

EXCLUDING THE INDIGENT FROM THE PUBLIC SPHERE

Amy Mintah

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EXCLUDING THE INDIGENT FROM THE PUBLIC SPHERE

Amy Mintah*

I. INTRODUCTION

“We are witnessing increasing marginalization, the deepening of stereotypes and the exiling of the poor from our political community” with the enactment of the *Safe Streets Act*.¹ The indigent are increasingly construed as dangerous and less deserving members of society, and the public and private spaces of these individuals have been shrinking as a result.² In 1999, the *Safe Streets Act* came into force in the province of Ontario.³ British Columbia passed similar legislation in 2004.⁴ With the enactment of this type of legislation, one of the most impoverished groups in society has been increasingly punished, imprisoned, and excluded from the public sphere. The *Safe Streets Act* has been described as one of the more salient displays of the Ontario government’s neo-conservative agenda that effectively exiles the poor from the political and geographical landscape, exacerbating stereotypes, and increasing the marginalization of one of the most impoverished groups in our society.⁵

The legislation is akin to the nineteenth century vagrancy laws that were used to punish and imprison the poor.⁶ The *Safe Streets Act* targets one of the most vulnerable groups in society, exacerbating their disadvantaged position. The legislation also offends the basic tenets underlying the constitutional framework of the *Canadian Charter of Rights and Freedoms*, specifically sections 7, 12, and 15,⁷ and therefore should be struck down. Alternatively, amendments could remove the unconstitutional or problematic provisions.

II. OVERVIEW OF THE ONTARIO LEGISLATION

Ontario’s *Safe Streets Act* prohibits individuals from approaching a vehicle at an intersection to ask for money or to repeat a request for money after a person solicited does not respond or declines. The legislation also prohibits aggressive solicitation.⁸ The *Safe Streets Act* defines aggressive soliciting as threatening those solicited, obstructing the path of persons solicited, using abusive language, proceeding behind, alongside, or ahead of persons solicited,

* Amy Mintah graduated from the University of Ottawa, Faculty of Law. She holds an Honours Bachelor of Arts degree from the University of Ottawa where she specialized in Psychology and completed a minor in Criminology.

¹ Joe Hermer & Janet Mosher, eds, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002) at 18 [Hermer].

² 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 Publishing, 2002) 39 at 50

³ SO 1999, c 8 [*Safe Streets Act*].

⁴ *Safe Streets Act*, SBC 2004, c 75.

⁵ Hermer, *supra* note 1 at 18-19.

⁶ *Ibid* at 11.

⁷ *Canadian Charter of Rights and Freedoms*, ss 7, 12, 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

⁸ *Safe Streets Acts*, *supra* note 3, s 2.

soliciting while intoxicated by alcohol or drugs, or continuing to solicit after the person has responded negatively to the solicitation.⁹

The legislation also prohibits the solicitation of a captive audience, which includes those who are using, waiting to use, or departing from an automated teller machine, using or waiting to use a pay telephone or a public toilet facility, waiting at a taxi stand or a public transit stop, on a public transit vehicle, getting in or out of a vehicle, in a parking lot, or in a stopped, standing, or parked vehicle.¹⁰ The legislation states that every person who contravenes the *Safe Streets Act* is liable for a fine up to \$500 for a first offence. For subsequent offences, that person can be liable for up to \$1,000, or imprisonment for up to six months, or both.¹¹ Therefore, for those who are dependant on panhandling for survival, there are only a few places left to engage in such activities.

III. PROBLEMS ASSOCIATED WITH THE *SAFE STREETS ACT*

The *Safe Streets Act* has significant problems. It targets one of the most disadvantaged groups in society, homeless and impoverished individuals many of whom have substance abuse problems and physical or mental disabilities.¹² Furthermore, many of the people in this situation have no other options for employment and turn to panhandling to survive.¹³ It follows that due to the all-encompassing nature of the provisions, these individuals are severely limited in securing their livelihood.

With regard to the fines for contravening the legislation, it is unrealistic to expect a homeless person, whose income is solely derived from panhandling, to pay these exorbitant amounts. Also, the legislation does not address the underlying causes of aggressive panhandling, which is often poverty, mental and physical disabilities, and substance abuse problems.¹⁴ The *Safe Streets Act* is an attempt to remove impoverished and homeless groups from the social sphere without addressing the issues responsible for marginalizing these groups. It is no more than a temporary solution, which does not address the foundational issues. Therefore, the *Safe Streets Act* must be examined to determine whether it requires amending or whether the legislation is necessary at all.

IV. IS THE *SAFE STREETS ACT* CONSTITUTIONAL?

Aside from the aforementioned problems associated with the *Safe Streets Act*, there has been a great deal of discussion about the constitutionality of the legislation.¹⁵ The constitutionality of the *Safe Streets Act* was upheld by the Ontario Court of Appeal,¹⁶ and ultimately by the Supreme Court of Canada.¹⁷ However, in light of the decision handed down by

⁹ *Ibid*, s 2(3).

¹⁰ *Ibid*, s 3(2).

¹¹ *Ibid*, s 5(1).

¹² Maureen Crane et al, "The Causes of Homelessness in Later Life: Findings From a 3-Nation Study" (2005) 60B:3 J Gerontology: Social Sciences S152 [Crane].

¹³ *R v Banks*, 2007 ONCA 19 (CanLII) at para 77, 84 OR (3d) 1 [*Banks*].

¹⁴ Tom Carter et al, "Panhandling in Winnipeg: Legislation vs Support Services" (2007) 1 UW 1 at 1-2 [Carter].

¹⁵ Hermer, *supra* note 1 at 18, citing Richard Moon, "Keeping the Streets Safe from Free Expression" in Joe Hermer and Janet Mosher, eds, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002) 63 at 63-75.

¹⁶ *Banks*, *supra* note 13.

¹⁷ *R v Banks*, [2007] SCCA No 139, 2007 CanLII 37182.

the Supreme Court of Canada in *R v Bedford*, the constitutionality of the *Safe Streets Act* may be re-examined.

The Supreme Court of Canada is not forever bound by its past rulings and has the jurisdiction to revisit a decision.¹⁸ A lower court is not entitled to ignore binding precedent. However, this common law principle of *stare decisis* is subordinate to the *Charter* and therefore a court cannot be required to uphold an unconstitutional law.¹⁹ That being said, the threshold for readdressing a matter is not an easy one to reach, as it requires a new legal issue to be raised, a significant change in the circumstances, or the introduction of evidence that fundamentally shifts the parameters of the debate.²⁰

The court in *Banks* did not consider whether the legislation violates section 12 of the *Charter*, nor did the court consider gross disproportionality or arbitrariness in its decision. In addition, the court did not consider the constitutionality of proceeding with an *ex parte* trial, where the defendant is not present at trial due to mental health issues or lack of transportation, and imprisonment may flow from a conviction.

Although the court in *R v Jenkins* upheld the constitutionality of conducting an *ex parte* trial when there is a risk of incarceration,²¹ the circumstances were quite different than those in *Banks*. The defendant in *Jenkins* was not as vulnerable as the appellants in *Banks*. The facts provide no indication that he was homeless and therefore, would presumably have less difficulty in ascertaining his trial date. In contrast, homeless individuals who do not own a means of communication may have greater difficulty discovering their trial date. Therefore, given that the court in *Banks* failed to consider such pressing issues, the constitutionality of the *Safe Streets Act* should be revisited.

V. THE ONTARIO COURT OF APPEAL'S ANALYSIS IN *BANKS*

Before addressing whether the *Safe Streets Act* is constitutional, it is necessary to examine the Ontario Court of Appeal's reasons for upholding the constitutionality of the legislation. The court's task was to determine whether section 3(2)(f) of the *Safe Streets Act*, which prohibits the activity of squeegeeing and soliciting drivers on roadways, violates sections 2(b), 7, and 15 of the *Charter*.²² The appellants were convicted of soliciting a person in a vehicle on a roadway contrary to section 3(2)(f) of the *Safe Streets Act* after they had approached vehicles stopped in traffic at red lights, and either asked for money or washed the windshields of the vehicles.²³ They appealed to the Ontario Court of Appeal and argued that the legislation is unconstitutional because it encompasses criminal law and therefore beyond the legislative jurisdiction of the province. The appellants also submitted that the legislation infringes their rights to freedom of expression, life, liberty, and security of the person, and equality, which are all protected by the *Charter*.²⁴

For the section 7 challenge, the appellants argued that the impugned provisions infringe their right to liberty and security of the person and violate the principles of fundamental justice

¹⁸ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 44, [2013] 3 SCR 1101 [*Bedford*].

¹⁹ *Ibid* at para 43.

²⁰ *Ibid* at para 42.

²¹ 2010 ONCA 278 (CanLII) at para 35, 99 OR (3d) 561.

²² *Banks*, *supra* note 13 at para 7.

²³ *Ibid* at paras 2-3.

²⁴ *Ibid* at para 7.

because they are overbroad and vague.²⁵ They contended that section 7's guarantee of physical liberty is engaged because of the potential for a penalty of imprisonment for a second offence, as articulated in the legislation.²⁶ The appellants also claimed that their right to security of the person was infringed because the prohibition of squeegeeing caused them to suffer serious psychological stress and denies them the necessities of life. They submit that persons who engage in squeegeeing are amongst the most disadvantaged persons in society, and often experience health and security issues that prevent them from maintaining employment.²⁷

While the appellants recognized that section 7 of the *Charter* does not generally protect economic rights, they asserted that it does protect economic rights that are fundamental to human life and survival.²⁸ The court rejected this argument and held that the impugned provisions permit the appellants to beg or to provide a service in exchange for alms in any circumstances and settings not prohibited by the *Safe Streets Act*.²⁹ The court held that while the impugned provisions engage the liberty interest by virtue of the possibility of imprisonment, the appellants failed to establish that the provisions violated the principles of fundamental justice or that the provisions were vague or overbroad.³⁰

The court rejected the fourth ground of appeal submitted by the appellants in *Banks* that the *Safe Streets Act* infringes the right to equality guaranteed by section 15 of the *Charter*.³¹ The court applied the test from *Law v Canada (Minister of Employment and Immigration)*, which provides that the court must first consider whether the impugned law: (1) draws a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (2) fails to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics. If answered in the affirmative, there is differential treatment that will infringe section 15 of the *Charter*. The court then must consider whether the claimant was subjected to differential treatment on the basis of any of the enumerated and analogous grounds. Lastly, the court must consider whether the differential treatment constituted discrimination in a substantive sense.³²

In *Banks*, the court concluded that the legislation does not draw a formal distinction between the appellants and others, but prohibits all persons from standing on a roadway to solicit or offer services to stopped vehicles. The court held that the effect of the provisions is that all persons who wish to solicit or offer a service must do so at locations other than on a roadway.³³ The court also drew a distinction between the discriminatory effects of legislation and discrimination in the administration of legislation. The appellants alleged discrimination in the enforcement of legislation that applies to all who solicit on roadways. The court noted that any discrimination in enforcement is not caused by the legislation, but by its administration. Therefore, the court held that the proper remedy would be against those enforcing the legislation and would not require a finding that the legislation itself is unconstitutional.³⁴

²⁵ *Ibid* at para 75.

²⁶ *Ibid* at para 76.

²⁷ *Ibid* at para 77.

²⁸ *Ibid*.

²⁹ *Ibid* at para 82.

³⁰ *Ibid* at para 88.

³¹ *Banks*, *supra* note 13 at paras 88-89.

³² *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 39, 1999 CanLII 675 [Law].

³³ *Banks*, *supra* note 13 at para 91.

³⁴ *Ibid* at para 96.

The Court of Appeal held that the *Safe Streets Act* did not affect the appellants' economic right to survival in a fundamental sense and that the appellants had failed to establish that enforcement of the prohibition against soliciting while on a roadway has a more onerous substantive effect on the appellants than it does on others.³⁵ However, the court failed to identify any other group that is equally affected by the legislation. The court also held that even if the appellants had established that there is differential treatment under the impugned provisions, they failed to demonstrate that this is based on an enumerated or analogous ground.³⁶ In the appellants' factum, they described the proposed ground as "beggars," "extreme poverty," "poverty that is so severe that people are forced to solicit alms in public," and "those poor enough to need to beg."³⁷ They argued the extreme poverty suffered by the poor is a characteristic that is not within their control or that it could only be changed at a great personal cost.³⁸

The court held that the appellants identified the proposed group not by a personal characteristic, but by an activity. The court noted that the act of begging is essential to the identification of an individual as a member of the proposed group and that the proposed group consists of "the poor who beg."³⁹ The court then referenced Professor Hogg's suggestion that a common element of the enumerated grounds is that "[t]hey describe what a person is, rather than what a person does."⁴⁰ Although the court conceded that there may be an activity which could be used to identify a prohibited ground of discrimination, the court ultimately rejected the activity of begging to be an immutable or constructively immutable personal quality that can only be changed at a "great personal cost."⁴¹ For these reasons, the court rejected the claim that the *Safe Streets Act* violates section 15 of the *Charter*. The court held that the deleterious effects do not outweigh the salutary effects resulting from the legislation. The court stated that the legislation's objective is to promote public safety, efficient circulation, and public enjoyment of the city streets.⁴² The court also considered the legislation to minimally impair the appellants' rights.⁴³

VI. SECTION 7 ANALYSIS

Although the Ontario Court of Appeal and the Supreme Court of Canada upheld the constitutionality of the *Safe Streets Act*, in light of the decision handed down by the Supreme Court in *Bedford*,⁴⁴ the constitutionality of the *Safe Streets Act* may be re-examined. The question under section 7 of the *Charter* is whether anyone's life, liberty, or security of the person has been denied by a law.⁴⁵ As the offences under the *Safe Streets Act* are provincial offences, an accused may be convicted at an *ex parte* trial, depriving such individuals of their right to full answer and defence.⁴⁶ Because a person convicted under the Act may receive a six-month jail

³⁵ *Ibid* at para 97.

³⁶ *Ibid* at para 98.

³⁷ *Ibid*.

³⁸ *Ibid*.

³⁹ *Ibid* at para 99.

⁴⁰ *Ibid*, citing Peter W. Hogg, *Constitutional Law in Canada* (Scarborough: Thomson Carswell, 1997) (loose-leaf revision 2) at 52-31.

⁴¹ *Ibid*.

⁴² *Ibid* at para 132.

⁴³ *Ibid*.

⁴⁴ *Supra* note 18.

⁴⁵ *Supra* note 7, s 7.

⁴⁶ *R v Jenkins*, 2010 ONCA 278 (CanLII) at paras 31-35, 99 OR (3d) 561.

sentence in an *ex parte* trial, an individual's section 7 *Charter* rights are engaged. Incarcerating an individual without giving them the right to a full answer and defence is not only problematic, but it infringes upon the defendant's liberty interests.

The impugned provisions also create an unsustainable life for the "poor who beg." The *Safe Streets Act* severely restricts groups who engage in squeegeeing to raise money for their livelihoods. An individual who is unemployable due to a mental illness or an addiction and does not have social support will not have money for food, clothing, or shelter. Begging may be the only way that this person is able to pay for the necessities of life.⁴⁷ When legislation severely restricts a person's freedom to sustain their life, this person will be left with two options: (1) to live without any income, and rely solely on shelters for food and housing; or (2) resort to other unlawful activities to earn income, such as selling drugs or stealing.⁴⁸ Therefore, the legislation produces an unsafe environment for those who are unemployable, do not qualify for social assistance, and have no social support.

In order to engage section 7 of the *Charter*, there must be a sufficient causal connection between the impugned laws and the risk to those who engage in panhandling.⁴⁹ As noted by the Supreme Court of Canada in *Bedford*, there are three possible standards for causation: (1) sufficient causal connection; (2) a general impact approach; and (3) active and foreseeable and direct causal connection.⁵⁰ The court held that the sufficient causal connection standard should prevail because it is a flexible standard that considers the unique circumstances of each case. It follows that to engage section 7, there must be a sufficient causal connection between the impugned law and the prejudice suffered by the claimant.⁵¹ The standard does not require that the impugned law be the only or the dominant cause of the prejudice suffered by the claimant. It is satisfied by a reasonable inference, drawn on a balance of probabilities.⁵²

With respect to the *Safe Streets Act*, there is a sufficient causal connection between the impugned law and the prejudice suffered by the "poor who beg." The legislation places excessive limits on this group's ability to panhandle, which prevents them from engaging in their only means of livelihood, pushing them further into poverty. According to sociologist Bill O'Grady, squeegee work is one of the few types of activities available to homeless youth that provide a level of stability and subsistence.⁵³ Prohibiting squeegee work encourages these individuals to engage in far riskier conduct for survival.⁵⁴ Because the legislation prohibits this group from engaging in one of their only means of subsistence and encourages participation in other unlawful activities,⁵⁵ there exists a sufficient causal connection between the legislation and the prejudice suffered by individuals who beg for a living.

Because it has been established that the impugned laws deprive the "poor who beg" of security of the person, the remaining step in the section 7 analysis is to determine whether this

⁴⁷ Carter, *supra* note 14 at 1.

⁴⁸ Bill O'Grady & Robert Bright, "Squeezed to the Point of Exclusion: the Case of Toronto Squeegee Cleaners" in Joe Hermer & Janet Mosher, eds, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002) 21 at 35-36.

⁴⁹ *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII) at para 60, [2000] 2 SCR 307.

⁵⁰ *Supra* note 18 at para 74.

⁵¹ *Ibid* at para 75, citing *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 SCR 307.

⁵² *Ibid* at para 76, citing *Canada (Prime Minister) v Khadr*, 2010 SCC 3 (CanLII) at para 21, [2010] 1 SCR 44.

⁵³ Hermer, *supra* note 1 at 17.

⁵⁴ *Ibid*.

⁵⁵ *Ibid* at 17-18.

deprivation is in accordance with the principles of fundamental justice.⁵⁶ The principles of fundamental justice lay out the minimum requirements that must be met by a law that negatively impacts a person's life, liberty, or security of the person.⁵⁷ The concept of principles of fundamental justice is not a right. Instead, it is a qualifier of the right not to be deprived of life, liberty, and security of the person, and its purpose is to set the parameters of that right.⁵⁸

The principles of fundamental justice are concerned with arbitrariness, overbreadth, and gross disproportionality.⁵⁹ An arbitrary, overbroad, or grossly disproportionate effect on one person is sufficient to establish a breach of section 7.⁶⁰ Gross disproportionality under section 7 of the *Charter* asks whether the law's effects on life, liberty, or security of the person are so grossly disproportionate to the law's purposes that they cannot rationally be supported.⁶¹ Gross disproportionality is not concerned with societal benefits that might flow from the law.⁶² Instead, it balances the negative effect on the individual with the purpose of the law. For example, the Supreme Court of Canada held that a bawdyhouse prohibition was unconstitutional because the law's harmful impact was grossly disproportionate to its purpose.⁶³

The object of the *Safe Streets Act* is to address the issues of public safety and nuisance that may be associated with aggressive panhandling.⁶⁴ The harmful impact of this legislation on the "poor who beg" is significant, as it exacerbates the group's disadvantaged position in society. As discussed previously, breaching this legislation may result in a sentence of up to six months in prison. Also, these individuals may have to pay substantial fines that they cannot afford and will likely be pushed to engage in other unlawful activities in order to survive. Prohibiting certain activities arbitrarily identified as "aggressive soliciting" puts the indigent at risk by forcing participation in other unlawful activities to earn income. The harmful impact of the legislation on the "poor who beg" is grossly disproportionate to the purpose of the law. It follows that the impugned law negatively impacts the security of the "poor who beg" and engages section 7 of the *Charter*.

A section 7 analysis also demands an assessment of arbitrariness. Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual.⁶⁵ There must be a rational connection between the object of the law that causes the section 7 deprivation and the limits imposed on life, liberty, or security of the person. Otherwise, the law will arbitrarily limit those rights.⁶⁶ The object of the *Safe Streets Act* is to promote safety within a community. However, the effect of preventing an individual from engaging in their livelihood, which leads to unlawful activity in order to earn income, has no connection to the objective of encouraging safety. Therefore, the law is arbitrary.

⁵⁶ *Bedford*, *supra* note 18 at para 93.

⁵⁷ *Ibid* at para 94.

⁵⁸ *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 62, 1985 CanLII 81.

⁵⁹ *Bedford*, *supra* note 18 at para 97.

⁶⁰ *Ibid* at para 123.

⁶¹ *Ibid* at para 120.

⁶² *Ibid* at para 121.

⁶³ *Ibid* at para 134.

⁶⁴ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 37th Parl, 1st Sess, No 8 (2 November 1999) at 284 (Hon Gary Carr) [*Hansard Debates*].

⁶⁵ *Bedford*, *supra* note 18 at para 111.

⁶⁶ *Ibid*.

VII. IS THE SECTION 7 VIOLATION JUSTIFIED UNDER SECTION 1 OF THE CHARTER?

Once it is established that a *Charter* right has been infringed, it must be determined whether the violation can be justified under section 1 of the *Charter*. To justify the violation, the law or government action must have a pressing and substantial objective.⁶⁷ Then, it must be considered whether the law's negative impact on an individual's rights is proportionate to its pressing and substantial goal of furthering the public interest.⁶⁸ In this analysis, the government bears the burden of demonstrating that a law that breaches an individual's rights can be justified.⁶⁹

For the law's negative impact to be proportionate to its objective, the law's objective must be rationally connected to the limitation it is imposing on the *Charter* right. A rational connection demands that the law is a rational means for the legislature to pursue its objective.⁷⁰ Also, the court must determine whether the legislature could have created a law that minimally impairs the right or infringes the right to a lesser extent.⁷¹ Finally, the court must weigh the negative impact of the impugned legislation on individual rights against the beneficial impact of the law in achieving its goal for the public good. The impact must be judged quantitatively as well as qualitatively.⁷²

The negative impact of the *Safe Streets Act* on the rights of individuals is not proportionate to the pressing and substantial goal of the law in furthering the public interest. The purpose of the legislation is to limit squeegeeing and aggressive forms of solicitation to promote street safety. The Attorney General stated that "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."⁷³ Promoting safer streets is a pressing and substantial goal. Although the law is a rational means for the legislature to pursue its objective of promoting safer streets, the legislature could have created a law that infringes rights to a lesser degree. For example, prison could be removed as a penalty, fines could be lowered, and less stringent limits could be placed on those who engage in soliciting and panhandling as a means of survival.

The legislation's negative impact on individual rights outweighs its potential beneficial impact. This negative impact includes prohibiting individuals from merely pursuing their sole means of livelihood, fining and imprisoning these individuals, encouraging participation in other unlawful conduct for subsistence, and excluding the indigent from the public sphere. The only potentially positive impact of the law may be more efficient circulation of traffic and less nuisance caused by "the poor who beg." Weighing the negative effects of the law with the beneficial effects shows that the negative effects outweigh the positive. Therefore, the law's violation of section 7 cannot be justified under section 1 of the *Charter*.

⁶⁷ *R v Oakes*, [1986] 1 SCR 103 at para 69, 1986 CanLII 46 [*Oakes*].

⁶⁸ *Ibid* at 70.

⁶⁹ *Ibid* at 66.

⁷⁰ *Bedford*, *supra* note 18 at para 126.

⁷¹ *Ibid*.

⁷² *Ibid*.

⁷³ *Hansard Debates*, *supra* note 64.

VIII. SECTION 12 ANALYSIS

The *Safe Streets Act* also violates section 12 of the *Charter*, which protects the right not to be subjected to any cruel and unusual treatment or punishment.⁷⁴ The test for determining whether a punishment is cruel and unusual within the meaning of section 12 is gross disproportionality, which considers the gravity of the offence, the personal characteristics of the offender, and the circumstances of the case.⁷⁵ This assessment may also consider whether punishment is necessary to achieve a valid penal purpose and if there are valid alternatives to the punishment imposed.⁷⁶

To determine whether a law violates section 12, the penalty or sanction must be assessed from the perspective of the individual subjected to it, while balancing the gravity of the offence with the circumstances of the offence and characteristics of the offender.⁷⁷ If the impugned legislation “provides for and would actually impose on the offender a sanction so excessive or grossly disproportionate as to outrage standards of decency” to the extent that Canadians “would find the punishment abhorrent or intolerable,” then it will amount to a *prima facie* violation of section 12.⁷⁸

Pursuant to the *Safe Streets Act*, a homeless individual, who likely has a mental health or substance abuse problem, and does not qualify for social assistance, may be imprisoned for up to six months and fined up to \$1000 for asking someone for money a second time or approaching an individual waiting in line to use a public telephone for money.⁷⁹ Such a sanction is so excessive that it would likely outrage the standards of decency and many would likely find this punishment to be abhorrent or intolerable. Although promoting street safety is a valid penal purpose, true crimes, such as harassment and assault, are already addressed by the *Criminal Code*.⁸⁰ Alternatives to the excessive sanctions permitted in our current regime could be providing services that are rehabilitative in nature, which address the underlying causes of aggressive panhandling, including poverty, mental illness, substance abuse problems, and lack of social support. It is my opinion that these alternatives are more appropriate than penal consequences. Therefore, the *Safe Streets Act* is not in accordance with section 12 of the *Charter*.

IX. IS THE SECTION 12 VIOLATION JUSTIFIED UNDER SECTION 1 OF THE CHARTER?

The section 12 violation cannot be justified under section 1 of the *Charter*. As discussed previously, in order for a law to be justified under section 1, there must be a pressing and substantial objective of furthering the public interest that is proportionate to the law’s negative impact on an individual’s rights.⁸¹ Although promoting street safety is a pressing and substantial goal, the means used to achieve the objective are not proportional to the burden on the claimant’s rights. The *Safe Streets Act*’s objective may be rationally connected to the limit, but does not

⁷⁴ *Supra* note 7, s 12.

⁷⁵ *R v Smith (Edward Dewey)*, [1987] 1 SCR 1045 at 1046, 1987 CanLII 64.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid* at 1072; *R v Wiles*, 2005 SCC 84 (CanLII) at para 4, [2005] 3 SCR 895; *R v Morrissey*, 2000 SCC 39 at para 26, [2000] 2 SCR 90; *R v Goltz*, [1991] 3 SCR 485 at 499, 1991 CanLII 51.

⁷⁹ *Safe Streets Act*, *supra* note 3, ss 2, 3, 5.

⁸⁰ *Criminal Code*, RSC 1985, c C-46, ss 264, 266 [*Code*].

⁸¹ *Oakes*, *supra* note 67 at paras 69-70.

minimally impair the *Charter* right. Lesser sanctions could be imposed. For example, prison could be removed as a possibility, fines could be lowered so that payment is actually possible for the groups targeted by the legislation, and less stringent limits could be placed on these individuals' ability to panhandle.

It is clear that the legislation's deleterious effects outweigh its benefits. The benefits include the potential for safer streets and more efficient circulation of traffic. However, the deleterious effects include the incarceration of an impoverished group in society for asking for money under certain circumstances, the imposition of hefty fines, and encouraging these groups to engage in crimes for survival. Therefore, the section 12 violation cannot be justified under section 1 of the *Charter*.

X. SECTION 15 ANALYSIS

The *Safe Streets Act* also violates section 15 of the *Charter*. The purpose of section 15(1) of the *Charter* is to cure social ills, such as prejudice, stereotyping, and historical disadvantage. The purpose of section 15 of the *Charter* is:

[T]o 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.⁸²

Justice Iacobucci also stated that:

Human dignity means that an individual or group feels self-respect and self-worth. It 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. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. 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.⁸³

The spirit of the *Charter* demands that we protect the human dignity and freedom of all Canadians and promote a society in which all persons enjoy equal recognition under the law. However, the *Safe Streets Act* does not reflect this. The legislation targets a vulnerable group in society through punishment and imprisonment. The legislation is not sensitive to the needs and capacities of the "poor who beg" and does not take into account the context underlying the group's differences. Rather, it marginalizes, ignores, and devalues this group.

To establish that a law is discriminatory under section 15(1), it must be determined that the law creates a distinction based on an enumerated or analogous ground and that the distinction creates a disadvantage by perpetuating prejudice or stereotyping.⁸⁴ In *Banks*, the Court of Appeal held that the *Safe Streets Act* does not affect the economic right to survival of "beggars" in a

⁸² *Law, supra* note 32 at para 51.

⁸³ *Ibid* at para 53.

⁸⁴ *R v Kapp*, 2008 SCC 41 (CanLII) at para 17, [2008] 2 SCR 483.

fundamental sense.⁸⁵ However, because homeless groups have extreme difficulty finding forms of income other than funds raised from squeegeeing, the only reasonable conclusion is that legislation that severely restricts a homeless person's ability to squeegee would substantially interfere with this person's economic right to survival. The effect of the provisions causes differential treatment between the "beggars" and others.

The court's conclusion that the *Safe Streets Act* does not have a more onerous substantive effect on homeless individuals than those who have a fixed address must also be examined. Although the prohibition may be a minor inconvenience to not-for-profit organizations that raise funds by soliciting on roadways, such individuals are not relying on the funds raised for necessities. In contrast, "beggars" often rely on the money raised while soliciting for survival. The substantive effect of enforcing the provisions drastically differs for "beggars" in comparison to other groups. Banning soliciting on a roadway may inconvenience some, but it prohibits "the poor who beg" from pursuing their livelihood. The provisions are akin to prohibiting sleeping under bridges. The impact on "beggars" is devastating. However, the same prohibition has no impact on the wealthy.

The court in *Banks* made several errors when concluding that the legislation does not result in differential treatment of beggars. The court held that the legislation does not apply only to beggars, but instead prohibits all persons from soliciting on a roadway when vehicles are stopped at a red light.⁸⁶ In making this assertion, the court clearly disregarded section 3(3) of the *Safe Streets Act*, which permits charitable organizations to engage in conduct that is otherwise considered aggressive soliciting. Therefore, the court's assertion that the legislation prohibits all persons from standing on a roadway to solicit or offer services to stopped vehicles is incorrect.

Not-for-profit organizations commonly stand at traffic lights and ask occupants in vehicles stopped at red lights for money. The legislation permits such activity, despite the court's assertion in *Banks* that the *Safe Streets Act* applies to everyone. Justice Juriansz later acknowledged that the legislation fails to include other conduct that could potentially create the same nuisance as soliciting.⁸⁷ For example, the legislation does not prohibit pamphleteering on roadways. However, the court resolved this dilemma by noting that there is no evidence that political pamphleteering in traffic lanes is a concern warranting legislative response.⁸⁸ The fact that the *Safe Streets Act* permits not-for-profit organizations to solicit on roadways, but prohibits the homeless from performing the same activity, demonstrates that the legislation violates section 15 of the *Charter*.

Another problematic aspect of the *Banks* judgment is the court's decision to reject the activity of begging as an immutable or constructively immutable personal quality that can only be changed at a great personal cost. This reasoning cannot be reconciled with the decision released by the Ontario Court of Appeal in *Falkiner v Ontario (Ministry of Community and Social Services)*, where it was recognized that receipt of social assistance is a characteristic that is difficult to change, and therefore "fits the expansive and flexible concept of immutability developed in the cases."⁸⁹ The court in *Falkiner* acknowledged that economic disadvantage alone

⁸⁵ *Supra* note 13 at para 97.

⁸⁶ *Ibid* at para 91.

⁸⁷ *Ibid* at para 132.

⁸⁸ *Ibid*.

⁸⁹ 59 OR (3d) 481 at para 89, 2002 CanLII 44902 (ONCA) [*Falkiner*].

does not justify protection under section 15, but concluded that economic disadvantage often co-exists with other forms of disadvantage.⁹⁰

It must also be noted that the Supreme Court of Canada has taken a more expansive view of immutability. A characteristic that is difficult to change, that can be changed only at great personal cost, or that can be changed only after a significant period of time, may be recognized as an analogous ground.⁹¹ The court in *Banks* distinguished the case before the court with *Falkiner*, by differentiating between the receipt of social assistance and poverty.⁹² However, social assistance was introduced to assist the economically disadvantaged and I contend that receiving social assistance cannot be differentiated from poverty. The only distinction that can be drawn between those receiving social assistance and beggars is that the latter group is the more vulnerable group because they generally are homeless and have no stable source of income.

As alluded to in *Falkiner*, overcoming poverty is a difficult, if not impossible, undertaking.⁹³ Squeezing or begging is often these individuals' only source of income. Many people may be forced into panhandling for survival.⁹⁴ Homelessness is a complex issue and a result of multiple overlapping factors, including mental illness, substance abuse problems, and a lack of social support. It is unlikely that a homeless individual who has a mental illness or an addiction, is unemployed, does not qualify for social assistance, and has no social support, will suddenly find an alternative lawful means of income when deprived of the ability to panhandle.

An individual would have to secure a residence to remove himself or herself from being classified as homeless. However, this is likely impossible without income or access to funds for the first month's rent. Without employment or social assistance, it is unlikely that this person will have sufficient funds to pay for a fixed address. Without a fixed address, this person will not qualify for social assistance. Further, without family or friends, this person is not in a position to borrow the funds. Finally, finding employment may be almost impossible for this person. If the person has the mental capacity to be employed, employment also requires maintenance of basic hygiene, sobriety, and access to transportation to and from work. All of this may be difficult, if not impossible, for homeless individuals. Therefore, in most cases, these issues could only be changed after a significant amount of time.

Although assessing whether a personal quality can only be changed at a great personal cost may be a factor in determining whether a quality is immutable, it is only one indicator that may be considered. It is also necessary to consider whether those individuals defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked.⁹⁵ The analogous grounds inquiry demands a purposive and contextual approach.⁹⁶ It demands consideration of the nature and situation of the individual or group, and the social, political, and legal history of society's treatment of that group.⁹⁷

When considering the social, political, and legal history of society's treatment of the homeless, it is clear that this group has been disadvantaged and continually have had their

⁹⁰ *Ibid* at para 88.

⁹¹ *Ibid* at para 89.

⁹² *Supra* note 13 at para 105.

⁹³ *Falkiner*, *supra* note 89 at para 86.

⁹⁴ *Federated Anti-Poverty Groups of BC v Vancouver (City)*, 2002 BCSC 105 (CanLII) at para 8, 40 Admin LR (3d) 159.

⁹⁵ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 152, 1989 CanLII 2.

⁹⁶ *Law*, *supra* note 32 at para 41.

⁹⁷ *Ibid* at para 93.

interests overlooked. Further, impoverished groups continue to be disadvantaged. A study conducted at McMaster University found that there is a twenty-one year difference in life expectancy between individuals residing in the poorest neighbourhood and those residing in the wealthiest neighbourhood in Hamilton, Ontario.⁹⁸ The homeless lack political power, are disadvantaged, and are likely to have their interests overlooked. Therefore, these factors lend credence to the assertion that being impoverished is an immutable quality.

X1. IS THE SECTION 15 VIOLATION JUSTIFIED UNDER SECTION 1 OF THE CHARTER?

The section 15 violation caused by the *Safe Streets Act* cannot be justified under section 1 of the *Charter*. The pressing and substantial goal of the legislation is not proportionate to the negative impact of the *Safe Streets Act* on the rights of individuals. The promotion of safety is a pressing and substantial goal and the legislation may be a rational means for the legislature to pursue its objective. However, the infringement does not pass the minimal impairment threshold. The legislature could have created a law that infringes rights to a lesser degree. Instead of passing the sweeping *Safe Streets Act* currently in place, the legislature could have enacted more focused legislation that only penalizes those who are truly engaging in aggressive panhandling. For example, prohibiting the use of threatening language might be a reasonable limit, whereas the prohibition on simply approaching occupants in a stopped vehicle may be excessive.

Under the final branch of the section 1 analysis, it is clear that the negative impact of the *Safe Streets Act* outweighs any beneficial impact of the legislation. The benefit of the legislation is that it may result in reduction of public nuisance. The negative impact includes violating human dignity and freedom, stereotyping, excluding the indigent from the public sphere, and treating “the poor who beg” as less deserving of concern, respect, and consideration. Weighing these factors show that the beneficial impact of the *Safe Streets Act* is outweighed by the legislation’s negative impact on the vulnerable and exploited group identified.

X11. IS THE *SAFE STREETS ACT* A DRACONIAN AND INEFFECTIVE LAW?

If the *Safe Streets Act* would survive *Charter* scrutiny, it is crucial to assess the effectiveness of the legislation. The assessment considers the following questions: (1) What social harms are we trying to remedy through the legislation? and (2) Is the legislation effectively addressing these harms? As previously outlined, the legislation seeks to remedy the social harm of the fear that aggressive panhandling may create. As articulated in *Banks*, people must be able to carry out their daily activities without fear. Although the immediate effects of the legislation may be desirable, the law does not offer a sustainable or permanent solution. Prohibiting aggressive panhandling does not address the underlying causal factors, such as poverty, desperation, mental illness, and addiction. Panhandlers, because of their impoverished and vulnerable state, are often not in the position to respond to tickets issued to them, do not have the means to pay the imposed fines, and are less likely to attend hearings where they may be sentenced to six months in prison.

There are already provisions in the *Code* that protect individuals from harm or harassment on the street. If an individual truly feels unsafe on the street because of threatening

⁹⁸ Rose (Vicky) Maldonado, *Interventions for At-Risk Youth in High Poverty Neighbourhoods* (Hamilton: McMaster-Community Poverty Initiative, 2011).

demands for money, this person would already have the power to report the conduct to the police under the *Code*.⁹⁹ Because of this existing avenue of protection, it must be determined whether a separate piece of legislation is necessary. The *Code*, as opposed to the *Safe Streets Act*, also creates greater safeguards for individuals charged under this offence because an *amicus curiae* may be appointed when required. Therefore, there is an existing regime in place to address danger in public spaces.

The provision that defines aggressive soliciting must be examined more closely. Although most would likely agree that threatening or using abusive language while soliciting would fall under the category of aggressive soliciting, the inclusion of soliciting while intoxicated may be overly broad and discriminatory. This provision targets homeless populations that are plagued with substance abuse problems. Such individuals are effectively banned from soliciting. Not only is this provision targeting those who are already vulnerable and impoverished, it is an ineffective way to address the underlying causes of aggressive panhandling. Under the current legislation, those with substance abuse problems will be fined or imprisoned instead of being offered treatment. Therefore, in addition to being unconstitutional, the legislation is fraught with problems.

XIII. REMEDIES

Since I have argued that the *Safe Streets Act* is unconstitutional and the *Charter* violations cannot be justified by section 1, the legislation should be struck down. The “poor who beg” should not be punished and imprisoned for merely engaging in an activity that is necessary for their survival. If the legislation was struck down, the *Code* would continue to offer protection where necessary and only true crimes would be punished. The provisions prohibiting approaching parked vehicles or people waiting in line and soliciting while intoxicated should also be removed. Although amending or striking out the most egregious provisions may be an improvement, striking down the entire *Safe Streets Act* is the preferable remedy because of the significant problems associated with the legislation.

XIV. CONCLUSION

The *Safe Streets Act* has “created a climate where poverty and other expressions of social and economic inequality are translated into narrow questions of criminal justice and law and order.”¹⁰⁰ The legislation violates impoverished individuals’ right to life, liberty, and security of the person because the legislation is grossly disproportionate and arbitrary. It also permits sanctions that are cruel and unusual within the meaning of section 12 of the *Charter*. In addition, the *Safe Streets Act* violates equality rights since the legislation results in differential treatment of impoverished groups and promotes discrimination of an already vulnerable group. These violations cannot be justified under section 1 of the *Charter*. Moreover, the *Safe Streets Act* offers a temporary solution that ignores the underlying causes of panhandling. It excludes the indigent from the public sphere. Furthermore, because the *Code* already addresses those who compromise safety in public spaces, the *Safe Streets Act* is unnecessary. The legislation must either be redrafted to remove the unconstitutional provisions or struck down completely. Until

⁹⁹ *Code*, *supra* note 80, s 264.

¹⁰⁰ *Hermer*, *supra* note 1 at 16.

this is addressed, the homeless will continue to suffer “a social death that is being accelerated by legislation such as the *Safe Streets Act*.”¹⁰¹

¹⁰¹ *Ibid* at 18.