Court File No.: M32206

ONTARIO COURT OF APPEAL

B E T W E E N:

DAVID BANKS et al.

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

APPELLANTS' FACTUM

Mary Birdsell
CANADIAN FOUNDATION FOR CHILDREN
YOUTH & THE LAW
415 Yonge Street, Suite 1203
Toronto, Ontario, M5B 2E7
Tel: 416-920-1633
Fax: 416-920-5855

Peter Rosenthal
ROACH, SCHWARTZ & ASSOCIATES
Barristers & Solicitors
688 St. Clair Avenue West
Toronto, Ontario, M6C 1B1
Tel: 416-657-1465
Fax: 416-657-1511

Counsel for the Appellants

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FACTUM OF THE APPELLANTS

PART I: STATEMENT OF THE CASE

1. This appeal is a constitutional challenge to the *Safe Streets Act 1999*[1] by thirteen homeless men who were charged and convicted of panhandling offences under ss. 2, 3, or 7 of the *Act*. All of the appellants beg as a means of subsistence. Some squeegee-clean car windows at intersections.

2. The appellants submit that the *Act* discriminates against the most vulnerable members of society and deprives them of their most basic rights to expression and personal autonomy.

[1] S.O. 1999, c.8 [the *Act*].

Although the government argues that the aim of the *Act* is to increase traffic safety, the appellants submit that the true purpose is to criminalize squeegeeing and panhandling.

3. Mr. Justice Babe, of the Ontario Court of Justice, entered convictions against all thirteen of the appellants on August 3rd, 2001. An appeal of the convictions was dismissed on March 21, 2002, by His Honour Justice M. Dambrot of the Ontario Superior Court of Justice, in a decision dated January 14, 2005.

4. The appellants respectfully submit that Justice Dambrot erred:

   (a) in failing to find that the *Act* is in pith and substance criminal law;

   (b) in failing to find that the *Act* infringes the right to freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*; [2]

   (c) in failing to find that the *Act* infringes security of the person pursuant to s. 7 of the *Charter*;

   (d) in failing to find that the *Act* infringes equality rights under s. 15 of the *Charter*; and

   (e) in saving the violation of the presumption of innocence by "reading in" to the *Act*.

PART II: SUMMARY OF THE FACTS

5. Agreed Statements of Fact were presented to the trial judge for all thirteen appellants.

THE APPELLANTS

6. The appellants before the Court are thirteen homeless men, described in police notes as being "scraggly", "unkempt", and "dishevelled", or as begging for money for food.

[2] Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11 [the *Charter*].

7. The appellants were all issued *Provincial Offences Act*[3] tickets under the provisions of the *Act*.

The History of Squeegeeing and Panhandling

8. The appellants rely on the fact that there was no challenge, either by way of cross-examination or by the introduction of contrary evidence, to the expertise or the evidence of any of the affiants who gave evidence on the appellants' behalf.

9. "Squeegeeing" developed in Ontario in the mid-1990's as a response to people telling panhandlers to "get a job." When regular employment was not an option, squeegeeing became an increasingly pragmatic alternative.[4]

10. Beginning in 1995, a number of politicians and police officers began publicly linking "squeegee kids" to crime. Professor David Hulchanski, Director of the University of Toronto Centre for Urban and Community Studies, has concluded that this campaign against squeegee kids is what sociologists call a "moral panic", *i.e.*, "a stylized and stereotyped representation by those in power . . . . [of an] alleged threat to societal values . . . . that is emotionally driven, exaggerated and disproportionate."[5] As a result of this "moral panic," squeegee kids were devalued and demonized.

11. Professor William O'Grady has conducted extensive research on street youth in Toronto, including those involved in squeegee cleaning. Professor O'Grady's studies have shown that

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[3] R.S.O. 1990, c. P-33.
[4] *Affidavit of Kolin Davidson*, Appellants' Appeal Book, Vol. 1, Tab G-1 at para. 15 [*Davidson Affidavit*].
[5] *Affidavit of Professor David Hulchanski*, Appellants' Appeal Book, Vol.1 Tab G-5 at paras. 6, 7, 8, 10, 11, 14 [*Hulchanski Affidavit*].

squeegee kids, as compared to street youth of similar backgrounds not involved in squeegee cleaning, reported significantly lower levels of depression and suicidal feelings, and lower incidence of drug use, theft, drug trafficking, and prostitution and other sex trade work.[6]

Government Purpose and Intended Effects

12. The *Act* and subsequent amendments to s. 177(2) of the *Highway Traffic Act*[7] prohibit squeegeeing and other forms of asking for money. At first reading, Attorney General Flaherty described the *Act* as "legislation empowering the police to crack down on squeegeeing and aggressive forms of solicitation experienced by many people in Ontario through panhandlers."[8] Similarly, Premier Harris stated that "This law would give police the tools to crack down on aggressive panhandlers and on squeegee people who harass and intimidate motorists."[9]

13. The government was addressing subjective public feelings of safety, not actual traffic safety. The Attorney-General made this clear when introducing the Bill:

> Our government believes that all people in Ontario have the right to drive on the roads, walk down the street or go to public places without *being or feeling intimidated*. They must be able to carry out their daily activities *without fear* [Emphasis added].[10]

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[6] *Affidavit of Professor William L. O'Grady*, Appellants' Appeal Book, Vol.1, Tab G-7 at paras. 1, 2, 5, 6 [*O'Grady Affidavit*].
[7] R.S.O. 1990, c. H-8.
[8] Ontario, *Official Report of Debates (Hansard)*, 08 (2 November 1999), Appellants' Appeal Book, Vol. 2, Tab I-1 at 1 (Hon. Jim Flaherty).
[9] Ontario, *Official Report of Debates (Hansard)*, 11A (15 November 1999), Appellants' Appeal Book , Vol. 2, Tab J at 44 (Hon. Michael D. Harris (Premier)).
[10] *Supra* note 8 at 1.

14. There is no evidence that the Legislature considered traffic safety when it introduced the *Act*.[11]

15. The current provincial government has introduced, by way of a private member's bill from a Liberal member, a bill entitled *Bill 58, An Act to amend the Safe Streets Act, 1999 and the Highway Traffic Act to recognize the fund-raising activities of legitimate charities and non-profit organizations*.[12] The bill passed second reading on June 17, 2004 and was sent to the Standing Committee on General Government. In support of the bill, a Liberal member stated that the *Act* "puts police officers in a very compromising position. It is not their job to pick and choose which laws they should enforce."[13] Thus, it is the status of the beggar, not the conduct, that is offensive.

16. It is evident that the Ontario government's purpose and intended effect of this legislation was to severely restrict begging, not to make roads safer.

Evidence respecting Traffic Safety

17. Professor Ezra Hauer, a renowned and decorated expert in road safety research and consulting, concluded that the *Act* has no direct bearing on road safety. [14] His conclusions have not been challenged.

18. Professor Hauer found no published report citing soliciting as a causal factor in the

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[11] Ontario, *Official Report of Debates (Hansard)*, 08 (2 November 1999), Appellants' Appeal Book, Vol. 2, Tab I; Ontario, *Official Report of Debates (Hansard)*, 11A (15 November 1999), Appellants' Appeal Book , Vol. 2, Tab J.
[12] 1st Sess., 38th Leg., Ontario, 2004.
[13] Ontario, *Official Report of Debates (Hansard)*, 64A (17 June 2004) at 2998 (Mr. Jeff Leal).
[14] *Affidavit of Ezra Hauer*, Appellants' Appeal Book, Vol. 1, Tab G-3 at para. 3 [*Hauer Affidavit*].

occurrence of any motor vehicle accidents; moreover, after examining hundreds of police records, Professor Hauer found no reference to soliciting as a factor in any accident. In his opinion, the thrust of the *Act* has no direct bearing on road safety and any theoretical dangers associated with soliciting on a highway are independent of the purpose of the solicitation. [15]

19. In a thorough literature and media review, Professor J. David Hulchanski found no statistical evidence that squeegeeing or panhandling present any highway safety issue.[16]

Poverty and Economic Necessity

20. Homeless people, as a class, suffer from a higher prevalence of physical disease and mental illness and have a lower life expectancy than people in the city's general population.[17] Poor people suffer everyday assaults on dignity and self-esteem. Professor Bruce Porter, an expert on international law and discrimination against the poor, states that discriminatory behaviour toward beggars takes the same form as discrimination based on race or sex.[18]

21. Professor Porter's studies show that invidious prejudices and stereotypes about poor people have become more widespread in recent years. Much of the discrimination against poor people is reminiscent of the most destructive forms of racial discrimination, including theories of genetic inferiority.[19] Banning squeegeeing and soliciting to protect public safety relies on

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[15] *Ibid*. at para. 4.
[16] *Supra* note 5 at para. 8.
[17] *Affidavit of Dr. Stephen Hwang*, Appellants' Appeal Book, Vol. 1, Tab G-6 at para. 6 [*Hwang Affidavit*]; *Davidson Affidavit*, *supra* note 4 at para. 12 ; *Affidavit of Dr. George Tolomiczenko*, Appellants' Appeal Book, Vol. 1, Tab G-9 at para. 7 [*Tolomiczenko Affidavit*].
[18] *Affidavit of Bruce Porter*, Appellants' Appeal Book, Vol. 1, Tab G-8 at paras. 26, 29 [*Porter Affidavit*].
[19] *Ibid.* at paras. 10, 25.

prejudices that vilify those in poverty, blaming them for their poverty rather than addressing underlying causes.[20]

22. Dr. George Tolomiczenko is a research psychologist whose work focuses on mental illness among homeless people. He concludes that extremely poor people who panhandle often have mental illnesses that make it difficult or impossible for them to change their social or economic status in society.[21]

23. The economist Armine Yalnizyan deposes that both begging for financial assistance and offering services such as cleaning windshields for a donation have visibly increased in recent years as a result of shrinking economic opportunities for an increasing proportion of the population.[22]

International Law

24. Canada does not comply with international human rights law regarding economic security.[23]

25. Article 11 of the United Nations *International Covenant on Economic, Social and Cultural Rights*, which Canada ratified in 1976, recognizes the "right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."[24]

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[20] *Ibid*. at para. 31.
[21] *Tolomiczenko Affidavit*, *supra* note 17 at para. 11.
[22] *Affidavit of Armine Yalnizyan*, Appellants' Appeal Book, Vol. 1, Tab G-10 at paras. 3, 10, 11.
[23] *Porter Affidavit*, *supra* note 18 at para. 42.
[24] (1976), 993 U.N.T.S. 3 [*ICESCR*].

26. In 1993, the United Nations Committee reviewing compliance with the *ICESCR* focused on Canada's non-compliance with article 11, including Canada's failure to apply the "maximum of available resources" to the progressive realization of this right.[25] The Committee strongly condemned the level of poverty among vulnerable groups, the gap between social assistance rates, and the minimal allocation of resources to address homelessness.[26] The Committee also expressed concern about the failure of lower courts to enforce the right to an adequate standard of living as a component of ss. 7 and 15 of the *Charter*.[27]

27. The same United Nations Committee reviewed Canada's compliance with the *ICESCR* again in 1998, at which time it expressed concern with Canada's "retrogressive measures." The Committee,

> was gravely concerned that such a wealthy country as Canada has allowed the problem of homelessness and inadequate housing to grow to such proportions that the mayors of Canada's 10 largest cities have now declared homelessness a national disaster.[28]

28. In its 1998 review, the Committee criticised Ontario for its discriminatory treatment of the poor. The Committee expressed concern that Ontario proceeded with drastic cuts to social assistance despite evidence that the cuts would force large numbers of people from their homes.[29]

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[25] *Porter Affidavit*, *supra* note 18 at para. 43.
[26] *Ibid.* at paras. 38, 42, 43.
[27] *Ibid.* at para. 44.
[28] *Ibid.* at paras. 45, 47.
[29] *Ibid.* at para. 48.

29. The United Nations Human Rights Committee monitors compliance with the *International Covenant on Civil and Political Rights*.[30] In its review of Canada's compliance in March, 1999, this Committee stated:

> The Committee is concerned that homelessness has led to serious health problems and even to death. The Committee recommends that the State party take positive measures required by article 6 to address this serious problem. [31]

30. Both United Nations Committees found that the extent of poverty and homelessness in Ontario is largely a result of legislative choices that are in violation of international human rights norms.[32] Although the *Act* had not been introduced at the time of Canada's last periodic reviews before the United Nations Committees, Bruce Porter concludes that "it is clear from both Committees' concerns and from the Committees' dialogues with the Canadian delegation that the *Act* would be viewed as inconsistent with international human rights law binding on Canada."[33]

PART III: ISSUES AND ARGUMENT

A. Sections 2, 3 and 7 of the Act are *ultra vires* the Province of Ontario because they invade the FEDERAL GOVERNMENT'S JURISDICTION to enact criminal law

31. Section 91(27) of the *Constitution Act, 1867* grants to the Parliament of Canada the exclusive power to enact criminal law.[34] The appellants submit that the Ontario Government's intent, as well as the effect of the *Act*, was to create criminal laws. The *Toronto Star* ran an article entitled "Squeegee squeeze election '99: Tories tough on street crime," in which the provincial Premier at the time, Mike Harris, referred to squeegeeing as criminal behaviour:

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[30] (1976), 999 U.N.T.S. 171.
[31] *Porter Affidavit, supra* note 18 at paras. 50, 54.
[32] *Ibid.* at para. 58.
[33] *Ibid.* at para. 57.
[34] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II. No. 5.

"We're going to call them what they are - they're crimes . . . . These ordinary people are victims of crime, but there's no statistics to count them."[35]

The Criminal Law Power

32. The classic formulation of the scope of the Federal criminal law power was made by Justice Rand in the *Margarine Reference* case:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened. . . .
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law. . . .[36]

The Pith and Substance of the *Act* is Criminal

33. In determining the pith and substance of legislation, it is necessary to look at both the legal and practical effect of the legislation. This analysis includes "the social or economic purposes which the statute was enacted to achieve, its background and the circumstances surrounding its enactment and . . . the actual or predicted practical effect."[37]

34. In *R. v. Westendorp*, a Calgary by-law was found to be *ultra vires* the Province because, although it purported to be about street safety, its true purpose was to prohibit prostitution.

[35] *Hulchanski Affidavit, supra* note 5 at para. 6.
[36] *Reference re: Dairy Industry Act (Canada) s.5(a)* [1949] S.C.R. 1 at 49-50 [*Margarine Reference*].
[37] *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 483 [*Morgentaler*].

Chief Justice Laskin (as he was then) determined that, since the by-law was triggered only by a solicitation of sexual services, street safety was not its prime concern:

> It is specious to regard s. 6.1 as relating to control of the streets. If that were its purpose, it *would have dealt with congregation of persons on the streets or with obstruction, unrelated to what the congregating or obstructing persons say or otherwise do* . . . . [emphasis added]
>
> If a province or municipality may translate a direct attack on prostitution into street control through reliance on public nuisance, it may do the same with respect to trafficking in drugs. And, may it not, on the same view, seek to punish assaults that take place on city streets as an aspect of street control?[38]

35. The enactment of restrictions on begging results in the same violation of the separation of powers as in *Westendorp*. Both laws focus on soliciting for specific purposes, even though their purported purposes were to increase safety. Following *Westendorp*, the enactment of ss. 2, 3 and 7 should be ruled outside of the Province's jurisdiction.

Section 2 Duplicates Criminal Code Sanctions

36. In *R.v. Morgentaler,* the Supreme Court of Canada found that overlap of the impugned law and the *Criminal Code*[39] is an indicator of provincial invasion into the criminal sphere:

> The duplication of *Criminal Code* language may raise an inference that the province has stepped into the realm of the criminal law; the more exact the reproduction, the stronger the inference that this is the dominant purpose of the enactment.[40]

37. The appellants submit that much of the conduct proscribed by s. 2(2) of the *Act* would contravene provisions of the *Code,* and that much of the language is very similar to that of the *Code*. For example:

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[38] [1983] 1 S.C.R. 43 at 51, 53-54 [*Westendorp*].
[39] R.S.C. 1985, c. C-46 [the *Code*].
[40] *Supra* note 37 at 498.

a) Threatening a person with physical harm, deemed to be aggressive by s. 2(3)(1) of the *Act*, would contravene s. 264.1(1)(a) (uttering threats) of the *Code*; or, if done by an act or gesture, s. 265(1)(b) (assault).

b) Obstructing the path of a person, deemed to be aggressive by s. 2(3)(2) of the *Act*, would contravene s. 175(1)(c) (causing disturbance - loitering, or obstructing persons) of the *Code* if it caused a disturbance.

c) Using abusive language, pursuant to s. 2(3)(3) of the *Act*, would contravene s. 175(1)(a)(i) (causing disturbance - using insulting or obscene language) of the *Code* if it caused a disturbance.

d) Following the person, as in s. 2(3)(4) of the *Act* could be intimidation prohibited by s. 423(1)(e) (intimidation - by following) of the *Code*.

e) Soliciting while intoxicated by alcohol, as in s. 2(3)(5) of the *Act*, would contravene s. 175(1)(a)(ii) (causing disturbance - being drunk) of the *Code* if it caused a disturbance.

f) Continually soliciting in a persistent manner, as described in s. 2(3)(6) of the *Act*, might contravene s. 264(2)(b) (criminal harassment) of the *Code*.

Sections 2, 3 and 7 Attempt to Fill Perceived Gaps in the Criminal Law

38. The purpose of provincial laws must not be to "fill perceived defects or gaps"[41] in the criminal law. Provincial law may not stiffen, supplement, or replace criminal law.[42]

39. Unlike s. 2 of the *Act*, ss. 3 and 7 do not, on their face, duplicate provisions of the *Code*. However, all three impugned sections were introduced together in the same Bill and for the same purpose: to address the perceived danger of the intimidation and harassment caused by squeegeeing and panhandling. Subsection 3(2)(f) of the *Act* and the amendment to s. 177 of the *Highway Traffic Act* each have the effect of completely prohibiting squeegeeing. The

[41] *Ibid.*
[42] *Ibid.*

appellants submit that providing penal sanctions for a person engaging in an activity because the activity might cause people to be fearful is exclusively within the purview of criminal law.

40. Prohibitions accompanied by penal sanctions create a *prima facie* indication that an act is criminal law.[43] Section 5 of the *Act* provides for imprisonment for up to six months upon a second or subsequent conviction.

41. Restrictions on begging have historically been part of vagrancy offences in our criminal law. For example, the 1892 *Criminal Code* included the offences of not having visible means of maintaining oneself and of begging without a certificate.[44] The 1954 *Code* included an offence of begging from door to door in a public place.[45] Offences related to begging were removed from the *Code* in 1972.[46] The fact that the subject, in this case begging, of particular legislation has traditionally been considered the subject of criminal law creates doubts about its *vires* on its face.[47] A province cannot re-enact a criminal provision in its own forum simply to target a particular group of people.

The Lower Court Decision

42. Justice Dambrot, in the lower court decision *R. v. Banks,*[48] cited the result in *Federated Anti-Poverty Groups B.C. v. Vancouver (City)*[49] in support of his finding. The appellants submit that, while that case is distinguishable from the present case, it is also instructive.

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[43] *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board),* [1987] 2 S.C.R. 59 at 71; *RJR-Macdonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199 at 241.
[44] *Criminal Code 1892*, 55 & 56 Vict. c. 29, ss. 207 – 209.
[45] *Criminal Code*, S.C. 1953-1954, c. 51, ss.160, 164, 182 and 372.
[46] *Criminal Code*, R.S.C. 1970, c. 34, s. 175 as am. by 1972, c.13, s.12.
[47] *Morgentaler*, *supra* note 36 at 496.
[48] *R. v. Banks*, [2005] O.J. No. 98 (Ont. S.C.J.) [*Banks*].
[49] [2002] B.C.J. No. 493 (B.C.S.C.) [*Federated Anti-Poverty*].

Unlike the *Act*, the Vancouver bylaw impugned in *Federated Anti-Poverty* did not proscribe threats, abusive language, intoxication, or proceeding behind a person while soliciting. Also, the Vancouver bylaw prohibited neither soliciting near a pay telephone, public toilet, taxi stand or public transit stop or vehicle, nor soliciting a person in a stopped vehicle, unless the solicitor obstructed the progress of the vehicle. In *Federated Anti-Poverty*, Justice Taylor, discussing an earlier, broader Vancouver panhandling bylaw, which was in many ways more similar to the *Act* than the impugned bylaw, stated that "The effect of this By-law on where one might panhandle was draconian."[50]

43. In the present case, Justice Dambrot held that the *Act* was *intra vires* the province, because ". . . the legislation . . . is not intended to control and punish begging, but rather to control the streets and promote public safety and the enjoyment of public property by prohibiting specific types of solicitation that are seen as threatening public safety."[51]

44. Justice Dambrot did not define "public safety." If "public safety" refers to public peace, order and security, which the Hansard comments of the Attorney General and the Premier of Ontario suggest,[52] then the purpose of the *Act* is within the ordinary ends served by the criminal law.

45. Further, Justice Dambrot found it "hard to accept" that the amendment to the *Highway Traffic Act* (in s. 7 of the *Act*), which extended the prohibition on the stopping of motor vehicles to a prohibition on approaching vehicles that are already stopped, "converted it from

[50] *Ibid.* at para. 37.
[51] *Banks*, *supra* note 48 at para. 32.
[52] *Supra*, note 11 at 1-3, 6-8.

permissible legislation promoting traffic safety to impermissible criminal legislation . . . ."[53] However, the evidence indicates that approaching a vehicle that is already stopped, unlike approaching a moving vehicle, is not a factor in the occurrence of motor vehicle accidents.[54] There is no evidence before the court that the *Act* improves traffic safety.[55]

Sections 2 and 3 Violate the *CHARTER OF RIGHTS AND FREEDOMS*

Sections 2, 3 and 7 of the *Act* Infringe the Right to Freedom of Expression Guaranteed by s. 2(b) of the *Charter*

46. The request for alms to buy food is among the most fundamental forms of freedom of expression:

> Asking for a donation is speech, whether it be done orally, by sending a letter, or by publishing an advertisement in the media. And the speech and its content are the heart of the matter; this is neither incidental speech nor speech in form only. To ask for money is to express meaning deliberately.[56]

The expression of society's poorest members, through panhandling and squeegeeing, is charitable speech. Begging is a request for help and a claim of need.

47. Begging can promote the same constitutionally protected speech values as other charitable appeals: "Like other charitable requests, begging appeals to the listener's sense of compassion or social justice, rather than to his economic self-interest."[57] A request for alms clearly

[53] *Banks*, *supra* note 48 at para. 30.
[54] *Hauer Affidavit*, *supra* note 14 at paras. 4-6.
[55] *Ibid.* at para. 5.
[56] *Epilepsy Canada* v. *Alberta (Attorney General)* (1994), 115 D.L.R. (4th) 501 at 503-504 (Alta C.A.).
[57] Helen Hershkoff & Adam S. Cohen, "Begging to Differ: The First Amendment and the Right to Beg" (1991)104 Harv. L. Rev. 896 at 908. See also *Benefit* v. *City of Cambridge*, 424 Mass. 918 (1997); *Loper* v. *New York City Police Department*, 999 F.2d 699 (2d Cir. 1993); *Blair* v. *Shanahan*, 775 F.Supp. 1315 (N.D.Cal. 1991); *C.C.B.* v. *State of Florida*, 458 So. 2d 47 (Fla. Dist. Ct. App. 1984); Arthur Schafer, *Down and Out in Winnipeg and Toronto: the Ethics of Legislating Against Panhandling* (Ottawa: Caledon Institute of Social Policy, 1998).

conveys information regarding the speaker's plight. Begging gives the speaker an opportunity to spread his or her views and ideas on, among other things, the way our society treats its poor and disenfranchised. A beggar's request can change the way the listener views his or her relationship with the poor.

48. Professor Joseph Hermer, whose doctoral thesis at the University of Oxford was entitled "Policing Compassion: The Governance of Begging in Public Space," defines a "gift encounter" as a form of social interaction where one person importunes a gift from another person in public space. Professor Hermer states that to restrict gift encounters is to prohibit a range of expression that is central to the experience of public space in modern life, and that gift encounters are a form of social interaction that is inherently expressive and communicative in character. For those individuals who are socially and economically marginalised, the gift encounter represents an important form of social interaction.[58]

49. The Supreme Court of Canada has developed the following two-stage test regarding freedom of expression:

1) Is the activity within the sphere of conduct protected by freedom of expression?
2) Is the purpose or effect of the government action to restrict freedom of expression?[59]

50. The appellants submit that the very purpose of the *Act* is to prohibit certain activities that are important forms of communication and expression. The expression prohibited by the *Act* is an attempt to communicate poverty and need to wealthier people. The purpose of the *Act* is to

[58] *Affidavit of Joseph Hermer,* Appellants' Appeal Book, Vol. 1, Tab G-4 at paras. 1, 4, 7 [*Hermer Affidavit*].
[59] *Irwin Toy Ltd. v. Quebec (Attorney General*), [1989] 1 S.C.R. 927 at 968, 972 [*Irwin Toy*].

severely limit the circumstances in which the communication of this most basic need can lawfully occur.

51. The *Act* prohibits almost all expressions communicating need and poverty. Section 2 of the *Act* prohibits soliciting while "intoxicated," which is not defined. Since it is estimated that 38% of street youth are substance abusers who take alcohol or drugs daily,[60] this means over one-third of street youth are completely prohibited from begging.

52. The *Act* prohibits people from soliciting near public phones, toilets, ATMs, transit vehicles or stops. The appellants submit that these places were chosen not because they are related to security or safety concerns, but because they are natural locations for people in cities to stop, congregate, and communicate.[61] The effect of the provision is to prohibit begging in a significant proportion of urban Ontario.

53. It is natural for an importuner to shift in the direction of the person being importuned as he or she passes by.[62] Since this could constitute an offence under s. 2(3)(4) of the *Act*, which prohibits proceeding in the direction of a person being solicited, the *Act* prohibits most begging.

54. In the United States, prohibitions on panhandling and squeegeeing have been found to infringe the First Amendment guarantee of freedom of speech. The U.S. authors Helen Hershkoff and Adam S. Cohen have reasoned that no distinction of a constitutional dimension exists between soliciting funds for oneself and for charities.[63]

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[60] *O'Grady Affidavit*, *supra* note 6 at 39.
[61] *Hermer Affidavit*, *supra* note 58 at para. 8.
[62] *Ibid.* at para. 15.
[63] *Supra* note 57 at 908.

55. In concluding that the *Act* does not have the effect of restricting expression within the meaning of s. 2(b), Justice Dambrot applied a *de minimus* test: in his view, the *Act* "has the effect of restricting only the manner of expression in a very limited way."[64] The appellants submit that the restriction on expression is significant, rather than minimal. However, even if the impairment is found to be minimal, it is still an impairment that must be evaluated against s. 1 of the *Charter*, with the onus on the respondent to demonstrate that the impairment is justified.

Sections 2, 3 and 7 Infringe the Right to Life, Liberty and Security of the Person Guaranteed by s. 7 of the *Charter*

The *Act* Infringes the Right to Liberty

The Act *Infringes Physical Liberty*

56. A law that provides a possible penalty of imprisonment engages a *Charter* s. 7 interest and contravenes the *Charter* if it is not in accordance with the principles of fundamental justice.[65] Sections 2, 3, and 7 of the *Act* provide for a maximum penalty of six months' imprisonment on a second conviction. Therefore, the *Act* engages s. 7 of the *Charter*.

The Act *Infringes the Liberty of Personal Autonomy*

57. In *Godbout v. Longeuil (City)*, Justice McLachlin (as she was then) explained that the right to liberty includes "the right to an irreducible sphere of personal autonomy wherein individuals

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[64] *Banks*, *supra* note 48 at para. 125.

[65] *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571; *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 639; *Reference re. ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1140-1141, 1156-1157; *R.* v. *Lucas*, [1998] 1 S.C.R. 439 at 457-458**;** P.W. Hogg, *Constitutional Law of Canada*, 4th ed. looseleaf (Toronto: Thompson Canada, 1997) at 44-7 [*Hogg*].

may make inherently private choices free from state interference."[66] Justice McLachlin cautioned that the sphere of liberty rights is a narrow one, but she included within it the right to choose where to establish one's home, which was "a quintessentially private decision going to the very heart of personal or individual autonomy."[67] The appellants submit that ss. 2, 3 and 7 of the *Act* similarly infringe the right to liberty pursuant to s. 7 because they severely restrict the poor in their private choice to beg for money as a means of subsistence.

The *Act* Infringes the Right to Security of the Person

58. Sections 2, 3, and 7 of the *Act* infringe the right to security of the person by denying people access to the economic means that are necessary for survival. In *Blencoe v. British Columbia (Human Rights Commission)*, the right to liberty was held to include a right to freedom from "serious, state-imposed psychological stress."[68] The protection accorded by this right extends beyond the criminal law.[69]

59. In a study of 360 homeless Toronto youth conducted by Professor William O'Grady, the most commonly cited reason for leaving home was physical and sexual abuse. Approximately 19% of males and 40% of homeless females reported having been sexually abused, and 39% of males and 59% of females reported having been physically abused.[70] The average age at which the children had left home was 15 years old.[71]

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[66] [1997] 3 S.C.R. 844 at para. 66.
[67] *Ibid.*
[68] [2000] 2 S.C.R. 307 at para. 55.
[69] *New Brunswick (Minister of Health and Community Services) v. G(J),* [1999] 3 S.C.R. 46 at 76.
[70] *O'Grady Affidavit, supra* note 6, Appendix "C" at 10.
[71] *Ibid.* at 5.

60. Nearly half of the subjects in Professor O'Grady's study reported having been "thrown out" of their homes, and 43% had spent time in a foster home.[72] Thirty-eight percent of the subjects reported having sought professional advice for a mental health problem.[73] The rate of diagnosed mental illness was more than four times higher than the average of the general population.[74]

61. Professor O'Grady analyzed the very limited options that the homeless have for obtaining income. He concluded that making squeegee cleaning unlawful encourages some of these youth to engage in other unlawful activity, such as theft or dealing in drugs. This cycle in turn increases the risk that they will participate in dangerous or harmful activity such as using hard drugs or being involved in the sex trade, since obtaining conventional employment is very difficult for these individuals.[75]

62. The concepts of "liberty" and "security of the person" are capable of a wide range of meaning, and their interpretation should be a "generous rather than a legalistic one aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."[76] The context of the legislation must inform the *Charter* analysis.[77] Economic rights fundamental to human life or survival may be protected within s. 7 of the *Charter*. The Supreme Court of Canada has held that:

> Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property and contract rights. To exclude all

[72] *Ibid*.
[73] *Ibid* at 34.
[74] *Ibid*.
[75] *O'Grady Affidavit, supra* note 6 at paras. 5-6; *Davidson Affidavit, supra* note 4 at paras. 13, 14.
[76] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 117.
[77] *Singh* v. *Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 206-207.

> of these at this early moment in the history of Charter interpretation seems to us to be precipitous. . . . [I]t appears to us that this section was intended to confer protection on a singularly human level.[78]

63. Much of the expert evidence in paragraphs 12—30 herein indicates that the economic rights of the appellants, as protected by s. 7, have been infringed. The complete ban on squeegeeing is therefore an infringement of the appellants' rights to life, liberty, and security of the person.

64. Justice Dambrot held:

> There was also no evidence that the prohibited activities are inextricably intertwined with the appellants' ability to survive. This is important, because a showing that the legislation interfered with the appellant's ability to survive, rather than with their right to make a living by a particular means might result in a different analysis than the one developed by Babe J.[79]

65. The appellants' uncontradicted evidence demonstrates that squeegeeing and panhandling are, for some, necessary for survival. In the present case, three of the appellants were begging for money to buy food and all of the appellants were homeless.

Section 7 of the *Charter* Should Reflect International Law

66. Although the body of international law does not have the direct force of law in Canada, it has significant normative, interpretative and persuasive force. The Supreme Court of Canada has recognized the importance and utility of international human rights instruments in interpreting *Charter* guarantees. As Justice L'Heureux-Dubé found, writing for the majority in *Baker v. Canada (Minister of Citizenship and Immigration)*, international law is a "critical

[78] *Irwin Toy*, *supra* note 59 at 1003-1004.
[79] *Supra* note 48 at para. 50.

influence on the interpretation of the scope of the rights included in the *Charter*."[80] Similarly, she remarked in *R. v. Ewanchuk* that,

> our *Charter* is the primary vehicle through which international human rights achieve a domestic effect. In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity.[81]

67. As Dickson J. noted in his dissent in *Reference Re Public Service Employee Relations Act (Alberta)*,

> The Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified . . . [T]hese norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions.[82]

68. Furthermore, the Supreme Court of Canada has held that Canadian law must be interpreted to comply with Canada's international treaty obligations.[83]

69. Canada has signed and ratified the *ICESCR*, which guarantees everyone "the right to an adequate standard of living, including adequate food, clothing and housing."[84] By ratifying the *ICESCR*, Canadian governments have agreed as a matter of international law to take steps to protect social and economic rights included in the *ICESCR*, and to ensure that disadvantaged individuals and groups benefit from the equal enjoyment of such rights without discrimination.[85]

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[80] [1999] 2 S.C.R. 817 at para. 70.
[81] [1999] 1 S.C.R. 330 at para. 73.
[82] [1987] 1 S.C.R. 313 at 349-350.
[83] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at para. 31 [*Canadian Foundation*].
[84] *Supra* note 24, article 11.
[85] *Ibid.*, article 2.

70. The United Nations Committee on Economic, Social and Cultural Rights urged Canadian Courts to "adopt a broad and purposive approach to the interpretation of the *Charter*. . . so as to provide effective remedies to violations of social and economic rights."[86] In its most recent review, the Committee reiterated its deep concern that,

> provincial courts in Canada have routinely opted for an interpretation which excludes protection of the right to an adequate standard of living and other Covenant rights. . . despite the fact that the Supreme Court of Canada has stated, as has the Government of Canada before this Committee, that the *Charter* can be interpreted so as to protect these rights.[87]

71. The *Act* is inconsistent with international human rights law binding on Canada.[88] Such limitations on the rights of the accused to the necessities of life deprive them of their rights to life, liberty and security of the person.

Sections 2, 3 and 7 of the *Act* Contravene the Principles of Fundamental Justice because they are Overly Broad and Vague

The Act *is Overbroad and Therefore Contravenes the Principles of Fundamental Justice*

72. A law is overbroad if it is too sweeping in relation to its objective.[89] Sections 2, 3 and 7 of the *Act* are therefore overbroad.

73. The definition of "solicit" in the *Act* does not require that it take place in public, or that it be between strangers. "Solicit" is defined in s. 1 of the *Act*: "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."

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[86] U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations*, E/C.12/1993/5 (1993) at para. 119.
[87] U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations (Canada)*, 10 December 1998, E.C.12/1Add.31 (1998) at paras. 14 and 15.
[88] *Porter Affidavit, supra* note 18 at paras. 42-48.

74. Examples of behaviour that could be "deemed to be soliciting in an aggressive manner" pursuant to s. 2(3) of the *Act* include:

a) stopping a friend as she walks down the street by stepping in front of her to ask for a quarter to make a phone call (s. 2(3)2);

b) a child asking his mother for money to buy candy as they walk together past a store (s. 2(3)4);

c) a husband asking his wife for money after they have shared a bottle of wine at dinner in their own home (s. 2(3)5); and

d) a child persistently begging his father to buy him a bicycle (s. 2(3)6).

75. Five of the six "deeming" subsections proscribe conduct "after," as well as during, the solicitation. There is no time limit placed on the word "after" in the *Act*, and therefore it could be an offence for a solicitor ever to proceed in the direction that the person solicited has gone after the solicitation (s. 2(3)4.).

76. The actions proscribed by s. 3 of the *Act* are also very broad. For example, it is an offence to:

a) ask a friend to re-pay a debt as you both leave an automated teller machine (s.3(2)(a));

b) ask a person for change for a dollar as she and you are waiting to use a public telephone (s. 3(2)(b));

c) ask a person waiting at a bus stop with you for change for a five dollar bill (s.3(2)(c));

d) ask a person to pay his fare on a bus, even if the person asking is the bus driver (s. 3(2)(d));

e) ask a driver waiting to exit a parking lot to pay the charge for parking, even if the person asking is the person employed by the lot owner for that purpose (s. 3(2)(e)); and

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[89] *R. v. Heywood*, [1994] 3 S.C.R 761 at 792 [*Heywood*].

> f) ask your spouse for change to put in a parking meter as you exit a car you have just parked while she remains in the car (s. 3(2)(f)).

77. Similarly, it would contravene s. 7 of the *Act* (the amended s. 177(2) of the *Highway Traffic Act*) for a merchant to cross a road to approach a parked car to deliver a commodity that the car owner had just purchased.

78. Everyday interactions with strangers are also prohibited. For example, stopping a stranger as she walks down the street by stepping in front of her to ask for change for a dollar to make a phone call would contravene s. 2(3)(2). Asking a stranger sitting in a car parked next to you for change to put in a parking meter as you exit a car you have just parked would violate s. 3(2)(f). Presumably, such activities were not intended by the Legislature to be caught by the *Act*. However, it is submitted that there is no basis on which a judge, the police or the public could properly interpret which activities are intended to be caught by the *Act* unless charges and convictions are based on the status of offenders rather than on their conduct.[90]

79. Justice Dambrot quoted many examples that the appellants had given to illustrate the overbreadth of the *Act.* He then found that:

> It is enough to conclude, as I do, that it is possible to construe the legislation to avoid absurdity should the occasion arise . . . .
>
> That is not to say that there is no possible overbreadth in s. 3. Some judge might conclude that the absurd examples of overbreadth mentioned above might fall within section 3, but I doubt it. [91]

The* Act *is Vague and therefore Contravenes the Principles of Fundamental Justice

80. The doctrine of vagueness is intended to prevent the evil of leaving policy matters to policemen, judges, and juries to resolve on a subjective basis.[92]

81. In order to avoid being unconstitutionally vague, a law must be intelligible to both the citizens it governs and the officials who enforce it. Professor Hogg notes that selective enforcement is a component of vagueness and occurs when "the law does not provide clear standards for those entrusted with enforcement, which may lead to arbitrary enforcement."[93] The *Act* requires selective enforcement because it fails to provide clear standards for police officers.

82. Responding to an opposition Member who raised a concern that the *Act* would curtail the activities of "legitimate charities,"[94] such as those who walk onto the roads to sell newspapers to people in cars at traffic signals or firefights with collection buckets, Premier Harris virtually instructed law enforcement officers to enforce the *Act* selectively:

> What I read into this question is a disgraceful lack of confidence in the police to use common sense in understanding the difference between aggressive panhandling, that which is interfering and causing safety concerns, and the case you raised. Anybody who would raise that kind of a question, particularly on this day, when a number of police officers are here, has a disgraceful lack of respect for a profession that has a far higher standard than you have.[95]

83. The police have followed the Premier's call to enforce the *Act* selectively. There have been numerous occasions when people who were not homeless were observed by police officers but not charged when they engaged in the following activities:

a) parking lot attendants standing on the road waving cars into specific parking lots;

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[90] In fact, the overbreadth of the *Act* is acknowledged through Bill 58, which seeks to exempt charities from the provisions of the *Act*.
[91] *Supra*, note 48 at paras. 44, 126.
[92] *Canadian Foundation, supra* note 83 at para. 16.
[93] *Hogg, supra* note 65 at 44-49.
[94] See note 90.
[95] *Supra* note 9 at 45-46.

b) students offering car wash services standing on the street to wave cars down;

c) people selling flowers standing directly in front of automatic teller machines or next to transit stops, and in the middle of the sidewalk obstructing the path of passers by.[96]

84. The *Act* does not provide clear and adequate standards for police officers to properly determine when individuals should be charged. To draw from American case law on this issue, the impugned sections of the *Act* fail to meet "the requirement that a legislature establish minimal guidelines to govern law enforcement."[97]

85. Furthermore, the difficulties are compounded by the fact that defining "aggressive" is inherently problematic. Even those trained in the psychology of aggression have great difficulty in determining what constitutes an aggressive act. [98] The police, who are forced to make many difficult decisions, might be biased against those who panhandle. Negative stereotypes and perceptions tend to increase the likelihood that a particular act is perceived as "aggressive."

Sections 2, 3 and 7 of the *Act* Infringe the Right to Equality Within the Meaning of s. 15 of the *Charter*

86. In 1894, Anatole France famously mocked: "the majestic egalitarianism of the law, which forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread."[99] The appellants submit that the legal concept of equality in Canada has evolved to the point where it is unconstitutional to enact a law that is specifically designed to deny the poorest of the poor the right to beg in the streets.

[96] *Davidson Affidavit*, *supra* note 4 at para. 31.
[97] *Kolender* v. *Lawson*, 103 S.Ct. 1855 at 185-9 (USSC).
[98] *Affidavit of Jonathan L. Freedman*, Appellants' Appeal Book, Vol. 1, Tab G-2 at paras. 9-11.
[99] Anatole France, *The Red Lily*, (New York: Boni and Liveright, 1917) at 75.

87. A court that is called upon to determine a discrimination claim under s. 15(1) of the *Charter* must should focus on three central issues:

1) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
2) whether one or more analogous grounds of discrimination are the basis for the differential treatment; and
3) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.[100]

The *Act* Imposes Differential Treatment Between the Appellants and Others

88. Differential treatment is not required to be *prima facie* discriminatory in order to meet the test in the first inquiry. As Justice Iaccobucci said in *Law*, "Differential treatment, in a substantive sense, can be brought about either by a formal legislative distinction, or by a failure to take into account the underlying differences between individuals in society."[101]

89. The appellants all share personal characteristics that make them readily identifiable as a group. They are all homeless or without a fixed address, they are extremely poor, and they are beggars. As a group, beggars have been historically disadvantaged, and economically and politically marginalised. The *Act*, as it is applied, treats the appellants differently than it treats others.

90. In prohibiting all squeegeeing and severely limiting all panhandling, the *Act* prevents the appellants, members of an identifiable group, from pursuing their means of subsistence. Also, the evidence before the Court, in the form of statements from government ministers,[102] recent

[100] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 88 [*Law*].
[101] *Ibid*. at para. 25.
[102] See paragraph 15, above.

legislative activity,[103] and observations of front-line outreach workers,[104] indicates that the *Act* is enforced selectively against this group but not against those outside the group who perform identical activities.

The Differential Treatment is Based on the Analogous Ground of "Extreme Poverty" or "Beggars"

91. The analogous ground on which the *Act* discriminates could be described as "extreme poverty" or "beggars," *i.e.*, poverty that is so severe that people are forced to solicit alms in public.

92. The fundamental question in determining if "extreme poverty" or "begging" is an analogous ground is whether recognition of it as a basis for differential treatment would further the purposes of s. 15(1) of the *Charter*. The purposes of s. 15(1) are 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. . . .
>
> Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued. . . .[105]

93. Contextual factors will inform the decision of whether indicators will establish analogous grounds. It is "central to the analysis if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to having their interests overlooked."[106] As the Supreme Court of Canada held in *Corbiere*,

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[103] *Ibid*.
[104] *Davidson Affidavit*, *supra* note 4.
[105] *Law*, *supra* note 98 at para. 53; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 59 [*Corbiere*].
[106] *Corbiere*, *ibid.* at 59; *Law*, *ibid*. at para. 29.

> The second stage must therefore be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new or different forms of stereotyping or prejudice. As this Court unanimously held in Law . . . 'The possibility of new forms of discrimination denying essential human worth cannot be foreclosed.'[107]

94. Those who must seek alms on the street are subject to discrimination and denial of their essential human worth. A number of cases have held that "poverty" or closely related grounds are analogous.[108]

95. It is submitted that extreme poverty is immutable or constructively immutable because "it is typically not within the control of the individual. . . [and is] a characteristic of personhood not alterable by conscious action."[109] The appellants, like the agricultural workers in *Dunmore*, can change their status in society "only at great cost, if at all."[110]

96. In *Falkiner*, Justice Laskin listed co-existing factors that supported a conclusion that "recognizing receipt of social assistance as an analogous ground of discrimination under s.15(1) would further the protection of human dignity."[111] The appellants submit that the evidence in the present case has shown that the factors listed in *Falkiner* are equally applicable here: beggars make up one of the most economically disadvantaged groups in Canada; they have difficulty becoming self-sufficient; they face resentment and anger from others in society,

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[107] *Corbiere, ibid.* at para. 61.
[108] *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.S.C. Appeal Division); *Schaff* v. *Canada* (1993), 18 C.R.R. (2d) 143 (Tax Court) ; *R.* v. *Rehberg* (1994), 111 D.L.R. (4th) 336 (N.S.S.C.) ; *Federated Anti-Poverty, supra* note 49; *Falkiner v. Ontario (Ministery of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.) [*Falkiner*].
[109] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para. 67 (*Andrews*); *Corbiere, supra* note 105 at 219, 252; *Dunmore v. Ontario (Attorney General)*, [2001] 2 S.C.R. 1016 at para.166 [*Dunmore*].
[110] *Dunmore, ibid.* at paras. 169-170.
[111] *Falkiner, supra* note 107 at para 87.

which leads to social exclusion; they are subject to stigmatization, stereotyping and a history of offensive restrictions on their personal lives; and they are politically powerless.

97. The appellants submit that those poor enough to need to beg should be considered an analogous group for the purposes of s. 15 of the *Charter*.

The *Act* Has a Discriminatory Purpose and Effect

98. Bill 58,[112] which will amend the *Act* to exempt organizations with charitable status from prosecution under the *Act*, will legislate the interpretation given by the former Premier to the province's law enforcement agencies to apply the law selectively against beggars and not charities. The appellants submit that, since there is no difference in terms of safety between a squeegee kid asking a driver for change and a fire-fighter asking a driver for change, the purpose and effect of the *Act* are discriminatory.

99. In *Gosselin v. Quebec (Attorney-General)*, Justice McLachlin listed four contextual factors to consider during the analysis of the third step of the *Law* framework. The factors are:

(a) a pre-existing disadvantage;

(b) a relationship between the grounds and the claimant group's characteristics or circumstances;

(c) the ameliorative purpose or effect of the impugned law upon a more disadvantaged group in society; and

(d) the nature and scope of the interests affected by the impugned law.[113]

[112] See para. 15, above.
[113] [2002] 4 S.C.R. 429 at para. 25 [*Gosselin*].

100. With respect to the first factor, the appellants submit that the *Act* reinforces existing stereotypes and prejudices. The proverb "Beggars can't be choosers" is indicative of an historical attitude that the extremely poor are less deserving members of society, and that they should not enjoy the same range of rights as wealthier members of society. This attitude was apparent in the public discourse at the time of the coming into force of the *Act,* when the poor were positioned in opposition to the public and characterized as dangerous, menacing and criminal people who had little, if anything, in common with the hard-working taxpayer.[114] Members of the provincial government explicitly equated squeegeeing and panhandling with criminality, and proposed the *Act* to remedy deviant behaviour.[115]

101. With respect to the second factor, ". . . a law that imposes restrictions or denies benefits on account of presumed or unjustly attributed characteristics is likely to deny essential human worth and to be discriminatory."[116]

102. With respect to the third factor, neither the purpose nor the effect of the law serves to ameliorate the condition of any disadvantaged group in Ontario society.

103. With respect to the fourth factor, the appellants submit that their interests affected by the *Act* are fundamental, and that the *Act* specifically attacks their dignity. As Arthur Schafer stated:

> When society silences a panhandler or banishes the panhandler from places which have traditionally been public places, such banishment comes close to being a denial of recognition. Each of us has a fundamental need to be

[114] Janet Mosher, "The Shrinking of the Public and Private Spaces of the Poor" in Joe Hermer and Janet Mosher, eds., *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Press, 2002) 41 at 50.
[115] See paragraph 31, above.
[116] *Gosselin*, *supra* note 113 at para. 37.

> recognized by our fellow citizens as a person with needs and views. The criminalization of panhandling is not only an attack upon the income of beggars, it is an assault on their dignity and self-respect, on their right to seek self-realization through public interaction with their fellow citizens.[117]

104. The extremely poor have been disadvantaged for centuries. Moreover, a moral panic about squeegee kids and other panhandlers has been created and perpetuated to increase prejudice against them. The *Act* was enacted, on the basis of a perceived and baseless fear, for the specific purpose of targeting the activities of those who must seek alms and removing from them their only source of income. The purpose and effect of the *Act* is to discriminate against beggars, and it therefore contravenes s. 15 of the *Charter*.

The "Deeming" Provisions of s. 2 of the *Act* Contravene the Right to be Presumed Innocent Until Proven Guilty Pursuant to s. 11(d) of the *Charter*

105. Section 2 of the *Act* creates an offence of soliciting "aggressively." It then identifies six situations in which an accused is deemed to have solicited aggressively for the purposes of the *Act*. The lower courts found, and the appellants agree, that these provisions violated the appellants' right to be presumed innocent until proven guilty guaranteed by s. 11(d). Section 2 of the *Act* creates a *prima facie* risk that the accused might be convicted despite the existence of a reasonable doubt of his or her guilt.

106. The courts below purported to restore the constitutionality of the deeming provisions by reading the phrase "in the absence of evidence to the contrary" into s. 2(3) of the *Act*, thereby permitting an accused to raise a defense that his or her actions would not have caused a reasonable person to be concerned for his or her safety or security. It is submitted that such

[117] *Supra* note 57 at 10.

reading in is not appropriate in the circumstances. As Justice Dickson held in *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam*:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislation lacunae constitutional.[118]

107. The appellants submit that the deeming provisions are very clearly drafted, and the intention of the legislature is manifest: to outlaw the listed acts themselves. Reading in is justified as a constitutional remedy only if the Court can safely assume that the legislature would have chosen the same means of curing the defect. The appellants submit that the recent second reading of Bill 58 indicates that the legislature has specifically chosen not to cure the defect, despite having a convenient opportunity to do so. Bill 58 was introduced almost three years after the trial decision in the present case, where the Court held that the provisions in s. 2 of the *Act* offended the *Charter*.

108. For trials under the *Act*, legal aid is generally not available and many accused are unrepresented by legal counsel and unaware of the potential defense outlined in *Banks*. Since many accused are repeatedly charged under the *Act*, they enter the Court facing a possible custodial sentence without any knowledge that they might have a viable defense.

The Violations of ss. 2(b), 7, 11(d) and 15 of the *Charter* are Not Justified Under s. 1 of the *Charter*

109. The *Act* cannot be justified in a free and democratic society. The Crown has submitted no evidence to justify the impugned sections of the *Act*. In contrast, the evidence of the appellants

[118] [1984] 2 S.C.R. 145 at 169; see also *M. v. H.*, [1999] 2 S.C.R. 3; *Schachter v. Canada*, [1992] 2 S.C.R. 679 at para. 61.

demonstrates that the *Act* is not rationally connected to the objective of traffic safety, but instead is connected to a criminal law objective that is *ultra vires* the Province, and neither pressing nor substantial. Further, the *Act* conflicts with Canada's international human rights obligations.

110. While the *Oakes* criteria are flexible and must be applied "having regard to the specific factual and social context of each case," it is rare that s. 1 will be satisfied where there is a violation of s. 15 or s. 7 of the *Charter*. As noted in *Re B.C. Motor Vehicle Act*, s. 1 "may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."[119] With respect to s. 15:

> Given that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.[120]

111. As argued in paragraphs 72-85 above, the *Act* is overbroad legislation which infringes s. 7, and therefore, in accordance with *Heywood*, would "appear to be incapable of passing the minimal impairment branch of the s. 1 analysis."[121] Even if the objective were determined to be *intra vires* the Province, the government has failed to employ the least restrictive means of achieving its objective.[122]

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[119] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 518.
[120] *Andrews, supra* note 109 at 154 (per Wilson J.).
[121] *Heywood, supra* note 89 at 802-3.
[122] *R. v. Demers*, [2004] 2 S.C.R. 489 at para. 46.

PART IV: REQUESTED ORDERS

112. It is respectfully requested that:

a) sections 2, 3 and 7 of the *Safe Streets Act* be declared unconstitutional and to be of no force or effect, and

b) that the convictions of the appellants be quashed and that acquittals be entered for every appellant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

_____

PETER ROSENTHAL
Roach, Schwartz and Associates

_____

MARY BIRDSELL
Canadian Foundation for Children, Youth, and the Law

Dated 2 June, 2005 at Toronto, Ontario.

SCHEDULE A: LIST OF AUTHORITIES

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

Benefit v. City of Cambridge, 424 Mass. 918 (1997)

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