second step is to consider whether, on all the evidence, the agreement should be enforced.¹³⁹

who are in COVID-19 isolation/recovery sites must be held for them to return to and are not in fact available to other clients (Tanner Affidavit, at para. 105).

¹³⁸ *Rules of Civil Procedure*, RRO 1990, Reg 194, s 49.09 [Rules], made under the *Courts of Justice Act*, RSO 1990, c C-43

¹³⁹ [*Hashemi-Sabet Estate v. Oak Ridges Pharmasave Inc.*, 2018 ONCA 839, at para. 27.](#)

67. All necessary components of a valid contract are found in this case.¹⁴⁰ Any disagreement regarding implementation does not change the fact that a settlement occurred.¹⁴¹

(ii) The Principles of Contractual Interpretation

68. The goal of contract interpretation is to determine the parties' objective intent and the scope of their understanding when the contract was made.¹⁴² The principles of interpretation are applied to the words of the written contract, considered in light of the factual matrix,¹⁴³ and by an objective reading of the language used by the parties.¹⁴⁴ As the Supreme Court stated in *Sattva Capital*, to determine the intention of the parties, the court "must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract."¹⁴⁵ A party cannot rely on an interpretation of the contract that goes beyond the clear wording of the contract.¹⁴⁶

69. The entire contract must be examined, not just the specific words in dispute as words alone do not have an absolute meaning.¹⁴⁷ The plain and ordinary meaning of a contractual term is based on the understanding of the average person. However, where a technical meaning or a meaning fixed by law has been used by the parties, it is that meaning which prevails.¹⁴⁸

70. The factual matrix is the background of relevant facts known or that reasonably ought to

¹⁴⁰ [Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust](#), 2007 ONCA 205 [*Ventas*], at para. 24; [Fontaine v. Canada \(Attorney General\)](#), 2013 ONSC 684, at para. 68; [Cellular Rental Systems v Bell Mobility Cellular Inc.](#), [1995] OJ No 721, at para 17, aff'd [1995] OJ No 3773 (CA), Book of Authority of the Applicants ("BOA"), at Tab 1; [Olivieri v. Sherman](#), 2007 ONCA 491 [*Olivieri*], at para. 41.

¹⁴¹ [Martin v. St. Thomas-Elgin General Hospital](#), 2018 ONSC 799, at para. 44.

¹⁴² [Creston Moly Corp. v. Sattva Capital Corp.](#), 2014 SCC 53 [*Sattva*], at para. 47.

¹⁴³ [Sattva](#), at para 50

¹⁴⁴ [Olivieri](#), at para. 44.

¹⁴⁵ [Sattva](#), at para. 47.

¹⁴⁶ [Sabeen v. Portage La Prairie Mutual Insurance Co.](#), 2017 SCC 7 [*Sabeen*], at para. 4.

¹⁴⁷ [Sattva](#), at para. at 47.

¹⁴⁸ [IFP Technologies \(Canada\) Inc. v EnCana Midstream and Marketing](#), 2017 ABCA 157 [*IFP*]; Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at pg. 78, BOA, at Tab 2.

have been known to both parties at or before the date of contracting.¹⁴⁹ Evidence of pre-contractual negotiations is only relevant insofar as it helps explain the genesis and purpose of the contract,¹⁵⁰ to help understand the parties' intentions and not to add to or vary the terms of the agreement.¹⁵¹

(iii) “Best efforts”

71. A contractual obligation to use “best efforts” imposes a higher obligation than simply a “reasonable effort”. “Best efforts” means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and “leaving no stone unturned”; to include doing everything known to be usual, necessary and proper for ensuring the success of the endeavour. An assessment of whether a party has used its best efforts must be approached in light of the particular contract, the parties to it, and the contract's overall purpose as reflected in its language, and is subject to such overriding obligations as honesty. It is not necessary to prove that a party acted in bad faith to establish that the requirement to use best efforts has not been met.¹⁵²

(iv) The scope and content of the duty of good faith

72. A duty of honest performance applies to all contractual relationships under Canadian common law. As the Supreme Court held in *Bhasin v. Hrynew*, this duty “applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations”.¹⁵³ The general organizing principle of good faith requires parties to:

- perform their contractual duties honestly and reasonably and not capriciously or

¹⁴⁹ [Sattva, at paras. 57-60.](#)

¹⁵⁰ Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham: LexisNexis, 2012) at 30, 80, BOA, at Tab 3; [IFP, at para. 85.](#)

¹⁵¹ [IFP, at para. 85.](#)

¹⁵² [Atmospheric Diving Systems Inc. v. International Hard Suits Inc., \[1994\] 5 W.W.R. 719, at paras. 75-82; Federal Electric \(1976\) Limited v. McDonald Brothers Construction, 2019 ONSC 496, at para. 33.](#)

¹⁵³ [Bhasin v. Hrynew, 2014 SCC 71 \[Bhasin\], at para. 93.](#)

arbitrarily; and

- have appropriate regard to the legitimate contractual interests of the contracting partner by not seeking to undermine those interests in bad faith but without engaging duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.¹⁵⁴

73. The general duty of honesty in contractual performance means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith.¹⁵⁵ The duty of good faith applies to contracts requiring the cooperation of the parties to achieve the objects of the contract.¹⁵⁶

74. In defining good faith requirements, courts will often discuss the obligations in terms of avoiding bad faith. A finding of bad faith requires a determination that the impugned conduct was: actuated by an intent to mislead or deceive; due to a neglect of, or refusal to, fulfil some duty or obligation; or, made for an improper purpose.¹⁵⁷

75. When negotiating contracts, courts have found that more than self-interested dealing is required where one party is relying on another for information necessary to make informed choices, and the party with information has an opportunity, by withholding or concealing it, to influence the other party's choice. One party can be justified in relying on the other for information, depending on the relative positions of the parties particularly in relation to their access to information and in their understanding of the possible demands of the dealing.¹⁵⁸

¹⁵⁴ [Bhasin, at paras. 63 and 65.](#)

¹⁵⁵ [Bhasin, at para. 73.](#)

¹⁵⁶ [Dynamic Transport Ltd. v. O.K. Detailing Ltd. \(1978\), \[1978\] 2 S.C.R. 1072.](#)

¹⁵⁷ [Hembruff v. Ontario \(Municipal Employees Retirement Board\) \(2005\), 78 O.R. \(3d\) 561, at para. 116.](#)

¹⁵⁸ [978011 Ontario Ltd. v. Cornell Engineering Co., \[2001\] O.J. No. 1446, at para. 34.](#)

(v) **Remedial Principles**

76. When damages are an inadequate remedy, equitable remedies are available to remedy a breach of contract.¹⁵⁹ Where damages are inadequate and the subject matter of a bargain is unique or irreplaceable, specific performance may be ordered.¹⁶⁰ In determining whether to order specific performance, the court looks at the nature of the subject matter, the inadequacy of damages as a remedy, and the behaviour of the parties.¹⁶¹ Where the breaching party is unable to comply literally or exactly with the contract's terms, the court may award specific performance *cy près*, when satisfied that such an order will result in substantial compliance with the spirit of the agreement.¹⁶²

77. As a superior court of general jurisdiction, this honourable Court has all the powers that are necessary to do justice between the parties. If a right exists, the presumption is that there is a Court which can enforce it.¹⁶³ The Court's inherent jurisdiction is a source of residual powers. In *Doucet-Boudreau*, the Supreme Court made it clear that Court involvement which includes hearing evidence and supervising cross-examinations on progress reports is not beyond the normal capabilities of the Courts, and is in no way inconsistent with the judicial function.¹⁶⁴ This Court also has inherent jurisdiction to authorize a Monitor to supervise any order it might make.¹⁶⁵

B. The City had not achieved compliance with Physical Distancing Standards on June 15, 2020

78. The Applicants seek declaratory relief that the City did not achieve compliance with

¹⁵⁹ [Pointe East Windsor Ltd. v. Windsor \(City\)](#), 2014 ONCA 467, at para. 17.

¹⁶⁰ [UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.](#), [2009] O.J. No. 1606, at para. 96.

¹⁶¹ [Landmark of Thornhill Ltd. v. Jacobson](#), [1995] O.J. No. 2819, at para. 37.

¹⁶² Robert J. Sharpe, *Injunctions & Specific Performance*, Looseleaf (2019) at 11.280 and 11.320, BOA, at Tab 4; [UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.](#), 168 A.C.W.S. (3d) 780, at paras. 5-6.

¹⁶³ [80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.](#), [1972] 2 O.R. 280 (C.A.) at p. 4.

¹⁶⁴ [Doucet-Boudreau v. Nova Scotia \(Department of Education\)](#), 2003 SCC 62, at paras. 71-74.

¹⁶⁵ For example, the inherent jurisdiction of the Court has been invoked to authorize an inspector to investigate the affairs of a litigant even in circumstances where the enabling statute may not have specifically authorized it: *620637 Ontario Ltd. v. Axton*, [1993] O.J. No. 212 (Ontario Court of Justice (General Division), BOA, at Tab 5.

Physical Distancing Standards on June 15, 2020 as it has claimed. Resolution of this issue requires the Court to determine two questions. First, the Applicants argue that the clear evidence of widespread non-compliance with Physical Distancing Standards in the Shelter System as of June 15 detailed above is determinative, even using the City's preferred interpretation of "lateral separation". The second question concerns the correct standard to be applied in achieving Physical Distancing Standards, the resolution of which will provide needed guidance to the City.

(i) The standard by which "compliance with Physical Distancing Standards" is to be assessed in the application of paragraph 7 is an objective one.

79. Paragraph 7 conditions the reduction in frequency of Progress Reports, and the start of a two-month period towards the expiry of the City's obligations (the Termination Date), upon whether the City has "achieved compliance with Physical Distancing Standards" on the date that it asserts it has done so. An objective standard applies to assess compliance. Specifically, "compliance" in paragraph 7 is to be determined without reference to whether the City had or had not employed its "best efforts" prior to the point in time at which compliance is claimed.

80. Compliance with Physical Distancing Standards pursuant to paragraph 7 must be assessed purely with reference to evidence of the actual bed spacing conditions in use in the Shelter System on the date that compliance is claimed. The immediate context surrounding the requirement of "compliance" in paragraph 7 is an express reference to "Physical Distancing Standards", a defined term, which establishes objective criteria referable to the actual bed spacing conditions in the Shelter System. The parties did not intend that compliance in paragraph 7 be determined with reference to whether or not the City's "best efforts" standard of conduct had been met.¹⁶⁶

¹⁶⁶ The City's obligations in paragraph 2 are not referred to in paragraph 7. In contrast, in paragraph 3 the content of the Progress Reports during the implementation period does refer to compliance with the City's obligations in

81. The Applicants' interpretation is also consistent with the Agreement's purposes. The City's interpretation¹⁶⁷ – that “compliance” in paragraph 7 (and eventually, one infers, the Termination Date) could be achieved without the City ever in fact having implemented Physical Distancing Standards across the Shelter System, so long as this failing was consistent with “best efforts” – runs contrary to the Agreement's purpose, and must be rejected. The Agreement's central purpose was to ensure that Physical Distancing Standards were in fact implemented.

(ii) “Lateral Separation” takes its meaning from the Shelter Standards

82. The Applicants submit that the correct meaning of “lateral separation of at least 2 metres between beds” in the definition Physical Distancing Standards is determined with reference to the legal meaning given to that concept in the Shelter Standards. There is no basis to ascribe a different meaning to “lateral separation” in the Agreement than is provided for in the Shelter Standards. The term “lateral separation” has a specific legal meaning in the Shelter Standards, and the parties' shared intention in negotiating the Agreement was to reference and invoke the Shelter Standards.

83. There is no basis to conclude that “lateral separation” in the Shelter Standards refers only to the distance between the long edges or sides of beds. Section 9.3.1(e) introduces the term “lateral separation” to refer to the distance “between beds” on the horizontal plane, as distinguished from the “vertical separation” between a bed and any bunk, object or ceiling above it. The phrase “lateral separation” is not further defined in the Shelter Standards in words, but it is illustrated in Appendix “A”, which shows that lateral separation refers to “the closest sides of adjacent beds”.¹⁶⁸ At the top of Example B, the blue-dotted lines indicating “allocated personal space” and the red arrow

paragraph 2. The parties' different use of “compliance” in the agreement is presumed to have been intentional, and supports the Applicant's interpretation.

¹⁶⁷ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at QQ 220, 447, 452 - 455; Tanner Affidavit, at para. 77.

¹⁶⁸ See Schedule G

indicating “lateral separation distance” confirm that under the Shelter Standards, “lateral separation” applies equally to the distance between the head and foot of two adjacent beds.

84. This interpretation is confirmed by the fact that “lateral separation” is the only measure of bed spacing on the horizontal plane to be found in the Shelter Standards. The City’s interpretation of “lateral separation” would leave head-to-toe spacing entirely unregulated in the Shelter Standards. This is not consistent with the purpose of the Shelter Standards, to establish common standards including with respect to bed spacing. In the context of COVID-19, it is also an approach that runs contrary to the purpose of limiting the transmission of communicable diseases.¹⁶⁹

85. The City’s claim of compliance as of June 15 is based on an incorrect, arbitrary, and internally incoherent interpretation of the term “lateral separation”, which should be rejected. The City admits that the Applicants reasonably understood that “lateral separation” in the Shelter Standards was not restricted to the distance between the long edges of beds.¹⁷⁰ The City’s evidence that the Shelter Standards’ illustration to the contrary is an “error”¹⁷¹ is both incredible and irrelevant as a matter of contractual interpretation – a parties’ subjective intention in entering into an agreement is not relevant to the Court’s interpretive task. To give effect to the City’s late-breaking interpretation would violate the “cardinal presumption” that the parties intended what they have said in reducing an agreement to writing.¹⁷² In effect, the City has arbitrarily decided only to comply with one component of its agreement, in a belated effort to reinterpret its obligations and justify its claim that compliance was achieved as of June 15.

¹⁶⁹ Affidavit of Tim O’Shea dated May 4, 2020, App MR, Tab 6; “*Two metres or one: what is the evidence for physical distancing in covid-19?*”, BMJ 2020; 370 doi: <https://doi.org/10.1136/bmj.m3223> (Published 25 August 2020).

¹⁷⁰ Tanner Cross-Examination, Sept 10, Supp Brief of Transcripts, at Tab A, at p. 78, Q 211; p. 84, Q. 226.

¹⁷¹ Tanner Cross-Examination, Sept 10, Supp Brief of Transcripts, at Tab A, at p. 82, Q. 219.

¹⁷² [Ventas, at para.24.](#)

C. The City has not achieved compliance at any point since June 15, 2020

86. Whichever interpretation of “lateral separation” prevails, there is no evidence that the City has in fact achieved compliance with Physical Distancing Standards across the Shelter System at any point since June 15, 2020. The Applicants seek a declaration confirming same.

D. The City failed to produce the required information under the Agreement

87. The Applicants seek a declaration that the City failed to discharge its obligations to answer “relevant and proportionate questions” from the Applicants with respect to “any matter arising out of the City’s Progress Reports, including with respect to any particular site(s) which it has reasonable grounds to suspect may not be adhering to Physical Distancing Standards”. As set out above in greater detail, from May 19 to June 15, the City consistently refused to answer the Applicants’ relevant and proportionate questions. The City also refused to provide the Applicants with information in the City’s possession which would allow the Applicants to assess various assertions made by the City in its Reports, such as confirming the City’s compliance with target capacities with adequate spacing of 2 metres between beds.

88. Information the City refused to produce to the Applicants includes but is not limited to:

- copies of site provider verification surveys given to (and received by) shelter providers;
- instructions from Shelter, Support and Housing Administration (“SSHA”) to Quality Assurance teams performing site visits; and
- site dimensions, plans or building records in the City’s possession for the sites in the shelter system.

89. The evidentiary record reveals that these failures were not minor or trivial, but rather had the effect of frustrating the Applicants’ ability to understand the truth about the actions being taken by the City in purported satisfaction of their obligations under the Agreement. In particular, they had the effect of frustrating the Applicants’ ability to understand that very significant portions of

the assurances provided by the City in that regard were not true, or were materially misleading.

E. The City's failure to discharge its obligations in good faith warrants a remedy

90. The City has repeatedly not been truthful with the Applicants about the actions it was taking in discharging its obligations under the agreement – a clear violation of the duty of good faith. The City has repeatedly misled the Applicants as to material facts that would have enabled the Applicants to understand the truth with respect to the City's non-compliance. This has deprived the parties of an opportunity for more meaningful engagement, and deprived Clients of the shelter system, and the public at large, of the additional protection that reduced shelter capacities could have offered in terms of reduced opportunities for transmission of COVID-19.

91. In addition to the examples detailed above, on the City's evidence, it failed to identify a serious gap in the parties' understanding as to the interpretation of "lateral separation" in the course of negotiations, or following receipt of the Applicants' June 7th letter.¹⁷³ Rather than engaging with the Applicants regarding this issue, the City claimed compliance on June 15, and then created an arbitrary, self-serving "longitudinal" standard to resolve its erstwhile non-compliance.

92. The City's failure to conduct itself in good faith is not isolated, not trifling, and not limited to the Progress Reports. The evidence offered by the City on this motion has now been shown to be demonstrably false and/or materially misleading on central issues. Strikingly, the City did not correct these serious errors at any point prior to or during the course of this motion, except when Mr. Tanner was forced to do so in cross-examination. In the circumstances, in addition to the declaratory orders sought and an Order requiring the City to comply with its obligations under the Agreement in a manner informed by those declaratory orders, the Applicants seek the following

¹⁷³ Tanner Cross, Sept 10, Supp Brief of Transcripts, Tab A, at p. 76-78, Q. 208-211.

additional equitable relief, to provide the necessary protections to ensure that the pattern of false and misleading information provided by the City not be permitted to continue:

- An Order requiring all future Progress Reports to be provided under oath, with confirmation of sign off by named management of all SSHA divisions/departments involved in their preparation, and filed with the Court;
- An Order requiring a representative of the City to attend before the Court, if directed, to answer questions regarding its progress towards achieving compliance with the Interim Settlement Agreement; and
- An Order appointing a monitor to make all inquiries determined to be necessary and advisable to confirm the accuracy and sufficiency of the information provided by and relied upon by the City, at the City's expense.

F. The City has failed to ensure that Bed are available to Clients as required by paragraph 2(b)

93. The Applicants request a declaration that the City has not discharged its obligations to use best efforts to ensure that sufficient beds were made available to Clients, as required by paragraph 2(b). The Court's guidance with respect to this issue is important as the colder weather returns and more Clients return to the Shelter System, exacerbating the existing stresses on the system.

94. The reduction in the system's capacity between May 15 and June 15 reflects a fundamental departure from the purpose of this provision, which was to ensure that achieving implementation of Physical Distancing Standards was not effected through a reduction in the Shelter System's capacity. The City also failed to do everything that was necessary and proper to ensure that Clients could access the spaces that were available.¹⁷⁴ Finally, despite a clear definition in the Shelter System of "shelter services", the City has conducted itself based on a narrower definition that is not sustainable as a matter of contractual interpretation.

¹⁷⁴ For example, by failing to implement simple steps that would have alerted SSHA staff with Streets to Homes to the fact of the obligation, and by failing to implement the call-back system prior to July 2.

PART IV - ORDER REQUESTED

95. The Applicants request the relief as set out in the Amended Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 25, 2020

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SCHEDULE “A” - LIST OF AUTHORITIES

1. [Hashemi-Sabet Estate v. Oak Ridges Pharmasave Inc., 2018 ONCA 839](#)
2. [Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust, 2007 ONCA 205](#)
3. [Fontaine v. Canada \(Attorney General\), 2013 ONSC 684](#)
4. *Cellular Rental Systems v Bell Mobility Cellular Inc.*, [1995] OJ No 721, aff'd [1995] OJ No 3773 (C.A.)
5. [Olivieri v. Sherman, 2007 ONCA 491](#)
6. [Martin v. St. Thomas-Elgin General Hospital, 2018 ONSC 799](#)
7. [Creston Moly Corp. v. Sattva Capital Corp., 2014 SCC 53](#)
8. [Sabean v. Portage La Prairie Mutual Insurance Co., 2017 SCC 7](#)
9. [IFP Technologies \(Canada\) Inc. v EnCana Midstream and Marketing, 2017 ABCA 157](#)
10. Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016)
11. Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham: LexisNexis, 2012)
12. [Atmospheric Diving Systems Inc. v. International Hard Suits Inc., \[1994\] 5 W.W.R. 719](#)
13. [Federal Electric \(1976\) Limited v. McDonald Brothers Construction, 2019 ONSC 496](#)
14. [Bhasin v. Hrynew, 2014 SCC 71](#)
15. [Hembruff v. Ontario \(Municipal Employees Retirement Board\) \(2005\), 78 O.R. \(3d\) 561](#)
16. [978011 Ontario Ltd. v. Cornell Engineering Co, \[2001\] O.J. No. 1446](#)
17. [Pointe East Windsor Ltd. v. Windsor \(City\), 2014 ONCA 467](#)
18. [UBS Securities Canada Inc. v. Sands Brothers Canada Ltd., \[2009\] O.J. No. 1606](#)
19. [Landmark of Thornhill Ltd. v. Jacobson, \[1995\] O.J. No. 2819](#)
20. Robert J. Sharpe, *Injunctions & Specific Performance*, Looseleaf (2019)
21. [UBS Securities Canada Inc. v. Sands Brothers Canada Ltd., 168 A.C.W.S. \(3d\) 780](#)

22. [*Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, \[1978\] 2 S.C.R. 1072](#)
23. [*80 Wellesley St. East Ltd. v Fundy Bay Builders Ltd.*, \[1972\] 2 O.R. 280 \(C.A.\)](#)
24. [*Doucet-Boudreau v. Nova Scotia \(Department of Education\)*, 2003 SCC 62](#)
25. *620637 Ontario Ltd. v. Axton*, [1993] O.J. No. 212

SCHEDULE "B" - RELEVANT STATUTES

Rules of Civil Procedure, RRO 1990, Reg 194

1. *Rules of Civil Procedure, RRO 1990, Reg 194, s 49.09*

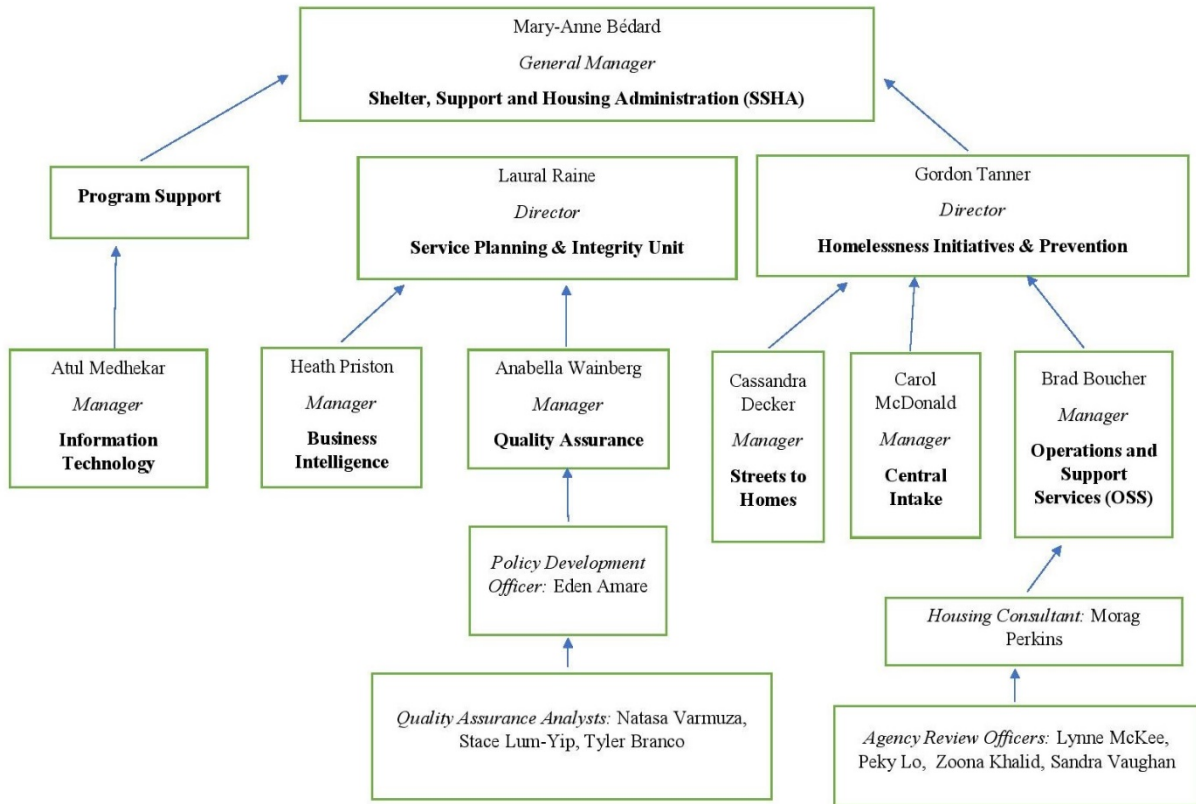
Failure to Comply with Accepted Offer

49.09 Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,

(a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge may grant judgment accordingly; or

(b) continue the proceeding as if there had been no accepted offer to settle. R.R.O. 1990, Reg. 194, r. 49.09.

SCHEDULE "C" - SSHA ORGANIZATIONAL STRUCTURE



SCHEDULE “D” - EXAMPLES OF CONFUSION WITHIN QA REGARDING 6 FEET AND 2 METRES

QA editing reports - Changing references from 6ft (as recorded by QA assessors) to 2m

“I do see a report for St. Felix and it has an estimated capacity of 42 clients and some additional notes. I'm a bit confused as this doesn't seem like my comments and is different than the PDSA report I submitted (attached). So I'm not sure did someone revisit and input another report for 69 Fraser? Or maybe this is from another Sprung Structure? I'm scratching my head ;)”

Stace” – Stace Lum-Yip, to Anabella Wainberg, Eden Amare; email dated June 15, 2020, 5:21pm

“Just to chime in, if the wording is different in the PDSA reports than in CheckMarket it's because I edit the PDSA reports all for consistency and clarity.” – Eden Amare, to Anabella Wainberg, Stace Lum-Yip, emailed dated June 15, 2020, 5:31pm¹⁷⁵

Selection of instances where QA references within the CheckMarket report to 6 feet were changed to 2 metres in the PDSA form¹⁷⁶

- Junction Place - May 29
 - PDSA form: “The distance between each frame to the next closest bed frame (edge to edge) **is not 2m**. The size of the room prevents additional separation. Some beds are arranged head-to-toe to mitigate (exact number to be verified).”
 - CheckMarket report (Q13): “The distance between each frame to the next closest bed frame (edge to edge) **is not 6ft**. The size of the room prevents additional separation. Some beds are arranged head-to-toe to mitigate (exact number to be verified).”¹⁷⁷
- Salvation Army – Gateway - June 3
 - PDSA Form: “3rd Floor: Beds 73, 74, 76, 77, 57, 80, 86, 87, 89, 90, 98, 99, 101, 102, 66, 65, 62 do not meet 2m lateral distance. Staff have not yet finished reconfiguring beds on the 3rd floor to meet 2m all edges. **Staff were using 2m** as guide to measuring distance between beds and head placements.”
 - CheckMarket Report (Q13): “3rd Floor: Beds 73, 74, 76, 77, 57, 80, 86, 87, 89, 90, 98, 99, 101, 102, 66, 65, 62 do not meet 2m lateral distance. Staff have not yet finished reconfiguring beds on the 3rd floor to meet 2m all edges. **Staff were using 6ft** as guide to measuring distance between beds and head placements.”¹⁷⁸

¹⁷⁵ Tab 15Z, Email, “RE Quick Check AW10.msg”, Brief of Excerpts to UTs, Vol. 2, p. 342.

¹⁷⁶ See QA Reports and Forms for each of the sites listed in this chart at Exhibit 1 to Tanner Sept 10 Cross, Supp Brief of Transcripts and Exhibits, Vol 2. with page numbers in the following footnotes.

¹⁷⁷ Junction Place: pp. 479-481

¹⁷⁸ Salvation Army – Gateway: p. 528-530

- Sojourn House - 101 Ontario Street¹⁷⁹ - June 3
 - PDSA Form: “Non-compliant [sic] beds are currently **less than 2m** edge to edge.”
 - CheckMarket Report (Q13): “Non-complaint [sic] beds are currently **less than 6ft** edge to edge”

- Sojourn House - 250 Queen Street East¹⁸⁰ - June 3
 - PDSA Form: “The room is too small to include 3 beds with **2m** of lateral separation.”
 - CheckMarket Report (Q13): The room is too small to include 3 beds with **6ft** of lateral separation.”

- St. Simon’s¹⁸¹ - June 2
 - PDSA Form: “Theoretical estimate and configuration of beds/mats should result in **2m** lateral separation between beds/cots.”
 - CheckMarket Report (Q13): “Visit was to assess the theoretical capacity estimated by the provider. QA assessor agrees with provider estimate for 11-12 beds in the upstairs Parish Hall and 17-18 in the downstairs dorm. For a new total capacity of 28-30 beds/cots to comply with **6ft** lateral separation between beds/cots (edge to edge)”

Selection of CheckMarket Reports referring to 6 feet¹⁸²

Site	Date	Statement
Horizons for Youth	May 25	CheckMarket Report (Q13): "Rms 1,3,4,5,6,7,8,9,10,11,13: 2 people, beds less than 2m lateral separation but have over 2m separation diagonally head-to-toe <u>Rm 2: 6ft lateral separation between 2 beds</u> , over 2m separation diagonally head-to-toe"
Junction Place	May 29	CheckMarket Report (Q13): " <u>The distance between each frame to the next closest bed frame (edge to edge) is not 6ft.</u> The size of the room prevents additional separation. Some beds are arranged head-to-toe to mitigate (exact number to be verified)."

¹⁷⁹ Sojourn House 101 Ontario Street: p. 570-572.

¹⁸⁰ Sojourn House 250 Queen Street East: p. 574-6.

¹⁸¹ St. Simon’s: 598 and 602-3.

¹⁸² See QA Reports and Forms for each of the sites listed in this chart at Exhibit 1 to Tanner Sept 10 Cross, Supp Brief of Transcripts and Exhibits, Vol 2 as follows: Horizons for Youth: p. 474; Junction Place, p. 481; Margaret’s 21 Park Road: p. 490; Sojourn House - 101 Ontario Street: p. 572; Sojourn House - 250 Queen Street East: p. 576; St Simon’s: p. 603; YWCA First Stop: p. 699.

Margaret's 21 Park Road Respite	May 29	CheckMarket Report (Q13): " <u>B-01: 2 beds within 6ft of another bed in head-to-toe arrangement B-02: 1 bed within 6ft of another bed in head-to-toe arrangement 2-03: 2 beds within 6ft of another bed in head-to-head arrangement 2-09: 2 beds within 6ft of another bed in head-to-head arrangement</u> "
Sojourn House - 101 Ontario Street	June 3	CheckMarket Report (Q13): " <u>Non-complaint beds are currently less than 6ft edge to edge.</u> Some rooms may be reconfigured to meet lateral separation (moving beds apart), others may need to be reduced in capacity. Many non-compliant beds are arranged with clients head-to-toe which is a mitigating strategy. There also some tall lockers that could be further placed between beds to create a partition/barrier."
Sojourn House - 250 Queen Street East	June 3	CheckMarket Report (Q13): " <u>The room is too small to include 3 beds with 6ft of lateral separation.</u> The removal of one bed and reconfiguration of existing beds should result in lateral separation."
St. Simon's	June 2	CheckMarket Report (Q13): "Visit was to assess the theoretical capacity estimated by the provider. Note that beds have not been moved and site was vacant of clients. QA assessor agrees with provider estimate for 11-12 beds in the upstairs Parish Hall and 17-18 in the downstairs dorm. <u>For a new total capacity of 28-30 beds/cots to comply with 6ft lateral separation between beds/cots (edge to edge).</u> "
YWCA First Stop	April 30	CheckMarket Form note: " <u>All sleeping/resting areas meet 2m/6ft lateral separation requirements at time of assessment.</u> Follow up visit is required."

**SCHEDULE “E” - INSTANCES OF NON-COMPLIANCE IDENTIFIED BY SSHA
DURING FOLLOW-UP ON JUNE 15, 2020**

A. Salvation Army – Evangeline Residence

Prior to June 15

- No QA visit prior to June 15.¹⁸³
- COVID-19 transmission had occurred at the site, TPH declared outbreak, outbreak announced by SSHA on May 8.¹⁸⁴
- In response to site provider verification survey in late May, provider indicated it was not in compliance with Directive 2020-01.¹⁸⁵
- In response to the Applicants’ questions regarding the May 25 Progress Report, on June 4 the City explicitly informed the Applicants that the site was in full compliance at its target capacity of 80.¹⁸⁶

Events on June 15¹⁸⁷

- Laural Raine asked Brad Boucher to add Evangeline to the list of sites for follow-up: “One addition is can you please also please add Evangeline on the list to confirm by phone today? Of the ones that have not had a site visit yet due to outbreak, all others are well under their capacity except for Evangeline and I think we will get questioned about this location in particular so will need to confirm this is the correct target capacity using 2m.”¹⁸⁸
- Brad Boucher asked Morag Perkins to confirm the site was able to achieve 2.0 metres physical distancing at its target capacity of 82.
- Perkins consulted with the site on June 15 and reported to Boucher that the average distance between beds at the site was 4.4 feet.
- Boucher replied: “So this means they measured but are not in compliance?” Perkins responded, “Correct.”
- Perkins instructed staff at Evangeline to deactivate 2 beds in the emergency program, and stated “It might be a good idea to deactivate any beds of clients that leave the program, and that will reduce your capacity somewhat and very gradually. Let me know whenever you do that, and we will reduce the capacity in SMIS.” Staff at Evangeline responded, “Thanks

¹⁸³ Transcript of Continued Examination of Gordon Tanner dated September 10, 2020 (“Tanner Sept 10 cross”), p. 132, Q. 370, Supp Brief of Transcripts and Exhibits, Vol. 1, Tab A.

¹⁸⁴ Tanner Sept 10 cross, p. 134, Q. 378, Supp Brief of Transcripts and Exhibits, Vol. 1, Tab A; Exhibit AAA to Second Talebi Affidavit, App MR, Tab 4, p.2142.

¹⁸⁵ Exhibit 1 to the Tanner Sept 10 cross, Supp Brief of Transcripts, Vol. 2, p. 526.

¹⁸⁶ Exhibit I to Second Talebi Affidavit, App MR, Tab 4, p. 1771.

¹⁸⁷ Tanner Sept 10 cross, pp. 136-7, Q. 379-387, Supp Brief of Transcripts, Vol. 1, Tab A.

¹⁸⁸ Tab 15C, Email “RE Confirmed capacities AW1.msg,” Brief of Excerpts from UTs, Vol. 2, p. 273.

Morag. Is there a certain number of beds that should be deactivated?”.¹⁸⁹ No response appears in the record.

- No further follow-up appears to have occurred.
- On the June 15 Progress Report, the City reported a target capacity of 82 for this site, despite its awareness that this target capacity was not accurate, and that it was in fact impossible to accommodate this number of beds while achieving compliance with Physical Distancing Standards.¹⁹⁰

Events on June 16¹⁹¹

- QA attended at the site for the first time.¹⁹²
- QA assessor, Stace Lum-Yip, reported that of the 80 beds at the site, 64 were not in compliance with 2 metres lateral separation and that approximately 32 beds would need to be removed to meet social distancing protocols.¹⁹³
- Lum-Yip communicated these findings to Eden Amare the same day.
- Amare responded to Lum-Yip, copying Wainberg, their manager, and wrote, “I agree that it is problematic that there is so much non-compliance (64 of 80 beds).” Amare also stated to Zoona Khalid who was copied on the e-mail, “Zoona, please feel free to escalate the findings from this visit to Brad and/or Morag, if needed.”¹⁹⁴

Events on June 17¹⁹⁵

- Wainberg wrote back to clarify Lum-Yip’s e-mail and Lum-Yip confirmed that the beds were less than 2 metres apart, even accounting for less than 2 metres spacing between the head and foot of a bed.
- Wainberg replied, “I thought so, I remember rooms in Evangeline having beds set up side by side.”

Outcome

- City continued to report a target capacity of 82 for this site in the July 15 and August 15 Progress Reports, and falsely report compliance at the site.¹⁹⁶

¹⁸⁹ Tab 15F, Email “RE SMIS.msg”, Brief of Excerpts from UTs, Vol. 2, p. 281.

¹⁹⁰ Exhibit P to Second Talebi Affidavit, App MR, Tab 4, p. 1847.

¹⁹¹ Exhibit 31 to the Tanner Sept 10 Cross, Supp Brief of Transcripts, Vol. 3, Tab 31, pp. 835-837.

¹⁹² Tanner Sept 10 cross, p. 132, Q. 371-372, Supp Brief of Transcripts, Vol. 1, Tab A. See also Exhibit 1 to the Tanner Sept 10 cross, Supp Brief of Transcripts, Vol. 2, p. 520-523.

¹⁹³ Exhibit 1 to the Tanner Sept 10 cross, Supp Brief of Transcripts, Vol. 2, p. 520-523.

¹⁹⁴ Exhibit 31 to the Tanner Sept 10 Cross, Supp Brief of Transcripts, Vol. 3, Tab 31, pp. 835-837.

¹⁹⁵ Exhibit 31 to the Tanner Sept 10 Cross, Supp Brief of Transcripts, Vol. 3, Tab 31, pp. 835-837.

¹⁹⁶ Exhibits E and H to Agreed Statement of Facts dated September 8, 2020, App MR, Tab 2.

- City’s July 15 and August 15 Progress Reports, as well as publicly available Open Data confirm that occupancy at this site remained around 80 until late August/early September.¹⁹⁷
- Tanner testified that he only became aware that Evangeline was not in compliance with Physical Distancing Standards at an occupancy of 80 when he reviewed the City’s production following the refusals motion, in late August.¹⁹⁸
- Tanner testified that the capacity for Evangeline that complies with Physical Distancing Standards is in fact 68. Evangeline reached an occupancy of 68 for the first time on September 2, 2020. The capacity figure of 68 for Evangeline would be compliant with Physical Distancing Standards only if the City’s restrictive interpretation of “lateral separation” is accepted. If it is not, the target capacity for this site is much lower.¹⁹⁹

B. Cornerstone Place

Prior to June 15

- On May 8, QA visited the site and estimated that 12 of the 32 beds needed to be removed and that 2 metres lateral separation would only be reached at a target capacity of 20 beds. At that site visit, QA determined that 29 beds were not in compliance with 2 metres lateral separation.²⁰⁰

Events on June 15²⁰¹

- Brad Boucher instructed Zoonah Khalid to follow up with the site.
- Khalid reported to Boucher that same day that the site provider had used 6 feet rather than 2 metres when it determined it could comply with a target capacity of 23.
- Boucher asked Khalid to get the site provider to measure their beds again and provide the information by 3:00 p.m., however there is no further documentation on June 15 with information from the site provider.

Events on June 16

- On June 16, Cornerstone staff sent an email to Khalid, indicating that the capacity of 23 could only be accommodated if many beds were spaced less than 2m apart.²⁰²

¹⁹⁷ Exhibits 17 and 18 to the Tanner Sept 10 Cross, Supp Brief of Transcripts, Volume 3, Tabs 17 and 18. See also Tanner Sept 10 Cross, p. 140, Q. 402, Supp Brief of Transcripts, Volume 1, Tab A.

¹⁹⁸ Tanner Transcript, Sept 10, p. 200, 206, 238-239, Supp Brief of Transcripts, Vol. 1.

¹⁹⁹ Tanner Transcript, Sept 10, p. 243-244, Supp Brief of Transcripts, Vol. 1.

²⁰⁰ Exhibit 1 to Tanner Sept 10 Cross, Supp Brief of Transcripts, Vol. 2, pp. 312-5.

²⁰¹ Exhibit 12 to Tanner Sept 10 Cross, Supp Brief of Transcripts, Volume 3, Tab 12, p. 745-5. See also Tanner Sept 10 Cross at Q. 321-332, pp. 119 – 122.

²⁰² Tab 14A, Email “Re Pay Period - May 31 to June 13 2020.msg”, Brief of Excerpts from UTs, Vol. 2, p. 264.

- Khalid spoke to Cornerstone staff on June 16, and they confirmed that a capacity of 20 would meet physical distancing.²⁰³
- On June 16, Perkins wrote to Khalid, cc Boucher: “Please send me a list of all of the shelter providers you work with who are still required to decrease their capacity based on the recent re-measuring and confirming capacity at 2 metres. For instance, if there is a site that has a lot of move-outs/FTR's etc, check in with them and then confirm the commitment to reduce capacity through attrition and maybe the expected timelines. For sites such as Margaret's or **Cornerstone** where there are not a lot of people moving out, indicate that we will have to assist in finding some alternative spaces for that number of clients.” Boucher responded “The list of 9 from yesterday would be the priority for adjustments. However, please sit tight until I can discuss with Gord later today about next steps.”²⁰⁴

Outcome

- Prior to reporting a target capacity of 23 and asserting that the City was in compliance with Physical Distancing Standards at this site, the City did not receive verbal or written communication from the site provider that their 23 beds were 2 metres apart on June 15.
- Although SSHA was aware as of June 16 that a capacity of 23 could not be accommodated at this site while complying with Physical Distancing Standards, it again reported a target capacity of 23 for this site on the July 15 and August 15 Progress Reports.
- Occupancy at the site remained at 23 after June 15, and only decreased to 20 on August 19.²⁰⁵

C. Junction Place

Prior to June 15

- QA visited this site on May 29, but the QA assessor used the measure of 6 feet rather than 2 metres.²⁰⁶
- Based on the 6 feet standard, QA determined that 24 of the 61 beds at the site needed to be removed – target capacity of 37.²⁰⁷
- Despite the QA assessment in May, the City continued to report a target capacity of 60 on subsequent progress reports.²⁰⁸

²⁰³ City's answers to UTs dated September 17, 2020, UT7, Brief of Excerpts from UTs, Vol. 1, Tab 4, p. 113.

²⁰⁴ Tab 15AAA, Email “RE capacities.msg”, Brief of Excerpts from UTs, Vol. 2, p. 408.

²⁰⁵ Exhibit 13 to Tanner Sept 10 cross, Supp Brief of Transcripts, Vol. 3, Tab 13.

²⁰⁶ Exhibit 1 to Tanner Sept 10 Cross, Supplementary Brief of Transcripts and Exhibits, Vol. 2, p. 481.

²⁰⁷ Exhibit 1 to Tanner Sept 10 Cross, Supplementary Brief of Transcripts and Exhibits, Vol. 2, p. 479.

²⁰⁸ Exhibit P to Second Talebi Affidavit, App MR, Tab 4, p. 1847. See also Exhibits E and H to Agreed Statement of Facts dated September 8, 2020, App MR, Tab 2.

Events on June 15

- SSHA staff identified Junction Place as a site requiring further follow-up.²⁰⁹
- In response to correspondence from Wainberg, the City's staff at the site, which is operated by the City rather than a third-party provider, stated that the site's current capacity was 52 and would need to be further reduced to 46.²¹⁰
- Site staff only expected to reach a capacity of 46 on June 30.²¹¹
- Wainberg wrote to Tanner and Raine: "To complicate matters further, QA estimated that they needed to be down to 37. I would prefer that for the time being capacity be set at 46. That may be more achievable."²¹²
- In later communication that same day, Junction Place reported that they would attempt to move four residents to achieve the target of 46 by 7:00 p.m. on June 15.²¹³
- Just after 7:00 p.m., QA assessor Natasa Varmuza wrote to Wainberg, "they are currently moving 4 clients to a motel program which will leave 48 clients on site today; two clients will be leaving tomorrow to bring the total to 46. I have emailed Scott to confirm site capacity, and the plan for ensuring the two clients staying today will have beds in spaces that have 2m edge-to-edge distancing; I am waiting for the reply."²¹⁴
- No further confirmation was received from Junction Place prior to the City asserting compliance in the Progress Report.
- In the June 15 Progress Report, the City reported a target capacity of 60 for this site, and reported occupancy as 52.²¹⁵

Events after June 15

- In its July 15 Progress Report, the City maintained the reported target capacity as 60.²¹⁶
- In its August 15 Progress Report the City reported a reduction in target capacity to 46.²¹⁷
- The capacity for this site was reduced to 37 as of August 12. Occupancy for this site has been 37 or lower since June 24.²¹⁸

Outcome

- SSHA staff were aware that Junction Place was not in compliance with its true target capacity as of June 14, the effective date of the June 15 Progress Report. The reported occupancy of 52

²⁰⁹ Exhibit 24 to Tanner Sept 10 Cross, Supplementary Brief of Transcripts and Exhibits, Vol. 3, p. 813 and following.

²¹⁰ Tab FF, Brief of Excerpts to UTs, Vol. 2, p. 354. See also emails between Tanner and Wainberg at pp. 367-69.

²¹¹ Ibid.

²¹² Tab JJ, Brief of Excerpts to UTs, Vol. 2, p. 368.

²¹³ Tab JJ, Brief of Excerpts to UTs, Vol. 2, p. 367.

²¹⁴ Tab NN, Brief of Excerpts to UTs, Vol. 2, p. 381.

²¹⁵ Exhibit P to Second Talebi Affidavit, App MR, Tab 4, p. 1847

²¹⁶ Exhibit E to Agreed Statement of Facts dated September 8, 2020, App MR, Tab 2.

²¹⁷ Exhibit H to Agreed Statement of Facts dated September 8, 2020, App MR, Tab 2.

²¹⁸ Exhibit B to Affidavit of Elizabeth Lalonde dated September 22, 2020, App MR, Vol. 9, Tab 16, p.2693-2694.

in the June 15 Progress Report exceeded the site's target capacity of 37 as determined by QA on May 29, or the target capacity of 46 reported by the site on June 15.

D. Seaton House

- Several programs operate within this City-operated shelter: Annex Harm Reduction & Managed Alcohol Program, Hostel Program, Hostels Extreme Weather Program, Infirmary Bedded Program, Long Term Program, O'Neill Harm Reduction Program, Winter Program. SMIS records occupancy and capacity separately for each of these programs.
- On the City's Progress Reports, the City only reported aggregate target capacity and occupancy numbers.²¹⁹
- In their questions in respect of the June 1 Progress Report, delivered on June 8, the Applicants requested that the City provide capacity and occupancy figures for Seaton House broken down by program.²²⁰

Events Prior to June 15

- Like Evangeline, an outbreak was declared at Seaton House and the City was aware that COVID-19 transmission had occurred at the site.
- QA reports reveal that on April 15, QA only assessed one of Seaton House's programs, the Hostel Program.²²¹
- QA never conducted a site visit for the remaining 6 programs.
- At the April 15 site visit, QA determined that of the 82 beds in the hostel program, 62 did not comply with 2 metres distancing, 20 beds would need to be removed, and reported that a follow-up visit was required.²²²

June 15

- As of June 15, no follow-up visit from QA had occurred. QA had not visited any program other than the Hostel Program.²²³
- According to SSHA's internal target capacities and occupancy numbers for Seaton House programs, the Hostel Program was reporting a target capacity of 76, and an occupancy of 82.²²⁴

²¹⁹ See, for example, Exhibit P to Second Talebi Affidavit, App MR, Tab 4.

²²⁰ Second Talebi Affidavit, Exhibit L, App MR, Tab 4, p. 1814.

²²¹ Exhibit 1 to the Tanner Sept 10 cross, Supplementary Brief of Transcripts and Exhibits, Vol. 2, p. 558 and following.

²²² Exhibit 1 to the Tanner Sept 10 cross, Supplementary Brief of Transcripts and Exhibits, Vol. 2, p. 558 and following.

²²³ City's UTs chart dated July 21, 2020, Brief of Excerpts to UTs, Vol. 1, p. 29.

²²⁴ Tab L, Brief of Excerpts to UTs, Vol. 2, p. 299

- SSHA staff believed the discrepancy between Seaton House’s reported target capacity and QA’s April 15 determination was that in April QA “was looking for 2m on all sides.”²²⁵
- Internally, Amare and Wainberg discuss, “I think we’ll take it” since QA would visit again in Phase 2 “to verify.”²²⁶
- However, following a verification inquiry on June 15, Seaton House staff reported at 11:10 pm on June 15, “This has become a bit of a bigger project. While trying to confirm distancing and capacity we determined that we may not have measured correctly the first time.”²²⁷
- Seaton House reported that they were attempting to meet a target capacity of 62 in the Hostel Program by moving approximately 20 clients to other programs within Seaton House and across the City’s shelter system.²²⁸
- Seaton House staff did not report on June 15 whether the moves had been completed that night, when they were expected to be completed. No further information on this point is available in the record.
- With respect to the other Seaton House programs, Priston advised Tanner, Raine, Wainberg and Boucher on June 15 that there were inconsistencies in the program-by-program data for Seaton House. Through further exchanges, the group determined that they did not have sufficient information to determine or explain how the total capacity for Seaton House that had been reported in prior Progress Reports (220) related to the different programs.²²⁹
- The City reported a target capacity of 220 for Seaton House, and an occupancy of 165, in the June 15 Progress Report.²³⁰
- The record contains no information upon which the basis for the target capacity of 220 for Seaton House can be assessed.

E. Sprung Sites (69 Fraser, 351 Lakeshore, 1A Strachan)

Events Prior to June 15

QA + Site Provider Verification

- City was in possession of spreadsheets and floorplans for the Sprung shelter sites, with space analyses that all supported the conclusion that the Sprung sites could not achieve Physical Distancing Standards at target capacities between 45 and 50.²³¹

²²⁵ Tab TT, Brief of Excerpts to UTs, Vol. 2, p. 393.

²²⁶ Tab TT, Brief of Excerpts to UTs, Vol. 2, p. 393.

²²⁷ Tab OO, Brief of Excerpts to UTs, Vol. 2, p. 383.

²²⁸ Tab OO, Brief of Excerpts to UTs, Vol. 2, p. 383.

²²⁹ Tabs RR and SS, Brief of Excerpts to UTs, Vol. 2, p. 390-392.

²³⁰ Exhibit P to Second Talebi Affidavit, App MR, Tab 4, p. 1848.

²³¹ Tab 18, Brief of Excerpts to UTs, Vol. 2, p. 470-475.

- On April 19, QA and OSS staff communicated regarding the application of the 74.3 “proxy” or theoretical calculation to the Sprung structures, which resulted in a target capacity of 42 for 69 Fraser,²³² 41 for 351 Lakeshore, and 45 for 1A Strachan.²³³
- QA did not carry out its usual practice of informing providers to reach the target capacity derived from the 74.3 “proxy” or theoretical calculation. Instead, QA sought direction from OSS regarding whether the Sprung sites should decant to approximately 42 clients.²³⁴ The record does not disclose what OSS instructed, but it is clear that the Sprung structure sites did not reduce their occupancies to 42 at this time.
- In April and May QA assessors consistently recommended target capacities below 50 for the Sprung sites, ranging from 41-49 when they visited the sites while they were in use.²³⁵
- The only QA assessment to report that a Sprung site could maintain a capacity of 50 while meeting Physical Distancing Standards was the first visit to 1A Strachan on April 16, which occurred when the site was unoccupied and empty for cleaning. That assessment was soon called into question when a subsequent QA visit to the site while it was occupied resulted in a recommendation to reduce the target capacity from 50 to 45.²³⁶
- On May 1, the site provider for 69 Fraser reported to the City that it could not maintain physical distancing standards at its capacity of 50 and would need to reduce to 40.²³⁷
- 351 Lakeshore reported to QA on May 29 that they had been directed by the City to have 50 cots, but to achieve 2 metres spacing between cots in all four directions they could only maintain 27 cots. In order to have 50 cots in the space, the site provider reported they would have to place cots 12 inches apart from head-to-toe.²³⁸

City’s Reporting to Applicants

- In its Progress Reports from May 19 to June 15, the City represented to the Applicants that the target capacity at 69 Fraser and 351 Lakeshore was 50.²³⁹
- For 1A Strachan, the City also reported the target capacity as 50 in the first four weekly Progress Reports.²⁴⁰ In the June 15 Progress Report, the target capacity for 1A Strachan was reduced to 45.

²³² Tab 6I – St. Felix – 69 Fraser, Brief of Excerpts to UTs, Vol. 2, p. 213-214.

²³³ Exhibit 33 to Tanner Sept 10 Cross, Supplementary Brief of Transcripts and Exhibits, Vol. 3, p. 843.

²³⁴ Tab 6H and 6I, Brief of Excerpts to UTs, Vol. 2, p. 203 and 216.

²³⁵ Exhibit 1 to Tanner Sept 10 Cross, Supplementary Brief of Transcripts and Exhibits, Vol. 2. St Felix: see p. 585-6; 1A Strachan: see 389-392; 351 Lakeshore: see p. 351.

²³⁶ Exhibit 1 to Tanner Sept 10 Cross, Supplementary Brief of Transcripts and Exhibits, Vol. 2, pp. 389-392.

²³⁷ Tab 6H, Brief of Excerpts to UTs, Vol. 2, p. 204.

²³⁸ Exhibit 22 to Tanner Sept 10 Cross, Exhibit 22, Supplementary Brief of Transcripts and Exhibits, Vol. 3, p. 737.

²³⁹ See Progress Reports appended to Second Talebi Affidavit at Exhibits C, F, K, N and P.

²⁴⁰ Ibid.

Events on June 15

- On June 15, 351 Lakeshore confirmed to SSHA that their previously-confirmed target capacity of 45 was based on 6 feet measurement, and that they would need to further reduce capacity to 40 to meet 2 metres distancing.²⁴¹
- On June 15, St Felix 69 Fraser staff advised SSHA that they had not done measurements to substantiate the target capacity of 50, even though the survey had been returned.²⁴²
- Nevertheless, in the June 15 Progress Report, the City maintained the target capacity for 351 Lakeshore and 69 Fraser at 50. Occupancy for 351 Lakeshore was reported to be 45 as of the June 15 Progress Report, and for 69 Fraser was reported to be 50.²⁴³
- SSHA staff discussed the Sprung structures “on a global basis” during a conference call held at 5:30 p.m. on June 15. “Mr. Tanner made the decision to maintain the structures at their current capacities based on his belief that these structures could accommodate a target capacity of 45-50 spaces and that QA would be following up in Phase II to determine final floor plans and adjust as needed.”²⁴⁴

Events since June 15

- Phase 2 assessments by QA of the Sprung sites have not in fact validated Mr. Tanner’s June 15 belief that these structures could accommodate 45-50 spaces while complying with Physical Distancing Standards, even following optimization of their layouts (which were not optimized as of June 15). Even using Scenario C spacing (2m lateral and 0.75m longitudinal), none of the Sprung sites can accommodate 50 beds. Using Scenario A spacing (2m lateral and 2m longitudinal), the capacities are 32, 33 and 36. See summary below:²⁴⁵

²⁴¹ Tab 15L, Email “RE Progress Reporting AW.msg”, Brief of Excerpts to UTs, Vol. 2, p. 301.

²⁴² Tab 15G, Email “RE For Follow-up.xlsxBB11.msg”, Brief of Excerpts to UTs, Vol. 2, p. 284.

²⁴³ Exhibit P to the Second Talebi Affidavit, App MR, Tab 4, p. 1844.

²⁴⁴ City’s answers to UTs dated September 17, 2020, UT 9, p. 113, Brief of Excerpts to UTs, Tab 4.

²⁴⁵ Tab 6A, Brief of Excerpts to UTs s, Vol. 1, p. 136.

Proposed Maximum Resting Capacities by Distancing Scenario

The following table outlines the proposed maximum resting capacities for each of the three (3) sprung structures for:

- Scenario A (2m lateral, 2m longitudinal)
- Scenario B (2m lateral, 1m longitudinal)
- Scenario C (2m lateral, 0.75m longitudinal)

Program	Scenario A (2m lateral + 2m longitudinal)	Scenario B (2m lateral + 1m longitudinal)	Scenario C (2m lateral + 0.75m longitudinal)	Comments
1A Strachan	33.00	45.00	45.00	Proposal includes two (2) beds in Scenarios A/B/C that will encroach into walkways/doorways.
351 Lakeshore Blvd E	36.00	45.00	49.00	Proposal includes two (2) beds in Scenarios A/B/C that will encroach into walkways/doorways.
69 Fraser	32.00	43.00	46.00	
Notes:				
QAT Recommended Capacity is the actual, on-site capacity estimate made by QAT after assessing a facility.				

- In light of the Phase 2 assessments, it is clear that at the occupancies reported in the June 15 Progress Report – 36 for 1A Strachan, 45 for 351 Lakeshore, and 50 for 69 Fraser – simply could not be accommodated within these spaces while complying with Physical Distancing Standards.

F. Scarborough Village Residence

Prior to June 15

- QA visit to this City-operated site occurred on May 13. The capacity at the time of assessment was 72, and QA estimated that 14 beds needed to be removed to meet physical distancing guidelines. At the same time, QA noted that the beds in 3 two-bed rooms were closer than 2m apart, with no barrier between them, and that the beds in another 24 two-bed rooms were closer than 2m apart, separated by a 5-ft T-shaped barrier. QA recommended a follow-up with OSS and TPH regarding the T-shaped barriers.²⁴⁶
- Notwithstanding QA’s findings on the May 13 visit, the City reported the target capacity for this site as 72 on its first four Progress Reports.

Events on June 15

- Wainberg wrote to Shawn Yoder at SVR in the morning of June 15, asking for confirmation that the site met 2m distancing standard for all beds at its target capacity. She indicated “In the case where partitions are used, you must distance beds regardless to meet 2m distancing as TPH has not yet given direction on whether those are acceptable and what characteristics they should have”. Wainberg noted that the capacity currently recorded for SVR was 54.²⁴⁷

²⁴⁶ Exhibit 1 to the Tanner Sept 10 cross, Supplementary Brief of Transcripts and Exhibits, Vol. 2, p. 549-552.

²⁴⁷ Exhibit 24 to the Tanner Sept 10 cross, Supplementary Brief of Transcripts and Exhibits, Vol. 2, p. 813.

- The QA assessor who had conducted the May 13 visit to SVR wrote to Wainberg at 12:51pm on June 15: “I just thought of Scarborough Village: there may be pushback from that site to reduce capacity because of the 5ft barriers that are between beds. Based on OUR standards, 25 beds would not meet 2m edge to edge. BUT TPH and ICHA told them that the 5ft T-shaped barriers were enough. And the barriers are fixed wall construction in the rooms and cannot be removed.”²⁴⁸
- Amare added: “I also want to echo that Laural said for the time being, we are taking the position that dividers don't count.”²⁴⁹
- Wainberg replied: “I know. In the email I said they should take into consideration that the barriers have not been approved so they should move their beds to create 2m. Let's see what we get back. You may want to reach out and see how they are doing with this.”²⁵⁰
- The QA assessor advised later that afternoon: “Shawn at SVR said he would let me know at 3 about the beds in the rooms that didn't meet. He mentioned the TPH & ICHA decision about the barriers being okay.” Still later that afternoon, she wrote: “This is where unclear messaging from different agencies is an issue. TPH & ICHA said the barriers were fine in March. We were looking at lateral separation; based on that, 25 beds would not meet. However, we have not yet received any final word from TPH about the barriers. Had we that information earlier (say within a week of the assessment being done on May 13th), this could have been mitigated earlier. And 25 people would not have to be displaced in a rush today.”²⁵¹
- Wainberg replied at 2:06pm: “...if Shawn can move beds apart as much as possible to create 2m with the dividers in the middle or somewhere, let them do that and get to the best number they can get. As long as they can confirm the 2m the capacity can be whatever they say it is. I think Shawn will need to understand that the idea is not what plan he has, rather that he needs to do it for today/tomorrow for the report.”²⁵²
- In an email to Tanner, Raine, Boucher and others at 2:11pm, Wainberg stated: “There is also an issue with SVR, they may not be able to meet distancing or decant sufficient clients by today. They were told by ICHA and TPH that the dividers were appropriate so they have done nothing to reduce clients. Natasa who did the visit estimates that they would need to decant 26 people. I've asked her to follow up with Shawn and see how much they can spread the beds to create distancing and then figure out what their capacity would be that they would need to move clients out. This site may require a different approach. Perhaps accepting ICHA/TPH ruling for now.”²⁵³

²⁴⁸ Tab HH, Email “RE TIME SENSITIVE CAPACITY CONFIRMATION THAT SITE MEETS PHYSICAL DISTANCING STANDARD AW6.msg”, Brief of Excerpts to UTs, Vol. 2, p. 361-362.

²⁴⁹ Tab HH, Email “RE TIME SENSITIVE CAPACITY CONFIRMATION THAT SITE MEETS PHYSICAL DISTANCING STANDARD AW6.msg”, Brief of Excerpts to UTs, Vol. 2, p. 361.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Tab SS, Email “RE Progress Reporting Seaton House capacities AW2.msg”, Brief of Excerpts to UTs, Vol. 2, p. 391.

- At 2:06pm, Shawn Yoder reported to the QA assessor: “We were able to social distance (2m +) every bed at SVR.”²⁵⁴ Three photos were attached to the email. Two of the photos appear to show furniture being used as a barrier, very close to the foot of the bed.
- The QA assessor advised Wainberg, at 3:10pm: “SVR: Shawn confirmed that they were able to move all the beds to meet 2m edge-to-edge. No clients were displaced out of the site. Current capacity and occupancy are 67.” Wainberg forwarded this email to Tanner, Raine, Priston and Boucher at 3:15pm.²⁵⁵
- In the June 15 Progress Report, the City reported that the capacity of this site as 72, the same number that had been reported on prior Progress Reports. Reported occupancy was 67.²⁵⁶

Events since June 15

- On its July 15 Progress Report, the City again reported the capacity of this site as 72, with an occupancy of 64.²⁵⁷
- On its August 15 Progress Report, the City reduced the reported capacity of this site to 67, with an occupancy of 62.²⁵⁸
- In answers to undertakings provided September 17, the City stated that the target capacity for Scarborough Village Residence was changed on the August 15 Progress Report to reflect the target capacity “that had been confirmed on June 15 but not changed on the Progress Reports.”²⁵⁹
- It would appear that the issue of beds being spaced less than 2m but separated by partitions, which had been identified in the May 13 QA visit as affecting 24 rooms, remains unaddressed to date.

²⁵⁴ Exhibit 24 to the Tanner Sept 10 cross, Supplementary Brief of Transcripts and Exhibits, Vol. 2, p. 813.

²⁵⁵ Tab UU, Email “FW WR SVR and JP.msg”, Brief of Excerpts to UTs, Vol. 2, p. 396.

²⁵⁶ Exhibit P to the Second Talebi Affidavit, App MR, Tab 4, p. 1847.

²⁵⁷ Exhibit E to Agreed Statement of Facts dated September 8, 2020, App MR, Tab 2.

²⁵⁸ Exhibit H to Agreed Statement of Facts dated September 8, 2020, App MR, Tab 2.

²⁵⁹ City’s answers to undertakings dated September 17, 2020, Brief of Excerpts to UTs, Vol. 1, p.116.

**SCHEDULE “F” - SITES FOR WHICH SSHA WAS AWARE OF NON-COMPLIANCE
(OR HAD NOT CONFIRMED COMPLIANCE) AS OF JUNE 15**

Site	Target Capacity on June 15 Progress Report²⁶⁰	Occup on June 15 Progress Report²⁶¹	Information Known to City on June 15²⁶²	Evidence confirming SSHA’s awareness on June 15	Date Occupancy Met Target Capacity
Salvation Army – Evangeline Residence	82	80	QA: 48 ²⁶³ (this visit occurred on June 16) Provider stated was not in compliance with Directive. ²⁶⁴	Brad Boucher (June 15), Anabella Wainberg (June 16) ²⁶⁵	City considers target capacity to be 68 (relying on restrictive interpretation of “lateral separation”). ²⁶⁶ Occupancy first reached 68 on Sept 6. Occupancy was 57 as of Sept 9 ²⁶⁷

²⁶⁰ Exhibit P to the Second Talebi Affidavit, App MR, Tab 4: City of Toronto Progress Report dated June 15, 2020 with covering email correspondence between Counsel

²⁶¹ Exhibit P to the Second Talebi Affidavit, App MR, Tab 4: City of Toronto Progress Report dated June 15, 2020 with covering email correspondence between Counsel

²⁶² For QA reports, see Exhibit 1 to Tanner Sept 10 Cross, Supp Brief of Transcripts and Exhibits, Tab A, Vol. 1.

²⁶³ Exhibit 1 to Tanner Sept 10 Cross, Supp Brief of Transcripts and Exhibits, Vol. 2, p. 520-523.

²⁶⁴ Exhibit 1 to Tanner Sept 10 Cross, Supp Brief of Transcripts and Exhibits, Vol. 2, p. 526.

²⁶⁵ City’s answers to UTs dated September 17, 2020, Tab 4, Supp Brief of Transcripts and Exhibits, Vol. 1, p. 122 (Wainberg’s knowledge); Exhibit 16 to Tanner Sept 10 Cross, Tab 16, Supp Brief of Transcripts and Exhibits, Vol. 3, p. 763 (Boucher’s knowledge).

²⁶⁶ Tanner Transcript, Sept 10, p. 243-244, Supplementary Brief of Transcripts and Exhibits, Vol. 1.

²⁶⁷ Exhibits 17 and 18 to Tanner Sept 10 Cross, Supp Brief of Transcripts and Exhibits, Tabs 17-18, Vol. 3. See p. 781 for occupancy on September 8.

Site	Target Capacity on June 15 Progress Report²⁶⁰	Occup on June 15 Progress Report²⁶¹	Information Known to City on June 15²⁶²	Evidence confirming SSHA's awareness on June 15	Date Occupancy Met Target Capacity
Cornerstone Place	23	23	QA: 20 ²⁶⁸ Provider used 6 ft when reporting target of 23 ²⁶⁹	Tanner, Raine, Wainberg, Boucher, Priston, Perkins ²⁷⁰	August 19 ²⁷¹
Junction Place	60	52	QA: 37 Provider advised target capacity of 46 on June 15. ²⁷²	Tanner, Raine, Wainberg ²⁷³	Capacity was reduced to 37 as of August 12. Occupancy has been 37 or lower since June 24. ²⁷⁴

²⁶⁸ Exhibit 1 to Tanner Sept 10 Cross, Supp Brief of Transcripts and Exhibits, Vol. 2, p. 312.

²⁶⁹ Email from Brad Boucher dated June 15, 2020 at 3:45 p.m., RE: Progress Reporting, Brief of Excerpts to Undertakings, Tab 15L.

²⁷⁰ Email from Brad Boucher dated June 15, 2020 at 3:45 p.m., RE: Progress Reporting, Brief of Excerpts to Undertakings, Tab 15L.

²⁷¹ Exhibit 13 to Tanner Sept 10 Cross, Supp Brief of Transcripts and Exhibits, Vol. 3, p. 748.

²⁷² Tab 15JJ, Email "FW TIME SENSITIVE CAPACITY CONFIRMATION THAT SITE MEETS PHYSICAL DISTANCING STANDARD_nv_JP6.msg", Vol 2, Brief of Excerpts to Undertakings, p. 368.

²⁷³ Tab 15JJ, Email "FW TIME SENSITIVE CAPACITY CONFIRMATION THAT SITE MEETS PHYSICAL DISTANCING STANDARD_nv_JP6.msg", Vol 2, Brief of Excerpts to Undertakings, p. 368.

²⁷⁴ Exhibit B to Affidavit of Elizabeth Lalonde dated September 22, 2020, App MR, Vol. 9, Tab 16, p.2693-2694.

Site	Target Capacity on June 15 Progress Report²⁶⁰	Occup on June 15 Progress Report²⁶¹	Information Known to City on June 15²⁶²	Evidence confirming SSHA's awareness on June 15	Date Occupancy Met Target Capacity
Na-Me-Res	43	40	QA: 36 Provider used 6 ft when reporting target of 36. Provider re-measured at 2 metres and reported target of 31. ²⁷⁵	Tanner, Raine, Wainberg, Boucher, Priston, Perkins ²⁷⁶	Never reached 31. Occupancy reached 36 on June 22. ²⁷⁷ City advised on UT: "...The service provider sent in a further survey on June 23 confirming a target capacity of 36..." ²⁷⁸
Salvation Army - Islington Seniors	30	30	QA: 17 Provider used 6 feet when reporting target of 30. ²⁷⁹	Tanner, Raine, Wainberg, Boucher, Priston, Perkins ²⁸⁰	Not to date. Occupancy of 29 on Sept 8. ²⁸¹
Salvation Army - Gateway	56	55	QA: 56 Provider stated needs to reduce to 54 to be in full compliance.	Tanner, Raine, Wainberg, Boucher, Priston, Perkins ²⁸²	Occupancy reached 54 on June 18. ²⁸³

²⁷⁵ Excel spreadsheet attached to email from Brad Boucher dated June 15, 2020 at 3:45 p.m., RE: Progress Reporting, Brief of Excerpts to Undertakings, Tab 15L.

²⁷⁶ Excel spreadsheet attached to email from Brad Boucher dated June 15, 2020 at 3:45 p.m., RE: Progress Reporting, Brief of Excerpts to Undertakings, Tab 15L.

²⁷⁷ Exhibit 15 to Tanner Sept 10 Cross, Supp Brief of Transcripts and Exhibits, Vol. 3, p. 758

²⁷⁸ City's answers to undertakings dated September 17, 2020, UT11, Brief of Excerpts from UTs, Vol. 1, Tab 4, p. 119.

²⁷⁹ Excel spreadsheet attached to email from Brad Boucher dated June 15, 2020 at 3:45 p.m., RE: Progress Reporting, Brief of Excerpts to Undertakings, Tab 15L.

²⁸⁰ Excel spreadsheet attached to email from Brad Boucher dated June 15, 2020 at 3:45 p.m., RE: Progress Reporting, Brief of Excerpts to Undertakings, Tab 15L.

²⁸¹ Tabs 19-20, Supp Brief of Transcripts and Exhibits, Vol. 3, at p. 792 and p. 803. Note occupancy of program includes women's and men's programs reported separately at Tabs 19 and 20.

²⁸² Excel spreadsheet attached to email from Brad Boucher dated June 15, 2020 at 3:45 p.m., RE: Progress Reporting, Brief of Excerpts to Undertakings, Tab 15L.

²⁸³ Tanner UT 11, City's answers to undertakings dated September 17, 2020, Tab 4, Vol. 1, Brief of Excerpts from UTs, p. 118.

Site	Target Capacity on June 15 Progress Report ²⁶⁰	Occup on June 15 Progress Report ²⁶¹	Information Known to City on June 15 ²⁶²	Evidence confirming SSHA's awareness on June 15	Date Occupancy Met Target Capacity
St. Felix - 69 Fraser Ave (Sprung Site)	50	50	<p>QA: 42</p> <p>Provider did not measure on their own.</p> <p>Provider did not confirm target of 50 in response to survey.²⁸⁴</p>	Tanner, Raine, Wainberg, Boucher, Priston, Perkins ²⁸⁵	<p>Occupancy first reached 43 on June 25 and 42 on July 1.²⁸⁶</p> <p>Latest occupancy figure in the record is 43 as of August 15.²⁸⁷</p> <p>QA Phase 2 assessment indicates capacity of 32 for Scenario A (2m lateral & longitudinal), 43 for Scenario B (2m lateral & 1m longitudinal), 46 for Scenario C (2m lateral & 0.75 longitudinal).²⁸⁸</p>

²⁸⁴ Excel spreadsheet attached to email from Brad Boucher dated June 15, 2020 at 3:45 p.m., RE: Progress Reporting, Brief of Excerpts to Undertakings, Tab 15L.

²⁸⁵ Excel spreadsheet attached to email from Brad Boucher dated June 15, 2020 at 3:45 p.m., RE: Progress Reporting, Brief of Excerpts to Undertakings, Tab 15L.

²⁸⁶ City's Undertakings Chart dated July 21, 2020, Brief of Excerpts to Undertakings, Tab 1, p. 24-25.

²⁸⁷ Exhibit H to Agreed Statement of Facts dated September 8, 2020, Tab 2, Vol 1, App MR, p. 63.

²⁸⁸ Tab 6I, Brief of Excerpts to UTs, Vol. 1, p. 209-211.

Site	Target Capacity on June 15 Progress Report²⁶⁰	Occup on June 15 Progress Report²⁶¹	Information Known to City on June 15²⁶²	Evidence confirming SSHA's awareness on June 15	Date Occupancy Met Target Capacity
351 Lakeshore (Sprung Site)	50	45	QA: 41 Provider used 6ft when reporting target of 50. Provider reported reduction to 40 necessary to maintain 2 m separation.	Tanner, Raine, Wainberg, Boucher, Priston, Perkins ²⁸⁹	Latest occupancy figure in the record is 40 as of Aug 15 ²⁹⁰ QA Phase 2 assessment indicates capacity of 36 for Scenario A (2m lateral & longitudinal), 45 for Scenario B (2m lateral & 1m longitudinal), 49 for Scenario C (2m lateral & 0.75 longitudinal). ²⁹¹
Christie Ossington Men's Hostel South (850 Bloor)	19	19	QA: 18 Provider stated 1 person moving out on June 15 to reach 18.	Tanner, Raine, Wainberg, Boucher, Priston, Perkins ²⁹²	Reported as 17 on July 15. ²⁹³

²⁸⁹ Excel spreadsheet attached to email from Brad Boucher dated June 15, 2020 at 3:45 p.m., RE: Progress Reporting, Brief of Excerpts to Undertakings, Tab 15L.

²⁹⁰ Exhibit H to Agreed Statement of Facts dated September 8, 2020, Tab 2, Vol 1, App MR, p. 63.

²⁹¹ Tab 6A, Brief of Excerpts to UTs, Vol. 1, p. 131-133.

²⁹² Excel spreadsheet attached to email from Brad Boucher dated June 15, 2020 at 3:45 p.m., RE: Progress Reporting, Brief of Excerpts to Undertakings, Tab 15L.

²⁹³ Exhibit F to Agreed Statement of Facts dated September 8, 2020, Tab 2, Vol 1, App MR, p. 43.

Site	Target Capacity on June 15 Progress Report ²⁶⁰	Occup on June 15 Progress Report ²⁶¹	Information Known to City on June 15 ²⁶²	Evidence confirming SSHA's awareness on June 15	Date Occupancy Met Target Capacity
Margaret's 21 Park Rd. Respite	30	30	QA: 25 Provider reported capacity of 26 at 2m spacing. ²⁹⁴	Boucher ²⁹⁵	Occupancy reached 25 on June 22 ²⁹⁶ City advised on UT: "Margaret's Park Road changed from target capacity of 30 to target capacity of 25 as a result of both service provider and QA verification. Target capacity was not changed and should have been." ²⁹⁷
Scarborough Village Residence	72	67	QA: 58 Wainberg on June 15 at 10 am: 54 ²⁹⁸ The issue at this is the use of partitions to separate beds which are not less than 2m	Tanner, Boucher ³⁰¹ Wainberg, Raine, Priston, Varmuza, Amare ³⁰²	City reported compliance at occupancy of 67 on June 15. ³⁰³ Occupancy was 62 on August 15. ³⁰⁴

²⁹⁴ Tab 6F, Email "RE Confirmed # of beds at Margarets.msg", Brief of Excerpts to UTs, p. 177.

²⁹⁵ Tab 6F, Email "RE Confirmed # of beds at Margarets.msg", Brief of Excerpts to UTs, p. 177.

²⁹⁶ City's undertakings chart dated July 21, 2020 (Summons #34 to Gord Tanner), Tab 1, Vol. 1, Brief of Excerpts from UTs, p. 7

²⁹⁷ City's undertakings chart dated July 21, 2020 (Summons #34 to Gord Tanner), Tab 1, Vol. 1, Brief of Excerpts from UTs, p. 7

²⁹⁸ Tab 6E, Email "email JP distancing standard confirmation", Brief of Excerpts to UTs, p. 175-6.

³⁰¹ Tab 15UU, Email "FW WR SVR and JP.msg", Brief of Excerpts to UTs, p. 396

³⁰² Tab 15SS, Email "RE Progress Reporting Seaton House capacities AW2.msg", Vol. 2, Brief of Excerpts to UTs, p. 391

³⁰³ Exhibit P to Second Talebi Affidavit, Tab 4, App MR, p. 1847.

³⁰⁴ Exhibit H to the Agreed Statement of Facts dated September 8, 2020, Tab 2, App MR, p. 67.

Site	Target Capacity on June 15 Progress Report²⁶⁰	Occup on June 15 Progress Report²⁶¹	Information Known to City on June 15²⁶²	Evidence confirming SSHA's awareness on June 15	Date Occupancy Met Target Capacity
			apart. ²⁹⁹ Tanner admitted beds at SVR can only achieve physical distancing if physical distancing does not require any particular longitudinal spacing. ³⁰⁰		

²⁹⁹ Tanner Sept 10 Cross, Q518-9, p. 181-3, Tab A, Supp Brief of Transcripts and Exhibits.

³⁰⁰ Tanner Sept 10 Cross, Q525, p. 184, Tab A, Supp Brief of Transcripts and Exhibits.

SCHEDULE “G” - EXCERPTS FROM TORONTO SHELTER STANDARDS

From Page 59:

9.3.1 Sleeping Areas and Beds

- (e) 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.) (see Appendix A: Sleeping Area / Personal Space Examples).

From Page 103:

APPENDIX A: Sleeping Area / Personal Space Examples

The following examples illustrate

- Single bed configurations that comply with personal space requirements (i.e., a minimum of 3.75 m.² or 37.7 ft.² per person), with a minimum lateral separation distance of 0.75 m. (2.5 ft.) between closest sides of adjacent beds
- Bunk bed configurations that comply with personal space requirements;
- Separation distance between top and bottom bunks (i.e., a minimum of 1.1 m. (3.5 ft.) of overhead clearance).

In the illustrated examples, the following symbols mean:



Allocated personal space (a minimum of 3.75 m.² or 37.7 ft.²)



Single bed



Bunk bed



Lateral separation distance (a minimum of 0.75 m. or 2.5 ft.)



Wall



Ceiling



Floor



Window



Door/entrance

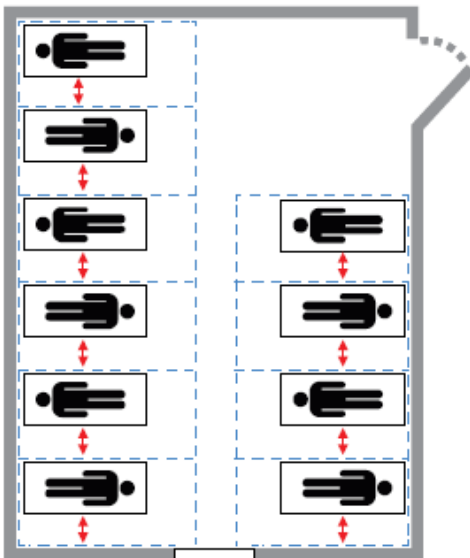
From Page 104:

Single Bed Configurations

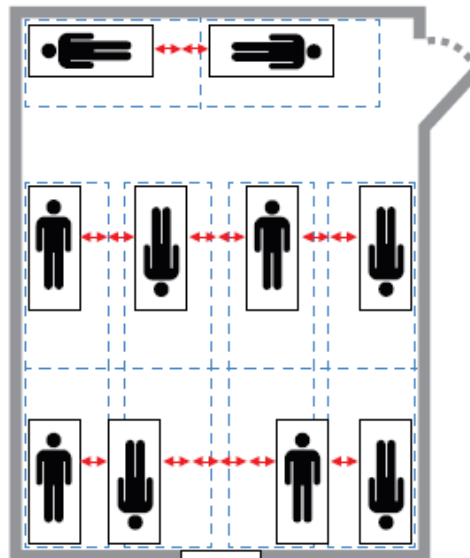
Examples that Comply with Sleeping Area / Personal Space Requirements

In the following examples, beds are arranged in an alternating 'head-to-toe' arrangement to minimize transmission of communicable diseases.

Example A: 10 single beds / 10 clients



Example B: 10 single beds / 10 clients



- Example A meets the personal space requirements and separation distance requirements between beds.
- Example A allows for better flow of foot traffic (e.g., in event of evacuation) and facilitates more respectful (i.e., less disruptive) and efficient bed checks than example B.
- Example B meets the personal space requirements and exceeds separation distance requirements between beds.
- Example B results in more obstructed flow (e.g., in event of evacuation) and may result in more disruptive bed checks.
- Beds nearest the window have been moved aside to allow adequate clearance around the window (e.g., facilitates easy access to window).

SANCTUARY MINISTRIES OF TORONTO et al.
Applicants

-and- CITY OF TORONTO et al.
Respondents

Court File No. CV-20-640061

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO

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