CITATION NO.: *Sanctuary et al v. Toronto (City) et al.*, 2020 ONSC 6207
COURT FILE NO. CV-20-640061
DATE: 20201015

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND:

CITY OF TORONTO and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, Respondents

BEFORE: Sossin J.

COUNSEL: Jessica Orkin, Geetha Philipupillai, Andrew Porter, Anthony Sangiuliano, Sahar Talebi and Emily Hill**,** Counsel for the Applicants

Kirsten Franz, David A. Gourlay, Michele Brady and Alison Barclay, Counsel for the Respondent, City of Toronto

HEARD: October 1, 2020

REASONS FOR DECISION

OVERVIEW

[1] This is a motion to enforce a settlement agreement which resulted in the adjournment of an injunction motion in May 2020 (the "Interim Settlement Agreement"). Under that agreement, the City undertook obligations toward achieving certain goals relating to the safety and capacity of Toronto's shelter system in the wake of the COVID-19 pandemic.

[2] The agreement provided that when those goals had been achieved, the City would assert compliance, and then after a further period of monitoring, the agreement would terminate.

[3] The City asserted compliance on June 15, 2020.

[4] The key question on this motion is whether the City properly did so within the terms of the Interim Settlement Agreement.

[5] In order to address this question, it is first necessary to understand the background of this motion.

[6] On April 24, 2020, Sanctuary Ministries of Toronto, Aboriginal Legal Services, Advocacy Centre for Tenants Ontario, Black Legal Action Centre, Canadian Civil Liberties Association and

HIV & AIDS Legal Clinic Ontario (collectively, "the applicants") brought a *Charter* application challenging the Shelter Standards and the 24-Hour Respite Site Standards of the respondent City of Toronto (the "City") as unconstitutional in the context of the COVID-19 pandemic, as those standards permitted the use of bunk beds and failed to require a minimum of two metre spacing between beds. The applicants subsequently added the respondent, Ontario, to its application.

[7] On May 4, 2020, the applicants sought an interim injunction restraining the City from continuing to permit the operation of sites within the City's shelter system with bunk beds and less than two metres lateral spacing between beds. The applicants' motion for an injunction was adjourned on terms when the applicants and the City signed the Interim Settlement Agreement on May 15, 2020.

[8] On June 15, 2020, on the basis of information provided by Shelter Support & Housing Administration ("SSHA"), the City informed the applicants that it had reached compliance with the Interim Settlement Agreement, and as such the agreement would reach its "termination date" within two months.

[9] The applicants brought a notice of motion, dated July 3, 2020, which raised three issues as the basis for the applicants' requested relief: first, that the City did not achieve physical distancing within its shelter system as of June 15, 2020; second, the City did not achieve the level of capacity for clients seeking shelter beds under the Interim Settlement Agreement; and third, that the City failed to address the applicants' questions about the weekly reports that the City was delivering pursuant to the Interim Settlement Agreement.

[10] The full grounds for the applicants' notice of motion are as follows:

> **THE GROUNDS FOR THE MOTION ARE**
>
> (a) The Applicants filed an application challenging, among other things, the bed spacing provisions in the Toronto Shelter Standards and the 24-Hour Respite Site Standards, and brought a motion for an injunction seeking interim relief as part of the application;
>
> (b) On May 15, 2020, the Applicants and the City of Toronto (the "City") entered into an Interim Settlement Agreement pursuant to which the Applicants' pending motion for an injunction was adjourned *sine die* on terms;
>
> **The Interim Settlement Agreement**
>
> (c) The primary components of the Interim Settlement Agreement include substantive commitments by the City relating to the subject matter of the application and motion for injunction and a reporting process pursuant to which regular Progress Reports are provided by the City to the Applicants with respect to its progress in achieving those substantive commitments and in which the Applicants are entitled to ask questions and receive responses to those questions from the City;

(d) The substantive obligations of the City are set out in paragraph 2 of the Interim Settlement Agreement, and are as follows:

> The City of Toronto (the "City") shall use best efforts, until the Termination Date to:
>
> (a) to achieve without delay and thereafter sustain Physical Distancing Standards in the Shelter System;
>
> (b) to provide shelter to Clients by making available such Beds as is necessary to achieve Physical Distancing Standards across the Shelter System;
>
> (c) to ensure that any new capacity developed to respond to encampments will meet the Physical Distancing Standards; and
>
> (d) to continue to publish the following Shelter System occupancy and capacity information online consistent with its past practices, as follows:
>
> > (i) the shelter occupancy Excel spreadsheet on the City's website tracking daily occupancy and capacity, typically updated at least three times per week; and
> >
> > (ii) the occupancy data for each respite, 24-hour women's drop-in, and 24-hour temporary response site and/or other sites established or funded by the City in response to the COVID-19 Pandemic, on a weekly basis.

(e) The obligations provided for refer to and rely upon certain defined terms set out at paragraph 1 of the Interim Settlement Agreement, which include:

> (a) "**Shelter System**" means the shelter, respite and overnight drop-in sites operated or funded by the City of Toronto, and includes the 24-hour temporary response sites, hotel rooms, isolation/recovery sites, Streets to Homes satellite temporary housing program and such other sites as have been or may be established or funded by the City in response to the COVID-19 Pandemic;
>
> (b) "**Clients**" means individuals who are, or who have been at any time since March 11, 2020, in receipt of any kind of support services provided by the Shelter System;
>
> (c) "**Beds**" means beds, mats or cots in the sites within the Shelter System; and
>
> (d) "**Physical Distancing Standards**" means: (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;
>
> (e) **"Termination Date"** means the date after which the City has achieved compliance with Physical Distancing Standards across the Shelter System and has sustained compliance for a two-month period. In this regard, during the two-month period following the date at which the City first achieves compliance with Physical

Distancing Standards, *de minimis* noncompliance of a merely transient nature shall not amount to noncompliance for the purposes of determining whether the Termination Date has been reached.

(f) The process and frequency with which the City is required to delivery Progress Reports to the Applicants, their prescribed contents, and the process by which the Applicants are permitted to deliver questions in writing regarding any matters arising out of the Progress Reports is set out at paragraphs 3-7.

(g) Under the terms of the Interim Settlement Agreement, once the City asserts that it has achieved compliance with the Physical Distancing Standards, Progress Reports are delivered on a monthly rather than weekly basis for a period of two months until the Termination Date (para. 7).

(h) Upon the Termination Date being reached, the City's substantive and reporting obligations under the Agreement are of no force and effect (para. 12).

The City's Failure To Achieve Compliance And Meet Its Obligations

(i) On June 15, 2020, the City asserted that it had achieved compliance with the obligations set out in the Interim Settlement Agreement as of the effective date of June 14, stating that the June 15, 2020 Progress Report would be the City's final Progress Report delivered on a weekly basis;

(j) The City has failed to achieve compliance on June 15, 2020 and meet its obligations in accordance with the terms of the Interim Settlement Agreement in that:

(i) The City has failed to discharge its obligation to comply with the Physical Distancing Standard of at least 2.0 m lateral separation between all Beds within the Shelter System as required by paragraph 2(a) of the Agreement, including in the following way(s):

(1) On Tuesday June 16, 2020, the City informed St. Felix that the capacity of the respite site at 69 Fraser Street was to be reduced from 50 to 41, effective immediately;

(2) As of June 14, 2020, the reported occupancy at the 69 Fraser Street respite was 50, and the occupancy at this site remained at 50 on June 16, 2020;

(3) On June 14, 2020 and for at least some time thereafter, the occupancy at the 69 Fraser Street respite exceeded the capacity of that site;

(ii) The City has failed with respect to its obligation to make best efforts to make Beds available to Clients (anyone who has received support services from the Shelter System since March 11, 2020) as required by paragraph 2(b) of the Agreement. The City has failed in the following way(s):

(1) To the extent that the City has achieved compliance with Physical Distancing Standards within the sites making up the Shelter System, this compliance has been achieved via a reduction in the overall capacity of the Shelter System, as compared to the capacity of the Shelter System prior to the COVID-19 pandemic;

(2) The total number of Clients served by the Shelter System has declined substantially over the course of the COVID-19 crisis;

(3) Clients entitled to a Bed under the terms of the Interim Settlement Agreement have been unable to secure Beds, despite repeated calls to Central Intake. The Shelter System is generally operating without sufficient capacity to accommodate individuals who have left the Shelter System since March 11, 2020, who are entitled to a Bed under the terms of the Agreement, and who request a Bed;

(iii) The City has failed to discharge its obligations to provide meaningful information and responses to the Applicants' questions, including in the following ways:

(1) Failing to provide the information relied upon to determine target capacities at each site; and

(2) Failing to provide the instructions provided to SSHA's Quality Assurance teams.

(k) The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;

(l) Such further and other grounds as the lawyers may advise and this Court may permit.

[11] Initially, the parties reached an impasse on the scope of disclosure relating to this motion.

[12] On August 5, 2020, I released a decision on a refusals motion which set out the scope of the questions which the applicants were entitled to pose and have answered by the City, as well as the scope of documentary disclosure to which the applicants were entitled (*Sanctuary et al v. Toronto (City) et al*., 2020 ONSC 4708).

[13] This decision led to additional disclosure and further cross-examination of the City's witness, Mr. Gordon Tanner, Director of SSHA ("Mr. Tanner").

ANALYSIS

[14] The central question on this motion is whether the City breached the Interim Settlement Agreement, and if so, what remedy should be ordered to address the breach?

[15] Specifically, the applicants allege that the City breached the Interim Settlement Agreement by asserting compliance on June 15, 2020 in circumstances where: (1) the City had not met its

physical distancing obligation; (2) the City had not met its obligations to make available sufficient shelter beds for clients; and (3) the City had failed to answer relevant and proportionate questions.

[16] In order to address these questions, it is first necessary to situate the Interim Settlement Agreement in the context of the shelter system and the City's response to the COVID-19 pandemic.

The shelter system and the City's response to the COVID-19 pandemic

[17] The Interim Settlement Agreement concerned the commitment by the City to achieve certain goals in responding to the COVID-19 crisis in the shelter system.

[18] The shelter system comprises both homeless shelters operated by the City, homeless shelters operated by community agencies and allied shelter services (often referred to as respite sites and drop-in programs). The City operates the Streets to Homes program which assists people with a history of homelessness to transition from living on the street to living in permanent housing.

[19] The City directly operates 11 homeless shelters and it also oversees the operation of 53 homeless shelters and 7 respite sites that are funded by 32 different community agencies (collectively referred to as "the shelter system").

[20] The City viewed its commitment to achieving physical distancing standards as one among several important commitments in the housing context. As the City stated in its letter to the applicants dated May 8, 2020, in the negotiations leading to the Interim Settlement Agreement:

> The City is committed to ensuring that physical distancing guidelines are implemented across the shelter and respite system during COVID-19 without delay.
>
> In addition, Council has indicated its commitment to many of the broader issues that your clients have raised in the framework proposal, including the *Housing TO 2020-2030 Action Plan*, approved by City Council in December 2019. The Plan is the continuing roadmap for the City's policy-work and investment decisions aimed at providing housing opportunities for everyone. This Plan builds on the work of the previous *Housing Opportunities Toronto: Affordable Housing Section Plan 2010-2020* and continues the overarching goal of improving housing stability for vulnerable Toronto residents. This Plan also updates Toronto's Housing Charter, which confirms the human rights based approach to housing. We understand that many stakeholders, including those who advocate on behalf of persons experiencing homelessness had the opportunity to provide input during the process of developing both this Plan and the changes to the Housing Charter.

[21] Section 2 of the Interim Settlement Agreement sets out the City's specific commitments in the following terms:

> The City of Toronto (the "City") shall use best efforts, until the Termination Date to:
>
> (a) to achieve without delay and thereafter sustain Physical Distancing Standards in the Shelter System;

(b) to provide shelter to Clients by making available such Beds as is necessary to achieve Physical Distancing Standards across the Shelter System;

(c) to ensure that any new capacity developed to respond to encampments will meet the Physical Distancing Standards; and

(d) to continue to publish the following Shelter System occupancy and capacity information online consistent with its past practices, as follows:

(i) the shelter occupancy Excel spreadsheet on the City's website tracking daily occupancy and capacity, typically updated at least three times per week; and

(ii) the occupancy data for each respite, 24-hour women's drop-in, and 24-hour temporary response site and/or other sites established or funded by the City in response to the COVID-19 Pandemic, on a weekly basis.

[22] With respect to "physical distancing standards" as referred to in the Interim Settlement Agreement, this term was defined as follows:

1(d) "**Physical Distancing Standards**" means: (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; …

[23] The Toronto Shelter Standards (the "Shelter Standards") govern the standards for personal space and bed layout, and specifically refers to "lateral separation" in section 9.3.1 "Sleeping Areas and Beds":

(a) Shelter providers will ensure that designated sleeping areas are physically separated from dining areas and other communal areas unless alternative sleeping arrangements are approved for limited use by SSHA (e.g., during an Extreme Weather Alert).

(b) Shelter providers will create or enhance the privacy of a client's sleeping area including, but not limited to, using screens, half walls, rearranging furniture or the layout of the sleeping area in order to create a more private space.

(c) Shelter providers will provide a minimum of 3.5 m.^{2} (37.7 ft.^{2}) of personal space per client in sleeping areas to decrease the transmission of communicable diseases and conflict between clients (see Appendix A: Sleeping Area / Personal Space Examples). Shelter providers are encouraged to exceed this standard by providing more space between beds and discouraging the use of large dorms.

(d) Shelter providers will prepare floor plans that illustrate the spacing of the beds in designated sleeping areas.

> (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).
>
> …
>
> (Emphasis added.)

[24] In March 2020, Toronto Public Health, issued guidance to shelter providers encouraging providers to:

> 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.

[25] In light of this direction, SSHA estimated 2000 beds would have to be removed (referred to as "decanted") from the existing shelter system. As it turned out, between March and May, 2020, the City moved approximately 2300 beds to 33 new sites.

[26] This undertaking involved more than acquiring new spaces for shelter residents (in leased hotels, for example). Additionally, the City had to make arrangements for services such as catering, security, and linen services, and ensure proper staffing for all new sites.

[27] The City's Directive 2020-01 setting out requirements for bed spacing in the shelter system was prepared prior to the signing of the Interim Settlement Agreement and was first issued on May 21, 2020 and amended May 25, 2020. It was subsequently amended again on June 4, 2020.

[28] The Directive 2020-01 provided that,

> Effective immediately, the following sections in the Toronto Shelter Standards and the 24-Hour Respite Site Standards are replaced by the versions contained in this directive.
>
> **Toronto Shelter Standards (TSS)**
>
> Section 9.31 (e) e. Shelter providers will maintain a lateral separation of at least 2.0 m. edge to edge between beds (or alternative sleeping arrangements) and a vertical separation of at least 1.1 m. between the top of a bed frame to the lowest hanging section of an overhead object (e.g., light fixture, bulkhead, air duct, plumbing, etc.).
>
> (i) Family shelter providers are exempt from meeting the lateral separation requirements of 9.3.1 Sleeping Areas and Beds in rooms where only one family unit/household has been assigned.
>
> (ii) Single adult, mixed adult and youth shelter providers will not use top bunks for clients to sleep in.

24-Hour Respite Site Standards (TRS)

Section 7.3.1 (i)

(i) Providers will maintain a lateral separation of at least 2.0 m. edge to edge between resting spaces.

(ii) Lateral separation exceptions may be made for couples that request it.

The personal space standards Section 9.31(c) of the Toronto Shelter Standards and Section 7.3.1(h) of the 24-Hour Respite Site Standards are no longer applicable while this directive is in effect.

Shelter and Respite Site providers are required to maintain physical distancing strategies to meet current public health guidance for shelter settings during the pandemic. Additional recommendations for physical distancing in homeless service settings include:

- Remind everyone at your setting to maintain a 2.0 m. distance from others as much as possible.

- Use furniture layout to promote physical distancing (e.g. removing chairs around tables to promote 2.0 m. distance between others for seating).

- When possible, stagger eating times and set-up tables so clients are not directly facing each other.

- When possible, create a staggered bathing schedule to reduce the amount of people using the facilities at the same time.

- Create a schedule for using common spaces.

- Use visual markers to help promote physical distancing in high-traffic locations throughout the setting (e.g. at intake, meal lines, offices).

- Ensure physical distancing in any elevators used at the setting.

- Cancel group activities that exceed five people; try to provide support through telephone or on-line activities where possible.

- For specialist services that may be required in the setting (e.g. mental health services, harm reduction, or substance use supports) for psychosocial support to clients, inform service providers to maintain physical distance.

The standards detailed in this Directive remain in effect until further notice.

[29] The purpose of this Directive was set out as: “To ensure health and safety in shelter and respite sites during the COVID-19 Pandemic by ensuring appropriate physical distancing occurs wherever clients sleep.”

[30] On May 22, 2020, the City sent a survey to each of the shelters in the shelter system to confirm compliance with Directive 2020-01, and to confirm that compliance was verified through a review of on-site conditions including measurements of the lateral spacing between beds or alternate sleeping arrangements.

[31] Additionally, SSHA deployed a Quality Assurance ("QA") Team to assess whether service providers were meeting the Shelter Standards. The mandate of the QA Team was to verify all sites through actual visits to the facilities.

[32] According to the City, the work of the QA Team continued through to the June 15 Progress Report.

[33] On June 15, 2020, counsel for the City wrote to the applicants to assert compliance with the obligations of the Interim Settlement Agreement:

> 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.
>
> In accordance with clause 7 of the Interim Agreement, attached please find the final weekly Progress Report

[34] In his affidavit dated July 8, 2020, Mr. Tanner stated that, "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."

Did the City breach the Interim Settlement Agreement?

[35] This motion concerns the enforcement of a contract.

[36] The contract at issue in this case is the Interim Settlement Agreement entered into on May 15, 2020, which led to the adjournment *sine die* of the motion for an injunction against the City pursuant to the application.

[37] In this case, there is no dispute that the parties entered into an agreement to settle the motion for an injunction. The question for this Court is whether the Interim Settlement Agreement should be enforced, and if so, what that entails; see *Hashemi-Sabet Estate v. Oak Ridges Pharmasave Inc.*, 2018 ONCA 839, at para. 27.

[38] The City submits that it is clear from paragraph 2 of the Interim Settlement Agreement that the City committed to use its "best efforts" to achieve the goals set out in the agreement, and that compliance must be assessed on this standard.

[39] The applicants advance the position that "best efforts" does not apply to assessing the achievement of physical distancing. Rather, they argue, the achievement of physical distancing, as defined in the Interim Settlement Agreement, is an objective standard. The applicants rely on paragraph 7 in the Interim Settlement Agreement as support for this interpretation.

[40] Paragraph 7 of the Interim Settlement Agreement states:

> 7. The City's Progress Report shall be delivered on a weekly basis on the Monday of each week until the date on which the City asserts that it has achieved compliance with Physical Distancing Standards. The City shall deliver a further Progress Report in respect of the date on which it asserts that it has achieved compliance with Physical Distancing Standards, within three days of that date. Thereafter, Progress Reports shall be delivered on a monthly basis for two months until the Termination Date, with the final Progress Report being delivered on or about the Termination Date.

[41] The applicants submit that paragraph 7 makes no mention of a "best interests" commitment. They submit (at para. 79 of the applicants' factum):

> 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.

[42] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at para. 47, the Supreme Court described the proper framework for the interpretation of a contract:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker 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. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should

> know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, per Lord Wilberforce) (Emphasis added.)

[43] Applying this framework, I find the reference to "compliance" in paragraph 7 of the Interim Settlement Agreement must be read in light of the broader commitment to use "best efforts" to achieve physical distancing standards as set out in paragraph 2 of the agreement.

[44] Therefore, "best efforts" is the standard on which compliance must be assessed under the Interim Settlement Agreement.

[45] Each party offers its preferred approach to the "best efforts" standard.

[46] The applicants argue in their factum that "best efforts" includes a requirement to act in good faith and take all reasonable steps to achieve the objective to which a party has committed (at para. 71):

> "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.

[47] According to the City, "best efforts" means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion, leaving no stone unturned. Evaluating best efforts requires consideration of the nature of the agreement, the parties to the agreement and the agreement's overall purpose as reflected in its language.

[48] The City submits that a "best efforts" undertaking is "not boundless" and "does not require a standard of perfection" (para. 84 of the City's factum).

[49] The City also submits that because the City is a municipality with overarching duties to the public at large and to the clients served by the shelter system, "best efforts" cannot require the City to neglect the public interest (relying on *CAE Industries Ltd. v. R.*, [1986] 1 F.C. 129 (Fed. C.A.) at p. 495).

[50] I do not find significant disagreement between the parties on the meaning of "best efforts." For example, the applicants do not argue that "best efforts" requires perfection or that the public interest should be disregarded in the course of complying with a "best interests" standard. By the same token, the City does not suggest something less than taking all reasonable steps to achieve the objective under the agreement would be sufficient to demonstrate "best interests."

[51] While the parties take diverging views on what the City's lead for the shelter system knew on June 15, 2020, or ought to have known, there does not appear to be a dispute as to the fact that

the City, in fact, was not in full compliance with its obligations to ensure physical distancing throughout the shelter system on that date.

[52] Specifically, the City states in its factum that "there were 32 beds (out of 7152) across 7 sites that were not in compliance with physical distancing standards on June 15." (at para. 19)

[53] The City emphasizes that this figure represents less than half of one percent (0.45%) of the entire shelter system, and that these remaining beds were "decanted" from the system by September 9, 2020.

[54] The City argues that the impact of any deficiencies in compliance on June 15, 2020 was negligible such that the Court ought to find that the City achieved physical distancing across the system by that date.

[55] According to the applicants, there were twelve sites not in compliance on that day, and in some cases the deficiencies were significant. For example, the applicants submit that in the Evangeline site, beds were an average of only 4.4 feet apart.

[56] As discussed below, the parties also disagree on the meaning of physical distancing standards generally, and "lateral separation" specifically.

[57] In my view, little turns on which version of the lack of compliance is accepted, or whose definition of "lateral separation" is adopted for purposes of the "best efforts" analysis.

[58] On any account, it is evident that a number of shelter sites were not in compliance with the physical distancing standard set out in the Interim Settlement Agreement as of June 15, 2020.

[59] The City has not asserted that all reasonable steps had been taken at the seven sites which it found were not in compliance by June 15, 2020. Rather, the City submits that these instances were the result of "isolated human errors," and not reported as a result of gaps in communication between staff.

[60] The City has provided no explanation for why these errors and gaps in communication could not or should not have been corrected prior to an assertion of compliance under the Interim Settlement Agreement. The City was under no deadline to assert compliance, nor did the City have any competing public interest in asserting compliance with physical distancing standards in the midst of a pandemic when these standards had not in fact been met.

[61] Taken as a whole, the record leads me conclude that the City had not used its "best efforts" to achieve physical distancing standards in the shelter system by June 15, 2020.

[62] The City relies on the common law doctrine of *de minimis.* According to the City, this concept addresses what it terms the "exceedances" which still existed on June 15, 2020, when the City asserted compliance with the Interim Settlement Agreement.

[63] The Interim Settlement Agreement includes a specific reference to "*de minimis* noncompliance" but not in the context of the "best efforts" commitment prior to any assertion of

compliance. Rather, the term is used to address ongoing compliance after the date on which the City asserts compliance and the "termination date":

> 1(e) **"Termination Date"** means the date after which the City has achieved compliance with Physical Distancing Standards across the Shelter System and has sustained compliance for a two-month period. In this regard, during the two-month period following the date at which the City first achieves compliance with Physical Distancing Standards, *de minimis* noncompliance of a merely transient nature shall not amount to noncompliance for the purposes of determining whether the Termination Date has been reached. (Emphasis added.)

[64] In my view, had the parties wished to address *de minimis* noncompliance as a condition of meeting the "best efforts" commitment in the Interim Settlement Agreement, it is reasonable to infer that they would have done so. The presence of the term in the explanation of the "termination date," but not in the explanation of the date by which compliance is asserted, suggests the parties did not agree *de minimis* noncompliance was appropriate at the stage of determining compliance.

[65] Even if one could infer some *de minimis* noncompliance is applicable to the determination of "best efforts" in achieving the standards agreed upon in the Interim Settlement Agreement, the case law suggests that this factor is not relevant in the determination of whether there is a breach for purposes of a motion to enforce.

[66] In *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 SCR 265, at paras. 74-75 the Supreme Court considered the relationship between de minimis noncompliance and the existence of a breach of contract entitling a party to a remedy:

> 74. The trial judge below was of the opinion that a court can apply de minimis after finding a minor divergence in performance from the express terms of a contract to prevent that divergence from being considered a breach. He made no distinction between the application of the principle to unilateral as opposed to bilateral contracts. In contrast, the Federal Court of Appeal was of the opinion that de minimis is only a rule of contractual interpretation used to determine whether or not a breach has been committed. According to Décary J.A., the principle can only be applied to prevent the finding of a breach on the basis that the parties had implicitly agreed that substantial performance would be tantamount to strict performance. He found that the principle could not be used to qualify a breach as minimal. Therefore, Décary J.A. held that the trial judge, having found that a breach had been committed, could no longer look to the *de minimis* principle to conclude that the breach was so trivial that it did not constitute a breach. However, like the trial judge, Décary J.A. did not comment on whether the application of the *de minimis* principle would differ depending on whether a case involved a unilateral or a bilateral contract.
>
> 75. While there is little jurisprudence which expressly addresses how the *de minimis* principle is to be applied, the case law which does exist suggests that the approach of the trial judge is correct, providing it is specified that a finding of *de minimis* means that no fundamental breach permitting rescission has been committed, not that there has been no breach giving rise to an action in damages. For example, in *Runnymede Iron & Steel Ltd. v. Rossen Engineering and Construction Co.*, [1962] S.C.R. 26, this Court dealt with

> the deficient performance of a contract of sale. In the contract, the respondent agreed to sell and deliver steel rails to the appellant. Approximately 20 to 25 percent of the delivered rails were defective. The appellant sought to rescind the entire contract. The important element of the case for present purposes is the order in which this Court dealt with the breach. The Court first found that the respondent had breached the contract by providing defective goods. Only then did the Court state that *de minimis* could not be applied since at least 20 percent of the goods were defective. This case thus supports the approach of the trial judge, namely that a court should first find a divergence from the performance dictated in the contract and then assess whether that divergence is *de minimis*. (Emphasis added.)

[67] Given that neither party is seeking rescission of the contract (though the City's alternative arguments with respect to the doctrine of "mistake" are addressed separately below), I find that whether the City's noncompliance could or could not be characterized as *de minimis* is not relevant to the enforcement of the Interim Settlement Agreement.

[68] As I interpret the Interim Settlement Agreement, the "best efforts" commitment will not have been met where reasonable steps to achieve compliance with physical distancing standards (for example, removing beds or rearranging the layout of beds) has not yet been attempted, or where City or shelter staff had an incorrect understanding the standard the City had committed to meet.

[69] Rather, the "best efforts" standard allows for imperfections notwithstanding all reasonable steps having been taken, as well as ongoing adjustments, where warranted, after the date of the assertion of compliance but prior to the termination date.

[70] The City emphasizes the pandemic context as another factor to consider in the determination of whether, by June 15, 2020, it had used "best efforts" to achieve physical distancing in the shelter system.

[71] There is no doubt that the City generally, and SSHA specifically, undertook a massive and complex project in a very tight time frame in attempting to ensure physical distancing across the entire shelter system as the COVID-19 emergency was unfolding.

[72] The pandemic context, however, cuts both ways.

[73] Just as the pandemic context may explain some of the logistical challenges that the City encountered in seeking to verify compliance by June 15, 2020, it also is the basis for the vigilance of the applicants in ensuring the City is held accountable for deficiencies in compliance.

[74] It is not disputed that any failure by the City to take all reasonable steps to meet physical distancing standard in congregate shelter settings heightens an already significant risk of the spread of COVID-19 to some of the most vulnerable members of our society.

[75] Given the instances of noncompliance in the record, where reasonable steps had not yet been taken to achieve physical distancing standards, I find that the City's assertion of compliance on June 15, 2020 was not accurate, and therefore, that the City was in breach of the Interim Settlement Agreement.

[76] This finding, however, does not end the matter. In order to determine how the Interim Settlement Agreement should be enforced, and with a view to providing the guidance that the parties seek on this motion, I address the key issues which remain in dispute below.

What is the physical distancing standard in the Interim Settlement Agreement?

[77] As set out above, in paragraph 1(d), the Interim Settlement Agreement defines "Physical Distancing Standard" as, "(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."

[78] According to the applicants, "lateral separation" refers simply to horizontal spacing, irrespective of direction, and is to be distinguished from vertical spacing (for example, with bunk beds).

[79] The City submits that the word "lateral separation" has a plain meaning which relates to the side of something, and in the context of the Interim Settlement Agreement, lateral relates to the sides the shelter beds or cots. In this sense, lateral is to be distinguished from longitudinal spacing.

[80] The City relies on various dictionary definitions of "lateral." For example, the *Oxford English Dictionary* (OED Online) (June, 2020) defines "lateral" as: "[o]f or relating to the side or sides; situated at or issuing from the side or sides (of a person or thing); towards the side, directed sideways."

[81] The City also refers to certain references in the case law to "lateral" in the context of ships (*R. v. Nord-Deutsche Versicherungs Gesellschaft*, [1969] 1 Ex.C.R. 117) and cars (*Hosseiny v. Porozni*, 2009 ABQB 83, at para. 45).

[82] Given the importance of context in the interpretation of the term "lateral separation" in the Interim Settlement Agreement, I do not believe a dictionary definition or the usage of "lateral" or references in the case law to the term in unrelated settings can resolve the dispute as to the proper interpretation of the term "lateral separation" in the shelter system setting.

[83] The City's own implementation of the "lateral separation" standard in its response to the COVID-19 pandemic appeared uncertain from the start.

[84] Initially, the spacing distance itself was a source of confusion, as the City instructed staff that either 2 metres or 6 feet would constitute compliance.

[85] It is not disputed that 6 feet does not constitute 2 metres. The City acknowledges that these communications of the standard were incorrect, though the City states the reference to the two standards together was consistent with at least some guidance from the province at the time.

[86] According to the City's factum (at paras. 30-32):

> 30. There was at times confusion around the difference between 2m and 6ft, both with staff in the field and service providers. The Court can take judicial notice of the fact that throughout this pandemic, 2m and 6ft have been consistently publically [sic] portrayed as

> equivalent. Signage encountered in workplaces and service settings routinely depict both measurements as appropriate physical distancing standards, often in the same publication. Even the Ontario Public Health Guidance specific to shelter settings equated these two measurements until a new guidance was issued on May 28. The difference between 2m and 6ft is 6.7 inches.
>
> 31. Early on in this process, QA staff raised questions regarding the difference between 2m and 6ft and it was clarified on April 23, 2020 that 2m should continue to be used.
>
> 32. This issue appeared again in early June and resulted in some sites being measured by QA staff at 6ft. The City has looked into the sites where it has been identified that the QA team may have used 6ft. Only one site required further decanting of 1 bed.
> (Footnotes omitted.)

[87] Directive 2020-01 was amended on June 4, 2020, as indicated above, and in those amendments, all references to "6 feet" in the spacing of beds was removed and replaced with 2 metres.

[88] While the discrepancy between 2 metres and 6 feet illustrates the evolving nature of the guidance from government during the early weeks of the COVID-19 response, in my view, this initial error in the City's guidance to shelter providers does not in itself constitute a breach of the Interim Settlement Agreement.

[89] I turn now to the dispute as to whether "lateral separation" standard requires only a 2-metre separation between the sides of each shelter bed, or whether it includes other forms of separation.

[90] I accept that the negotiations and correspondence between the parties prior to entering into the Interim Settlement Agreement can assist in the interpretation of the terms of the agreement as part of the factual matrix within which the agreement was formed.

[91] In the period in which the parties were negotiating the Interim Settlement Agreement, the applicants proposed substituting "lateral separation" with "two metre distancing in all directions between beds mats and cots" in their first version of the proposed settlement agreement dated May 8, 2020.

[92] The City rejected this formulation and the final version of the agreement retained the term "lateral separation."

[93] The City relies on this exchange as showing that the applicants understood "lateral separation" was not the same standard as a distance of "two metre distancing in all directions between beds and cots."

[94] I accept that this exchange lends support to the view that the applicants knew the City viewed "lateral separation" as different than a standard of 2 metres distancing in all directions. However, I see no evidence in the record of negotiations that the City took the position at that time that "lateral separation" refers only to the distance between the edges of the beds.

[95] The applicants argue that the negotiations, and any language that may or may not have been discussed is of little persuasive value, and the key to interpreting "lateral separation" is to look to the Shelter Standards from which the term "lateral separation" derives.

[96] The applicants further argue that the term "lateral separation" in the Shelter Standards must be read together with the Appendix to the Shelter Standards, which includes various diagrams depicting scenarios of spacing and separation requirements.

[97] Under "Example B: 10 Single Beds/ 10 Clients" in the "Single Bed Configuration" section of the Appendix, there is a diagram shows eight beds separated with a dotted red line to illustrate the physical distancing standard in the Shelter Standards, and two beds placed against a wall with a red dotted line to illustrate the required separation between the ends of these beds.

[98] As example "B" in that diagram depicts, lateral separation in the Shelter Standards generally refers to the spacing between the sides of beds, but also in some circumstances refers to the distance between the ends of beds.

[99] The City argues that this one graphic depiction of separation between the ends of two beds in the floor layout is an error and should be disregarded.

[100] The City not only relies on the ordinary meaning of "lateral" but also the prefatory language to the diagrams, which states that "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.) <u>between closest sides of adjacent beds</u>." (Emphasis added)

[101] Rather than read into the diagram a meaning other than what it depicts, or disregard the diagram as an error, it is important to consider an interpretation of "lateral separation" that is consistent with the language of the Shelter Standards, and the illustration in the Appendix.

[102] On this interpretation, "lateral separation" always refers to the required distance between the sides of shelter beds, but does not <u>only</u> refer to the distance between the sides of beds.

[103] This interpretation is consistent with how City staff implemented physical distancing standards in the shelter system in the QA process.

[104] According to Mr. Tanner, staff encountered situations where 2-metre lateral spacing between beds was not applicable. For example, when beds are placed perpendicular, there is no side-to-side measurement of separation. In such cases, site specific decisions had to be made in accordance with the objectives of the public health advice, in order to achieve 2 metres between the heads of clients to lower the risk of COVID-19 transmission.

[105] It is apparent that the objective of the physical distancing standard contained in s.9.3.1 of the Shelter Standards, as illustrated in the Appendix diagrams, is not to set out an abstract requirement of layout of beds, but rather to respond to the risk of communicable diseases (and other space related risks) in a congregate living context.

[106] If there is ambiguity with respect to the interpretation of "lateral separation," it should be resolved with the meaning that advances the purpose of this provision.

[107] It is reasonable to infer from the context of s.9.3.1 of the Shelter Standards, and accompanying diagrams in the Appendix, that the reason why the separation between the ends of shelter beds is not specifically included as a requirement in the Shelter Standards is that the length of the standard shelter beds itself may in some settings serve as a proxy for 2 metres of physical distancing.

[108] It is clear, however, that the lack of a minimum standard for separation between the ends of shelter beds can create heightened risk of transmission in certain settings, given the particular layout of a shelter space, the capacity of that space, or as a result of other risk-related factors.

[109] In light of the objective of the Shelter Standards, as amended by Directive 2020-01, to reduce the risk of transmitting COVID-19, I do not find it contradictory to have a standard of "lateral separation" which covers side-to-side separation in all settings, and in some circumstances relating to risk of transmission, may extend to end-to-end separation, or the separation of diagonally placed beds, or perpendicular beds, among other possible forms of separation.

[110] Ultimately, the goal of the physical distancing standards is to ensure the physical separation of individuals, not furniture. As Mr. Tanner stated in the cross-examination on his affidavit evidence conducted on September 10, 2020,

> I think, in the circumstances with perpendicular beds, the standard that -- that I have been guided by is the -- is the distance between the heads of the individuals in those beds and achieving at least a 2-metre separation between those individuals. As it relates to the transmission of COVID-19, certainly, that is the transition point and the transmission point that we are most concerned about, and the lateral bed spacing.

[111] Further in his cross-examination testimony, Mr. Tanner highlighted the significance of public health guidance in applying the physical distancing standards in the shelter setting: "[Y]ou know, the guidance that we provided to our shelter providers, the guidance that we determined to be in compliance with Ontario Public Health guidelines was 2-metre lateral separation edge to edge of the bed. <u>What you're calling longitudinal and we what understood as longitudinal 2-metre distance was never part of our guidance that we received from Ontario Public Health, and it was not included in our directive to shelter providers.</u>" (Emphasis added.)

[112] Mr. Tanner confirmed that the 2-metre lateral separation standard was developed with guidance from Ontario Public Health. He further confirmed that similar guidance from Ontario Public Health has not yet been obtained with respect to other forms of separation.

[113] The fact that public health guidance has not yet been obtained with respect to other forms of separation does not mean the physical distancing standards do not include those other forms of separation. To state the obvious, COVID-19 may be transmitted through airborne droplets which do not only move in side-to-side directions.

[114] For example, in his cross-examination of September 10, 2020, Mr. Tanner confirmed that a specific diagonal layout of beds was implemented at one of the shelter sites to address the need

for separation that was not limited to the side-to-side distance between the beds. He further confirmed that QA staff noted as non-compliant several sites where there was insufficient distancing between the heads of beds.

[115] City staff appeared to appreciate the relevance of other forms of separation between beds during the QA period. For example, on a May 8, 2020 QA visit of the Na-Me-Res site, staff provided the following report:

> Two beds are less than 2 metres apart laterally. 12 other beds are less than 2 metres apart from any point of the bed to another. These beds are arranged head to toe so the heads of the clients are more than 2 metres apart.

[116] To take another example, a staff report arising from June 2, 2020 QA visit to the Scott Mission revealed that,

> With the exception of two beds that are close to compliance and arranged in head-to-toe arrangement, all sleeping areas meet space and lateral separation requirements at time of assessment.

[117] These reports and others like them throughout the April-June 2020 period lend support to the interpretation that "lateral" separation was understood principally as side-to-side spacing, but that other forms of spacing deficiencies could render a site non-compliant with physical distancing standards, in certain circumstances.

[118] Mr. Tanner acknowledged that as of the end of May 2020, after the Interim Settlement Agreement was signed, SSHA still had not made a determination as to whether, and in what circumstances, shelter beds could be determined to have met the required physical distancing standard where the sides of beds were separated by 2 metres, but other forms of separation were inadequate.

[119] Mr. Tanner stated that each shelter's floor layout is "absolutely unique" with "any number of varying room configurations, size of rooms, number of beds in rooms, all of those sorts of things" which made a blanket standard in relation to other forms of separation "not feasible."

[120] Nonetheless, at some point in advance of the June 15, 2020 assertion of compliance, the City adopted a revised view that any spacing issues beyond lateral separation between the sides of beds fall outside the scope of the Shelter Standards (and therefore outside the scope of the Interim Settlement Agreement).

[121] Subsequent to the assertion of compliance on June 15, 2020, in what the City refers to as "phase 2" of its QA process, SSHA ultimately adopted what it referred to as a minimum standard of .75 metre "longitudinal" separation between shelter beds.

[122] To the extent the City focused on a narrower adherence exclusively to side-to-side spacing in the June 2020 period, however, I find that this revised approach was not consistent with the physical distancing standards in the Shelter Standards, and was inconsistent with the physical distancing standards set out in the Interim Settlement Agreement.

[123] In oral submissions, I asked counsel for the City if there is evidence that it had relied on public health expertise in the SSHA adopting the view that separating the sides of beds is all that would be required to achieve physical distancing standards. Counsel was unable to point to any aspect of the voluminous record on this motion where specific public health expertise supported such an interpretation either of the Shelter Standards or the Interim Settlement Agreement.

[124] Therefore, I reject the City's narrower definition of the physical distancing standard, which appears to have been decided upon after the Interim Settlement Agreement came into effect, and without the benefit of public health guidance.

[125] I also do not accept the applicant's broadest definition of the physical distancing standard, which would require 2 metres of horizontal separation in all directions in all contexts as a minimum physical distancing standard in the Interim Settlement Agreement.

[126] For the reasons stated above, I find that the Interim Settlement Agreement reference to "lateral separation" in the physical distancing standards generally refers to the distance between the sides of beds. It does not refer, however, only the separation between the sides of beds.

[127] I find that the physical distancing standards in the Interim Settlement Agreement may include other forms of separation (end-to-end, diagonal, perpendicular, etc) where the distance requirement is tied to specific risks of transmission of COVID-19 in light of the layout of specific shelter spaces and beds.

[128] In light of this interpretation, the clarity which all parties must have with respect to whether current configurations in shelters meet the physical distancing standards in the Interim Settlement Agreement, must be rooted in specific and transparent public health expertise and guidance.

[129] Further, I find that the City's commitment to use "best efforts" to achieve the requisite physical distancing standards in the Interim Settlement Agreement includes a commitment to take reasonable steps to obtain the public health guidance, as needed, to ensure the measures to address the risk of COVID-19 transmission in the Shelter Standards and Directive 2020-01 are met.

[130] If, based on public health guidance, the City determines that there is a further need to reconfigure the layout of certain shelter spaces or "decant" additional shelter beds, then this remedial step must be addressed prior to an assertion by the City of compliance with the Interim Settlement Agreement.

[131] Further, in light of the context of the Interim Settlement Agreement, this public health guidance, once obtained, must be disclosed to the applicants.

[132] For these reasons, even if the deficiencies in compliance with the City's interpretation of the physical distancing standard were not present on June 15, 2020, the City still would not have been in a position to assert it had met the physical distancing standard across the shelter system on that date, as the City had not addressed the risks across specific shelters that could require other forms of separation between shelter beds.

Do the different approaches to the physical distancing standard in the Interim Settlement Agreement engage the doctrine of mistake in contract law?

[133] The City in its alternative arguments submits that if something other than a side-to-side interpretation is given to "lateral separation," then it is apparent that the Interim Settlement Agreement between the City and the applicants was entered into with either a mutual or unilateral mistake as to its fundamental terms.

[134] Mistake in contract law may arise in mutual or unilateral settings.

[135] The City relies on the application of mutual mistake in *W. Robert Hutcheson Sand & Gravel Ltd. v. Taylor* (1999), 48 C.L.R. (2d) 292 (Ont. S.C.), at para 7.

[136] In that case, the parties were involved in litigation and entered into minutes of settlement. In finding that this was a "classic case of mutual mistake", the court observed that when the minutes of settlement were executed, each side understood its own and its adversaries' legal obligations thereunder in significantly different ways, and neither side was responsible for the difference of understanding. The court declared that there was no binding contract.

[137] In *Ron Ghitter v. Beaver Lumber*, 2003 ABCA 221, at para. 14, the Alberta Court of Appeal set out the test to determine if there is a mutual mistake that prevents the formation of an agreement: 1. Has there been a mistake? 2. Were the parties, on an objective basis, *ad idem* notwithstanding any alleged mistake? If not, is the mistake material?

[138] Before a contract exists, there must be a meeting of the minds of the parties. What existed in the minds of the parties is what a reasonable third party would infer from their words and conduct.

[139] In this case, I do not find a basis for the application of the doctrine of mutual mistake with respect to the Interim Settlement Agreement.

[140] The language in the Shelter Standards, including the diagrams in the Appendix, were known to both parties as they entered in the Interim Settlement Agreement. Just as the record of the negotiations between the parties lead to a conclusion that the applicants knew "lateral separation" was not treated by the City as the same as "2 metres separation in all directions," so the City was aware that the Shelter Standards included depictions of the requirements of physical distancing standards beyond side-to-side separation of shelter beds.

[141] I find that in the context of the Interim Settlement Agreement, as with many agreements, the parties understood that what they were agreeing to was a compromise, and not the result either party initially sought.

Did the City act in bad faith?

[142] The applicants allege the City has acted in bad faith by concealing the extent to which its obligations under the Interim Settlement Agreement had not been met. Specifically, they allege Mr. Tanner swore to statements in his affidavit of July 8, 2020, which he knew to be untrue.

[143] The record makes clear that Mr. Tanner failed to obtain the information he needed to support the statements he made, both in advising that compliance had been achieved on June 15, 2020, and in his sweeping statements of the City's achievement in his affidavit of July 8, 2020.

[144] For example, in his July 8, 2020 affidavit, Mr. Tanner stated unequivocally, "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."

[145] Mr. Tanner subsequently acknowledged that this statement was not true, but stated in his cross-examination of September 10, 2020, that he believed this statement was true when he made it.

[146] I accept that Mr. Tanner did not knowingly make false statements in his affidavit.

[147] To be clear, the Interim Settlement Agreement placed obligations on the City. Those obligations – particularly the commitment to use "best efforts" in reaching the objectives of the agreement – applies to all City officials, including those who report to Mr. Tanner, and those to whom Mr. Tanner reported.

[148] Mr. Tanner testified he has 14 direct reports, and that there are approximately 800 staff involved in the relevant City departments responsible for the shelter system. It is no answer to the City's breach of the Interim Settlement Agreement to say that Mr. Tanner did not know certain instances of noncompliance because these were not communicated by other City officials.

[149] The record shows that to the extent the City experienced internal communication problems, many of these problems were of its own making in failing to make key staff aware of the City's commitment in the Interim Settlement Agreement.

[150] Further, to the extent Mr. Tanner did not obtain the information he needed, the record suggests that this lack was due to the apparent rush to complete the QA process and follow-up inquiries on compliance on June 15, 2020.

[151] In an email sent by Mr. Tanner to members of his staff, dated June 15, 2020, he stated that "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."

[152] The resulting miscommunication, confusion, and ultimate failure to demonstrate best efforts to meet the requisite physical distancing standard in the shelter system was a product of the City's own self-imposed determination of urgency.

[153] In its factum (at para. 43), the City acknowledges this lack of communication and information flow:

> It is a fair inference that staff did not appreciate the significance of some sites not confirming their target capacities on June 15 for the purposes of the Agreement. While Mr. Tanner advised that he took the City's commitments made in the Agreement very seriously, it is evident that its significance was not communicated to staff. However, the evidence does not support the allegation that staff were deliberately trying to hide non-compliant sites. Rather, the reasonable inference is that the staff understood that it was acceptable if some sites required minor adjustments after June 15.

[154] The deficiencies in communication and the flow of information between staff, however, do not relieve the City of its obligations under the Interim Settlement Agreement.

[155] In other words, if any City official knew or ought to have known that the shelter system was not in compliance with the requirements of the Interim Settlement Agreement on June 15, 2020, because "best efforts" had not been taken to meet those requirements at all shelter sites by June 14, 2020, then the assertion of compliance on June 15, 2020 was premature.

[156] According to the applicants, a finding of bad faith requires a determination that the impugned conduct was the result of 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; see *Hembruff v. Ontario Municipal Employees Retirement Board*, (2005) 78 OR (3d) 561 (C.A.).

[157] I find City officials took significant steps to ensure compliance with physical distancing and capacity standards through a quality assurance system ("QA"), though not always expressed as rooted in an understanding of the Interim Settlement Agreement.

[158] There are several exchanges in the record, however, which are concerning. For example, Mr. Boucher, Manager, Operations & Support Services, wrote the following email to Mr. Tanner, and other staff members on June 15, 2020:

> 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.

[159] While comments such as this reinforce the conclusion that the City did not take all reasonable steps to comply with the Interim Settlement Agreement by June 15, 2020 because of a self-imposed deadline, I do not find a sufficient basis in the record to conclude that the City acted in bad faith in its assertion of compliance.

Has the City discharged its obligations under the Interim Settlement Agreement to ensure sufficient beds for "clients"?

[160] 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) of the Interim Settlement Agreement.

[161] Paragraph 2(b) of the Interim Settlement Agreement provides:

> 2. The City of Toronto (the "City") shall use best efforts, until the Termination Date to:
>
> …
>
> (b) to provide shelter to Clients by making available such Beds as is necessary to achieve Physical Distancing Standards across the Shelter System;

[162] The term "Client" is defined in paragraph 1(b) of the Interim Settlement Agreement as follows:

> (b) "Clients" means individuals who are, or who have been at any time since March 11, 2020, in receipt of any kind of support services provided by the Shelter System

[163] As with the term "physical distancing standards," the parties also differ on the meaning of the term "client" within the Interim Settlement Agreement.

[164] The City adopt an interpretation of "clients" that limits its obligation to individuals who had been in a shelter between March 11 and May 15.

[165] The applicants argue that 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.

[166] In this case, the plain meaning of paragraph 1(b) of the Interim Settlement Agreement assists in clarifying the divergence in the parties' interpretation of "clients."

[167] The definition in this paragraph clearly refers to those who "are" or "who have been at any time since March 11, 2020" in the shelter system. This definition does not refer to those "who may be in the future" in the shelter system.

[168] I find the "clients" referred to in the Interim Settlement Agreement represent a particular group of individuals who had left the shelter system between March 11, 2020 and May 15, 2020, and who wished to return to the shelter system subsequent to May 15, 2020.

[169] According to the applicants, 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 achieved through a reduction in the Shelter System's capacity.

[170] The applicants further submit that the City also failed to do everything that was necessary and proper to ensure that clients could access the spaces that were available.

[171] The City rejects the applicants' characterization of declining capacity in the shelter system. The City submits that while shelter beds online in the singles sector did go down during the period after the Interim Settlement Agreement was signed, a number of new COVID-19 Response sites were added, which absorbed a majority of the beds "decanted" in the singles sector in order to achieve physical distancing.

[172] Mr. Tanner gave evidence that, as of July 21, 2020, SSHA moved 598 people from encampments to indoor spaces. Mr. Tanner stated that the vast majority of these people were moved to hotels and transitional housing.

[173] The City submits that SSHA moved an additional 1,000 people since March 2020 directly from the shelter system into permanent housing, through its Rapid Housing Initiative, through housing allowances, and through the Rent-Geared-to-Income Program.

[174] I am aware there is a separate application against the City from individuals in an encampment (*Black et al. v. Toronto (City)* CV-20-00644217-0000). Addressing the reasons why homeless individuals chose to leave the shelter system in the initial weeks after the COVID-19 emergency was declared, or why some have sought to obtain beds, is beyond the scope of this motion.

[175] The applicants identify two specific clients of the shelter system within the meaning of the Interim Settlement Agreement who were unable to obtain a shelter bed through the central intake system.

[176] Kathleen Smith, a staff member at the applicant, Sanctuary Ministries of Toronto, stated in her affidavit dated July 2, 2020 that she called the Central Intake line on behalf of a single male seeking a shelter bed on June 14, 2020. Ms. Smith described the call as follows (at para. 6 of her affidavit):

> On the call, I spoke to a dispatcher and stated that I was calling from Sanctuary and that I was looking for a shelter space for a single man. The dispatcher I spoke to said that there was no space and that I, or the young man, would have to call back in 2 hours to see if any spaces had become available after the shelter curfew. The call ended without the dispatcher asking any information about the young man such as his name, or history of receiving services in the shelter system.

[177] The City does not dispute this account. The City acknowledges that a caller to Central Intake might not always get a bed on a first call.

[178] This account also demonstrated that the City did not have any protocol to determine if calls coming to Central Intake were from "clients" as defined in the Interim Settlement Agreement, seeking to return to the shelter system.

[179] The City submits that after becoming aware of the situation of these individuals, it implemented a new procedure to prioritize clients who resided in shelters between March 11, 2020 to May 15, 2020 and sought a shelter bed through the Central Intake system.

[180] On the record before me, I am unable to conclude that the City used its best efforts to make shelter beds available specifically to "clients" who may have left the shelter system in response to the pandemic between March and May 2020, as required under the Interim Settlement Agreement.

[181] The City referenced no actions between May 15 when the Interim Settlement Agreement was signed and June 15 when the City asserted compliance, to ensure its obligation to these clients as a specific group (and as opposed to its efforts to ensure shelter beds for all in need regardless of whether they are clients within the meaning of this agreement or not).

[182] The City appears to have assumed that capacity in the system generally would be sufficient to ensure that "clients" as defined in the Interim Settlement Agreement, would be able to access shelter beds. Such an assumption is not consistent with the "best efforts" standard.

[183] In response to the applicants alerting the City to instances of clients not obtaining beds through the Central Intake system, the City created a priority queue for clients within Central Intake's existing call-back procedure. This step, by contrast, does reflect a "best efforts" approach.

[184] The applicants argue more broadly that a decrease in the overall capacity in the shelter system is evidence that the City has not met its obligation to make available beds to "clients."

[185] I find that this conclusion does not follow. The applicants have not shown, beyond the individual deficiencies documented, that the City did not maintain sufficient shelter beds to be able to accommodate "clients."

[186] Therefore, while I find that the City was not in compliance with its commitment to use "best efforts" to ensure sufficient beds were being made available to "clients" as defined in the Interim Settlement Agreement as of June 15, 2020, I also accept that the City will have complied with this obligation by July 2, 2020, assuming the City has continued to implement the priority protocol for clients within its Central Intake system.

[187] It falls to the City, through its reporting, to demonstrate that the actual operation of this protocol has led to compliance with its commitment under the Interim Settlement Agreement.

Are the applicants entitled to a declaration that the City failed to answer "relevant and proportionate" questions?

[188] 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."

[189] The applicants argue that from May 19 to June 15, the City consistently refused to answer the applicants' relevant and proportionate questions.

[190] Specifically, the applicants seek the following information as answers to its questions:

- copies of site provider verification surveys given to (and received by) shelter providers;
- instructions from SSHA to QA teams performing site visits; and
- site dimensions, plans or building records in the City's possession for the sites in the shelter system.

[191] In the refusals motion referred to above, I accepted that some of the applicants' request for disclosure in advance of this motion to enforce the Interim Settlement Agreement was premature, as it would render any finding on whether the City is required to provide this information under the agreement moot.

[192] The City has failed to provide a rationale for why the information sought by the applicants is not relevant in light of its commitments under the Interim Settlement Agreement.

[193] I find the information sought by the applicants is relevant and proportionate.

[194] Specifically, I find that the applicants' questions with respect to any site provider verification surveys given to (and received by) shelter providers, and the question with respect to instructions from SSHA to QA teams performing site visits, are relevant and proportionate, as these form a basis for the City's assertion of compliance.

[195] However, in light of the finding above with respect to the interpretation of the physical distancing standard in the Interim Settlement Agreement, new guidance will need to be provided to shelter site providers and the QA process will need to be adjusted accordingly.

[196] In light of this new phase of the City's compliance process under the Interim Settlement Agreement, I find the requirement to answer questions from the applicants in these areas should be prospective rather than retrospective.

[197] In other words, from this point forward, the City must answer questions by the applicants relating to any future site provider verification surveys which may be given to and received by site providers, and questions relating to any future instructions from SSHA to QA teams performing site visits.

[198] However, if in any future progress report or assertion of compliance, the City chooses to rely on prior shelter provider verification surveys or prior QA site visit reports, then questions by the applicants in relation to those verification surveys, and any instructions to QA teams, also must be answered by the City

[199] With respect to the applicants' questions regarding site dimensions, plans and building records in the City's possession for the sites in the shelter system, this order was made as part of

the relief on the refusals motion, and according to the City, subsequently complied with. I do not find a further order for this material is necessary.

What is the appropriate remedy?

[200] The parties differ on the remedy which is appropriate to this case if a breach of the Interim Settlement Agreement is found.

[201] The applicants believe ongoing judicial supervision of compliance with the Interim Settlement Agreement is necessary, and rely on the remedy in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62. The applicants request that the Court exercise its equitable jurisdiction to make the following orders:

> 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.

[202] I find the Constitutional context in which the ongoing involvement of the Court was required in *Doucet-Boudreau* is not present in this contractual setting.

[203] More importantly, there is no basis in the record to suggest that the City will not comply with its requirements as set out by the Court.

[204] Further, paragraph 9 of the Interim Settlement Agreement sets out that "if the Applicants do not agree that the City has met the conditions for ceasing delivery of weekly Progress Reports, or any other term in this agreement, they may seek a case management conference with the Court for directions pursuant to paragraph 2 of the Consent Order."

[205] Therefore, there is an ongoing mechanism to engage the Court's assistance should the applicants feel this is necessary, should a further dispute arise with respect to the City's compliance with the Interim Settlement Agreement.

[206] In the alternative, the applicants seek as a remedy the progress reports under the terms of the Interim Settlement Agreement they would have been owed since June 15, 2020.

[207] Once again, in light of the findings above with respect to the need for the City to obtain public health guidance on physical distancing requirements between shelter beds other than 2 metres side-to-side, the City will need to generate new compliance data for the sites in the shelter

system. I see no reason why the City should have to go back in time to provide data from June 15, 2020 to the present, based on standards that will no longer be applicable.

[208] Rather, it is imperative that the City resume its regular reporting and data collection on compliance from this point forward, under the terms of the Interim Settlement Agreement, until the City is in a position to assert compliance in light of the findings in these reasons.

[209] The City takes the position, in the alternative, that if a breach is found that leads to the conclusion compliance should not have been asserted on June 15, 2020, then the date of September 9, 2020 should be recognized as the date of compliance. The City states that the last of the "exceedances" which it acknowledged existed on June 15, 2020, had been addressed by September 9, 2020.

[210] In light of the earlier finding that the physical distancing standard requires additional forms of separation beyond the 2-metre side-to-side spacing that the City has used to date, it is premature at this point for the City to assert compliance with the Interim Settlement Agreement.

[211] If after obtaining public health guidance with respect to other forms of separation which may be required in specific shelter sites, the City continues to assert compliance was achieved on September 9, 2020, it must do so in the form set out in the Interim Settlement Agreement.

[212] Alternatively, at this juncture in the City's response to the COVID-19 pandemic, and in an abundance of caution, the City may conclude that it is appropriate to ensure 2 metres of separation in all directions for all shelter beds. While this measure would go beyond what I have found to be the minimum requirements in the Shelter Standards, as amended by Directive 2020-01, and in the Interim Settlement Agreement, the City may determine that going beyond compliance with minimum physical distancing standards is now necessary.

[213] Adopting this approach, referred to by the Mr. Tanner in his evidence as the "optimal scenario" to physical distancing, also would obviate the need for further, specific evaluations of risk and public health guidance on the required separation between shelter beds in order to demonstrate compliance with the "best efforts" commitment in the Interim Settlement Agreement.

Order to go as follows:

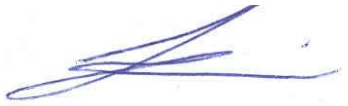
[214] For the reasons set out above, the applicants' motion is granted.

[215] A declaration shall issue that the City of Toronto breached the Interim Settlement Agreement, dated May 15, 2020, through its assertion of compliance on June 15, 2020.

[216] The City of Toronto shall continue its pre-compliance reporting obligations under the Interim Settlement Agreement from the date of this decision until it has met its obligations under the terms of the agreement, consistent with the interpretation of those terms in these reasons.

[217] The applicant is not seeking costs on this motion. While the City stated in its factum that it was seeking costs, counsel confirmed at the hearing that it was no longer seeking to recover costs.

[218] I agree that costs are not appropriate on this motion.



Sossin J.

Released: 2020-10-15