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PANHANDLING FOR CHANGE IN CANADIAN LAW

DINA GRASER*

I. INTRODUCTION

Over the last decade, the “panhandling problem” in major cities in the U.S. and Canada has brought about a growing body of legislative responses by municipalities, states and provinces. This is not a new phenomenon. For centuries, cities around the world have tried to find a way to deal with street people, who have been variously classified as indigents, vagrants, tramps, the homeless or simply the poor. Measures for coping with begging and panhandling in particular have ranged from the institution of poorhouses and parish charities to government relief programs and workfare.1

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1. For a complete discussion of the history of regulating such populations, see F. Fox Piven and R. A. Cloward, Regulating the Poor: The Functions of Public Welfare (New York: Random House, 1971).
This article describes legal challenges to anti-panhandling laws currently underway in Canada, sets out an analysis of the Canadian claims under the Charter of Rights and Freedoms, and canvasses the judicial results of similar challenges in the United States.

a) Definition of Terms and Scope of this Paper
Laws which restrict or ban begging are often part of general “nuisance” legislation governing behaviour in public spaces. This paper centres on the effect of such legislation on panhandlers, whom I define as those who ask passers-by for financial assistance in public places, whether by speech or by conduct. I also restrict my definition to those whose conduct is peaceable, as legislation defensible under the Charter already exists in most cities to capture conduct that is abusive, threatening or disorderly. The terms “panhandler” and “beggar” will be used interchangeably in this article.

One of the challenges in making Charter arguments on behalf of panhandlers, particularly under section 15, is the difficulty in locating them within a specific group: for example, “the poor” and “the homeless” are terms which are often used interchangeably in describing those who panhandle. However, while all those who panhandle can almost always be called poor, not all the poor panhandle. Similarly, those who panhandle may be homeless, but panhandling may also be a means by which they purchase shelter, either on a temporary or permanent basis. In theory, both homelessness and poverty can also be seen as mutable states; many poor people move in and out of homelessness and could arguably move in and out of conditions of poverty. However, since regulations of the sort discussed in this article tend to be aimed at the visibly poor, and since chronic poverty tends to be a difficult category to escape, I will use the general category of poverty as a group within which panhandlers can be located.

The causes of poverty are complex, and are well documented in books and articles across Canada and the U.S. This paper does not deal with the root causes of begging and homelessness, except as they are incidental to the argument. This article also limits

3. For example the Criminal Code, R.S.C. 1985, Chapter C-46 [hereinafter the Criminal Code], s. 264.(1) Criminal harassment (“No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct...that causes that other person reasonably, in all of the circumstances, to fear for their safety or the safety of anyone known to them”; s. 264.1(1) Uttering Threats; s. 265.(1) Assault (including attempted assault, threatened assault, or begging while openly wearing or carrying a real or imitation weapon); s. 269. Unlawfully causing bodily harm; etc.
its discussion of efforts to regulate panhandling to urban areas, where the phenomenon is most apparent and most troubling.

b) The "Beauty Myth" of Public Order

While governments ascribe a variety of purposes to anti-panhandling legislation, the underlying motive of all of the ordinances can fairly be described as answering a perceived need for public order. Large numbers of beggars on the street indicate a social problem of major and growing proportions. The prevailing view was set out eloquently in the introduction to a New York District Court judgment, *Loper v. New York*:

As Alfred Hitchcock, the master of cinematographic terror and suspense, is reported to have said, "terror results from disorder," and begging, the subject of the statute here under constitutional attack, over time has been viewed as the archetypical expression of disorder. Since the early days of western civilization, people have sought to define the conduct that violates society's sense of order and that which society permits or even encourages. Yet, as civilization as a whole has moved forward, people have learned time and again that suppressing speech and conduct deemed contrary to a society's sense of order merely masks the underlying disorder. These motions for summary judgment require the resolution of a modern-day constitutional challenge to a statute which provides that loitering for the purpose of begging is a crime.

Anti-panhandling legislation is a governmental attempt to "take back the streets" for those members of urban communities who are not poor. A common theme in American academic writing on the subject is "compassion fatigue"—the impatience and growing intolerance on the part of the public with being confronted with the needy on a daily basis. The view taken by governments, as put by Robert Ellickson, is that "to be truly public, a space must be orderly enough to invite the entry of a large majority of those who come to it. Just as disruptive forces at a town meeting may lower citizen attendance, chronic panhandlers, bench squatters, and other disorderly people may deter some citizens from gathering in the agora." It is noteworthy that even in this introductory extract from Ellickson's article, panhandlers and "bench squatters" are characterized as disorderly, even though they may be sitting or standing in a completely non-intrusive way. To Ellickson, and to the governments who enact anti-panhandling legislation, the very existence of panhandlers suggests disorder. This normative assumption is in tension with those who view beggars as part of a natural plurality of a city, and who see the beggar's message as a crucial signifier of the social structure of the day. Ellickson's standpoint is also informed by those who espouse the "Broken Windows"

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5. 802 F.Supp. 1029.
theory. As put forth by George Kelling and James Q. Wilson in their original landmark article in *The Atlantic Monthly*, small signs of disorder—such as broken windows—give rise to a sense that nobody cares about the community, and paves the way for more serious criminal activities. This thesis has been used, for example, to justify crackdowns on crime and on the homeless in New York (although it has not been proved that cracking down on homelessness *per se* has reduced crime). Kelling himself has been careful not to espouse the current trend towards “zero tolerance” so popular in current policing philosophy. At the 1997 Jane Jacobs conference in Toronto (Ideas that Matter) he spoke of the need to use negotiation and persuasion rather than force in dealing with street people. He stressed the importance of police collaboration with local community organizations to reduce opportunities for “disorderly behaviour.” In his article, he notes the ethical dilemmas caused by arresting street people on charges such as “vagrancy” or “public drunkenness”—charges with scarcely any legal meaning” and clearly recognizes other concerns: “How do we ensure...that the police do not become the agents of neighborhood bigotry? We can offer no wholly satisfactory answer to this important question.” Yet, he still favours the criminalization of panhandling.

Such criminalization sets up two false equations. The first is that removing beggars from the streets will actually eliminate beggars. The second is that, in making the public feel safe, they actually are safe. Both are dangerously simplistic notions which contribute to the “beauty myth” of public order. In this paper, I suggest that anti-panhandling laws criminalize the poor, censor criticism of social problems, and visually sanitize streets and public places to the detriment of society at large. I also argue that such legislative actions are in serious conflict with the values of free expression, individual liberty and human dignity which underlie the *Charter*.

**II. CANADIAN CASES IN PROCESS**

Several Canadian cities have enacted anti-panhandling by-laws, two of which are currently the subject of challenge in the courts. In addition, the Province of Ontario recently passed the *Safe Streets Act*, a province-wide version of the municipal by-laws. While each law differs slightly, the general approach is the same in each. A more thorough examination of the purposes and constitutionality of these laws is set out in section III of this paper. The relevant provisions of the by-laws of Vancouver and

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12. Cities with some form of anti-panhandling or anti-squeegeeing legislation include Saint John, NB; Vancouver, BC; Sudbury, ON; Winnipeg, MB; Saskatoon, SK; Québec City, QC; Edmonton, AB; Calgary, AB; Kingston ON; and Hamilton, ON.
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Winnipeg and the current status of the claims are set out below. In addition, a short section deals with Ottawa's anti-panhandling by-law, which was rescinded in January of 2000.

A. **Vancouver**

* A By-law to Regulate and Control Panhandling*¹³

THE COUNCIL OF THE CITY OF VANCOUVER, in open meeting assembled, enacts as follows:

1. This By-law may be cited as the “Panhandling By-law”.

2. In this By-law

   “panhandle” means to beg for or, without consideration, ask for money, donations, goods or other things of value whether by spoken, written or printed word or bodily gesture for one’s self or for any other person but does not include soliciting for charity by the holder of a license for soliciting for charity under the provisions of the License By-law,

   “street” includes a public road, highway, bridge, viaduct, lane and sidewalk and any other way normally open to the use of the public, but does not include a private right-of-way on private property,

3. No person shall panhandle on a street within 10 m of
   (a) an entrance to a bank, credit union or trust company,
   (b) an automated teller machine,
   (c) a bus stop,
   (d) a bus shelter, or
   (e) the entrance to a liquor store.

4. No person shall panhandle from an occupant of a motor vehicle which is
   (a) parked,
   (b) stopped at a traffic control signal, or
   (c) standing temporarily for the purpose of loading or unloading.

5. No person shall panhandle on a street at any time during the period from sunset to sunrise.

6. No person shall sit or lie on a street for the purpose of panhandling.

7. No person shall continue to panhandle on a street from a person after that person has made a negative response.

9. Every person who commits an offence against this By-law is liable to a fine and penalty of not more than $2,000 and not less than $100 for each offence.

For the most part, this by-law is tailored to address panhandling in specific locations. However, it is noteworthy that in addition to restricting such activity to within ten

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¹³ City of Vancouver, By-law No. 7885, *Panhandling By-law* (30 April 1998).
metres of banks, bus stops, liquor stores, etc., it also imposes a form of “blanket ban” in clause 6, which states “No person shall sit or lie on a street for the purpose of panhandling.” This seems to assume that a standing panhandler is less offensive than someone who merely sits on the street with a baseball cap in front of them. This is peculiar, since a standing or walking panhandler is arguably more intrusive to a passerby than a sitting panhandler. It is also overly broad, since the same person who sits on a street with his cap in front of him may not be panhandling at all, but may simply be tired. As a result, it opens the door for arbitrary enforcement by officials and catches conduct which may be completely innocent.

The B.C. Public Interest Advocacy Centre (BCPIAC) is representing three groups who are filing a claim challenging the constitutionality of the by-law. While preparing the claim, a panhandler actually received a ticket and BCPIAC intended to support his challenge in provincial court. However, when the City of Vancouver received notice of the challenge and the intent to put forth a constitutional question, the City dropped the charges. Only one ticket has ever been given in Vancouver, but panhandlers in the City claim they are nonetheless being harassed to “move along” under threat of being ticketed. Because it is unlikely that the City will press charges against anyone else at this point, and because of the relative inability of panhandlers to pursue a challenge even if they did, BCPIAC’s clients are planning to sue for a declaration from the Supreme Court of B.C. that the law is contrary to the Charter and ultra vires as an invalid exercise by a municipality of federal criminal law power. They will also argue that the municipality exceeded its authority under the provincial legislation, i.e., that there is no authority in the Vancouver Charter for the City of Vancouver to pass a by-law regulating individuals about the time, place and method of panhandling, nor to enact a by-law that discriminates between classes of individuals. No trial date has yet been set.

B. Winnipeg

Winnipeg’s by-law is titled “A By-law of the City of Winnipeg to regulate and control panhandling.”

THE CITY OF WINNIPEG, in Council assembled, and not withstanding the Canadian Charter of Rights and Freedoms, enacts as follows:

1. This By-law may be cited as “The Panhandling By-law”.

... “panhandle” means to beg or ask, whether by spoken, written or printed word, for donations of money or other things of value for one’s self or for any other person, except where the solicitation has been authorized pursuant to The Charities Endorsement Act; ...

14. The federated anti-poverty groups of B.C., the National Anti-Poverty Organization and End Legislated Poverty Society.

15. City of Winnipeg, By-law No. 6555/95, A By-law of THE CITY OF WINNIPEG to regulate and control panhandling (26 January 1995).
“street” means any roadway, sidewalk, boulevard, place or way, which the public is ordinarily entitled or permitted to use for the passage of vehicles or pedestrians and includes a structure located in any of those areas;

3. No person shall panhandle within 10 metres of:
   (a) the main entrance to a bank, credit union or trust company;
   (b) an automatic teller machine;
   (c) a public entrance to a hospital;
   (d) a bus stop; or
   (e) a bus shelter.

6. No person shall panhandle from an occupant of a motor vehicle which is:
   (a) parked;
   (b) stopped at a traffic control signal; or
   (c) standing temporarily for the purpose of loading or unloading.

7. No person shall panhandle after sunset.

8. No person shall continue to panhandle from a person, or follow a person, after that person has made a negative response.

9. Penalties for the failure to comply with the provisions of this By-law shall be in accordance with Section 149 of The City of Winnipeg Act which provides:
   “149(1) Any person who contravenes or fails to comply with ... 
   (b) a provision of...a by-law...for which no other penalty is provided in this Act, is guilty of an offence and liable to a fine not exceeding $1000 in the case of an individual or...to imprisonment for a term not exceeding 6 months or to both.
   149(3) The justice imposing a penalty on a person under subsection (1) may, in addition to imposing the penalty, order the person to observe the provision that was breached ...”

Like the Vancouver by-law, the Winnipeg ordinance is tailored to address panhandling in specific locations and at specific times. While it does not have a “blanket ban” provision on sitting or lying in roadways, it does, peculiarly, use wording similar to section 33 of the Charter of Rights and Freedoms, commonly known as the “notwithstanding clause,” in its preamble. The notwithstanding clause gives a province the right to “opt out” of the Charter for the purposes of passing certain legislation for a period of five years. However, that section can only be invoked by “Parliament or the legislature of a province” and only in relation to statutes or parts of statutes passed by those bodies. It is clear that Winnipeg City Council is not a legislature, nor are their by-laws “an Act of the legislature” which can operate notwithstanding sections 2, 7 or 15 of the Charter. It is also clear that by incorporating this provision in its preamble, the City of Winnipeg is indicating its awareness that the by-law is vulnerable to constitutional challenge.

The National Anti-Poverty Organization has been granted standing to pursue a claim at the Court of Queen’s Bench and is being represented by the Public Interest Law Centre (PILC) in Winnipeg. The by-law is being challenged both on a jurisdictional basis, similar to that in Vancouver, and on constitutional grounds. PILC will be making arguments under Charter sections 15 (the equality provision), 2(b) (freedom of
expression) and 7 (life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice). Under section 15, they are arguing that the ordinance denies panhandlers equal protection and benefit of the law and equality before and under the law. They submit that the by-law singles out panhandlers from the rest of the population regardless of whether or not they are causing any disturbance, essentially so that “the general population may avoid the discomfort of proximity to indigents on the street”\textsuperscript{16} and that, both in form and substance, panhandlers are denied the right to use and enjoy public space based on personal characteristics which are analogous to grounds of discrimination listed in the Charter. The section 2 argument rests on the simple fact that panhandling is a form of expression denied by the by-law. Under section 7, the by-law is said to infringe the liberty interest because of a potential jail term for an offence; as in Vancouver, PILC is also arguing that it is counter to the principles of fundamental justice because it is overbroad, catching peaceful conduct that is “incapable of causing any blameworthy harm.”\textsuperscript{17} They are seeking a declaration that the law contravenes the Charter and is \textit{ultra vires}. A trial date has been set for February of 2000.

C. Ottawa

In Ottawa, the anti-panhandling provision was one of several included in a by-law under the general heading of public nuisances:\textsuperscript{18}

WHEREAS the purpose of this by-law is to provide for an environment free from certain public nuisances which may degrade the quality and tranquillity of life:

THEREFORE the Council of the Corporation of the City of Ottawa enacts as follows:

BEGGING
1. No person shall go from door to door in private or commercial and business establishments or place himself in or upon any highway or public place to beg or receive alms for himself or any other person, association or corporation, save and except, donations requested on behalf of institutions corporate or otherwise which are established for charitable purposes.

1A. The provisions of Section 1 shall not apply to street performers or street musicians who receive voluntary public contributions for their performance.

... 

OFFENSE
8. Every person who contravenes any of the provisions of this by-law is guilty of an offense and on conviction is liable to a fine of not more than five thousand ($5,000) dollars, exclusive of costs.

\textsuperscript{16} Taken from Statement of Claim filed by PILC on behalf of NAPO in 1995.
\textsuperscript{17} \textit{Ibid.}
\textsuperscript{18} City of Ottawa, By-law No. 117-91, \textit{A by-law of The Corporation of the City of Ottawa respecting public nuisances} (15 May 1991).
Of the three Canadian by-laws under discussion here, this is the only one which could properly be called a "blanket ban." No effort was made to tailor this ordinance at all with the exception of an exemption for street performers or musicians. As such, it was the one most vulnerable to constitutional challenge.

A panhandler received a ticket under this by-law in 1999 and a trial date was set for February of 2000. The Canadian Civil Liberties Association had planned to intervene in the case. As in the other two cities, a declaration of invalidity and unconstitutionality under the *Charter* would have been sought, based on the infringement of sections 2, 7 and 15 using similar arguments to those being made in Winnipeg. In light of the generality of the provision, a compelling argument existed that the legislation was not only overbroad, but targeted panhandlers by virtue of their perceived status rather than by their activities.

In the fall of 1999, however, the Province of Ontario introduced Bill 8, the *Safe Streets Act*. Once this bill took effect (on January 31, 2000), the city of Ottawa rescinded its own anti-panhandling by-law, presumably finding it redundant, and withdrew the charges against the claimant.

D. The *Safe Streets Act*

Ontario's recently enacted *Safe Streets Act* prohibits not only aggressive solicitation, but any solicitation of a "captive audience" in specified locations, similar to the Vancouver and Winnipeg by-laws. It also prohibits the disposal of "certain dangerous things" in public places, including used condoms, syringes and broken glass. Punishment for either panhandling or disposing dangerous items is a first-time fine of $500, followed by up to $1000 or imprisonment for up to six months for subsequent convictions. Relevant provisions are set out below:

**Bill 8, 1999**

An Act to promote safety in Ontario by prohibiting aggressive solicitation, solicitation of persons in certain places and disposal of dangerous things in certain places, and to amend the Highway Traffic Act to regulate certain activities on roadways

... Definition

1. In sections 2 and 3,

   "solicit" means to request, in person, the immediate provision of money or another thing of value, regardless of whether consideration is offered or provided in return, using the spoken, written or printed word, a gesture or other means.

   ...

2. (1) In this section,

   "aggressive manner" means a manner that is likely to cause a reasonable person to be concerned for his or her safety or security.

Solicitation in aggressive manner prohibited

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(2) No person shall solicit in an aggressive manner.

Examples

...  

1. Threatening the person solicited with physical harm, by word, gesture or other means, during the solicitation or after the person solicited responds or fails to respond to the solicitation.

2. Obstructing the path of the person solicited during the solicitation or after the person solicited responds or fails to respond to the solicitation.

3. Using abusive language during the solicitation or after the person solicited responds or fails to respond to the solicitation.

4. Proceeding behind, alongside or ahead of the person solicited during the solicitation or after the person solicited responds or fails to respond to the solicitation.

5. Soliciting while intoxicated by alcohol or drugs.

6. Continuing to solicit a person in a persistent manner after the person has responded negatively to the solicitation.

...  

Solicitation of captive audience prohibited

(2) No person shall,

(a) solicit a person who is using, waiting to use, or departing from an automated teller machine;
(b) solicit a person who is using or waiting to use a pay telephone or a public toilet facility;
(c) solicit a person who is waiting at a taxi stand or a public transit stop;
(d) solicit a person who is in or on a public transit vehicle;
(e) solicit a person who is in the process of getting in, out of, on or off a vehicle or who is in a parking lot; or
(f) while on a roadway, solicit a person who is in or on a stopped, standing or parked vehicle.

Offence

5. (1) Every person who contravenes section 2, 3 or 4 is guilty of an offence and is liable,

(a) on a first conviction, to a fine of not more than $500; and
(b) on each subsequent conviction, to a fine of not more than $1,000 or to imprisonment for a term of not more than six months, or to both.

...  

Arrest without warrant

6. A police officer who believes on reasonable and probable grounds that a person has contravened section 2, 3 or 4 may arrest the person without warrant if,

(a) before the alleged contravention of section 2, 3 or 4, the police officer directed the person not to engage in activity that contravenes that section; or
(b) the police officer believes on reasonable and probable grounds that it is neces-
nary to arrest the person without warrant in order to establish the identity of the person or to prevent the person from continuing or repeating the contravention.

At the time of this writing, no charges have yet been laid under this legislation; however, should the police choose to enforce it aggressively, it seems likely that a constitutional challenge will result. It is odd that aggressive panhandling is included at all in this legislation, since such behaviour is already covered under the Criminal Code (and thus could be subject to a challenge that such criminalization is ultra vires the powers of the province); it also conflates aggressive panhandling with solicitation by those who are under the influence of drugs or alcohol, although drunk panhandlers are not necessarily aggressive. Additionally, this law criminalizes much non-aggressive panhandling, and by including clauses about the disposal of condoms, syringes and broken glass, suggests by inference that all panhandlers are prostitutes, drug dealers or petty criminals. Few would dispute the necessity for curbing aggressive panhandling or would disagree with the prohibitions on disposing of dangerous items. However, the juxtaposition of these items with non-aggressive panhandling signifies an attitude which is prejudicial at the least and dangerously discriminatory when taken to its logical conclusion.

III. PANHANDLING LEGISLATION UNDER THE CHARTER OF RIGHTS AND FREEDOMS: AN ANALYSIS

As noted above, the criminalization of panhandling can be seen to breach three separate rights under the Charter of Rights and Freedoms: section 2 (freedom of expression); section 7 (life, liberty and security of the person); and section 15 (the equality guarantee). I argue that these breaches are interrelated. Anti-begging laws infringe freedom of expression by depriving a panhandler of the ability to express his need, which is a valid and protected form of communication. Limiting expression results in a corresponding deprivation of liberty and security of the person on both the physical and psychological plane, because if a beggar can’t communicate his hunger, he can’t exercise his chosen means to address it—and may have no other means of subsistence available. By restricting expression in this form, the laws also act as blunt weapons to regulate the visible poor, an identifiable and historically disadvantaged group, which conflicts with the Charter’s purported protection of vulnerable groups and its section 15 guarantee of equality before and under the law. Taken together, these infringements show that the state is acting in a fashion clearly inconsistent with the values underlying our Charter of Rights.

A. Section 2 (b) Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

1. Scope of the Right

Freedom of expression is a fundamental freedom under the Charter of Rights, and is one of the core values of a democratic society. Unlike in the United States, freedom
of expression in Canada has almost unlimited scope. As determined by the court in *Irwin Toy,*

"Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution ... so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual... If the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee.22

The right to freedom of expression is subject to a broad and purposive interpretation in the context of the ideals the right was meant to protect.23 As summarized by Dickson C.J. in *R. v. Keegstra,*24 these ideals include:

(1) seeking and attaining truth is an inherently good activity;
(2) participation in social and political decision-making is to be fostered and encouraged; and
(3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom the meaning is conveyed.25

2. The *Irwin Toy* Test

The *Irwin Toy* test has two stages: first, does the activity convey a meaning and thus fall under the sphere of 2(b)?26 Regardless of what kind of speech begging is deemed to be, the simple act of communication involved in asking for assistance undoubtedly conveys meaning as understood by the freedom of expression guarantee.

The second part of the *Irwin Toy* test asks whether the government's restriction of speech is the purpose or simply the effect of a given law.27 As explained by Dickson C.J.C.,

If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain

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26. *Irwin Toy, supra* note 21 at 968-69.
27. *Irwin Toy, supra* note 21 at 972-73.
human activity, regardless of the meaning being conveyed, its purpose is not to control expression.\textsuperscript{28}

In this case, the stated purpose of the three municipal panhandling by-laws under challenge both "controls access by others to the meaning being conveyed" and controls the ability of a panhandler to convey meaning by restricting where and when such expression can (or cannot) take place. Even were the by-laws to pass the purpose test, their effects, as I will discuss below, not only infringe but directly contravene the purpose of the right of freedom of expression.

3. **Begging: Political or Commercial Speech?**

   i) Panhandling as "Political" Speech

The Supreme Court of Canada approaches every section 2(b) case by exploring the interests of the individual and the nature of the speech being restricted in light of these traditional values. While every activity which has "meaning" is protected, it is clear that some expressions are closer to the core of the right than others. Of central importance is the concept of free speech as essential to the functioning of democracy. In \textit{R. v. Kopyto}, Cory J.A. (as he then was) wrote: \textsuperscript{29}

The very lifeblood of democracy is the free exchange of ideas and opinions. If these exchanges are stifled, democratic government itself is threatened...History has repeatedly demonstrated that the first step taken by totalitarian regimes is to muzzle the media and then the individual in order to prevent the dissemination of views and opinions that may be contrary to those of the government. The vital importance of freedom of expression cannot be overemphasized.\textsuperscript{30}

Panhandling has much in common with political speech, in that the need which is expressed and received conveys basic truths about our social condition. It is direct communication which traditionally takes place in public areas (such as streets, parks and plazas) where people tend to congregate. Criminologist Joe Hermer argues that "the activity of 'passing by' and that of being a 'passer-by' is an extremely important form of conduct that constitutes the social relations of public space [and] is part of a wider communicative sphere" which includes such other means of communication as posterizing, leafleting and peaceful picketing or demonstrations.\textsuperscript{31} Writers Helen Hershkoff and Adam Cohen note that "views about the way in which society should be ordered are implicit in the beggar's request for money. Her plea is a direct challenge to prevailing assumptions about the social responsibilities that members of a community owe to each other."\textsuperscript{32}

\textsuperscript{28} \textit{Irwin Toy, supra} note 21 at 974.

\textsuperscript{29} \textit{R. v. Kopyto} (1987), 24 O.A.C. 81 [hereinafter \textit{Kopyto}].

\textsuperscript{30} \textit{Ibid.} at 91.


Speech does not have to be overtly political to be political in effect. It is doubtful that many panhandlers, if questioned, would say that asking for change is a political statement. Yet, an expression of need—the very presence of beggars—clearly makes a political statement, whether intentionally or unintentionally. People are bothered by the sight of homeless people, I would argue, not so much because they feel harassed when asked for change—although that may be the case in some instances—but because, as Professor David Snow says, it's part of "the question of maintenance of social order." When behaviour is not controlled and/or institutionalized, people become nervous; they sense that the social order is breaking down. Since the government is generally responsible for maintaining social order (how things really are, as opposed to the public order, which is how things appear to be) the visible presence of people on the street is an implicit criticism of the system. When there are beggars on the street, something isn't working. The expression of need thus becomes a comment on the social order; ironically, the more beggars there are, the more political their presence becomes. However discomfiting it may be to receive, such expression is a vital component of democratic reality. The "marketplace of ideas" finds in panhandling a valid form of expression that speaks a certain truth, and thus deserves not only to be voiced but to be heard and debated: as U.S. Supreme Court Judge Brennan wrote in Lamont v. Postmaster General in 1965, "[i]t would be a barren marketplace of ideas that had only sellers and no buyers." In trying to legislate panhandling away, the government is trying to hide the visual manifestation of a range of social problems, rather than addressing those problems directly. Less charitably put, the government is trying to censor expression which reflects badly upon itself. Such action is in serious conflict with the values of free exchange and participatory democracy which lie behind the right of freedom of expression.

Anti-panhandling by-laws also target a group which has few other channels of communication. As noted by L'Heureux-Dubé J. in Committee for the Commonwealth of Canada v. Canada:

If members of the public had no right whatsoever to distribute leaflets or engage in other expressive activity on government-owned property (except with permission), then there would be little if any opportunity to exercise their rights of freedom of expression. Only those with enough wealth to own land, or mass media facilities (whose ownership is largely concentrated), would be able to engage in free expression. This would subvert achievement of the Charter's basic purpose as identified by this Court, i.e., the free exchange of ideas, open debate of public affairs, the effective working of democratic institutions and the pursuit of knowledge and truth. These eminent goals would be frustrated if for practical purposes, only the favoured few have any avenue to communicate with the public.

34. Ibid.
35. 381 U.S. 301, 85 S.Ct. 1493, 1497 (1965).
37. Ibid. at 198.
The poor are unlikely to have recourse to avenues other than direct communication. The underlying values of the Charter, which include human dignity, equality, and the protection of vulnerable groups, are called into play by this legislation. In essence, by-laws such as these can be seen as the criminalization of poverty—a theme to which I will return in my section 15 analysis.

ii) Begging as Commercial Speech

Commercial expression can be defined as that which is motivated primarily by the desire for profit. Advertising is an invitation to participate in a commercial transaction: it is arm's length solicitation with the same goal of exchange as its eventual end point. If one defines profit as financial gain, then on its face, begging is an economic transaction. Beggars rarely offer a tangible good in exchange for money. Indeed, the dictionary definition of “beg” is to “ask for (food, money, etc.) as a gift.” Such expression is close to that of charitable solicitation, which offers only the altruistic benefit of supporting a worthy cause in exchange for a donation. It is not, in contractual terms, an “invitation to treat.” As such, calling begging simply commercial speech is inaccurate. However, even if begging were to be considered commercial speech, it would still be protected under section 2(b) in light of Canadian jurisprudence.

The Supreme Court has resisted following the U.S. Supreme Court in overtly assigning different levels of protection to various kinds of speech. In the first Charter case to deal with the subject, Ford v. Quebec (Attorney General), the Court made an emphatic statement about the need to include commercial expression within the scope of 2(b) protection:

> Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian Charter should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the Charter... Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers, plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. The Court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection.

While some commentators have resisted the categorization of economic choices as a constitutional value, this inclusive approach seemed a promising start to civil

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38. Profit is defined as “financial gain” in the Canadian Oxford Dictionary, ed. K. Barber, (Toronto: Oxford University Press, 1998) at 1155
39. Canadian Oxford Dictionary, ibid. at 119 – see also s.v. panhandle, at 1050, “beg for money in the street.”
41. Ibid. at 767.
libertarians. In its next major case dealing with section 2(b), however, the court began qualifying its perspective. In *Irwin Toy*, the court referred to the traditional values underlying the right of free expression, and noted that when dealing with legislation which contravened the right in effect rather than as its purpose, a more specific justification on the plaintiff’s part was required:

The precise and complete articulation of what kinds of activity promote these principles is, of course, a matter for judicial appreciation to be developed on a case by case basis. But the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.43

In other words, the “intrinsic value of expression” espoused in *Ford* was no longer quite enough. Yet, the court in *Irwin Toy* did not address how advertising directed at children fulfilled one of the three traditional rationales for freedom of expression. Nor did they address how a constitutional document, designed to protect individual rights vis-a-vis the state, can protect corporate rights; or how a “corporate person” is to relate to a concept such as individual self-fulfillment. In *Ford*, the court dealt with this problem by judging the speech in question partly by its value to the receiver, as well as to the speaker. There, the power of economic choice was seen as enabling the fulfillment of individual autonomy on the consumer’s part. However, it is worth noting that the issue in *Ford* was not simply commercial speech, but the larger question of economic and political participation by a linguistic minority, which brought it closer to the “core” values underlying the section 2(b) right.

A year later in *Rocket v. Royal College of Dental Surgeons of Ontario*,44 the court struggled again with the question of commercial speech. The expression under consideration in *Rocket* was advertising by dentists, which McLachlin J. characterized as being motivated by economic considerations:

[T]heir loss … is merely loss of profit, and not loss of opportunity to participate in the political process or the “marketplace of ideas”, or to realize one’s spiritual or artistic self-fulfillment … This suggests that restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b).45

McLachlin J. seemed to infer that expression motivated by profit is less important than other forms of expression, quoting Wilson J. in *Edmonton Journal v. Alberta (Attorney General)*:46 “not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.” Yet, she decided that such expression was an important factor in enhancing informed consumer decision-making in the choice of a dentist. Unlike in *Irwin Toy*, where the advertising at issue

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43. *Irwin Toy*, supra note 21 at 977.
45. Ibid. at 247.
46. [1989] 2 S.C.R. 1326
was not considered to be of particular value to the children who were solicited (in fact, the question was whether such advertising was harmful) *Rocket* squarely set out the tension between the “value” of choice to the consumer and the profit-making purpose of commercial expression.

McLachlin J. seemed to suggest in *Rocket* that the profit motive behind the expression makes it less worthy of stringent protection than other speech tied to the traditional values underlying the right. Yet, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, she wrote:

> (J)ust as care must be taken not to overvalue the legislative objective beyond its actual parameters, so care must be taken not to undervalue the expression at issue. Commercial speech, while arguably less important than some forms of speech, nevertheless should not be lightly dismissed.

While this Court has stated that restrictions on commercial speech may be easier to justify than other infringements, no link between the claimant's motivation and the degree of protection has been recognized. Book sellers, newspaper owners, toy sellers—all are linked by their shareholders' desire to profit from the corporation's business activity, whether the expression sought to be protected is closely linked to the core values of freedom of expression or not. In my view, motivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified as an infringement of freedom of expression.

If advertising cigarettes is protected, advertising to children is protected and advertising of dentists is protected, it seems that begging—regardless of any economic motivation from which it springs—should be equally protected under the section 2(b) guarantee. The aspect of begging which is commercial in character is protected, just as that aspect of begging which is political in character is protected. Yet the jurisprudence reveals that the Supreme Court has categorized speech in the first stage of analysis, if only to inform the standard of proof required under section 1. As Bastarache J. wrote in *Thomson Newspapers v. The Attorney General of Canada*:

> “[t]he degree of constitutional protection may vary depending on the nature of the expression at issue... This is not because a lower standard is applied, but because the low value of the expression may be more easily outweighed by the government objective.”

In defining the character of speech, the Court also defines the value of that speech, which in turn raises or lowers the justificatory standard required of the government.

Notwithstanding this nuance, begging is indisputably speech; anti-panhandling laws are directed at regulating that speech. Both aspects of the *Irwin Toy* test are met. Thus a section 1 analysis which investigates the context and legitimacy of such restrictions

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47. [1995] 3 S.C.R. 199 [hereinafter *RJR*]
48. Ibid. at 347 [emphasis added].
50. Ibid. at 943.
is required, weighing the purpose of the by-laws to determine if such infringements may be “reasonably justified in a free and democratic society.”

3. **Section One Analysis**

Once a right is found to have been infringed, the investigation passes to a section 1 analysis. Section 1 of the *Charter* states: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” As stated in *R. v. Oakes* and modified in *Dagenais v. Canadian Broadcasting Corp.*, the test for determining if a right can be limited under section 1 consists of, a) deciding if the state has a pressing and substantial interest served by the legislation; and if so, b) the proportionality test: is the legislation rationally connected to the objective? Are the means chosen minimally impairing of the right in question? Is the effect of the limit proportionate to the legislative objective? Do the salutary effects of the legislation outweigh its deleterious effects? I argue that the purposes of anti-panhandling legislation are not substantial enough to outweigh the infringement of a fundamental freedom, and that even if the objectives were important enough to pass the first stage of the *Oakes* test, it would fail the second stage proportionality test.

a) **Is the government’s objective “pressing and substantial”?**

**Standard of Review**

The purpose of the *Oakes* test is to scrutinize whether government legislation has an objective compelling enough to justify violating a *Charter* right. The right of freedom of expression has generally been held to demand a particularly strict standard of justification. In discussing this issue, both L'Heureux-Dubé J. in her concurring reasons in *Commonwealth* and McLachlin J. in her *Keegstra* dissent referred to the writings of the philosopher F. Schauer. McLachlin J. wrote specifically of the standard of review required in cases involving infringements of freedom of expression:

> Rather than evaluating expression to see why it might be worthy of protection, Schauer evaluates the reasons why a government might attempt to limit expression. Schauer points out that throughout history, attempts to restrict expression have accounted for a disproportionate share of governmental blunders...Professor Schauer explains this peculiar inability of censoring governments to avoid mistakes by the fact that, in limiting expression, governments often act as judge in their own cause. They have an interest in stilling criticism of themselves, or even in enhancing their own popularity by silencing unpopular expression. These motives may render them

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51. *Charter*, supra note 2 (s. 1).


55. *Oakes*, supra note 53 at 136-139.

unable to carefully weigh the advantages and disadvantages of suppression in many instances. That is not to say that it is always illegitimate for governments to curtail expression, but government attempts to do so must prima facie be viewed with suspicion.\textsuperscript{57}

Because of the importance ascribed to the right of freedom of expression, its place as a “fundamental freedom” and the caution that democratic societies should direct towards governmental attempts to restrict expression, a strict standard of review is generally required.

As noted above, Dickson C.J.C. wrote that freedom of speech could be infringed either in purpose or effect. If a government’s purpose was to restrict speech directly, or to restrict the access of others to an expression being conveyed, then it was clearly an infringement of the right. But if the government’s purpose was aimed at different mischief, and the restriction of speech was an ancillary effect of the legislation, the burden then lay on the plaintiff to prove that the speech which was effectively restricted related in some way to the values surrounding the right (\textit{i.e.} the search for truth, political participation and individual self-fulfillment).\textsuperscript{58}

This seems to set a double standard: in the case at hand, if legislation restricting begging is seen as a limitation of speech \textit{per se}, or as an attempt to regulate when, where and how such speech can take place, then such a law infringes the right because it is aimed at content. The plaintiff does not have to prove the actual value of that speech; the onus lies on the government to justify its restriction of it, which is the exercise undertaken in a section one analysis. If, however, a government argues that the purpose of a law is, say, traffic control, and the restriction of speech is merely ancillary to that purpose, then the onus lies on the beggar to explain how his speech relates to the values surrounding the right of expression before the government’s justification even takes place in the analysis. At this point, the difference between a hot dog vendor and a panhandler becomes clear. A municipal by-law forbidding, for example, any commercial transactions from taking place outside a theatre between the hours of 7 PM and 8 PM in order to allow theatregoers unimpeded entrance to the doorway could theoretically be upheld, since it would not aim to restrict speech but to control crowds. The hot dog vendor could presumably stand near the lineup and call out “Great hot dogs down at the corner!” without contravening the by-law. The beggar’s transaction, however, is intrinsic to his expression: whether silent or spoken, the request for funds is both expression and transaction, the more so because of the lack of exchange component. Every law aimed at restricting begging is therefore restricting content, regardless of how it is worded.

Another issue factored into this dynamic by the court in \textit{Irwin Toy} was that of judicial deference to legislative choice. The court noted the difference between situations in which the legislature was acting to protect a vulnerable group or mediating between different groups in society, and those instances where the state was “best characterized

\textsuperscript{57} Keegstra, supra note 24 at 805.

\textsuperscript{58} Irwin Toy, supra note 21 at 977.
as the singular antagonist of the individual whose right has been infringed,"59 for example in criminal law. In the latter circumstances, the court would be more watchful of individual rights; in the former, the court would tend to cede responsibility for mediating between groups to the legislature.

Begging can fall into either category. On one hand, since the laws carry penal sanctions, the state is in the role of the antagonist. Thus, such laws merit a higher standard of review by the courts. On the other hand, the objective of the legislation, as discussed below, can also be reduced to the maintenance of public order, interpreted as removing an element displeasing to the majority from view. This is where the distinction between begging as commercial or political speech becomes relevant. Governments regulate commercial enterprises all the time, through such vehicles as vending permits and zoning regulations. This could be seen as mediating between competing groups who wish to use the same public space for different purposes. What is the difference between telling our hot dog vendor that he can't sell sausages outside a theatre, and telling a beggar that he can't beg outside a theatre? Both individuals affected could protest that their income, and thus their very livelihood, is being affected by the actions of the state in the name of public order. As discussed above, however, a restriction of vending is not necessarily a restriction on expression, while a restriction of begging surely is. “Brother, can you spare a dime?” is a request for funds which meets an economic imperative, but also expresses much more: it is an appeal to a passerby's generosity, based on a recognition of income disparity which in itself makes a political statement about our society. Directly or indirectly, therefore, a beggar's speech is political in nature. This, combined with the penal nature of the sanctions imposed, requires a stringent standard of review on the part of the courts.

b) Purpose of the laws: Public Order
While the by-laws passed in Ottawa, Vancouver and Winnipeg differ somewhat, they share similar characteristics, as noted in section II, infra, and their overriding purpose can be seen as an attempt to impose a sense of “public order.” In each city, there is an underlying presumption that governments can enact such legislation by virtue of their ownership of public property, probably pursuant to provincial powers in subsection 92(13) (property and civil rights), s. 92(10) (Local Works and Undertakings) and subsection 92(16) (matters of a local or private nature) of the Constitution Act, 1867. In Ottawa, the additional purpose of the (now rescinded) by-law, “to provide for an environment free from certain public nuisances which may degrade the quality and tranquillity of life,” further reveals the public order objective. Ontario’s Safe Streets Act (part of which amends the Highway Traffic Act) purports to protect “safety,” but its real motivation, as revealed in government press releases, is more psychological than real: “Ontario’s three justice ministers today said that 1999 was a year of solid progress toward giving families peace of mind about the safety of their neighbourhoods,” leads one release, which also quotes Solicitor General David Tsubouchi as stating “[p]eople have the right not only to be safe, but also to feel safe.”60

59. Ibid. at 994.
60. Government of Ontario, Press Release “Harris government acting to make Ontario a safer place” (30
There is no question that, in general, governments have the authority to regulate public property in the furtherance of public order. Traffic regulations, littering provisions, opening and closing hours for bars, and zoning regulations are just some of the myriad of municipal by-laws to this end. The question at hand, however, is not whether it is within the purview of governments to make legislation for the furtherance of public order. The question is whether the purpose of this particular kind of legislation—i.e. anti-panhandling laws—is pressing and substantial enough to override a constitutionally protected right, and whether blanket bans in particular can be justified.

The Ottawa by-law was the most explicit in its purpose: “to provide for an environment free from certain public nuisances which may degrade the quality and tranquillity of life.” The first question—defining the “environment”—can fairly be understood as public streets and public areas in general. As discussed below, these locations are traditional centres for public discourse of all varieties. As such, the government bears the burden of proving that its objective is substantial enough to override a right which has existed in such arenas for centuries.

The second issue is the tricky one of defining what constitutes quality of life, a vague term which sets out an irretrievably subjective standard. For example: some people enjoy music on the street, whether it comes from store doorways or live artists, because they perceive it as giving the city vitality and rhythm. However, others complain bitterly that such forms of music constitute simple noise and are irritating in the extreme. One person’s life is enriched by the same causes which arguably degrade another’s. Numerous examples of this paradox exist and it is doubtful whether, in the absence of genuinely dangerous, criminal or threatening behaviour, social consensus can easily be found on such issues.

These laws impose a hierarchy, dividing those who are “nuisances” or whose behaviour constitutes a nuisance, from those who are “not.” In this case, the line is explicitly drawn: panhandlers are on one side, and everybody else is on the other. The objective of the laws works against the quality of life and the tranquillity of panhandlers; by virtue of this legislation, they are deemed less worthy of respect and consideration than everyone else. Further, pursuant to the Ontario legislation, they are considered an automatic threat to safety, regardless of their actual comportment on the street.

Few people are untroubled by the sight of homeless people who beg for alms, either actively or passively. Homelessness is not pretty. But people who are solicited for change will generally react, _au moment_, in one of three ways: by giving change; by ignoring the request; or by answering verbally in some way. As a momentary disturbance, it may indeed interfere with someone’s tranquillity; as Ellickson argues, repeated disturbances may become more irritating. However, those who do give may also experience a sense of momentary well-being (the classic byproduct of charity so promoted by various religions.) If someone does not want to give, she can simply walk away without being impeded in her progress. Begging does not generally interfere

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61. “Chronic Misconduct”, _supra_ note 7 at 1169.
with the normal functioning of a street, i.e. pedestrian and vehicular traffic, roadside commercial operations, parades, social gatherings, etc. As the American court wrote in Loper: “the potential listener’s control over this situation is ultimately indistinguishable from his control over the situation in which protected forms of speech are thrust upon him by persons soliciting contributions for charitable organizations on the street or by persons pamphleteering for religious or political causes on his doorstep.”

The notions of “quality of life” and “tranquillity” seem oddly unprepossessing when compared with the infringement of a fundamental freedom. There are many daily and equally “chronic” events which disturb tranquillity as much or more than panhandling: road work which causes drivers to detour far out of their way during rush hour; a brass band marching by a funeral home; the side effects of a children’s baseball game crashing through the window of a home bordering on a public park; picket lines during labour disturbances; overenthusiastic street vendors; or dogs that won’t stop barking. Yet, none of these nuisances are legislated out of sight.

The purposes of the laws also rest on two erroneous premises. First and most importantly, governments assume that people should not see something which may disturb their tranquillity: in this case, the need of other human beings. This gives short shrift to the notion of democracy, which depends for its vitality on a pluralism of views. It can be argued that begging serves an important social purpose by raising awareness of conditions of poverty. Furthermore, it may stimulate debate or impel some people to work to change the situation, either through political lobbying or direct involvement with agencies who work to alleviate poverty and homelessness.

Secondly, the laws rely on a fallacious notion that in making the problem disappear from a visual standpoint, it really will go away; in other words, that the disease of poverty or homelessness will be cured by removing panhandlers, its most visible symptom, from the public eye. This notion of recreating the urban picture was discussed by Joe Hermer in his article about loitering laws in Oshawa, “Keeping Oshawa Beautiful”. He wrote:

The construction of the public nuisance of the loiterer as a visual figure committing offenses against community space enabled officials to construct and deploy a regulatory imaginary which could be governed by an official “vision” of the future ... the power of the police to “move on” public nuisances is suggestive of a technique where people are moved out of sight, out of a picture of an acceptable public... The ability of officials to forge a discourse of regulation through techniques of visualization is so strong that even the most serious concerns about the by-law—that it could offend constitutional rights and liberties and that it was considered ultra vires—could not compete with how the loiterer was visualized as an immoral figure.”

62. Loper, supra note 5 at 1045.

We live in an era where appearances are often more important than reality. The age of television, mass marketing, glossy magazines and shopping malls have delivered the triumph of image over substance. We have become a society addicted to the quick fix: faster is better, cleaner is safer. But do most citizens really believe that forbidding panhandling will alleviate poverty or make beggars disappear? The notion of tranquility rests on an assumption that if people are not presented with images of need on a daily basis, they will not worry about it. In fact, such by-laws merely shift the problem to somewhere else. As pointed out by McLachlin J. in the quote that begins this section, it is quite possible that the real motive for suppressing such expression has less to do with tranquility than of stilling criticism of the state for not dealing with the real problems at hand, i.e. increasing poverty and homelessness. A steady diet of federal and provincial government cuts to social programs, unemployment insurance, social housing and job retraining has resulted in increased numbers of panhandlers as well as higher levels of homelessness and poverty generally. Unfortunately, these problems have been downloaded to the level of government least able to remedy them; instead, municipalities try to block them from sight through anti-panhandling legislation. The Ontario government is most directly implicated in this cycle. Their cuts to welfare and social programs have helped drive people onto the streets; the Safe Streets Act removes the results of their actions. The solution proposed by these laws confuses safety with inconvenience, and does not improve the thinking citizen’s tranquillity or quality of life.

As detailed above, I conclude that the objective of the legislation—to regulate public nuisance and ensure public tranquillity—is vague, un compelling and at odds with the government’s responsibility to ensure free expression to all its citizens in public places, especially expression which is political in effect. As such, it is not “pressing and substantial” enough to pass the strict standard of review of first stage of the Oakes test, and should be struck down.

c) Proportionality test
If the purpose of public order were to be found compelling enough to justify infringing a fundamental freedom, the provision would still have to be examined to see if the means chosen—i.e. the legislative scheme—are proportional to the objectives. The proportionality test balances the objective of the by-law with the right in question. Before examining the provisions in light of the three stages—rational connection, minimal impairment and salutary versus deleterious effects—it is useful to point out some of the contextual issues which inform the balancing act undertaken in the proportionality analysis.

i) Public Property is a Public Trust
American courts focus on the concept of the public forum when dealing with anti-panhandling ordinances (see section IV). As such, they consider where the expression takes place: whether it is in a “traditional” public forum such as streets or parks, publicly owned property that government “designates” for use wholly or partly for expressive purposes, or publicly owned property which is held to fulfill other purposes.
Canadian courts have considered this doctrine, most notably in *Commonwealth*, a case which upheld the right of a group to leaflet in airports. After discussion of the public forum concept, Lamer C.J. wrote:

[I]n the Canadian legal context, it would be preferable to disregard the nominalistic approach developed by the American courts and instead to balance the interests underlying the public forum doctrine. The American experience shows that the "public forum" concept actually results from an attempt to strike a balance between the interests of the individual and the interests of the government. As there is no provision similar to s. 1 of our Charter, the American "public forum" doctrine is the result of the reconciliation of the individual's interest in expressing himself in a place which is itself highly propitious to such expression and of the government's interest in being able to manage effectively the premises that it owns. For example, parks and public roads which have earned the "public forum" classification are in fact places whose functions will generally not be interfered with by the exercise of freedom of expression.64

All of the judges in *Commonwealth* agreed that the issues set out in the public forum doctrine were best addressed as part of a section 1 analysis in the Canadian context, but the three judgments revealed slightly different approaches. Lamer C.J. tended toward a highly functional approach, balancing the interests of the individual against the uses made of the state by the property in question. L'Heureux-Dubé J. was the most protective of the right, finding that freedom of expression would almost always take precedence on public property unless clearly incompatible with the function of a place. McLachlin J. (as she then was) asked first whether the individual's activity in that location furthered the right and balanced the state's interest in limiting expression on that particular property, and second whether the connection between the physical location and the expression under consideration related to the values underlying section 2(b) before finally balancing the rights in question.

Notable in every judgment given in *Commonwealth* was the expression of the belief that, as put succinctly by LaForest J.,

[F]reedom does not encompass the right to use any and all government property for purposes of disseminating one's views on public matters, but I have no doubt that it does include the right to use for that purpose streets and parks which are dedicated to the use of the public, subject no doubt to reasonable regulation to ensure their continued use for the purposes to which they are dedicated.65

A functional approach to public property can go too far, however. Writer Peter Marin points out that as retail areas in urban centres become more "mall-like" in physical form, merchants begin to treat the streets as if they were in fact malls.66 Thus they begin to think of these areas as private spaces, easily subject to regulation. Anti-begging laws play a role in what Marin calls an "urban mercantile campaign against

64. *Commonwealth, supra* note 36 at 152 [emphasis added].
66. The Sparks St. Mall in Ottawa is a perfect example of this phenomenon.
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the homeless." Indeed, he notes that some of the anti-begging ordinances in the U.S. redefine the public function of the street as economic rather than political. As urban areas become gentrified, an incipient contest arises for certain territories between richer and poorer residents, or between businesses and former residents. This conflict of two worlds displaces the poor but, notes Marin wryly, also presents great begging opportunities.67

Notwithstanding this caution, Canadian courts have followed the functional approach of Commonwealth, generally ruling that limitations on such expression will only be allowed when they interfere with the normal operation of a publicly-owned space. For example, in Peterborough (City) v. Ramsden,68 the court asked whether posting on public utility poles interfered with their use as utility poles. Unsurprisingly, Iacobucci J. found that it did not. In a unanimous decision, the court wrote: "posters have communicated political, cultural and social information for centuries. Posterizing on public property including utility poles increases the availability of these messages, and thereby fosters social and political decision-making." Similarly, in United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. KMart Canada Ltd.,70 the court upheld the right of the union to hand out leaflets because such action was not coercive, did not unduly interfere with the ability of consumers to use the store, and did not prevent access to the premises by suppliers or other staff workers. As such, leafleting was not seen as being incompatible with the use of the space and an attempt to limit such expression was struck down. Wrote Cory J:

The distribution of leaflets and posters is typically less expensive and more readily available than other forms of expression. As a result, they are particularly important means of providing information and seeking support by the vulnerable and less powerful members of society... Leafleting, like the postering at issue in Ramsden, is a form of expression that has historically been used by vulnerable and disadvantaged groups.71

Public places have been used for centuries to disseminate information to those who gather there in various forms: posters, placards, leaflets, performance, debates and advertising. Like these kinds of communication, panhandling has historically been a feature of public space. Panhandling is a basic form of social conduct, as it relies on person-to-person interaction; and public space, as discussed above, is an historic forum for such interaction between strangers. Personal contact is the first element of all communication; advertising of any sort is merely a sophisticated proxy which allows the communicator to reach more people than a single voice ever could in a given space of time. As such, panhandling in public places is part and parcel of the diverse, vital and sometimes chaotic nature of democratic society.

69. Ibid. at para. 29.
71. Ibid. at para. 28.
ii) Rights and Obligations of Public Property Ownership

In *Commonwealth*, Lamer C.J. called the government’s relationship to public space a “quasi-fiduciary” right of ownership. This notion of a trust-like relationship assumes that governments not only have a responsibility not to unduly restrict freedom of speech in public spaces, but places a corresponding obligation on them to ensure a right of access for this purpose as an essential part of a functioning democracy. He wrote:

The very nature of the relationship existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns. The “quasi-fiduciary” nature of the government’s right of ownership was indeed clearly set out by the U.S. Supreme Court in *Hague v. Committee for Industrial Organization*, supra, at pp. 515-16:

‘Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.’

The *Charter* itself was created in the recognition that rights and liberties of citizens do not exist in a vacuum, but need to be actively protected by governments and by the justice system. As such, the notion of a positive obligation on the part of a government—i.e. ensuring the right of free speech on publicly owned property—can be seen as consistent with the purposes of a rights-protecting document, and as inconsistent with the purposes of the anti-panhandling laws under discussion.

iii) Rational Connection

If one assumes that the objective of the laws is public order in an aesthetic sense, then the means chosen can be seen as rationally connected on its face. The restoration of public order, defined by the removal of beggars from the streetscape, may indeed make people feel safer. However, if public order means the lessening of crime and a safer environment in a substantive sense, then there is no rational causal connection between the laws, which are largely aesthetic and psychological in nature, and an objective of increased public safety. Legislation to combat crime is quite different from legislation to address distaste. As John Stuart Mill wrote, “[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” Furthermore, he wrote:

...with regard to the merely contingent or, as it may be called, constructive injury which a person causes to society by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself, the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom.

The suppression of panhandling may be rationally connected to a goal of less “annoyance” on city streets, but, to go back to the quote of McLachlin J. on page 63, it may also be politically expedient: it makes people “feel” safer by removing beggars from the street and removes overt criticism of the government’s social policies.

iv) Minimal Impairment

The Winnipeg and Vancouver by-laws, as well as Ontario’s Safe Streets Act, may satisfy a minimal impairment test by virtue of their tailored geographical scope, similar to a time/place/manner restriction used in the United States. The Vancouver “sitting” provision, however, is less likely to be considered minimally impairing of the right. Like the former Ottawa by-law, it is overbroad (in Ottawa, all expressions of need by individuals were prohibited in all public spaces, regardless of whether they were genuinely “panhandling” or requesting a quarter for an emergency phone call). Such legislation has the potential to catch much innocent conduct as well as actual begging. In addition, only the Ontario legislation makes any attempt to distinguish between aggressive forms of begging and peaceful begging, and even the Safe Streets Act appears to lose this distinction once it moves into the prohibition of begging at certain locations.

One of the questions asked in the minimal impairment analysis is whether other alternatives of furthering the legislative objective could reasonably be found. If the objective is construed as furthering public order, it would seem logical that a better-tailored law would address itself to disorderly, obstructionist or aggressive conduct. In fact, provisions already exist for many of these offenses under the Criminal Code. Whether criminal or municipal in form, however, the principle of targeting a narrow range of actual problems is more appropriate than banning, in advance, speech which is tenuously connected to such behaviour.

v) Proportionality: Salutary and deleterious effects

The last stage of the Oakes test examines the proportionality of the infringing measure to the objective as it will be experienced in practice. The refinement made to this stage in Dagenais requires that the salutary effects of the legislation be compared to its deleterious effects.

It is hard to justify the concept that improving the aesthetics of a street for the benefit of the majority truly outweighs the serious subsistence concerns of an underprivileged minority. As discussed above, the practical implications of this legislation are enormous for panhandlers, and are offset by an objective which really addresses a minor inconvenience, if any, to other members of the public. It bears repeating that the salutary effects of the legislation are only salutary for the better-off in our society. The deleterious effects of the legislation, which are further explored in the section 7 argument, far outweigh the salutary effects which might be gained by restoring a measure of “tranquillity” on city streets. The dubious pleasure of being able to walk down a street without being faced by the indigent pales in comparison to the effects on the population targeted by the by-laws.

74. Ibid. at 80.
B. Section 7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice

1. The Scope of the Right

Section 7 is commonly understood to have two distinct parts: the right of life, liberty and security of the person; and the internal qualifier which allows that right to be trenched upon only in accordance with the principles of fundamental justice.

2. Liberty

In *Big M*, Dickson C.J.C. wrote "[f]reedom can primarily be characterized by the absence of coercion or constraint... Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others."^{75}

As already noted, the prohibitions against panhandling apply in purpose to everyone without distinction. In effect, however, the by-laws only restrict the liberty interest of those who panhandle. While the "choice" to panhandle may not be on everyone's list of economic alternatives, it is a viable subsistence strategy and a valid personal choice for a significant segment of the poor and/or homeless population. In *R. v. Morgentaler*,^{76} Wilson J. wrote that the right to liberty guaranteed individuals autonomy to make decisions affecting their private lives. The anti-panhandling provisions prohibit such decisions and, as such, "determine or limit alternative courses of conduct available to others."^{77}

It could also be argued that panhandling constitutes a livelihood for those who practice it. Sociologist David Snow suggests that the traditional definition of work is too narrow: social scientists typically let governments define it because they collect the data. But governments think of work institutionally, in terms of set wages, places and time period. Prof. Snow maintains that there is a world of activity, which he calls "shadow work", devoted to the same ends as "traditional work": they are both legitimate means through which people attempt to survive. In *Wilson v. Medical Services Commission of British Columbia*,^{78} the court wrote that the right to pursue a livelihood affects one's dignity and self-worth, and directly implicates the liberty interest. If panhandling could be seen as a livelihood, then "[t]he effect...of the alleged deprivations... has far reaching implications."^{80}

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76. [1988] 1 S.C.R. 30 [hereinafter *Morgentaler*].
77. *Big M*, supra note 75.
78. Interview with Prof. D. Snow, 2 November 1999. "Shadow work" could include, for example, dumpster diving, selling one's blood (in the U.S.), collecting bottles, etc.
80. *Ibid.* at 188.
3. Security of the Person

In *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*,81 Chief Justice Lamer wrote that the Supreme Court has held on numerous occasions that security of the person includes both physical and psychological integrity. He also concluded that security of the person can extend beyond the context of the criminal justice system: "...s. 7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of the administration of justice, can deprive a person of the s. 7 rights to liberty and security of the person."82

The anti-panhandling by-laws infringe the physical security of those affected clearly and simply: they deprive panhandlers of what may in some cases be their only means of subsistence. Even if a panhandler collects a minimal amount of social assistance, panhandling may be the means by which this amount is "topped up" to allow him to meet his physical needs. The law acts to potentially deprive panhandlers of the ability to meet these needs at the most basic level: food, clothing and shelter. As such, the deprivation of security of the person could also infringe the right to life. As the Supreme Court wrote in *Morgentaler*, "The law has long recognized that the human body ought to be protected from interference by others."83 More specifically in this case, it is the state's interference that infringes the right, since—ironically—it is the "requested interference" of the passer-by which protects the physical subsistence of the panhandler.84

The deprivation of physical security of the person also triggers the right of psychological security of the person. By depriving a panhandler of his means of sustenance, a level of stress and desperation results which has "a serious and profound effect" on his psychological integrity.

In *J(G)*, Chief Justice Lamer opened an intriguing door to the relationship between sections 2 and 7. In his discussion of psychological stress, he noted that:

> [T]he right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action....Nor will every violation of a fundamental freedom guaranteed in s. 2 of the Charter amount to a restriction of security of the person. I do not believe it can be seriously argued that a law prohibiting certain kinds of commercial expression in violation of s. 2(b), for example, will necessarily result in a violation of the psychological integrity of the person. This is not to say, though,
that there will never be cases where a violation of s. 2 will also deprive an individual of security of the person.\textsuperscript{85}

In other words, there are potential situations where a violation of section 2 may result in a deprivation of security of the person. This requires a high threshold: a prohibition against making child pornography, against hate speech, or against expressing religious views in certain situations could be said to infringe a person's psychological integrity where he passionately believes in his views and wishes to communicate them to the public (no matter how distasteful they may be to others). This does not apply, of course, to situations where speech causes actual harm to other people, but laws already exist to address such situations. Panhandling is a perfect example of the Chief Justice's theory: not being able to express one's need causes psychological stress of the severest nature. Further, it affects physical security of the person both because a beggar is prevented from making enough money to eat or find shelter, and because he may be subject to police harassment and potential incarceration.

4. Principles of Fundamental Justice
The principles of fundamental justice are found in the "basic tenets of our legal system" and commonly refer to the individual's interaction with the criminal justice system. In \textit{B(R) v. Children's Aid Society of Metropolitan Toronto},\textsuperscript{86} Lamer C.J.C. broadened the notions of the principles of fundamental justice to deal not just with criminal proceedings but with state action in general: "...the subject matter of s. 7 must be the conduct of the state when the state...invokes the law to deprive a person of liberty through judges, magistrates, ministers, board members, etc."\textsuperscript{87}

The principles of fundamental justice have two aspects: procedural and substantive. Procedurally, the notion of the rule of law is central. If the state is going to infringe an individual's rights, it must not act in an arbitrary or unfair fashion.

An examination of the by-laws reveal no procedural arbitrariness. In Ottawa, the penalty is a fine of not more than $5000; in Vancouver, it is a fine of up to $2000; in Winnipeg it is a fine of up to $1000, or possibly a jail term of up to six months. In Ontario, a first conviction carries a fine of up to $500; subsequent convictions are either a fine of up to $1000 or a prison term of up to six months.

While the basic procedures surrounding the regulations of panhandling do not offend the principles of fundamental justice, the substantive question of "fairness" is worth more thought. Is it "fair" that a "charity" can collect donations for the needy, while the needy themselves are prohibited from doing so? Is the law prohibiting the conduct of asking, or the visual disturbance of being faced with a person in distress? If the law prohibits the conduct of soliciting donations, it seems both arbitrary and unfair that those who are most needy are penalized, while charities whose funds may go to the needy but which may also go to salaries, office space and marketing brochures, are

\textsuperscript{85} J(G), \textit{supra} note 81 at para. 59.

\textsuperscript{86} [1995] 1 S.C.R. 315, [hereinafter \textit{B(R)}].

\textsuperscript{87} \textit{Ibid.} at 340; see also \textit{Reference re Section 94(2) of the Motor Vehicle Act (BC)}, [1985] 2 S.C.R. 486.
not. I am not arguing against the validity of institutionalized charities, nor am I suggesting that they should also be prohibited from soliciting donations: charities play a vital role in our society. I simply point out the inherent arbitrariness of the legislation: it supports abstract need but recoils from the specific.

The effects of this legislation from a substantive point of view fail to meet the principles of fundamental justice in two other aspects. First, the penalty is grossly disproportionate to the crime: it can be probably be assumed that a panhandler with $2000 to spend on a fine doesn’t exist. Second, the by-laws are arguably overbroad. At what point do you distinguish someone who is soliciting alms from someone in an emergency situation who asks a bystander for a quarter to make a phone call? Can a panhandler who turns a pirouette every time he gets a quarter be deemed a street performer and thus be exempt? If someone is sitting on the sidewalk with a sign that says “looking for work” and his baseball cap is overturned beside him, is he begging? There is no bright line which distinguishes innocent from prohibited conduct under these by-laws. As such, they give the police highly discretionary powers. The role of the police is to enforce the law, not to interpret it: the role of government is to create laws that can be enforced clearly and fairly. Constitutional values and the rule of law demand no less.88

C. Section 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 of the Charter reflects the constitutional values which provide equal opportunity to all citizens to participate in society, and reinforce respect for minority groups. The concepts of substantive equality and human dignity inform all of the other Charter rights. The Supreme Court has struggled since the inception of the Charter with the questions of how to define equality, differential treatment and discrimination. The approach has been continually redefined, as in, for example, the landmark case of Vriend89 in which the court ruled that not only government action, but government inaction, could be the basis for finding discrimination under the Charter.90

The Supreme Court brought its equality jurisprudence together last spring when it ruled on Law v. Canada.91 This case, which dealt with the question of whether the denial of survivors’ benefits to those under 35 years old constituted discrimination,

88. As no case which has found a breach of the principles of fundamental justice has ever survived a section 1 analysis, I shall spare the reader the exercise.
90. In Vriend, the plaintiff was fired from a religious college after he disclosed he was gay. When he sought to challenge his firing, he discovered that Alberta’s Individual Rights Protection Act (IRPA) did not list sexual orientation as a grounds for discrimination. He successfully challenged this omission as being discriminatory under the Charter.
gave the court an opportunity to set out clear guidelines for the analysis of section 15 claims.

The *Law* approach asks the court to consider three questions, keeping in mind a purposive and contextual approach to the analysis:

1. Does the law impose differential treatment, in purpose or effect, between the claimants and others?
2. Are one or more enumerated or analogous grounds of discrimination the basis for the differential treatment?
3. Does the law in question have a purpose or effect that is discriminatory within the meaning of the equality guarantee?

1. **Differential Treatment**

The law draws a distinction between those who "beg or receive alms" and those who do not. Ostensibly, it draws a distinction based on an action—those who beg—rather than on a personal characteristic—poverty. In operation and impact, however, it is clear that few people will be soliciting alms unless they are poor. The question thus becomes whether poverty can be considered a personal characteristic, *i.e.* whether poverty is analogous to the other grounds specified in section 15.

In *Andrews v. Law Society of B.C.*, Wilson J. wrote that a ground could qualify as analogous if the people characterized by the trait in question are, among other things, "lacking in political power", "vulnerable to having their interests overlooked and their rights to equal concern and respect violated" and "vulnerable to becoming a disadvantaged group", and furthermore noted that "this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society." 

In *Masse v. Ontario (Ministry of Community and Social Services)*, the Ontario Court of Appeal concluded that the Ontario government’s reduction in the level of social assistance did not create a distinction "as a result of a differential effect" between social assistance recipients and others. The court felt that the rise in unemployment, climate of fiscal austerity, political commitment to reducing the deficit and the impact of the recession had submitted many different sectors of the population to hardship and accepted the government’s assertion that the cuts to social assistance recipients were part of a broad-based program of cuts to all sectors, as opposed to selecting a specific group to bear hardship. Corbett J. particularly noted that it was difficult to separate social assistance recipients from other low income Canadians. While not

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finding differentiation on the basis of personal characteristics of social assistance recipients as a group in this case, the judge wrote: "[i]n another context, social assistance recipients may well constitute an analogous group or a discrete and insular minority, as a historically vulnerable, disadvantaged, and marginalized group."97

In these cases, however, the by-laws do not affect many sectors of society: they are aimed at those who beg. The laws have an unfair impact on a distinct segment of the population. Throughout history up to the present day, it can be generally be said that while all the poor do not beg, all beggars are poor. As such, the broader implication of this legislation is that the state is criminalizing the most visible aspect of poverty. There is a wealth of evidence that shows the poor already suffer a disadvantaged position within Canadian society, from sheer economic hardship, to social perceptions of the poor, to underrepresentation in the democratic political process, both as voters and candidates.98 The legislation reinforces society's disapprobation of the poor, rather than ameliorating it in furtherance of the equality guarantees under section 15(1).

2. Distinction on the basis of enumerated or analogous grounds

Poverty and homelessness affect a wide range of people: single mothers with children, the elderly and the disabled, to name but a few. Indeed, poor people are often members of groups already recognized under section 15 as tending to suffer discrimination. Yet, to dismiss the poor as not being an analogous ground because so many of them are already covered under other enumerated areas is to miss the point. In Vriend, the Attorney-General of Alberta tried to argue that Delwin Vriend, a homosexual, was covered by the Individual Rights Protection Act under other headings: for example, the government lawyer argued famously in his oral submission, should Vriend contract AIDS, he would be covered by the disability provisions of the Act. The Supreme Court rightly pointed out that the purpose of the equality provision was to protect citizens from discrimination on the precise grounds upon which such discrimination occurred. To argue that Vriend could seek recourse under other provisions but not on the grounds of sexual orientation was to force him to deny the very characteristic for which he sought redress. Chief Justice Lamer noted that the general purpose of the Act—to protect citizens from discrimination—was not limited to only those grounds enumerated in section 15(1); the categories of discrimination are not closed.99

A rights-based society which seeks to promote equality and tolerance must be vigilant. Courts have a duty to ensure that the guarantee of equal protection extends not simply to those whom society deems "worthy" of respect and consideration, but to those

97. Ibid. at para. 52
99. From oral argument made by John McCarthy to the Supreme Court of Canada in Vriend, supra note 87.
whose dignity is genuinely impugned by state action. Laws which prohibit panhand-ling purport to do so in the name of public order or, as the Ottawa by-law states, “to provide for an environment free from certain public nuisances which may degrade the quality and tranquillity of life.” Translated, this means: panhandlers are a nuisance because they remind those who are better off of our society’s failure to care for its most needy. Hence, rather than addressing the root cause of the problem—the lack of state support and resources dedicated to helping the poor out of their poverty—these by-laws address only the visual manifestation of poverty. In removing the constant, daily reminders of poverty without addressing its root, the state becomes a conspirator in the act of discrimination.

3. **Contextual Factors: Historic Disadvantage**

In *Law*, Iacobucci J. wrote “…probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group.”

The criminalization of poverty, homelessness and begging have been part of the social fabric for centuries. In *Regulating the Poor*, Frances Fox Piven and Richard Cloward trace the history of beggars and the western relief system from feudal times:

> Even before the sixteenth century, the magistrates of Basel had defined twenty-five different categories of beggars, together with appropriate punishment for each. But penalties alone did not deter begging, especially when economic distress was severe and the numbers affected were large. Consequently, some localities began to augment punishment with provisions for the relief of the vagrant poor.

In 1534, the town of Lyons, France, dealt with an increasing number of beggars by instituting state aid in the form of the “Aumone-Générale,” whose mandate was to “nourish the poor forever.” Write Piven and Cloward “…most of the features of modern welfare—from criteria to discriminate the worthy poor from the unworthy to strict procedures for surveillance of recipients and measures for their rehabilitation—were present in Lyons’ new relief administration.” At almost exactly the same time in England, the government replaced what had been up to that point local parish schemes of charity with a national relief system. “In 1531, an act of Parliament decreed that local officials search out and register those of the destitute deemed to be impotent, and give them a document authorizing begging. Almsgiving to others was outlawed. As for those who sought alms without authorization, the penalty was public whipping till the blood ran.”

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104. *Ibid.* at 15
institutions of workhouses and relief which followed were designed to be so harsh that no one with any conceivable alternative would turn to them:

The workhouse was designed to spur men to contrive ways of supporting themselves by their own industry, to offer themselves to any employer on any terms. It did this by making pariahs of those who could not support themselves; they served as an object lesson, a means of celebrating the virtues of work by the terrible example of their agony. Three years after the Poor Law Commissioners of 1834 decreed the abolition of outdoor relief and the expansion of the system of workhouses, Disraeli accurately said of this reform that 'it announces to the world that in England poverty is a crime.'

Canada moved from a primarily agrarian society in the late nineteenth century to an industrialized nation in the early years of the twentieth century. As in England, this spawned considerable economic instability, causing social reformers to press for a system of social security. Martha Jackman discusses this phenomenon in her article "The Protection of Welfare Rights":

Leacock described the progressive rejection of nineteenth century individualism—the doctrine ‘every man for himself’—and the awakening sense in Canadians of the collective responsibility of society towards its weaker members... In response... the federal and provincial governments began, during and after the first world war, to enact workmen's compensation acts, minimum wage legislation, mothers' allowances and old age pension legislation.

Between the mid-1940s and the end of the 1950s, legislation was brought in to deal with regional disparities in the form of equalization payments, Canada's first unemployment insurance act, family allowances, retirement and disability pensions, old age security and cost-sharing of hospital insurance programs. In 1966-67, the Canada Assistance Plan consolidated existing federal-provincial social assistance programs. Wrote Jackman:

For the first time, social security benefits were extended to the working poor...[but] In the late 1960's, after two decades of steady economic growth, intense public attention was focused on the problem of the continued existence of serious poverty in Canada... The 1971 report of the Special Senate Committee on Poverty...emphasized the structural causes of poverty in Canada, and the disproportionate impact of poverty on women, racial minorities and native people.

After several years of expansion of relief programs by both levels of government, cutbacks began taking place in the mid 1970s in response to high unemployment, rising inflation and the energy crisis.

105. Ibid. at 17 [emphasis in original].
107. Ibid. at 270.
108. Ibid. at 273.
109. Ibid. at 274.
110. Ibid. at 275.
In a 1998 report to the City of Toronto Homelessness Task Force titled "Trends in Poverty in the New City of Toronto,"" the authors note that despite the economic recovery of the mid-1990s, poverty in Canada has continued to increase. This trend is reflected internationally, particularly in the United Kingdom, the U.S., Australia and New Zealand. The authors quote the Organization for Economic Development and Co-operation as attributing this phenomenon to three main factors: structural economic change ('deindustrialization'); changing patterns of international trade; and technological change which reduces the demand for low skill labour.112 While noting that Canada has done a better job than most of these other countries in keeping pace with market income inequality through social assistance, they note:

There is a worrying tic upward in inequality over the last two years. This coincides with substantial reductions in transfer payments at both the federal and provincial levels... Although detailed data on Ontario is not yet available, it can be safely assumed that the province's overall patterns of poverty are similar to those we have seen for Canada. This means that the underlying trend in Ontario is to a much higher inequality of market income, with lower incomes for the poorest families and an increasing incidence and depth of poverty, partially disguised for the time being by the economic boom cycle. The consequences for the prevalence of poverty in the next economic downturn, which will with certainty come at some time, could be severe. Policy responses to address the issues of poverty or homelessness should therefore take account of this underlying reality.113

In the fall of 1995, the Ontario government cut welfare allowances by 21.6% and tightened eligibility rules. The proportion of adult food bank users who missed meals on a daily basis because they could not afford food rose from 15% in 1995 to 35% in 1996.114

The number of children who lived in families needing food bank assistance increased by 65% to 71,000. The de-institutionalization of psychiatric patients without a corresponding community social safety net means they now form an estimated 11% of the homeless population.116 Official unemployment rates in Ontario are currently about 7%.117 Wrote the Ontario Social Safety Network "Many people can no longer afford transportation to look for work or go to training courses... do not even have money to buy stamps, print resumes or buy newspapers to check job ads... In one training program for welfare recipients, half the participants had to leave classes during a month to get to a local food bank during its operating hours."118

112. Ibid. at 8.
113. Ibid. at 11.
114. Supra note 98 at 10.
115. Ibid.
116. M. Philp "Idea of Mentally Ill Homeless in Doubt" The Globe and Mail (04 Nov. 1997), challenging an earlier estimate that 30% of the homeless population were mentally ill.
The rise of poverty and the visible number of homelessness on the streets have given rise to what Prof. David Hulchanski of the University of Toronto calls a “moral panic.”119 People feel threatened by the increasing numbers of homeless people, squeegee kids and beggars on the streets, and fall back on stereotyping homeless people as lazy, undeserving and unworthy of support. This attitude is reinforced by continuing government cutbacks. In the fall of 1999, the Ontario government introduced yet more cuts to the system, including:

- $75-million cut. Purpose: Continuing to reduce welfare rolls
- $25-million cut. Purpose: Streamlining the welfare system
- $8-million cut. Purpose: Helping welfare recipients pursue spousal support.120

Implicit in these cuts is an attitude that by “streamlining” welfare (translation: kicking people off), the lazy will become industrious, find jobs or sell their cottages in the country. As The Globe and Mail reported:

A crackdown on welfare fraud is projected to save $3-million a year. Included in this is a requirement that individuals with second residences, such as cottages, sell them before becoming eligible for welfare. This new regulation has drawn considerable attention, although the Social Services Ministry says there are only 20 such cases in the province and the resulting savings will total about $200,000 a year.121

This gives rise to a peculiar situation. Stereotypes notwithstanding, I think it can fairly be said that most Canadians are worried about homelessness and poverty. At the same time, the state is cutting benefits—which will result in more poverty, not less by any common sense analysis—and then criminalizing the results of its action by introducing anti-panhandling legislation.122 In everyday parlance, this is called punishing the victim. In equality discourse, it can be seen as compounding the historic disadvantage faced by the poor and demonizing them as being unworthy of support. As Justice Iacobucci wrote in Law of groups suffering from pre-existing disadvantage, “It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.”123 His words ring
true in this context. Recognition of the poor and the homeless as an analogous group entitled to equal protection of the law would recognize that even the most destitute among us are human beings, worthy of dignity, concern and respect.

4. Discrimination
Do municipal by-laws which criminalize panhandling constitute discrimination under section 15? The purpose of the panhandling by-laws generally consist of eradicating public "nuisances." The purpose of section 15(1) is to "prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration."124

On its face, the purpose of the by-law is not necessarily in conflict with section 15(1). To paraphrase Anatole France, the rich and the poor are equally prohibited from panhandling. As shown above, however, the social and political context of these laws makes their effect discriminatory. Anti-panhandling laws express a society's disapproval of the poor, its rejection of their expression of need, and reinforce stereotypes of the poor as unworthy of "concern, respect and consideration."125 The reasonable person would agree that panhandling laws, in effect, penalize only the poor. It is extremely localized legislation aimed at a specific and easily identifiable group: those who dare ask for help.

The most important value underlying the section 15 right, and the value that the equality guarantee lends to all Charter rights, is that of human dignity. In Law, Iacobucci J. wrote:

Human dignity ... is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits ... Human dignity is harmed when individuals and groups are marginalized, ignored or devalued ... Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?126

John Stuart Mill wrote "For a long time past, the chief mischief of the legal penalties is that they strengthen the social stigma. It is that stigma which is really effective..."127 We don't like to look at a beggar because he reminds us of what we could become. Thus, we punish him for the crime of being poor; we deny him individuality by

124. Ibid. at para. 51.
125. Ibid.
126. Ibid. at para. 53.
condemning beggars en masse, without regard to circumstances or personalities; and
we deny him dignity by treating him as less than human, in order to further distance
him from our perception of ourselves. Such a law is not only discriminatory, but
indulges the smallest part of our natures: that which is beset by fear and intolerance
of difference.

IV. AMERICAN CASE LAW

A number of cases dealing with various forms of anti-panhandling ordinances and
related by-laws have been litigated over the past decade in the United States. Such
laws have been challenged on grounds varying from violations of the First Amendment
(freedom of speech) to the Fourth Amendment (protection against unreasonable search
and seizure), the Fifth Amendment (deprivation of life, liberty or property, without
due process of law), the Eight Amendment (cruel and unusual punishment) and the
Fourteenth Amendment (no law can "abridge the privileges or immunities of citi-
zens"). In addition, by-laws have been struck down for violating the right to travel, because they are too vague to be precisely understood by a person of ordinary
intelligence, or because they are overly broad in their scope, catching innocent activity
as well as impugned conduct.

A. The First Amendment

While the First Amendment, which states "Congress shall make no law...abridging
the freedom of speech, or of the press," sounds very similar to the language used in
section 2(b) of the Canadian Charter of Rights and Freedoms, the two differ consid-
erably from an interpretive standpoint. While Canadian courts count virtually all forms
of expression as lying within the scope of the guarantee, courts in the United States
have been far less generous. Three major differences in approach are notable in
discussing anti-panhandling ordinances.

1) Speech versus Conduct

First, American courts distinguish between speech and conduct. In Canadian jurispru-
dence, if activity conveys a meaning—whether central or otherwise—it is considered
to be within the scope of protection of the guarantee of freedom of expression, as long

128. 'The ... right to travel ... finds no explicit mention in the Constitution. The reason, it has been
suggested, is that a right so elementary was conceived from the beginning to be a necessary concom-
itant of the stronger Union the Constitution created. In any event, freedom to travel throughout the
United States has long been recognized as a basic right under the Constitution.' United States v.

129. For a comprehensive discussion of begging and the First Amendment, see "Compassion Fatigue,"
supra note 7.

130. See discussion of the Irwin Toy test, infra at 56.

131. While almost any expression considered to be political in nature has been safeguarded, the American
courts have, over the years, expanded protection in some areas (advertising, corporate expression,
and boycotting) while cutting back protection in others (picketing, free speech rights of government
employees, privately owned public areas, etc.) See L.H. Tribe, Constitutional Choices (Cambridge:
Harvard University Press, 1985) at 192.
as it is not violent.\textsuperscript{132} In the United States, however [m]ere conduct is not expressive, and legislation may restrict it. But if the conduct is expressive and central to the actor's message, a law restricting that conduct is subject to a free expression challenge.\textsuperscript{133}

Thus, a Seattle ordinance which prohibited sitting or lying on sidewalks in downtown or other commercial zones between 7 AM and 9 PM was not held to violate freedom of expression because sitting was not deemed expressive conduct—regardless of the fact that one of the plaintiffs was sitting with a lap full of pamphlets protesting the by-law under challenge.

2) The Public Forum

The second major point of distinction is the concept of the public forum. In his seminal 1965 article "The Concept of the Public Forum: Cox v. Louisiana," Prof. Harry Kalven, Jr. wrote: "in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom."\textsuperscript{134}

The public forum doctrine suggests that certain areas owned by the government are traditional platforms for public expression and should remain so. For First Amendment purposes, public property is typically divided into three categories: traditional public fora (typically sidewalks, streets and parks); designated public fora, where the government has specifically allowed a property to be used for public access and expressive activity (such as a community centre or university); and all other public property, such as metropolitan airports and subway systems.\textsuperscript{135} A stringent standard of review is applied to restrictions of expression in traditional public fora. As long as the designated public fora retains an open character, it is equally bound to the same standards; but, as long as speech is not restricted on the basis of content, a restriction need only be reasonable to pass muster in the third category.\textsuperscript{136} While the public forum doctrine has come under fire from academic commentators in recent years, it nonetheless continues to form an integral part of the analysis in American caselaw dealing with anti-panhandling ordinances.\textsuperscript{137}

\textsuperscript{132} Irwin Toy, supra note 21 at 970.

\textsuperscript{133} City of Seattle v. McConahy 86 Wash.App 557 (1997) at 567. See also the two-stage test from Spence v. Washington, 418 U.S. at 410-11, which holds that in order to be expression, the speaker must intend the conduct to convey a particular message and there must be a strong likelihood that the audience can understand it.

\textsuperscript{134} [1965] Sup. Ct. Rev. 1, at 11-12.

\textsuperscript{135} See Doucette v. City of Santa Monica 955 F. supp 1192 (1997) paras. 17-22.

\textsuperscript{136} Ibid. quoting the Supreme Court, at para. 22.

\textsuperscript{137} In addition to the cases discussed here, see also International Society For Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S.Ct. 2701 (1992), [hereinafter ISKCON] and Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).
3) Time/Place/Manner Restrictions
The final major distinction between American and Canadian jurisprudence is the time/place/manner restriction, which is somewhat similar to the *Oakes* test used under the Canadian *Charter*. As in *Oakes*, the court looks at the purpose of the ordinance, the objective of the government in enacting it, and whether the government has restricted the constitutional right as minimally as possible in meeting its objective. Two tests come into play, as summarized by the New York District Court in *Loper*:

The *O'Brien* test is normally used to analyze government regulation of conduct that may have an expressive element. Under *O'Brien*, a government regulation is sufficiently justified when: (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest...

Merging with *O'Brien* is the standard used to assess time, place, and manner restrictions on "pure speech" in traditional public fora... Such restrictions are valid provided that they are justified without reference to the content of the regulated speech...are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

a) Is begging "speech" for the purposes of the First Amendment?
The "threshold" question is one of content: strict scrutiny will be given to a regulation which aims at suppressing the content of speech, where a more relaxed standard will be given to one which is content-neutral in its purpose. Thus, how speech is characterized becomes the first part of the test, and can determine the outcome of the case. For example, in *Young v. New York City Transit Authority*, the Court of Appeal upheld a prohibition on individual begging in the subway system, even though the Authority allowed some charitable organizations to solicit on their property. Said the court:

The real issue here is whether begging constitutes the kind of "expressive conduct" protected to some extent by the First Amendment... It seems fair to say that most individuals who beg are not doing so to convey any social or political message. Rather, they beg to collect money. Arguably, any given beggar may have "[a]n intent to convey a particularized message," e.g.: "Government benefits are inadequate;" "I am homeless;" or "There is a living to be made in panhandling." ... The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that passengers generally understand this generic message, we think it falls far outside the scope of protected speech under the First Amendment.

Because the *Young* court felt that begging was not communicative in character, they applied a more relaxed standard to the regulation and upheld the ordinance. In doing

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138. Supra note 5 at 1039.
139. 903 F.2d 146 (1990).
140. Ibid. at 153-154.
so, however, they disagreed with the prevailing interpretation of three Supreme Court cases known as the "Schaumburg Trilogy," each of which had ruled in different contexts that "the nexus between solicitation and the communication of information and advocacy of causes ... implicates interests protected by the First Amendment."142 (Indeed, in International Krishna Consciousness v. Lee (ISKCON I),143 a case about a religious order begging in airports, Rehnquist J. for the Supreme Court noted as if in passing that "It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment."144) The Young court saw a clear distinction between solicitation by beggars and solicitation by charities. However, other rulings note that the conduct itself is indistinguishable: at issue is its source. The court in Loper pointed out "[i]f the solicitor is an organized charity, the solicitation is permitted. If the solicitor is a beggar, the solicitation is criminal."145

Courts which have considered begging to be indistinguishable from charitable solicitation argue that the content of begging is important speech. As noted by the Loper court,

The beggar's personal message...contains a broader social message even when it is not explicitly presented to his audience. This is the flip-side of the "Broken Windows" message ... that social and economic conditions and opportunities and governmental services are such that many people are unable to support themselves and must rely on the freely given alms of others in order to eke out an existence while living on the streets of New York. This too is a critical message that the beggar has a genuine and legitimate interest in presenting to the public.146

In Blair v. Shanahan,147 the District Court also made a point of expressly dissenting from the Young decision:

Young's emphasis on the beggar's motivation seems singularly misplaced in light of the recent Supreme Court cases giving professional fund raisers full First Amendment protection. ... [The] fund raiser may present a clearer message to his listener

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141. In addition to their finding that the law was content-neutral, they also decided that subway cars were not public fora which again allowed a more relaxed application of the O'Brien test.

142. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 105 S.Ct. 3439, 3447 (1985) as quoted in Young, supra note 12. See also Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 104 S.Ct. 2839 (1984) (waiving a requirement that less than 25% of a charity's contributions be used to finance fundraising activities); Riley v. National Federation of The Blind of North Carolina, Inc., 108 S.Ct. 2667 (1988) (striking down a regulation stipulating a maximum amount a fundraiser could charge for his services); and Village of Schaumburg v. Citizens For a Better Environment et al, 100 S.Ct. 1668 (1980) (regulation denying charities a solicitation permit if less than 75% of their contributions went to charitable causes was held invalid). These Supreme Court cases held that solicitations by charities, canvassers, and fundraisers were types of speech protected by the First Amendment.

143. ISKCON, supra note 135.

144. Ibid. at 677

145. Loper, supra note 5 at 1040.

146. Ibid. at 1042.

than the beggar does. But First Amendment protection should not be limited to the articulate. This Court finds that begging constitutes protected speech.\(^{148}\)

b) **Alternate channels of communication**

Key to the time/place/manner analysis is the question of whether alternative channels for communications are open, and this tends to be the ostensible point on which most decisions about panhandling ordinances turn. In *Young*, *supra*, the subway system was not considered to be a designated public forum, partly because the “audience” was unable to escape the solicitation. Additionally, however, the regulation was upheld as being a reasonable time/place/manner restriction because many other locations existed where beggars could solicit freely. Similarly, the court in *McFarlin v. District of Columbia*\(^{149}\) upheld a restriction on begging within 15 feet of a subway escalator top as being narrowly tailored to meet an objective of public safety. In *Smith v. City of Fort Lauderdale*,\(^{150}\) the court found that a prohibition of begging on a five-mile strip of beach frequented by tourists was not unreasonably restrictive as alternative opportunities existed in the rest of the city. In *United States v. Kokinda*,\(^{151}\) the Supreme Court ruled that a post office sidewalk was not a public forum, but that even if it was, the prohibition on soliciting was a reasonable exercise of the time/place/manner distinction\(^{152}\) because other forms of speech, picketing and leafleting were not prohibited—simply the request for funds—and plenty of alternative channels for communication remained available, including a municipal sidewalk nearby.\(^{153}\) Similarly, in *ISKON I*, the Supreme Court banned begging by a religious order in airports because they were not seen as public fora, but took into account the fact that they could beg without impediment on the sidewalk outside the terminal, where almost all travellers would enter or exit.\(^{154}\)

c) **“Blanket” bans of panhandling**

Unlike such specifically tailored ordinances, “blanket” bans on begging do not usually survive First Amendment analysis. In *Blair v. Shanahan*,\(^{155}\) banning begging in “any public place” left panhandlers virtually no alternative places to communicate and was thus struck down. The *Loper* court, dealing with a class action by the homeless (challenging a New York Penal Law which made a person guilty of loitering when

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150. 177 F.3d 954 (1999).
152. It should be noted, however, that this was a 5-4 decision with a strong dissent on the public forum issue written by Justice Brennan.
153. In his dissent, Brennan J. noted with irony that although solicitation was banned as being too obtrusive, large political gatherings attracting thousands of people to the same space were perfectly permissible.
154. *ISKCON, supra* note 137 at 2708-09. In *ISKCON II and III*, 112 S. Ct. 2709, 2715, the Court struck down the companion ban on distributing literature in the airport, as this was not seen as incompatible with the functional operation of the terminal in the way that in-person solicitation might be.
155. *Blair, supra* note 147.
begging in a public place), similarly found a blanket ban untenable.156 A preliminary injunction was granted to the plaintiffs in Berkeley Community Health Project v. City of Berkeley157 because the court adjudged there was a substantial likelihood that the ordinance banning solicitation in certain locations would be shown to be both overbroad and invalid on its face as restricting the content of speech (the parties eventually settled, and the City withdrew the ordinance). Alternatives are seen as important in this context because the poor and homeless lack the financial resources to participate fully in political and social life, and solicitation is their primary method of communication with others. Banning begging outright “deprives beggars of the opportunity to deliver their message, and...deprives some beggars of their only chance for survival.”158

Finally, as Nancy Millich notes, blanket bans can in some cases be seen as “prior restraints” on expression, which allow governments to forbid expression before it even takes place.

Ordinances banning begging are nearly identical to classic prior restraints by judicial injunction, because [they] are a priori determinations by the government that factual information should not be disseminated...A blanket ban on begging authorizes governmental suppression of beggars' speech before its expression...and would constitute 'the most serious and least tolerable infringement on First Amendment Rights.'159

B. Other constitutional rights implicated in anti-panhandling ordinances
American courts have struck down ordinances which are supposedly directed at other forms of conduct, or which include begging as part of a larger category, generally homelessness. After having made several unsuccessful attempts at legislating begging and homelessness (all of which were struck down in the courts), the city of Santa Ana, California enacted a municipal “camping ordinance” which prohibited “camping” and storing personal property in public places.160 The Santa Ana police raided the personal possessions of homeless people on several occasions and made no secret about its desire to drum the homeless out of town. In a challenge to the ordinance, a clearly exasperated state appeal court found the by-law “constitutionally repugnant” on three separate grounds: the right to travel, cruel and unusual punishment, vagueness and overbreadth. Noting the lack of shelter and low-cost housing in Orange County and the complex life of the homeless, the court wrote:

156. “Walking through New York’s Times Square, one is bombarded with messages. Giant billboards and flashing neon lights dazzle; marquees beckon; peddlers hawk; preachers beseech; the news warily wraps around the old Times Building; and, especially around the holidays, the Salvation Army band plays on. One generally encounters a beggar too. Of all these solicitors, though, the only one subject to a blanket restriction is the beggar.” Loper, supra note 5 at 1039.
158. “Compassion Fatigue”, supra note 7 at 348.
159. Ibid. at 337-338.
Panhandling for Change in Canadian Law

The city speciously claims denying petitioners the use of sleeping bags and blankets outdoors does not outlaw necessities of life because the homeless can sleep somewhere else. Where?... Simply put, as in some vintage oater, petitioners are to clear out of town by sunset; and that, of course, is what this ordinance is all about, a blatant and unconstitutional infringement on the right to travel.\textsuperscript{161}

However, at the California Supreme Court, \textit{Tobe}\textsuperscript{162} was reversed. In a narrow and technical reading of the ordinance, the majority found that the plaintiffs could only exert a facial challenge to the by-law, since they had not proved an "as applied" case (i.e. that they had been personally affected by the ordinance). They ruled the by-law did not violate the right to travel, was not unconstitutionally vague, and did not constitute cruel or unusual punishment. The court maintained that the fact that the City of Santa Ana had a history of trying to evict homeless persons could not, by inference, be held to be the purpose of this ordinance when the statute itself did not state so clearly. If a statute did not have a discriminatory purpose and was constructed in such a way as to appear to be constitutional, then it would be—and indeed, was—upheld. It distinguished a similar case, \textit{Pottinger v. City of Miami},\textsuperscript{163} (where a class action against the city's practice of arresting the homeless for sleeping, standing and congregating in public places was held to violate the right to travel and protection from unreasonable search and seizure, as well as being overbroad in nature) on the facts that the plaintiffs in that case could prove they had been personally affected (and therefore had standing to challenge it "as applied") and that substantial evidence had been filed with that court as to the City's true intent.\textsuperscript{164}

Other cases have held that such ordinances are unconstitutionally vague under the due process clause of the Constitution. In \textit{Streetwatch v. National Railroad Passenger Corporation}\textsuperscript{165} the District Court granted a preliminary injunction against Amtrak because the "rules of conduct" under which they ejected "undesirables" from the station ran counter to the "nature of the public invitation to enter and remain in Penn Station extended by Amtrak"\textsuperscript{166} and allowed the exercise of arbitrary enforcement power by officials. In \textit{Papachristou v. City of Jacksonville}\textsuperscript{167} an anti-vagrancy law was deemed imprecise, allowing the police to arrest people because of past or potential criminality. As in \textit{Streetwatch}, the Court noted the potential for arbitrary and unfair

\textsuperscript{161} \textit{Ibid.} at 393.

\textsuperscript{162} \textit{Tobe et al v. Santa Ana et al}, 40 Cal.Rptr.2d 402 (1995) [hereinafter \textit{Tobe}].


\textsuperscript{164} The dissent of Mosk A.J. in \textit{Tobe} upheld the appeal court, maintaining that the majority had chosen to sidestep the real issues in the case. Mosk A.J. also saw the law as being discriminatory in impact, and pointed out "(t)he City... expressly conceded at oral argument that the purpose of the ordinance was to address the problem of homeless persons "camping" in public areas, including the parking lot across from City Hall," concluding "even under a facial analysis we cannot blind ourselves to the evident intent of the Santa Ana ordinance." \textit{Tobe, supra} note 162 at 435, 437.

\textsuperscript{165} 875 F.Supp 1055 (1995).

\textsuperscript{166} \textit{Ibid.} at 1059.

\textsuperscript{167} 405 U.S. 156, 92 S.Ct. 839 (1972).
enforcement of the provision and held it violated the due process clause of the Fifth and Fourteenth Amendments.

While not pointedly directed at begging, by-laws which regulate the conduct of the homeless, “vagrants” or “undesirables” implicitly work to achieve the same goal: the removal of seeming disorder and poverty from the streets.

C. Summary of American Jurisprudence
The United States Supreme Court has not yet ruled on a case specifically dealing with anti-panhandling laws. It is clear, however, that cities are trying numerous ways to address what they see as an overriding problem of public order through ordinances which penalize behaviour ranging from the actively threatening to the aesthetically displeasing. The more recent cases show that courts will uphold such ordinances if they are limited in geographical scope and can show a compelling state interest, especially if they do not pinpoint locations generally considered to be public fora. This becomes a bit of a slippery slope: if governments can claim property is not designated as a public forum (as in the post office sidewalk in Kokinda or the airport terminal in ISKCON), a more relaxed standard of review will apply and ordinances will tend to be upheld if they are “reasonably” tailored. As a result, we could see more and more property being “depublicized.” As noted by Millich, “...future decisions will hold more and more public facilities closed for solicitation or other unpopular activities. The homeless would thus be unable to beg in any locations where the public congregate...(and) would be out of sight and out of the minds of the people who might come to their assistance.”

The larger problem, as noted by writer Peter Marin, is not each single law but the attitude they communicate taken together: the effective legislating of prejudice against the poor. After a decade of fighting such ordinances at the state court level, a pattern emerges that is distinguishable and discomfiting. The question is open as to whether the Supreme Court would recognize this larger pattern if and when a case on point goes to America’s highest court. In light of the Schaumburg Trilogy, it is likely that they would hold that begging is protected speech. However, later cases such as ISKCON and Kokinda may mean that they will apply a more deferential standard of review to ordinances which regulate the time, place and manner of such speech. It remains to be seen if the Supreme Court will extend the protection of the constitution to the most politically powerless and vulnerable population in America, or whether they, too, will bow to the “beauty myth” of public order.

V. Conclusion
Beggars who contravene panhandling by-laws are not publicly whipped any more; in our more polite, “civilized” society, they are simply moved out of the way, in the name of public order. Unless constructive efforts are made to better the beggar’s lot—

168. “Compassion Fatigue” supra note 7 at 273.
through social assistance, genuine employment counseling (as opposed to workfare), increased housing, and better access to social services—the panhandling by-laws become an exercise in large-scale social self-deception. Scapegoating beggars and removing them from sight does a great disservice to the concept of public order. True public order springs from a democratic community which works openly to address its problems, and allows all citizens to see, hear and engage in a debate toward their solutions. In a country governed by a Charter of Rights and Freedoms, we must remember that rights are not privileges for the wealthy, the educated and the fortunate alone. They belong to all of us.