

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**DERRICK BLACK, MICHELLE PLOURD, MATINA KOUMOUDOUROS, ASHLEY ELLIS, NANCY FISHER, MARK MEDAS, JOAN SMITH, PAUL KAGER, RAYMOND MARTIN, MARK BARATTA, MARIE GRAVES, KATELYN BOWMAN, JOHN CULLEN, DANIEL CUNNINGHAM, TORONTO OVERDOSE PREVENTION SOCIETY and ONTARIO COALITION AGAINST POVERTY**

Applicants

- AND -

**CITY OF TORONTO and ~~ATTORNEY GENERAL OF ONTARIO~~**

Respondents

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

**FACTUM OF THE RESPONDENT CITY OF TORONTO**

September 24, 2020

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## OVERVIEW

1. Parks are not places to live. They are shared community resources, intended for shared use by all members of the public.
2. The individual applicants are people who have experienced homelessness, although several applicants are currently housed.
3. They seek an interim order enjoining the City from enforcing its Parks Bylaw, which prohibits camping in or otherwise permanently occupying municipal parks. They argue, incorrectly, that the *Charter* entitles them to live in parks rather than in the City's shelter system.
4. The applicants do not meet the test for an injunction. Like the underlying application, this motion is premised on a false dichotomy between supposedly safe encampments in parks on one hand, and supposedly unsafe shelters on the other. However, the evidence before this Court is that the encampments are significantly more dangerous than the applicants claim, while the shelter system is considerably safer.
5. There have been frequent incidents of violence and human trafficking, fires, and unsanitary conditions in the various tent encampments in the City's parks. In a three-month period this summer, the City collected more than 10,000 discarded needles in parks. On the other hand, the City has taken extraordinary steps to reduce the COVID risks within its shelters. The applicants' own proposed experts recommend those steps as the best way to mitigate the COVID risks.
6. This motion should be dismissed, with costs.

## PART I – FACTS

### A. Almost All the Applicants Were Offered Shelter or Housing Services

7. The City has offered 13 of the 14 individual applicants housing or shelter services; 11 were offered hotel spaces and/or permanent housing. Eight of the applicants accepted the offer of hotel space. Five remain in hotels: two did not arrive at their designated hotels after accepting the offer, and one was discharged after she did not return.

8. One applicant regularly uses the respite centre at 69 Fraser Ave.<sup>1</sup>

9. Only one applicant, Marie Graves, does not appear to have ever received housing or shelter services from the City.<sup>2</sup>

#### *i. Mr. Black and Ms. Plourd have homes*

10. The applicant Derrick Black has a home. Until March of this year, he was staying with his parents.<sup>3</sup> His mother asked him to leave her home out of fear of contracting COVID, after he continued to go out into the community to visit Michelle Plourd, his common law spouse and co-applicant.<sup>4</sup> He admits that, if he had agreed to stay home, he was welcome to continue living with his mother.<sup>5</sup>

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<sup>1</sup> Affidavit of Scott McKean, affirmed August 10, 2020, paras. 59-61, Respondent's Record, Tab 3. [McKean Affidavit].

<sup>2</sup> McKean Affidavit, paras. 59-61.

<sup>3</sup> Affidavit of Derrick Black, sworn July 29, 2020, para. 4, Applicants' Record, Tab 2 [Black Affidavit].

<sup>4</sup> Black Affidavit, para. 5.

<sup>5</sup> Transcript of the cross-examination of Derrick Black, pg. 5, lns. 9-17, Applicants' Brief of Transcripts, Tab E [Black Transcript].

11. Mr. Black also admits that he continues to receive a shelter payment from Ontario Works, and that he still pays his mother \$450 per month in rent.<sup>6</sup>

12. Ms. Plourd also has a home: she has a rent-geared-to-income apartment at Fred Victor, across the street from Moss Park.<sup>7</sup>

*ii. Mr. Black and Ms. Plourd refused a one-bedroom apartment*

13. The City offered Mr. Black and Ms. Plourd spaces in various hotels, which they declined. It subsequently offered them a one-bedroom apartment downtown. They refused that offer as well, because they wanted a two-bedroom apartment.<sup>8</sup> He, therefore, has the means to rent a place to live.

*iii. Mr. Cullen receives \$2,000 every four weeks*

14. While Mr. Cullen is currently living in an encampment somewhere outside the downtown core, he admits that he receives \$2,000 in Canada Emergency Relief Benefit payments every four weeks.<sup>9</sup> He, therefore, has the means to rent a place to live other than a city park.

**B. City Parks are not Safe Places to Live**

15. Parks are intended as shared public recreational spaces; they are not designed as places to live.

16. Encampments pose serious dangers to encamped people, City staff, and the public. These include injury and death from winter weather, fires, and violence. There are significant health

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<sup>6</sup> Black Transcript, pg. 8, Ins. 6-25; McKean Affidavit, para. 62.

<sup>7</sup> McKean Affidavit, para. 63.

<sup>8</sup> McKean Affidavit, para. 64.

<sup>9</sup> Affidavit of John Cullen, affirmed July 29, 2020, para. 6, Applicants' Record, Tab 4 [Cullen Affidavit]; Transcript of the cross-examination of John Cullen, pg. 7, qq. 23-24, Applicants' Brief of Transcripts, Tab G [Cullen Transcript].

and sanitation problems, such as overdoses, discarded used needles, and garbage, rats and human waste.

17. The City has made a policy decision to invest its scarce resources in making safer indoor spaces available to as many people as possible, rather than building infrastructure to support living within parks.<sup>10</sup>

*i. Encampments are exposed to winter weather*

18. Winter weather may begin soon after the hearing of this motion. Exposure to winter weather can kill or injure encamped people.<sup>11</sup> Helping people move from parks to warm spaces takes time, and is best done well in advance of winter.<sup>12</sup>

19. The Applicants do not challenge this evidence. Indeed, one of their proposed experts reports her patients losing fingertips to frostbite.<sup>13</sup>

*ii. Injury and death from fires*

20. Encampments pose a significant fire risk. At least one person died in an encampment fire in spring 2020.<sup>14</sup> From March 13 to July 30, 2020, encampment fires have increased by 450% compared to the same period last year.<sup>15</sup> Encampment fires have happened at several parks,

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<sup>10</sup> McKean Affidavit, para. 18; Transcript of the cross-examination of Scott McKean, pg. 44-45, q. 126, Applicants' Brief of Transcripts, Tab C [McKean Transcript].

<sup>11</sup> Affidavit of Troy Ford, affirmed August 8, 2020, para. 29, Respondent's Record, Tab 1 [Ford Affidavit]; McKean Affidavit, para. 25.

<sup>12</sup> Ford Affidavit, para. 29; McKean Affidavit, para. 25.

<sup>13</sup> Affidavit of Dr. Gillian Wiwcharuk, affirmed July 29, 2020, para. 42, Applicants' Record, Tab 7 [Wiwcharuk Affidavit].

<sup>14</sup> Ford Affidavit, para. 8, Ex. A.

<sup>15</sup> Ford Affidavit, para. 7.

including Moss Park and Alexandra Park where the affiants Derrick Back and Katelynn Bowman live.<sup>16</sup>

21. The Toronto Police Service has reported multiple incidents of arson at encampments.<sup>17</sup> The City has also received complaints of arson and tents catching on fire.<sup>18</sup>

22. Many encamped people keep generators and fuel tanks in or near their tents.<sup>19</sup> Mr. Black has three generators in his encampment, and there was a generator present at the applicant John Cullen's Dufferin Grove Park encampment.<sup>20</sup> A generator fire occurred at an encampment with over 20 propane tanks, gas cans, and acetylene tanks.<sup>21</sup> Multiple encamped people have refused City requests to remove propane tanks they kept inside and next to tents.<sup>22</sup>

23. Generators and electrical wires also carry electrocution and carbon monoxide poisoning risks.<sup>23</sup> City staff have observed and received complaints of encamped people breaking into electrical fixtures, and electrical wiring running outdoors at encampments.<sup>24</sup>

24. Encampment fires have damaged City-owned bridges. So far in 2020, there have been at least six encampment fires under City bridges or elevated roadways, including in the Rosedale

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<sup>16</sup> Ford Affidavit, paras. 11-12, Ex. D, E.

<sup>17</sup> Affidavit of Kelly Walsh, sworn September 8, 2020, Ex. C, pgs. 28-29, 67-68, 70-71, Respondent's Supplementary Record, Tab 1 [Walsh Affidavit].

<sup>18</sup> Ford Affidavit, para. 13.

<sup>19</sup> Ford Affidavit, para. 9, Ex. B, I (pg. 49 specifically); McKean Affidavit, Ex. A, pg. 684.

<sup>20</sup> Black Affidavit, para. 7; Cullen Affidavit, para. 22.

<sup>21</sup> Ford Affidavit, para. 9, Ex. B.

<sup>22</sup> McKean Affidavit, para. 13, Ex. A.

<sup>23</sup> Ford Affidavit, para. 18.

<sup>24</sup> Ford Affidavit, paras. 14-16, Ex. G, H, and I; McKean Affidavit, para. 24.



Valley parkland. Four bridges or elevated roadways were temporarily closed due to these encampment fires.<sup>25</sup>

25. Fires at park encampments are particularly concerning given that City parks have extensive tree, vegetation, and leaf litter cover.<sup>26</sup>

*iii. Significant incidents of violent crime*

26. Encamped people, City staff, and park visitors have repeatedly experienced violence at encampments. The police have reported:

- guns seized from encampments;<sup>27</sup>
- assaults by and on encamped people, including one requiring plastic surgery for the victim;<sup>28</sup>
- sexual assaults on encamped people;<sup>29</sup> and
- knife and machete attacks by and on encamped people.<sup>30</sup>

27. City staff working at parks with encampments have been victims of violence and threats, including being chased by an encamped person with a knife. This has happened as City staff tried to provide services in encampments, such as removing litter and used needles.<sup>31</sup>

28. Too frequently, as with a sexual assault at George Hislop Park, encamped people are preyed upon by non-residents.<sup>32</sup>

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<sup>25</sup> Ford Affidavit, para. 10, Ex. C; McKean Affidavit, para. 24.

<sup>26</sup> Ford Affidavit, para. 18.

<sup>27</sup> Ford Affidavit, para. 46, Ex. R; Walsh Affidavit, Ex. C, pgs. 85-87, 113-120.

<sup>28</sup> Walsh Affidavit, Ex. C, pgs. 15-16; 18-19; 36-37; 42-43; 125-129; 135-136; 154-156

<sup>29</sup> Ford Affidavit, para. 43, Ex. O.

<sup>30</sup> Ford Affidavit, para. 45, Ex. Q; Walsh Affidavit, Ex. C, pgs. 64, 148-149.

<sup>31</sup> Ford Affidavit, paras. 47-49.

<sup>32</sup> Walsh Affidavit, Ex. C, pgs. 106-111; McKean Affidavit, paras. 27-29.

*iv. Health and sanitation problems at encampments*

29. Encampments suffer from severe health and sanitation problems, including:

- fatalities from overdoses;<sup>33</sup>
- inadequate physical distancing and a lack of masks;<sup>34</sup>
- sex trafficking and coerced "survival sex";<sup>35</sup>
- pervasive discarded needles, one of which punctured a City worker's glove and hand as he tried to clear needles from Moss Park;<sup>36</sup>
- garbage, used condoms, human waste, and unsanitary washroom messes;<sup>37</sup> and
- rodents. Ms. Bowman specifically noted during her cross-examination the presence of rats at the Alexandra Park encampments.<sup>38</sup>

30. Between May 1, 2020 and July 31, 2020, City staff recorded 10,052 discarded needles and other drug paraphernalia at 49 City parks. This represents an increase of 334% percent from 2019 to 2020.<sup>39</sup>

31. Mr. Ford's uncontradicted evidence is that, since March 24, 2020, he has never seen an encamped person wearing a mask.<sup>40</sup>

32. Although they express misgivings about living indoors, the encamped affiants acknowledge accessing indoor living facilities. For example, Ms. Bowman has shared the

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<sup>33</sup> Ford Affidavit, para. 30.

<sup>34</sup> Ford Affidavit, paras. 20, 22; McKean Affidavit, para. 13.

<sup>35</sup> Ford Affidavit, para. 20; McKean Affidavit, para. 28.

<sup>36</sup> Ford Affidavit, paras. 31-34, Ex. K.

<sup>37</sup> Ford Affidavit, paras. 24, 36-38, Ex. L; McKean Affidavit, para. 13; Transcript of the cross-examination of Troy Ford, pg. 86, qq. 292-293, Applicants' Brief of Transcripts, Tab D [Ford Transcript].

<sup>38</sup> Ford Affidavit, paras. 19, 36; Transcript of the cross-examination of Katelynn Bowman, pgs. 12-13, qq. 51-53, Applicants' Brief of Transcripts, Tab F [Bowman Transcript].

<sup>39</sup> Ford Affidavit, para. 32.

<sup>40</sup> Ford Affidavit, para. 22.

Alexandra Park pool's indoor shower facilities with pool users and/or other encamped people, and accesses the West Neighbourhood House for (indoor) showers, laundry, and meals.<sup>41</sup>

*v. Discrimination at encampments*

33. City staff have observed and received complaints of discrimination at encampments, including homophobic graffiti at Moss Park and the screaming of anti-gay slurs.<sup>42</sup> Ms. Bowman has experienced discrimination from another encamped person at Alexandra Park.<sup>43</sup> An encamped person at Alexandra Park has yelled a sexist slur at people using its public pool, while mocking their clothing.<sup>44</sup>

*vi. Exclusion of parks users*

34. Park users, neighbours, and City staff have reported pervasive violence, threats, and harassment at parks with encampments.<sup>45</sup> Park users, including seniors and parents, have told City staff that they are scared to enter or walk near certain parks. Public access to amenities such as community gardens and a pool have been curtailed.<sup>46</sup> Families are unable to bring their children to Alexandra Park due to needles left in the playground area.<sup>47</sup> Police and the City have received extensive complaints from citizens about encampment issues like violence, drug trafficking, garbage, and noise at all hours of the night.<sup>48</sup>

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<sup>41</sup> Black Affidavit, para. 8; Bowman Transcript pgs. 8-10, qq. 33-42.

<sup>42</sup> Ford Affidavit, paras. 52, 57-58, Ex. T.

<sup>43</sup> Affidavit of Katelynn Bowman, sworn July 28, 2020, para 12, Applicants' Record, Tab 3 [Bowman Affidavit].

<sup>44</sup> Walsh Affidavit, Ex. C, pg. 61.

<sup>45</sup> Ford Affidavit, paras. 51-52, Ex. S.

<sup>46</sup> Ford Affidavit, paras. 53-56.

<sup>47</sup> Walsh Affidavit, Ex. C, pg. 55; see also Ford Affidavit, para. 53.

<sup>48</sup> Ford Affidavit, paras. 6, 20, 35, 36-37, 52, 56; Walsh Affidavit, Ex. C, pg. 55.

### C. The City's Shelter System is Safe

#### *i. The City has taken extraordinary measures to reduce the risks in shelters*

35. Toronto's shelter system is complex. It serves the largest population of people experiencing homelessness in the country, and has more beds *per capita* than any other Canadian city.<sup>49</sup>

36. The system is made up of homeless shelters and respite centres. Shelters offer more extensive programming and services to clients, such as housing and employment support; respites are low-barrier facilities for people who are unable or unwilling to access shelters, which prioritize access to indoor space and essential services.<sup>50</sup> Medical and mental health services and referrals are available at many shelter and respite locations.<sup>51</sup>

37. The City directly operates 11 homeless shelters, and oversees the operation of a further 53 shelters and seven respites by 32 different community agencies. As part of that oversight, the City sets out the operating standards, terms and conditions pursuant to which those agencies may operate.<sup>52</sup>

38. The City has taken extraordinary measures to reduce the risk of COVID spread within the shelter system. Since March, the City's Shelter, Support & Housing Administration ("SSHA") has:

- opened 30 new shelter facilities, including 19 hotel sites;<sup>53</sup>

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<sup>49</sup> Affidavit of Gordon Tanner, affirmed August 10, 2020, para. 12(a), Respondent's Record, Tab 2 [Tanner Affidavit].

<sup>50</sup> Tanner Affidavit, para. 5.

<sup>51</sup> Tanner Affidavit, para 32.

<sup>52</sup> Tanner Affidavit, para. 8, Ex. A, B.

<sup>53</sup> Tanner Affidavit, para. 12(a), 50.

- moved 3,800 clients into new spaces, including 1,500 people into permanent housing;<sup>54</sup>
- implemented requirements that all shelter operators maintain a lateral separation of at least 2.0 metres edge-to-edge between beds, among other physical distancing strategies.<sup>55</sup> By June 15, 2020, 99.5% of all shelter beds in the City's shelter system achieved this measure of physical distancing;<sup>56</sup>
- provided shelter providers with funding for and guidance on infection prevention and control;<sup>57</sup>
- provided funding to five shelters that traditionally closed during the day to remain open and allow vulnerable clients to remain indoors;<sup>58</sup>
- distributed personal protective equipment directly to shelter operators;<sup>59</sup>
- implemented daily COVID assessment and screening for clients, staff and visitors;<sup>60</sup>
- created a transportation service which has safely transported approximately 600 people to and from COVID assessment centres;<sup>61</sup>
- created isolation spaces for people awaiting test results,<sup>62</sup> and recovery sites for those who have tested positive;<sup>63</sup>
- advocated for the province to prioritise testing people experiencing homelessness;<sup>64</sup> and
- participated in a targeted testing program providing proactive testing at 71 shelter sites. The positivity rate of the proactive testing was 0.3%<sup>65</sup>

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<sup>54</sup> Tanner Affidavit, para. 12(a), 50.

<sup>55</sup> Tanner Affidavit, para. 12(b).

<sup>56</sup> Tanner Affidavit, para. 12(a); Supplementary Affidavit of Gordon Tanner, affirmed September 18, 2020, para 3, Respondent's Supplementary Record, Tab 2.

<sup>57</sup> Tanner Affidavit, para. 12(c) – (d).

<sup>58</sup> Tanner Affidavit, para. 12(e).

<sup>59</sup> Tanner Affidavit, para. 12(f).

<sup>60</sup> Tanner Affidavit, para. 18(a).

<sup>61</sup> Tanner Affidavit, para. 18(b).

<sup>62</sup> Tanner Affidavit, para. 18(c).

<sup>63</sup> Tanner Affidavit, para. 19.

<sup>64</sup> Tanner Affidavit, para. 18(e).

<sup>65</sup> Tanner Affidavit, para. 18(f).

39. The applicants' proposed experts, Drs. Wiwcharuk and O'Shea, postulated in a recent publication that four factors have been "particularly important" in reducing the spread of COVID within the Hamilton shelter system:

1. increased capacity of shelter space by opening surge shelters and hotel rooms, allowing for more effective physical distancing in congregate shelters;
2. access to rapid assessment and testing on site when symptomatic residents or staff are identified through active screening;
3. restructuring of physical spaces to accommodate isolation of residents with confirmed COVID-19 and those awaiting test results; and
4. rapid turnaround of test results through collaboration with our regional laboratory program allowing triage of individuals into isolation spaces without exceeding available capacity.<sup>66</sup>

40. As set out above, the City has implemented the first three measures, and advocated to the province for the fourth.

*ii. Half the COVID cases in the system were in shelters not serving encamped people*

41. Between March 11, 2020 and August 14, 2020, there were a total of 636 confirmed COVID cases linked to the City's shelter system.<sup>67</sup> Between March 11, 2020 and July 1, 2020, 9,988 unique clients received shelter services.<sup>68</sup>

42. The COVID cases identified were not distributed evenly throughout the shelter system. Of the 636 confirmed cases, 310 were located in three shelters that do not typically serve the

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<sup>66</sup> O'Shea, T., et al., "Pandemic Planning in Homeless Shelters: A pilot study of a COVID-19 testing and support program to mitigate the risk of COVID-19 outbreaks in congregate settings", Ex. 4 to the cross-examination of Dr. Wiwcharuk, Brief of Exhibits of the Applicants, Tab G.

<sup>67</sup> Ex. 1 to the cross-examination of Gordon Tanner, Brief of Exhibits of the Applicants, Tab B; Transcript of the cross-examination of Gord Tanner, pg. 5, lns. 15-25, Applicants' Brief of Transcripts, Tab B [Tanner Transcript].

<sup>68</sup> Tanner Affidavit, para. 26.

homeless population coming from encampments.<sup>69</sup> In their factum, the applicants refer to Dr. O'Shea's evidence that there were 153 COVID cases linked to the Willowdale Welcome Centre.<sup>70</sup> Willowdale Welcome Centre is one of the three shelter locations referred to above that do not typically service the homeless population coming from encampments.

*iii. The majority of COVID cases in the shelter system occurred early in the pandemic*

43. While there were 636 confirmed COVID cases linked to the shelter system as of August 14, 2020, most of these cases occurred in the earlier months of the pandemic. Of the 636 total confirmed COVID cases, 314 COVID cases were confirmed in April and 217 COVID cases were confirmed in May.<sup>71</sup> These two months represent 83.5% of the total confirmed COVID cases.

44. The number of confirmed COVID cases linked to the shelter system has decreased significantly in recent months. Only six confirmed COVID cases were linked to the shelter system in July.<sup>72</sup> Between July 29 and August 14, 2020,<sup>73</sup> there were no confirmed COVID cases linked to the City's shelter system.

45. A person whose COVID case is linked to the shelter system did not necessarily contract the virus in the system. They may have contracted it in the community, and then brought it into the system.

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<sup>69</sup> Tanner Affidavit, para. 27.

<sup>70</sup> Applicants' Factum, para. 58; Affidavit of Dr. Tim O'Shea, affirmed July 30, 2020, para. 27, Applicants' Record, Tab 6 [O'Shea Affidavit].

<sup>71</sup> Ex. 1 to the cross-examination of Gordon Tanner, Brief of Exhibits of the Applicants, Tab B; Tanner Transcript, pg. 5, lns. 15-25.

<sup>72</sup> Ex. 1 to the cross-examination of Gordon Tanner, Brief of Exhibits of the Applicants, Tab B; Tanner Transcript, pg. 5, lns. 15-25.

<sup>73</sup> Tanner Affidavit, para. 29; Ex. 1 to the cross-examination of Gordon Tanner, Brief of Exhibits of the Applicants, Tab B; Tanner Transcript, pgs. 4-7.

46. Notably, the applicants have provided no comparable data for COVID outbreaks in encampments.

47. In their factum, the applicants state that there is no evidence in the record indicating a confirmed case of COVID-19 transmission within encampments. However, there is no evidence in the record of COVID transmission within the shelter system. Nor have the applicants provided any evidence demonstrating that anyone is tracking outbreaks at homeless encampments in a systematic way comparable to the tracking of shelter outbreaks by Toronto Public Health and the Province of Ontario. Indeed, Dr. O'Shea acknowledges in his affidavit that tracking COVID outbreaks in homeless encampments would be difficult compared to the tracking done in shelters.<sup>74</sup>

*iv. 11 of 14 individual applicants were offered space in hotels*

48. As noted, the City has offered 11 of the 14 individual applicants spaces in hotels. In doing so, the City has offered those applicants a level of protection from COVID comparable to that enjoyed by the housed population. Dr. O'Shea testifies in his affidavit that, "Housing homeless individuals in hotel rooms with private sleeping and bathroom spaces likely reduces the risk of transmission to effectively the same as people who have their own self-contained dwelling unit or home."<sup>75</sup>

49. Although the applicants complain that shelter sites are far from their current location, half of the nineteen hotel sites are located in the downtown area.<sup>76</sup> Furthermore, not all people

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<sup>74</sup> O'Shea Affidavit, para. 48.

<sup>75</sup> O'Shea Affidavit, para. 42.

<sup>76</sup> Tanner Affidavit, para. 52.



experiencing homelessness come from the downtown area, and the City has established hotel across different communities.<sup>77</sup>

**v. *Services and supports are available to clients in shelters and respites***

50. All shelters and respites in the City's shelter system, including hotels, provide clients with essential services, such as access to nutritious meals, washroom and shower facilities, hygiene products, clothing, and laundry facilities. Further, medical and mental health services and referrals for clients are available at many shelter and respite locations.<sup>78</sup>

51. All shelters also must have harm reduction policies in place.<sup>79</sup> While some shelters have abstinence-based policies, many shelters have supports for clients who use drugs.<sup>80</sup> For instance, these shelters and respites have naloxone kits on site and are required to provide referrals to organizations that offer harm reduction supplies and related support services, including referrals to methadone/suboxone treatment sites.<sup>81</sup>

52. Many shelters have rules and policies in place such as curfew, night-time checks and no external guests. These rules are in place to manage shelter space and to ensure the safety of clients and staff, especially during the ongoing pandemic.<sup>82</sup>

53. When providing shelter options to persons living in homeless encampments, the City endeavours to provide choices of shelter locations.<sup>83</sup> If a shelter space is located away from a

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<sup>77</sup> Tanner Affidavit, para. 51.

<sup>78</sup> Tanner Affidavit, para. 32.

<sup>79</sup> Tanner Affidavit, para. 40.

<sup>80</sup> Tanner Affidavit, para. 40.

<sup>81</sup> Tanner Affidavit, para. 40.

<sup>82</sup> Tanner Affidavit, paras. 36-38.

client's desired supports and services, the City provides public transit fare to clients so that they can access those supports and services.<sup>84</sup>

54. The City also considers the particular needs of a client when offering shelter space, including finding space for couples, women and those with pets.<sup>85</sup> While hotels are suitable for many clients, some clients who are particularly vulnerable or at risk often need supports that hotel rooms cannot provide. In such a case, the City works to find appropriate shelter or respite space for the client.<sup>86</sup>

#### **D. The Parks Bylaw Prohibits Living in City Parks**

55. The Parks Bylaw<sup>87</sup> limits the public's use of parks. The impugned provisions at issue in this proceeding prohibit the following activities without permission:

- accessing or occupying a park for non-recreational uses (§ 608-9(A));
- using, entering or gathering in park between 12:01 a.m. and 5:30 a.m. (§ 608-9(B));
- dwelling, camping or lodging in a park (§ 608-13); and
- erecting a tent, structure or shelter at, in or to a park (§ 608-14).

56. These four provisions together prohibit people from living in City parks.

57. The applicants also attack § 608-7, which prohibits people from encroaching on and taking possession of City parks by installing a fixture such as a fence on park land.

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<sup>83</sup> Tanner Affidavit, para. 52.

<sup>84</sup> Tanner Affidavit, para. 40.

<sup>85</sup> Tanner Affidavit, para. 53.

<sup>86</sup> Tanner Affidavit, para. 53.

<sup>87</sup> Toronto Municipal Code, chp. 608.

58. This Court has recognized that the Parks Bylaw is a, "clear and sensible...attempt to balance, in a fair way, the different uses we wish to make of our public parks so, at the end of the day, we all get to enjoy them."<sup>88</sup>

## **PART II – ISSUES**

59. The sole issue on this motion is whether the applicants have met the test for an interim injunction.

60. For the reasons set out in detail below, the City submits that they have not met the test, and this motion should be dismissed.

## **PART III - SUBMISSIONS**

### **A. Evidentiary Objections**

#### ***i. The applicants rely on unreliable or inadmissible evidence***

61. Only three of the 14 individual applicants swore affidavits in support of this motion for an injunction.

62. The City has brought a motion to strike the affidavits of the applicants' two proposed expert witnesses, Drs. O'Shea and Wiwcharuk. As set out in detail in those materials, the witnesses' history of advocacy on the key issue on this motion and their direct interest in the outcome of this proceeding render them incapable of fulfilling their duty of impartiality to this Court.

63. The City also takes issue with the evidence of Zoe Dodd. Of the 32 paragraphs of Ms. Dodd's affidavit sworn in support of the motion for an injunction:

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<sup>88</sup> *Batty v City of Toronto*, 2011 ONSC 6862 at para. 95.

- 15 contain hearsay;<sup>89</sup>
- three contain opinion;<sup>90</sup> and
- one contains speculation.<sup>91</sup>

64. Moreover, no information is provided that would permit this Court to assess the quality of the hearsay evidence. The dates and circumstances of the various out of court statements are never provided. In all but two instances,<sup>92</sup> the source of the hearsay statements is unidentified, and no explanation is provided for if or why the declarants are unavailable to provide that evidence themselves. In several instances, Ms. Dodd refers to the content of photographs<sup>93</sup> and emails<sup>94</sup> which she has not attached as exhibits to her affidavit.

65. Given the absence of the declarants' identities and the documents referred to, or any of the surrounding circumstances, this Court cannot assess the necessity or reliability of the hearsay she puts forth as evidence.<sup>95</sup>

66. While the *Rules of Civil Procedure*<sup>96</sup> permit hearsay evidence on motions, this Court has held that including hearsay evidence on key points is improper.<sup>97</sup>

67. In light of the foregoing, the City asks that this Court give no weight to Ms. Dodd's affidavit.

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<sup>89</sup> Affidavit of Zoe Dodd, sworn July 29, 2020, paras. 6-9, 11, 13-17, 19-21, 23, 31, Applicants' Record, Tab 5 [Dodd Affidavit].

<sup>90</sup> Dodd Affidavit, paras. 18, 28, 29.

<sup>91</sup> Dodd Affidavit, para. 22.

<sup>92</sup> Dodd Affidavit, paras. 21 ("one person named Allie") and 14 ("Nicole, manager of the program").

<sup>93</sup> Dodd Affidavit, paras. 8-9.

<sup>94</sup> Dodd Affidavit, paras. 7, 14, 19.

<sup>95</sup> *R v Khelawon*, 2006 SCC 57 at para. 42.

<sup>96</sup> RRO 1990, Reg. 194, Rule 39.01(4).

<sup>97</sup> *1910878 Ontario Inc. v 2551204 Ontario Inc.*, 2020 ONSC 3415 at paras. 27-29.

## B. This Court Should Refuse to Grant an Injunction

68. It is trite that a party seeking an interim injunction must satisfy the three-part test set out in *RJR-MacDonald Inc. v Canada*.<sup>98</sup>

### *i. The application raises a serious issue*

69. At the first stage of the test, an applicant must show that it has raised a serious issue to be tried. This is a low threshold; in most cases, a party seeking an injunction need only show that its application is neither frivolous nor vexatious.<sup>99</sup>

70. The City agrees that the applicants' s. 7 *Charter* argument raises a serious question to be tried in their application, given the low threshold they must meet.

71. The City denies that the applicants raise a serious question to be tried regarding ss. 12 or 15 of the *Charter*, or Ms. Bowman's *Human Rights Code* claims:

- a prohibition on living in a public park does not constitute punishment<sup>100</sup> or treatment, and in any event is not grossly disproportionate or so excessive as to outrage the standards of decency;<sup>101</sup>
- homelessness is neither an enumerated nor an analogous ground for the purposes of s. 15;<sup>102</sup> and
- the applicants cannot seek relief pursuant to s. 46.1 of the *Human Rights Code* on this Rule 14 application.<sup>103</sup>

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<sup>98</sup> *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311[*RJR-MacDonald*].

<sup>99</sup> *Ibid* at para. 49.

<sup>100</sup> *R. v KRJ*, 2016 SCC 31 at para. 41.

<sup>101</sup> *R v Smith*, [1987] 1 SCR 1045 at 1072.

<sup>102</sup> *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 5410 at paras. 136; aff'd 2014 ONCA 852.

<sup>103</sup> Section 46.1 of the *Human Rights Code*, RSO 1990, c H19 (the "*Code*"), limits the Court's remedial jurisdiction to ordering monetary compensation and/or restitution, other than monetary compensation, to a party whose rights under the *Code* have been infringed by another party. The applicants in this case seek neither monetary compensation nor restitution (see the Applicants' Amended Notice of Application, CV-

***ii. Refusing an injunction will not cause the applicants irreparable harm***

72. The applicants bear the onus of demonstrating they will suffer irreparable harm if the injunction is not granted.<sup>104</sup> Irreparable harm must be real and substantial, and the evidence establishing irreparable harm must be clear and not speculative. Bald allegations or general beliefs or concerns, without factual underpinning establishing a reasonable likelihood of irreparable harm, do not satisfy this requirement.<sup>105</sup>

73. Assessing the true overall risk of irreparable harm will always be a function of both the likelihood of harm occurring and its size or significance should it occur.<sup>106</sup>

74. The applicants allege that there is a real and substantial risk of contracting COVID-19 within the City's shelter system. That argument is inconsistent with the evidence before this Court. As outlined in detail above, the City has taken extraordinary steps to ensure its shelter system is safe.

75. City staff have worked to create space for physical distancing while maintaining capacity of the City's shelters by opening surge shelters and hotel rooms, which allows for more effective physical distancing in congregate shelters. There is now access to rapid assessment and testing on site when symptomatic residents or staff are identified through active screening. The City has

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20-644217). The applicants seek only declaratory relief with respect to the infringements of the *Code* that they allege. Further, claims for a remedy under the *Code* often involve disputed facts and require the trier of fact to make determinations of credibility. The Human Rights Tribunal's trial-like process is better equipped to make determinations of credibility than this Court on a Rule 14 application (see *Power Tax Corp. v. Millar*, 2013 ONSC 135 at paras. 38-44).

<sup>104</sup> *Pickering (City) v Slade*, 256 ACWS (3d) 257, 2015 CarswellOnt 10461 (ONCA) at paras. 8, 11; see also *Waddell v Weeneebayko Area Health Authority*, 2018 ONSC 4535 at para. 9; *Vancouver (City) v Wallstam*, 2017 BCSC 937 at para. 46.

<sup>105</sup> *Dilico Anishinabek Family Care v Her Majesty the Queen (Ontario)*, 2020 ONSC 892 at para. 35.

<sup>106</sup> *Potash Corp. of Saskatchewan Inc. v Mosaic Potash Esterhazy Ltd. Partnership*, 2011 SKCA 120 at para. 59.

restructured physical spaces to accommodate the isolation of residents with confirmed COVID-19 and those awaiting test results.

76. Unlike many of the cases upon which the applicants rely, currently all but one of the homeless applicants in this matter have been offered housing services, and 11 have been offered hotel rooms or permanent housing. Moreover, there is no evidence in the record before this Court that there is insufficient space in the City's shelter system for people currently living in encampments.<sup>107</sup>

77. The applicants also allege without evidence that there is risk of psychological and physical harm due to displacement from familiar neighbourhoods and the inability of shelters to meet their needs. However, the three applicants who provided evidence in support of this motion have all lived or currently live outside downtown: Mr. Cullen is currently camped in a park near St. Clair Ave.;<sup>108</sup> Mr. Black lived with his parents at Bathurst and Sheppard from 2016 until March 2020;<sup>109</sup> and Ms. Bowman was incarcerated until January, 2020.<sup>110</sup>

78. The applicants have highlighted in particular how some of the rules in place in shelters and hotel spaces may be challenging for them, such as the prohibition on having guests. The rules put in place in shelters are meant to balance respect for the dignity and autonomy of shelter users while recognizing their needs and promoting shelter users' health, safety and well-being.<sup>111</sup>

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<sup>107</sup> The applicants have highlighted *Victoria (City) v Adams*, 2009 BCCA 563, and *Abbotsford (City) v Shantz*, 2015 BCSC 1909. In both cases, the courts noted the lack of adequate shelter space: see *Adams* at para 132 and *Shantz* at para 276. The City has presented evidence that there is adequate shelter space for the applicants.

<sup>108</sup> Black Affidavit, para. 4; Black Transcript, pg. 4, ln. 25 – pg. 5, ln. 11.

<sup>109</sup> Cullen Transcript, pg. 4, ln. 23 – pg. 5, ln. 6.

<sup>110</sup> Bowman Affidavit, para. 5.

<sup>111</sup> Tanner Affidavit, para. 35.

79. The City is concerned that if external guests were generally permitted, it would be very difficult to keep track of who was at a shelter at any given time, impeding the ability to monitor safety and security of both clients and staff.<sup>112</sup> Moreover, in the context of COVID-19, the presence of external guests creates an added safety risk.<sup>113</sup>

80. The City has also demonstrated a responsiveness to the concerns of clients and their advocates. For instance, a policy of not allowing clients to go into each other's rooms, in order to maintain physical distancing, was changed after concerns were raised that this would create an increased risk of overdose deaths.<sup>114</sup>

81. The applicants have not demonstrated that they will suffer irreparable harm if the injunction is not granted. As discussed in detail above, the encampments pose serious risks of danger to their inhabitants and other residents of Toronto who want to use the parks. In contrast to the increasing dangers associated with the encampments, the risks of contracting COVID-19 in City shelters have dramatically reduced since July.

***iii. The balance of convenience favours refusing the injunction***

82. At this stage of the test, the Court must determine which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction.<sup>115</sup> The Supreme Court has stated that, "in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies."<sup>116</sup>

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<sup>112</sup> Tanner Affidavit, para. 38.

<sup>113</sup> Tanner Affidavit, para. 38.

<sup>114</sup> Tanner Affidavit, para. 41.

<sup>115</sup> *Metropolitan Stores (MTS) Ltd. v Manitoba Food & Commercial Workers, Local 832*, [1987] 1 SCR 110 at para. 35.

<sup>116</sup> *RJR—MacDonald*, *supra* note 98 at para 69.



**a. The Parks Bylaw is presumed to be valid**

83. The Court must proceed with the third branch of the *RJR* analysis on the assumption that the impugned law is directed toward the public good and serves a valid purpose, and that the public interest favours enforcing the law. Only in clear cases will interlocutory injunctions against the enforcement of law on grounds of alleged unconstitutionality succeed.<sup>117</sup>

84. This Court has held that the third branch of the *RJR-MacDonald* test creates, "a very low hurdle for governments and a high one for applicants seeking an interim injunction to restrain, even briefly, the operation of a law enacted by a democratically elected legislature."<sup>118</sup>

85. Neither the government nor a private litigant has a monopoly on the public interest. However, when a private litigant alleges that the public interest is at risk, that harm must be demonstrated and the private litigant must convince the court of the public interest benefits which will flow from granting the relief sought.<sup>119</sup>

86. Comparable cases considering encampments have held that the balance of convenience favours municipalities seeking to enforce their by-laws.<sup>120</sup>

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<sup>117</sup> *Harper v Canada (Attorney General)*, 2000 SCC 57 at para. 9.

<sup>118</sup> *Satschko v Ontario (Government Services)*, 2007 CanLII 13944 (ONSC) at para. 33.

<sup>119</sup> *Ontario Federation of Anglers & Hunters v Ontario (Ministry of Natural Resources)*, [1999] OJ No 1690, 1999 CarswellOnt 1444 at para. 77.

<sup>120</sup> See *Vancouver Board of Parks and Recreation v Mickelson*, 2003 BCSC 1271 at paras. 33, 35; *Vancouver Board of Parks and Recreation v Sterritt*, 2003 BCSC 1421 at para. 5; *Vancouver (City) v O'Flynn-Magee*, 2011 BCSC 1647 at para. 65.

**b. The Applicants have not met their burden**

87. The balance of convenience overwhelmingly favours refusing the motion for an interlocutory injunction. The applicants have not made out the test for such relief as established by the Supreme Court in *RJR-MacDonald*.

88. All but one of the individual applicants were offered housing services by the City; eight of 14 initially accepted hotel spaces. They, therefore, did not have to choose between camping in a park or staying in a shelter or respite centre.

89. The encampments are creating dangers for their inhabitants and other residents of Toronto who wish to use the parks, as discussed above.

90. The City is responsible for the care and management of the parks at issue in this Application, including the health, safety, and benefit of all City residents who are entitled to use them. Further, it is in the public interest to allow a variety of users access to City parks. The applicants may not intend to exclude other users, but the significant health and safety concerns at the parks are having that effect.

91. The applicants argue that the City has the necessary resources to address concerns raised by homeless encampments in a proportionate, measured and targeted way. On the contrary, the City has made a policy decision to invest its available resources in creating safe indoor shelter spaces for as many people as possible, rather than developing housing or camping infrastructure within parks. Investing limited City resources in the encampments risks encouraging further camping in parks. Moving into the winter months, installing infrastructure like running water will become increasingly impractical.

92. Finally, the applicants argue that the injunction sought is not a sweeping suspension of any law but a targeted exemption for a limited class of individuals, namely those experiencing homelessness. However, by purporting to bring their application on behalf of all homeless people encamped in City parks, and by seeking a s. 52 *Charter* remedy, they are effectively asking this Court for a sweeping suspension of the prohibition on camping in City parks for all people. This could drastically increase the number of encampments in the City's parks and the associated dangers outlined herein.

#### **PART IV – ORDER REQUESTED**

93. The City respectfully requests that this motion be dismissed, with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**, this 24<sup>th</sup> day of September, 2020.



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**CITY SOLICITOR'S OFFICE**

**Michael J. Sims**  
**Nicholas Rolfe**  
**Jennifer Boyczuk**  
**Molly Lowson**

## Schedule "A" – Authorities Cited

1. [\*R v Khelawon\*](#), 2006 SCC 57
2. [\*1910878 Ontario Inc. v 2551204 Ontario Inc.\*](#), 2020 ONSC 3415
3. [\*RJR-MacDonald Inc. v Canada \(Attorney General\)\*](#), [1994] 1 SCR 311, 1994 CanLII 117 (SCC)
4. *Pickering (City) v Slade*, 256 ACWS (3d) 257, 2015 CarswellOnt 10461 (ONCA)
5. [\*Waddell v Weeneebayko Area Health Authority\*](#), 2018 ONSC 4535
6. [\*Vancouver \(City\) v Wallstam\*](#), 2017 BCSC 937
7. [\*Dilico Anishinabek Family Care v Her Majesty the Queen \(Ontario\)\*](#), 2020 ONSC 892
8. [\*Potash Corp. of Saskatchewan Inc. v Mosaic Potash Esterhazy Ltd. Partnership\*](#), 2011 SKCA 120
9. [\*Victoria \(City\) v Adams\*](#), 2009 BCCA 563
10. [\*Abbotsford \(City\) v Shantz\*](#), 2015 BCSC 1909
11. [\*Metropolitan Stores \(MTS\) Ltd. v Manitoba Food & Commercial Workers, Local 832\*](#), [1987] 1 SCR 110, 1987 CanLII 79 (SCC)
12. [\*Satschko v Ontario \(Government Services\)\*](#), 2007 CanLII 13944 (ONSC)
13. [\*Harper v Canada \(Attorney General\)\*](#), 2000 SCC 57
14. [\*Ontario Federation of Anglers & Hunters v. Ontario \(Ministry of Natural Resources\)\*](#), [1999] OJ No 1690, 1999 CanLII 14789 (ONSC)
15. [\*Vancouver Board of Parks and Recreation v Mickelson\*](#), 2003 BCSC 1271
16. [\*Vancouver Board of Parks and Recreation v Sterritt\*](#), 2003 BCSC 1421
17. [\*Vancouver \(City\) v O'Flynn-Magee\*](#), 2011 BCSC 1647
18. [\*Tanudjaja v Attorney General \(Canada\)\*](#), 2013 ONSC 5410
19. [\*Power Tax Corp. v Millar\*](#), 2013 ONSC 135
20. [\*R v KRJ\*](#), 2016 SCC 31
21. [\*R v Smith\*](#), [1987] 1 SCR 1045
22. [\*Batty v City of Toronto\*](#), 2011 ONSC 6862

## Schedule "B" – Statutes Cited

### TORONTO MUNICIPAL CODE, CHAPTER 608, PARKS

#### **§ 608-7. Encroachment.**

Unless authorized by permit, no person shall encroach upon or take possession of a park by any means whatsoever, including the construction, installation or maintenance of a fence or structure, the dumping or storage of materials or plantings, or planting, cultivating, grooming or landscaping.

#### **§ 608-9. Access.**

A. Unless authorized by a parks access agreement, no person shall access or occupy a park for non-recreational uses, or to access an adjacent property.

B. Unless authorized by permit, no person shall use, enter or gather in a park between the hours of 12:01 a.m. and 5:30 a.m.

#### **§ 608-13. Camping and lodging.**

Unless authorized by permit, no person shall dwell, camp or lodge in a park.

#### **§ 608-14. Tents and structures.**

Unless authorized by permit, no person shall place, install, attach or erect a temporary or permanent tent, structure or shelter at, in or to a park.

**B E T W E E N:**

**BLACK, et al.**  
*Applicants*

**and**

**CITY OF TORONTO**  
*Respondent*

ONTARIO  
SUPERIOR COURT OF JUSTICE

Proceeding commenced at  
TORONTO

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