



Memorandum

To National Anti-Poverty Organization ("NAPO")
From Jane Doe, Pro Bono Students Canada ("PBSC")
Date March 15, 2012
Subject **Feasibility of Enacting a Bylaw on Panhandling**

Introduction

You have asked me to provide you with a general research memo on whether the Constitution allows Canadian municipalities to place any limits on panhandling or can ban panhandling altogether in a geographic area.

To determine if a municipality can enact by-laws relating to panhandling, a first issue to consider is whether the municipality has the delegated authority to enact the by-law. Provided a municipality has the requisite authority to enact an anti-panhandling by-law, it will then need to be determined if there any *Charter* limits on this authority. To generate this memo, I have considered and reviewed: statutory language, jurisprudence and commentary on Canada's panhandling by-laws.

This memo is divided into four parts. In [Part 1](#), I consider the authority of a municipality to enact a by-law relating to panhandling. In [Part 2](#), I examine the *Charter* limits on a municipality's authority to enact a by-law relating to panhandling. In [Part 3](#), I look at whether a municipality can prohibit *all* panhandling throughout certain geographic areas such as a downtown core. Finally, in [Part 4](#), I consider Canada's international commitments and their relation to panhandling laws.

Summary of Recommendations

A municipality does not have express statutory authority to enact by-laws related specifically to panhandling. Nevertheless, it is likely that certain express powers given to a municipality are broad enough to capture panhandling and related conduct.

Should a municipality decide to enact a by-law to limit panhandling, it will have to ensure that any limits are related to the powers under which it enacts the by-law and that the by-law does not infringe rights guaranteed under the *Charter*. Based on the existing case law, it would appear that limits aimed at the message conveyed by panhandlers would not be upheld in the event of a *Charter* challenge, although limits on the manner or location of conveyance may be upheld, particularly if the limits address threatening, violent or obstructive forms of expression.

The Courts would likely set the standard very high for banning panhandling altogether in city streets in a geographic area, because it is a form of expression. In order to justify a total ban under Section 1 of the Charter, a municipality would need significant evidence on what the problem is, what the alternatives to banning are, and what has been done to test the potential success of those alternatives. The success of a municipality in defending a challenge to a by-law limiting panhandling will depend on the strength of the evidence connecting the limits set out in the by-law to the sphere of jurisdiction on which a municipality relies to enact the by-law. Until a draft by-law is circulated, it is not possible at this time to conclude on its constitutionality.

PART 1: Authority of a Municipality to Enact a By-Law Relating to Panhandling

Municipalities are creatures of statutes. They are given the right to pass by-laws through various provincial acts. Municipalities can therefore only exercise powers which are expressly conferred by statute or which, though not expressly set out, are necessary or implied for the exercise of an express power.

There are no statutory provisions which expressly give a municipality authority to enact by-laws for the purpose of limiting or prohibiting panhandling. Generally speaking, however, cities do have express powers on which they may be able to rely, in order to address panhandling in various contexts. The following general spheres of jurisdiction, although they will be different for each city, may provide authority to enact by-laws relating to panhandling:

- a) economic, social and environmental well-being of a municipality;
- b) health, safety and well-being of persons; and
- c) protection of persons and property, including consumer protection.

In order to rely on one of the preceding spheres of jurisdiction as authority to regulate or prohibit panhandling, a municipality must demonstrate that there is a connection between the activity sought to be regulated or prohibited, and the sphere of jurisdiction. Accordingly, if, for example, a municipality wished to regulate or prohibit panhandling by relying on the "economic, social, and environmental well-being of a municipality", it will have to adduce evidence that panhandling is related to the municipality's prosperity.

A municipality may have difficulty in proving a connection between panhandling and the "protection of persons and property, including consumer protection". It must carefully consider which activities associated with panhandling could be covered by a by-law. This may

require differentiating between aggressive panhandling versus peaceful panhandling; the location of panhandling; and the times at which people are allowed to panhandle.

Furthermore, panhandling is also partially regulated by provincial and federal law. Panhandling that is done in a way that is threatening or violent or obstructive may be contrary to laws such as the *Safe Streets Act* and/or the *Criminal Code*. In Ontario, for example, aggressive panhandling is illegal under that province's *Safe Streets Act*. The *Criminal Code* sets out a comprehensive range of offences which protect the public against harmful conduct, including laws against harassment, intimidating, mischief, assault, uttering threats, theft, etc.

PART 2: Limits on a Municipality's Authority to Enact a By-Law Relating to Panhandling

In addition to proving that a municipality has the statutory authority to enact a by-law relating to panhandling, a municipality must also comply with the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

Charter challenges to by-laws or legislation pertaining to panhandling and associated behaviour have most commonly alleged infringements of the freedom of expression (s.2(b)). It may, however, also be possible to launch a challenge under the right to equal treatment (s.15) or the right the right to life, liberty and security of the person (s.7).

[A] Freedom of Speech

Peaceful panhandling it involves both a communication of a personal plight and a reminder to the public of the existence of poverty. Therefore, as a first *Charter* consideration, peaceful panhandling is protected expression within the meaning of Section 2(b) of the *Charter*.

There are two main cases on panhandling and the *Charter*. They are:

- *Federated Anti-Poverty Groups of British Colombia v. Vancouver (City)* (2002), 28 M.P.L.R. (3d) 165 (B.C.S.C.); and
- *R. v. Banks* (2007), 275 D.L.R. (4th) 640 (Ont. C.A.) (Leave to Appeal to S.C.C. denied).

Both cases find that panhandling, at least in its passive form, is protected by Section 2(b) of the *Charter*, which is the Section that protects freedom of expression.

In *Federated Anti-Poverty Groups of British Colombia*, the Court said: "Panhandling is a tool used by those in poverty to engage in dialogue with the rest of society about their plight. As such, it is form of expression" (at para. 151).

In *R. v. Banks*, a case that challenged the *Safe Streets Act, 1999* (the "*SSA*"), the Ontario Court of Appeal acknowledged that peaceful panhandling for some low income people is the only accessible means by which they can readily communicate their daily reality: "The

act of begging is communication and is evidently expression. [...] The message "I am in need and I am requesting your help" is primary communication that seeks and invites participation in the community" (at para. 121).

Accordingly, it may be argued that, by restricting the content of, location where, manner in which and persons with whom panhandlers may engage in the peaceful solicitation of donations for themselves or for others in many public spaces, regulating panhandling infringes freedom of speech. This is best said by Herkshoff and Cohen in a *Harvard Law Review* article:

When a beggar begs, one member of a stigmatized group steps forward and, on a human level, engages a member of the mainstream in her problems her life. It is at best a rough form of communication that can produce a rough sense of engagement. But it is capable of producing understanding and awareness among people who might otherwise never think about the poor or who might never think about them in a positive way.¹

[B] The Deprivation of Liberty and Security of the Person

Section 7 of the Charter provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Life, liberty and security of the person are interests protected by section 7, but the section is only violated if the infringement of those interests is not in accordance with the principles of fundamental justice.

It can be argued the impugned sections infringe the right to liberty and security of the person and contravene the principles of fundamental justice in that they are overbroad and vague. Although the exact wording of the definition of "panhandling" is unknown at this time, if the offence of panhandling is described so broadly as to encompass conduct incapable of causing any blameworthy harm, the law may be void for vagueness. For example, if panhandling is described to encompass all people requesting money, would a person looking to use two quarters to make a pay phone call be engaging in panhandling? Drawing on this example, depending on its definition of panhandling, a by-law may provide an unintelligible standard for both for the citizens it governs and the officials who must enforce it. If this is the case, such deprivations of liberty and security of the person would not be in accordance with the principles of fundamental justice.

Secondly, it can also be argued that a panhandler's right to security of the person is infringed because the prohibition of the activity of panhandling causes him or her serious psychological stress and denies the necessities of life. Those who engage in panhandling are among the most disadvantaged individuals in society, who often experience health and security issues that prevent them from maintaining employment. While section 7 of the Charter does not protect economic rights generally, it can be argued that it does protect those economic rights that are fundamental to human life and survival. This argument would, however, not likely succeed in the courts. The Ontario Court of Appeal rejected a

¹ Herkshoff, Helen & Adam S. Cohen, "Begging to Differ: The First Amendment and the Right to Beg" (1991) 104(4) *Harvard Law Review* 896.

similar argument advanced by individual landlords affected by the retroactive voiding of approved rent increases in *A & L Investments Ltd. v. Ontario*²:

The s. 7 claim is that the effect of the 1991 Act on individual plaintiffs has been to deprive them of a source of livelihood, their occupation, and their savings. It is not alleged that the legislation has destroyed their right to work altogether. In my view, the jurisprudence that has developed under the Charter has made it clear that economic rights as generally encompassed by the term "property" and the economic right to carry on a business, to earn a particular livelihood, or to engage in a particular professional activity all fall outside the s. 7 guarantee.

[C] Discrimination

It may be argued that the proposed by-law has a disproportionate adverse effect upon panhandlers by restricting their ability to peacefully use and enjoy public spaces, to express themselves and to meet their basic needs. It exacerbates the pre-existing stigmatization of panhandlers by penalizing behaviours that are peaceful, benign and lacking in moral blameworthiness. The by-law may be argued to send a message that panhandlers are less worthy of dignity and respect than other citizens within the municipality. It could potentially deny panhandlers the equal protection and benefit of the law and equality before and under the law based on personal characteristics which are prohibited grounds of discrimination including: poverty, homelessness, disability, race and/or addiction to drugs or alcohol.

It is worth noting that while the "poor" would more likely be more disadvantaged by a regulation of panhandling by-law, without further categorization the term signifies an amorphous group, which is currently not analogous to the grounds enumerated in section 15.³ The "poor" are thus not a discrete and insular group defined by a common personal characteristic. At this time, it is unlikely that a section 15 challenge would succeed.

PART 3: Can a Municipality Prohibit *all* Panhandling Throughout Certain Geographic Areas such as a Downtown Core?

As demonstrated in [Part 2](#), courts have found that panhandling is a form of expression protected by Section 2(b) of the *Charter*. The Courts have also upheld the right to regulate such panhandling. The question now is whether a municipality can move beyond regulation to a complete ban on all panhandling within a geographic area.

The courts will have to determine if the objective of improving the economic vibrancy of the downtown core is important enough to warrant overriding the right guaranteed by s. 2(b). The onus will be on the given City to justify a move from regulation to a total ban. That justification must be made under Section 1 of the *Charter*. The test for a Section 1 justification is set out in a Supreme Court of Canada case called *R. v. Oakes*, [1986] 1 S.C.R. 103. A municipality must show that:

- (a) the limitation on the right (to panhandle) is directed at a pressing and substantial objective (mere inconvenience is insufficient); and that

² (1997), 36 O.R. (3d) 127. Goudge J.A. wrote at 136.

³ *R v. Banksat* para. 104-05.

(b) the limitation is proportionate (meaning, not overbroad).

"Proportionate" means that the bylaw must be drafted with sufficient precision to address the problem, but do so with as little interference with the protected right as possible. A fair balance must be struck between the rights of the panhandlers and the rights of others using the street.

The municipality's objective in regulating panhandling, which is, say, to improve business and enhance the experience of tourists, might be justified as a "pressing and substantial objective". However, a bylaw banning all panhandling, including passive panhandling, in the entire city may not meet the proportionality test. It would depend on the quality of the evidence adduced. Prohibiting persons from panhandling will have to be rationally connected to the legislative objective. That is, reducing the presence of panhandlers would have to be shown to be rationally expected to increase tourist and business activity.

In order to meet the proportionality test, the City would need to show that:

- (a) a ban on panhandling is necessary in wide geographic areas such as a downtown core;
- (b) a general ban is necessary on passive panhandling within those areas; and that
- (c) other regulatory methods of dealing with the problem of panhandling, will not address the issue.

It is instructive to turn to examples of Canadian municipalities that have enacted panhandling regulations, to see how they have dealt with anti-panhandling laws. It would appear that, in recognition that panhandling is a permitted activity, no existing by-laws in any Canadian jurisdiction currently contains an absolute prohibition on panhandling. There are by-laws that contain provisions designed to control such issues as obstructive, repetitive soliciting, loitering and some of the by-laws including restrictions on panhandling at certain times and locations (see [appendix 1](#)). Many cities, including both Calgary and Winnipeg, have enforcement programs on aggressive panhandling which are coupled with strong outreach programs. Before any municipality institutes a ban, a court would likely consider to what extent a municipality has tested an outreach program.

Based on *City of Montreal v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141 at para. 81), the presumption is that forms of expression, such as panhandling, will be allowed in some way on a public street. The bar is set very high under Section 1 to justify why any problems regarding panhandling cannot be dealt with by regulation, rather than prohibition.

PART 4: International Law

If the above legal analysis is not conclusive, you may wish to raise Canada's international commitments. It can be argued that introducing panhandling laws would not comply with international human rights law regarding economic security.

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.”⁴

In 1993, the United Nations Committee, in 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. 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. 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 sections 7 and 15 of the *Charter*. Although section 7 and 15 challenges have yet to succeed with respect to panhandling, the Committee's concern may suggest further *Charter* challenges to panhandling laws down the road.

⁴ (1976), 993 U.N.T.S. 3 [ICESCR].

Appendix 1⁵

	By-law	Types of Restrictions
Calgary	No. 3M99 – Regulating Panhandling	-Time (between hours of 8 p.m. - 8 a.m.) - Location (within 10 metres of a bank, credit union, ATM, transit stop) -Obstructing traffic -Repetitive solicitation -Soliciting people in a vehicle
Vancouver	No. 8309 s.70A – The Street and Traffic Bylaw (aka the panhandling by-law)	-Obstructing traffic -Soliciting in a group of three or more persons -Location (within 10 meters of a bank, atm) -Soliciting from persons in a vehicle
Halifax	City of Halifax Ordinances Number 180 - Respecting Streets	-Obstructing a person -Loitering or congregating in a manner that disturbs others
Montreal	RBCM, c. P-12.2 - Concerning Cleanliness and Protection of Public Property and Street Furniture	-Obstructing traffic -loitering -prowling - lying drunk
New York	Section 240.35 of the New York State Penal Law	-Loitering, remaining or wandering in a public place for the purposes of begging*
New York City	Section 10-136 of the New York Administrative Code	-Aggressive solicitation in public places - solicitation at certain locations such as a bank, atm, cheque cashing business - soliciting people in vehicles

⁵ City of Toronto legaldocs.