Homelessness and the Charter of Rights

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There have, to date, been relatively few cases concerning homelessness and the Canadian Charter of Rights. Yet the rights set out in the Charter, such as the right to freedom of expression (s. 2(b), the right to life, liberty and the security of person (s. 7) and equality rights (s. 15) should all play an important role in protecting the position of a disadvantaged group such as the homeless. This article looks at some of the main cases concerning homelessness and the Charter (part I). It then goes on to look at the constitutional case law of the United States of America (Part II). The purpose is neither to provide a comprehensive account of the status of US law nor to provide a comparative assessment of the extent to which the rights of homeless people are constitutionally protected in the respective legal systems. Rather the purpose is to identify the constitutional basis on which the rights of


2 The focus here is on the Federal Constitution although cases have, of course, also been brought under State constitutions: see, for example, A.J. Liese ‘We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process Law’ (2006) 59 Vanderbilt Law Rev, 1413.
homeless people have been protected in US law. Part III then explores the implications of this in a Canadian context. The focus in this article is on laws adopt to ‘control’ homeless people such as anti-vagrancy, anti-begging or panhandling laws, and laws which restrict where (or how) people may, sit, lie or sleep.

I. Canadian case law on Charter rights and homelessness

There have to date been three main cases concerning the Charter of Rights and homelessness. Two cases – Federated Anti-Poverty Groups of BC v Vancouver (City) and R v Banks - concerned the constitutionality of restrictions on begging while the recent case of

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3 It is not suggested that Canadian jurisprudence should follow that of the USA and, obviously, the Canadian Charter and the US Constitution have very different histories. One might suggest that a more relevant comparator would be the European Court of Human Rights. However, there has to date been very little ECHR case law on the issues considered in this article (in contrast to the abundance of US case law). Much of the case law before the European Court of Human Rights relates to the right to housing (an issue not considered in this article) and also involved ethnic minorities (such as gypsies or Roma) which would add an additional complexity to any comparison.

Victoria (City) v Adams concerned city byelaws which prohibited erecting temporary shelter on public property.5

Restrictions on panhandling

The Federated Anti-Poverty Groups (FAPG) and Banks cases involved restrictions on begging and, in both cases, these were upheld by the BC Supreme Court and the Ontario Court of Appeal respectively. The FAPG case involved a challenge to Vancouver byelaws which prohibited (so-called) ‘obstructive solicitation’.6 The Banks case involved an appeal against a

5 Federated Anti-Poverty Groups of BC v Vancouver (City) 2002 BCSC 105; R v Banks, 2007 ONCA 19; Victoria (City) v Adams, 2008 BCSC 1363; 2009 BCCA 563. There are, of course, a number of other cases which have considered issues concerning aspects of Charter rights and homelessness but these have not engaged in detail with the issues. For example, in City of Vancouver v. Maurice 2002 BCSC 1421, the BC Supreme Court upheld the grant of an injunction to the city to bring to an end the contravention of its Street and Traffic by-law by a large group of homeless people who were sleeping outside a building from which they had been evicted. The consideration by the Court of Charter issues (at paras 25-32) is very limited and appears to take the view that the Charter is only applicable insofar as it is not inconsistent with Vancouver byelaws, see, for example (at para 30) the statement that ‘[o]bstructing the city’s sidewalks in breach of its by-law is clearly not a form of expression that is compatible with the use of the sidewalks.’ See also Vancouver (City) v. Maurice, 2005 BCCA 37; Provincial Rental Housing Corporation v. Hall, 2005 BCCA 36 (CanLII); City of Vancouver v. Zhang, 2008 BCSC 477 (CanLII); 2008 BCSC 875 (CanLII).

6 This was defined as

(a) to sit or lie on a street in a manner which obstructs or impedes the convenient passage of any pedestrian traffic in a street, in the course of solicitation,

(b) to continue to solicit from or otherwise harass a pedestrian after that person has made a negative initial response to the solicitation or has otherwise indicated a refusal,
conviction under the Ontario Safe Streets Act, 1999 which amended the Highway Traffic Act and prohibited soliciting (while on a roadway) a person in or on a stopped, standing or parked vehicle. In both cases, it was argued that the laws were in breach of ss. 2(b), 7 and/or 15 of the Charter.

The right to freedom of expression

S. 2 of the Charter provides that

2. Everyone has the following fundamental freedoms:

   ... 

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

   (c) to physically approach and solicit from a pedestrian as a member of a group of three or more persons, 

   (d) to solicit on a street within 10 m of (i) an entrance to a bank, credit union or trust company, or (ii) an automated teller machine, or 

   (e) to solicit from an occupant of a motor vehicle in a manner which obstructs or impedes the convenient passage of any vehicular traffic in a street.

7 The legislation sought to prohibit aggressive solicitation and the solicitation of persons in certain places. At trial before Babe J ((2001), 55 O.R. (3d) 374 ) and before the Superior Court for Ontario (2005 CanLII 605) the case had also involved s. 2 of the Act concerning aggressive solicitation but this issue was not before the Court of Appeal. The intervenors – the Canadian Civil Liberties Association - sought to use the case as a means to challenge the constitutionality of the provisions generally but the Court of Appeal (arguably correctly) confined the issues to those involved in the specific convictions before it (which related only to ‘squeegeeing’ in the hope of receiving some payment).
In Banks the Court noted that most recent exposition by the Supreme Court as to the analytical framework to be applied in a s. 2(b) case was Montréal (City) v. 2952-1366 Québec Inc. ⁸ This stated that the test to be applied was:

First, did the [activity] have expressive content, thereby bringing it within s. 2(b) protection? Second, if so, does the method or location of this expression remove that protection? Third, if the expression is protected by s. 2(b), does the [law] infringe that protection, either in purpose or effect?

Applying that test to the facts of the case, Juriansz, J.A. (for the Court) held that ‘act of begging is communication and is evidently expression’ which he would characterise as ‘fundamental expression at the core of free speech’. ⁹ He found that expressive content of the activity of squeegeeing was essentially the same. ‘While words may not be spoken and although a service is provided’ the Court accepted ‘that the driver of the stopped vehicle understands full well that the squeegee person is requesting a donation.’ ¹⁰ In FAPG, the City had conceded that even obstructive panhandling is a form of expression – a view with which Taylor J expressly agreed. ¹¹

Turning to the issue of the method or location, the Ontario Court noted that no objection could be taken to the method of expression of the appellants, and the issue was whether the location of the expressive activity, i.e. a ‘roadway’, was incompatible with free

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⁸ [2005] 3 S.C.R. 141. In FAPG, the Court relying on the earlier case law had used a slightly differently worded test (at para 147) but not much would appear to turn on this.

⁹ Banks at para 112.

¹⁰ Banks at para 113.

¹¹ FAPG at paras 149-151.
expression. The Court again referred to Montréal (City) in which a majority of the Supreme Court had offered its views on the diverging tests presented in previous case law.\textsuperscript{12} This had suggested that

The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfilment.

To answer this question, the following factors should be considered:

(a) the historical or actual function of the place; and

(b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

The ultimate question was whether free expression in the public place at issue would undermine the values s. 2(b) is designed to promote.\textsuperscript{13} Juriansz, J.A. accepted that ‘the open right to engage in expression on the traveled portion of a roadway would hamper the intended function of the space.’\textsuperscript{14} However, he expressed the view that it was not clear to him that the expression (the squeegeeing), although incompatible with the function of a traffic lane, undermined the values s. 2(b) is designed to promote, i.e. democratic discourse, truth finding and self-fulfilment.

\textsuperscript{12} [2005] 3 S.C.R. 141 at para 74.

\textsuperscript{13} Banks at para 119 citing Montréal (City) at para 77.

\textsuperscript{14} Banks at para 122.
Thirdly, the Court found that the provisions in question infringed s. 2(b). While the dominant aspect of the provisions was the regulation of the interaction of pedestrians and vehicles on the roadways in the interests of public safety, efficient circulation, and public enjoyment of public thoroughfares, the Court found that in achieving that overall objective the legislation has the incidental purpose of restricting soliciting which is an expressive activity.\(^{15}\)

This was a substantially broader view than that taken by the BC Court in \textit{FAPG}. That Court did not, of course, have the benefit of the views of the \textit{Montréal (City)} majority and this may explain the different approach taken (at least on the initial issue). Based on the case law at that time, the \textit{FAPG} Court focussed on the compatibility of expression with the function of the place rather than with the purposes which s. 2(b) is intended to serve.\(^{16}\) It found that the dominant purpose of the by-laws was the safe and efficient movement of pedestrians and that other activities, whether or not they involved forms of expression, were subordinate to the purpose of safe and efficient movement of pedestrians.\(^{17}\) Taylor J took

\(^{15}\) The Court of Appeal did not dwell on the precise purpose of the legislation in this context (see para 126). In contrast, Babe J. at first instance, applying \textit{Irwin Toy Ltd. v. Quebec (Attorney General)}, 1989 CanLII 87 (S.C.C.), had considered that the purpose of the legislation was to restrict expression and that, therefore, it was in breach of s. 2(b) and required to be justified under s.1 (which he found it was). Drambot J. (in the Superior Court) had also taken the view that the conduct of the appellants did involve communication protected by s. 2(b) but, while accepting that the ‘purpose test’ not easy to apply in this case had concluded that the purpose was to promote public safety (at para 105-106) and had the effect of restricting only the manner of expression ‘in a very limited way’ (para 125). Therefore there was no breach of s. 2(b).

\(^{16}\) \textit{FAPG} at paras 152-6.

\(^{17}\) At para 157-9.
the view that the bye-laws did not prohibit anyone from asking another for help. He stated that

The right to express one’s views about poverty, whether in the form of panhandling as solicitation for money has been defined, is not prohibited under By-law 8309 ... [which sought only] ... to interfere with panhandling as a form of social interaction (i.e. expression) as minimally as possible so that the act of panhandling does not impair the dominant purpose of the street.\(^{18}\)

Accordingly, he concluded that ‘the act of panhandling which constitutes obstruction as defined above is not within the scope of the protected right of freedom of expression in s. 2(b) of the Charter.\(^{19}\) In any case, the Court concluded that the byelaws did not purport to impose a restriction on the message sought to be delivered as they did not prohibit panhandling per se but only ‘obstructive’ panhandling.\(^{20}\) Finally, Taylor J, despite the City’s concession that panhandling (as a legitimate form of participation in the discussion of political or social issues) promoted at least one of the purposes underlying the freedom of expression, ruled that obstructive panhandling could not be said to promote the values underlying freedom of expression.\(^{21}\)

Given these conclusions, there was no need for the FAPG Court to consider s. 1 of the Charter. However in Banks the Ontario Court had to consider whether the breach of s. 2(b)

\(^{18}\) At para 161.

\(^{19}\) At para 162.

\(^{20}\) At para 169 et seq.

\(^{21}\) At paras 185-7.
was saved by s. 1 and found that it was.\footnote{Banks at paras 128-32.} Firstly, the objective of regulating the interaction of pedestrians and vehicles on roadways was important enough to warrant overriding the right guaranteed by s. 2(b). Prohibiting persons from soliciting or approaching a vehicle while ‘on a roadway’ was rationally connected to the legislative objective. Third, the provisions impaired the appellants’ right of expression as little as possible. And finally, the deleterious effects on the appellants (described as ‘minimal’) did not outweigh the benefits of the legislation, i.e. the objective of promoting public safety, efficient circulation, and public enjoyment of public thoroughfares.

While the laws in question and the factual circumstances are different, there is a clear divergence between the views taken by the two Courts.\footnote{Unfortunately the Banks Court did not refer to FAPG.} Both found that begging was expressive activity. However, the BC Court would have held that both the method and location of that activity removed the protection of s. 2(b). While one might argue that, in the light of Montréal \textit{(City)}, a different conclusion should be arrived at as to the location, there would appear to be little difference in the method involved in both cases.\footnote{Taylor J.’s frequent use of the term ‘obstructive’ might hide the fact that none of the activities proscribed appear any more obstructive than that in question in the Ontario case.} Yet the Ontario Court found the method to be unobjectionable.

\textit{Right to life, liberty and security of person}

S. 7 of the Charter provides that
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.

The two Courts also took somewhat different views on how this provision should be interpreted as it applied to begging (although in this regard the Ontario Court was much less expansive than it had been on the freedom of expression issues).

The BC Court found that ‘the ability to provide for one’s self ... is an interest that falls within the ambit of the s. 7 provision of the necessity of life.’ However, the Court’s discussion on this point is rather unclear (despite having set out the standard three-stage test) and it is not apparent whether the Court found that there had been no deprivation of the right to life or that, in any case, such deprivation was justified. As to the right to liberty, the Court found that the byelaws did not provide for imprisonment per se for breach of the law nor for imprisonment for default in payment of a fine and, one must surmise, that there was no deprivation of the right to liberty.

25 FAPG at para 200.

26 1. Has there been a deprivation of the right to life, liberty or security of the person to the extent that the deprivation is real or imminent and sufficiently serious to merit Charter protection? 2. What are the applicable principles of fundamental justice? 3. Is the deprivation in accordance with the applicable principles of fundamental justice?

27 The finding at para 227 would suggest the former but the judgement is entirely confusing on the point and questions as to whether there is a deprivation are inextricably mixed with those of justification.

28 Again the judgement is unclear but the Court found no breach of s. 7 on this basis (at para 243). There is no explicit consideration of the ‘security of the person’ aspect.
The Ontario Court was much clearer (if not any more helpful to those involved in begging). The *Banks* appellants did not argue that their right to life was engaged but did claim that the law infringed their security of the person by denying them the economic means necessary for survival. The Court quoted its earlier decision to the effect 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.\(^{29}\)

In any case, the Court agreed with the trial judge that the evidence did not demonstrate that squeegeeing was necessary for the appellants’ survival nor that the legislation affected their economic right to survival in any fundamental sense.\(^{30}\) The Court did find that the right to liberty was engaged as they faced potential imprisonment. However, the Court rejected arguments that the law was overbroad or vague and found that it was consistent with the principles of fundamental justice.\(^{31}\)

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\(^{29}\) *A & L Investments Ltd. v. Ontario* (1997), 36 O.R. (3d) 127 at para 136. The case involved landlords and it might be suggested that the issues involved in begging are rather different from ‘carrying on a business’. The Superior Court had taken a similar view though citing the perhaps more relevant decision in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, in which the Supreme Court concluded that the stigma suffered by Mr. Blencoe while awaiting trial of a human rights complaint against him, which hindered him from pursuing his chosen profession as a politician, did not implicate his rights under s.7.

\(^{30}\) *Banks* at 81.

\(^{31}\) At paras. 83-87.
Vagueness and overbreadth

Although not considered by the Court of Appeal, the lower Courts in *Banks* had also considered arguments that the provisions of the Safe Streets Act were overbroad and/or void for vagueness under s. 7 of the Charter. It had been argued that various sections of the Act were (i) unconstitutionally vague because they fail to give fair notice of what conduct is prohibited by law, and fail to impose real limitations on the discretion of those entrusted with enforcing the law and (ii) that the law was unconstitutionally overbroad because it restricted liberty more than necessary to accomplish its purpose. The trial judge, Babe J., (with whom the Superior Court agreed) took the view that ‘[t]he language of the Safe Streets Act is like that found in many other statutes that the Courts routinely interpret daily’ and that the impugned provisions easily met the standard set out by the Supreme Court and were not, therefore, unconstitutionally vague.\(^32\)

On the issue of overbreadth, Babe J focused on whether the means used to achieve the legislature’s objective were too sweeping. The main issue in dispute was the definition of ‘soliciting in an aggressive manner’ in s. 2(3) of the Act.\(^33\) The defendants and intervenors


\(^33\) S. 2(1) provided that ‘aggressive manner’ meant a manner that is likely to cause a reasonable person to be concerned for his or her safety or security. However, s. 2(3) went on to provide that ‘Without limiting subsection (1) or (2), a person who engages in one or more of the following activities shall be deemed to be soliciting in an aggressive manner for the purposes of this section: 1. Threatening the person solicited with
had put forward various (somewhat strained) examples of how the law could lead to absurd results arguing, for example, that a child asking his mother for money to buy candy could be in breach of the law. Babe J held that such a result could be avoided by ‘a purposive and contextual interpretation’ of the language in accordance with the well-settled principle that whenever possible a statute should be construed so as to avoid absurd or unintended consequences’. In particular, he suggested that the term ‘solicit’ should be construed in the context of the legislative intention shown in the long title of the Act. Thus, although the definition of ‘solicit’ in s. 1 of the Act did not require that solicitation be between strangers or in public, he took the view that this was implicit in the context. Dambrot J. in the Superior Court took a somewhat different view. Babe J. on a separate argument had held that these ‘deeming’ rules were in breach of s. 11(d) of the Charter – which guarantees the right of anyone charged with an offence to be presumed innocent until proven guilty according to law – and had read in the words ‘in the absence of evidence to the contrary’ into s.2(3). Dambrot J upheld this view and took the view that this would also eliminate any absurd

physical harm, by word or gesture or other means, during the solicitation or after the person solicited responds or fails to respond to the solicitation. 2. Obstructing the path of the person solicited during the solicitation after the person solicited responds or fails to respond to the solicitation. 3. Using abusive language during the solicitation or after the person solicited responds or fails to respond to the solicitation. 4. Proceeding behind, alongside or ahead of the person solicited during the solicitation or after the person solicited responds or fails to respond to the solicitation. 5. Soliciting while intoxicated by alcohol or drugs. 6. Continuing to solicit a person in a persistent manner after the person has responded negatively to the solicitation.

On a separate argument, Babe J (whose view was upheld by the Superior Court) held that this ‘deeming’ provision was in breach of s. 11

34 As this argument is specific to the legislation involved, we do not discuss it in detail here.
interpretations of s. 2. He did not feel it necessary to indicate how the legislation should be interpreted given that none of the appellants actually argued that their acts fell into any of the absurd or unintended categories.

The right to equality (s. 15)

S. 15(1) of the Charter provides that

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

Applying the standard *Law* test, Taylor J in *FAPG* asked first if the law drew a formal distinction between panhandlers and others. One might think that the answer was obvious given that the law only affected panhandlers but Taylor J took the opposite view. He identified the appropriate comparator group as ‘those who use the streets for activities that may have the effect of impeding the safe and efficient flow of pedestrian movement’. He concluded (on the basis of evidence not clear from the judgement itself) that all persons were proscribed from being obstructive in carrying out their activities and that, therefore, no distinction arose. In any case, the Court took the view that poverty and or the activity of panhandling were not ‘analogous grounds’ under s. 15 of the Charter and that the bye-

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35 *FAPG* at para 263.

36 At paras 271 and 289.
laws did not impose a burden upon or withhold a benefit from those engaged in panhandling that could be said to affect essential human dignity.\textsuperscript{37}

The Ontario Court’s consideration of s. 15 was, perhaps, the least satisfactory part of the judgement. The Court pointed out that the provisions did not draw a formal distinction between the appellants and others in that they prohibited all persons, and not just ‘beggars’, from standing on a roadway to solicit a stopped vehicle and from approaching a vehicle to solicit or offer a service.\textsuperscript{38} The Court also rejected the argument that the provision involved indirect discrimination against homeless and poor persons and beggars on the basis that the trial judge had found that the Act did not affect the appellants’ economic right to survival in any fundamental sense. Therefore, the Court argued, it had not been established 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. In any case, the Court also did not find that any distinction was on the basis of an analogous ground. The Court suggested that the appellants identified the proposed group not by a personal characteristic, but by an activity.\textsuperscript{39} The act of begging, it stated, is essential to the identification of an individual as a member of the proposed group. The Court did not find that an activity could ‘never be used to identify a prohibited ground of discrimination’. However, in this case it did not regard ‘the activity of begging to be an immutable or

\textsuperscript{37} At para 295.

\textsuperscript{38} Banks at para 91.

\textsuperscript{39} Although this is questionable as the Court itself (at para 98) outlined the grounds 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.’
constructively immutable personal quality that can only be changed at a ‘great personal cost.’”

This aspect of the decisions is very unsatisfactory. First a provision which, in reality, affects only or predominantly beggars would appear both (a) to draw a formal distinction between the claimant and others at least by effect, and (b) to fail to take into account the claimant’s already disadvantaged position in Canadian society resulting in substantively differential treatment between the claimant and others. Secondly, while one can understand the reluctance of the lower Courts to extend the analogous grounds, when one examines the purpose of the Charter, poor persons who are homeless and/or begging would appear to be amongst those with a (highly) disadvantaged position within Canadian society and to justify inclusion as an analogous ground. Whether or not restrictions on begging infringe on human dignity so as to constitute discrimination could then receive more adequate consideration than they have to date.

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40 At para 99. The Court distinguished *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.) in which it had held that ‘receipt of social assistance’ was an analogous ground. Its distinction is not convincing given that receipt of social assistance could also be described as an activity and one which, one could argue, is no less or more immutable than begging.

41 *Law v. Canada (Minister of Employment and Immigration)* 1999 CanLII 675 (SCC).

42 See the recent decision by the UK House of Lords that homelessness (rough sleeping) fell within the concept of ‘other status’ for the purposes of the European Convention on Human Rights: *R v Secretary of State for Work and Pensions ex parte RJM* [2008] UKHL 63. The legal context is, of course, entirely different and the Superior Court in *Banks* had relied on *Polewsky v. Home Hardware Stores Ltd.*, 2003 CanLII 48473 (ON S.C.D.C.) in support of its conclusion that ‘the poor’ do not constitute an analogous ground for the purposes of s. 15.
Restrictions on temporary shelter

The recent case of Victoria (City) v Adams concerned city byelaws which prohibited erecting temporary shelter on public property. In response to the large number of persons camping in a public park and in an apparent effort to disperse a ‘tent city’ the City of Victoria sought to enforce existing bye-laws against those living in the tent city. The defendants raised the Charter in their defence arguing that the enforcement of the bye-laws against them was in breach of s. 7. The City argued that this was an attempt to create positive rights under s. 7 but the Superior Court was satisfied that the City’s actions in prohibiting the erection of shelter were sufficient to bring the claim within the scope of s. 7. Having considered the evidence the Superior Court found that there were then more than 1,000 homeless people living in the City. In comparison with this figure, the City had 104 shelter beds, expanding to

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43 Federated Anti-Poverty Groups of BC v Vancouver (City) 2002 BCSC 105; R v Banks, 2007 ONCA 19; Victoria (City) v Adams, 2008 BCSC 1363. There are, of course, a number of other cases which have considered issues concerning aspects of Charter rights and homelessness but these have not engaged in detail with the issues. For example, in City of Vancouver v. Maurice 2002 BCSC 1421, the BC Supreme Court upheld the grant of an injunction to the city to bring to an end the contravention of its Street and Traffic by-law by a large group of homeless people who were sleeping outside a building from which they had been evicted. The consideration by the Court of Charter issues (at paras 25-32) is very limited and appears to take the view that the Charter is only applicable insofar as it is not inconsistent with Vancouver byelaws, see, for example (at para 30) the statement that ‘[o]bstructing the city’s sidewalks in breach of its by-law is clearly not a form of expression that is compatible with the use of the sidewalks.’

44 At paras 104 and 113.
326 in extreme conditions. Thus the Court found that hundreds of the homeless had no option but to sleep outside in the public spaces of the City.45

Turning to the Bylaws in question, it found that they did not prohibit *sleeping* in public spaces. They did, however, prohibit taking up a temporary abode. In practical terms the Court found that this meant that the City prohibited the homeless from erecting any form of overhead protection including, for example, a tent, a tarp strung up to create a shelter or a cardboard box, even on a temporary basis. The Court was satisfied that the byelaws in question constituted state action sufficient to fall within the scope of s. 7. The City argued that the cause of deprivation was the condition of being homeless and not the result of state action. However, the Court did not accept this argument. The expert evidence before the Court established that exposure to the elements without adequate protection is associated with a number of significant risks to health including the risk of hypothermia, a potentially fatal condition.46 The expert evidence also established that some form of overhead protection is part of what is necessary for adequate protection from the elements. However, the Court found that the City’s Bylaws prohibit persons who had (because of the shortage of shelter accommodation) to sleep outside from erecting even the most rudimentary form of shelter to protect them from the elements.47 This prohibition on erecting shelter was in effect at all times, in all public places in the City. The Court found further that the effect of the prohibition was to impose upon those homeless persons, who are among the most vulnerable and marginalized of the City’s residents, significant and

45 Para 58.

46 Paras. 67-69.

47 Para 194.
potentially severe additional health risks. In addition, sleep and shelter are necessary
preconditions to any kind of security, liberty or human flourishing. Accordingly it
concluded that the prohibition on taking a temporary abode contained in the Bylaws and
operational policy constituted an interference with the life, liberty and security of the
person of these homeless people.

The Court went on to consider whether this was in accordance with the principles of
fundamental justice. The Court concluded that the prohibition was both arbitrary and
overbroad and that there were a number of less restrictive alternatives which the City could
have adopted. Therefore, the approach was not consistent with the principles of
fundamental justice. Finally the Court turned to consider whether the infringement of s. 7
could be justified pursuant to s. 1 of the Charter. The Supreme Court of Canada has stated
that infringements of the rights under s. 7 that have been found to be contrary to the
principles of fundamental justice will only be justified in rare circumstances such as natural
disasters, the outbreak of war, epidemics, and the like. In this case, while accepting that
the preservation of parks (the City’s stated objective) was an important objective, Ross J.
found that the provisions in question were not rationally connected to the objective, did not
impair the right in question as little as possible, and that their negative impact was
disproportionate to their advantages.

48 Ibid.

49 At para 194.


51 Adams at paras 201-217.
On appeal, the City’s main argument was that ‘by declaring the bylaw provisions of no force or effect, the trial judge improperly intruded into the City’s legislative jurisdiction to make complex policy decisions concerning the allocation of scarce parkland and other public resources’. But this argument was shortly rejected by the Court of Appeal. The Court ruled that the fact that a legal issue raises political concerns did not render it non-justiciable. It considered that the question before the Court was not ‘the wisdom of policy decisions of elected officials on how to best allocate public resources to address the problem of homelessness’ but ‘whether the provisions of the Bylaws that prohibit the erection of temporary overhead shelter violate the respondents’ rights under s. 7 of the Charter, in circumstances in which there are insufficient alternative shelter opportunities for the City’s homeless.’ It held that there was no doubt that this was a proper question for a Court to address. In general the Court of Appeal upheld the analysis of the trail judge and her finding that that the prohibition on the erection of temporary shelter violated the rights of homeless people to life, liberty and security of the person under s. 7, and the violation was not justified under s. 1 of the Charter.

Only in relation to the finding of arbitrariness did the Court of Appeal come to a different conclusion. While accepting that the Superior Court had applied the correct test, the Court of Appeal found that the trial judge had approached the issue too narrowly and that given the objective of the Bylaws of ‘maintaining the environmental, recreational and social benefits of urban parks’, it could not be said that the prohibition on the erection of shelter

52 Ibid at para 6.

53 At paras 67-9.

54 At paras 122-23.
bore ‘no relation’ to the legislative goal, or that the connection between the restrictions and
the legislative objectives was only theoretical.

The Court of Appeal also varied the order made by the Superior Court by narrowing it to two
specific provisions of the Bye-laws, by specifying that these provisions were inoperative only
insofar as they applied ‘to prevent homeless people from erecting temporary overnight
shelter in parks when the number of homeless people exceeds the number of available
shelter beds in the City of Victoria’; and by providing that the Supreme Court of British
Columbia may terminate this declaration on the application of the City of Victoria, upon
being satisfied that sections 14(1)(d) and 16(1) no longer violate s. 7 of the Canadian Charter
of Rights and Freedoms.\textsuperscript{55}

This is an important and interesting case and shows the potential of s. 7 in the context of
homelessness. It should be noted that it was premised on the fact that the number of
homeless people greatly exceeded the available beds. Ross J. specifically stated that ‘[i]f
there were sufficient spaces in shelters for the City’s homeless, and the homeless chose not
to utilize them, the case would be different and more difficult’.\textsuperscript{56}

\textbf{II. \hspace{1em} Constitutional protection in the USA Courts}

Although many of the issues concerned in cases concerning homelessness have been
considered by the US Supreme Court, rather few cases specifically concerning homelessness

\textsuperscript{55} At para 166.

\textsuperscript{56} At para 191. A point emphasised by the Court of Appeal at para 74.
have reached the Court itself. The main source of case law is the Circuit Courts of Appeal, the federal District Courts, and State Courts. Where State laws are involved, one could obviously expect some differences in approach from State to State and even in the case of federal law, where the Supreme Court has not spoken, consistency between circuits would not appear to be a valued feature of US law. In addition, the type of cases involved in this area does not lend itself to final determinations. Many cases involve injunctions and Courts have to decide whether to grant or refuse such an injunction rather than to come to a final decision on the issues. In other cases, initial decisions have been vacated following settlement negotiations. Accordingly here, the focus is not to identify what the current state of the law is but rather to outline the constitutional sources which have been drawn on to protect (or attempt to protect) the rights of homeless people.

As in the Canadian case law, the right to freedom of expression (First Amendment), and equal protection (Fifth and Fourteenth Amendments) have featured strongly in the USA case law. However, other aspects of the Constitution such as the prohibition on cruel and unusual punishment and the due process clause on conviction for ‘vague’ offences have also been used to protect the rights of homeless persons.

*Freedom of expression*

As is well known, the United States Supreme Court has consistently taken the view that freedom of expression under the First Amendment is entitled to a very high level of

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57 In a number of cases the Court has struck down ‘vagrancy’ statutes, e.g. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). However, whatever their historical origins, the cases would suggest that such statutes are now rarely used against homeless persons.
Begging has been recognised as a form of expression thereby attracting constitutional protection and a number of restrictive laws have been struck down on this basis. For example, in *Loper v New Your City Police Dept* the Court of Appeals held unconstitutional a law which prohibited loitering for the purpose of begging (which applied throughout the city).⁵⁸ The Court held that begging was ‘expressive conduct or communicative activity’.⁵⁹ Similarly, the Massachusetts Supreme Court found that ‘peaceful begging’ involved communicative activity under the First Amendment.⁶⁰

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⁵⁹ Citing *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, (1980), the Supreme Court, in a case involving solicitation by charitable organizations, held that ‘charitable appeals for funds, on the street or door to door, involve a variety of speech interests--communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes--that are within the protection of the First Amendment....’. See generally J.T. Haggerty ‘Begging and the public forum doctrine in the First Amendment ‘ (1992-1993) 34 B.C. L. Rev. 1162; C.R. Mabry, ‘Brother Can You Spare Some Change? -- And Your Privacy Too?: Avoiding a Fatal Collision Between Public Interests and Beggars' First Amendment Rights, (1994) 28 U.S.F. L. Rev. 309 although this is weak on historical (‘In America today, the situation is much like that of old England’) and sociological (‘Beggars are everywhere’) analysis; N. A. Milich ‘Compassion fatigue and the First
Where communicative activity is involved, the USA case law then examines whether the activity is conducted in a public forum. As the Loper Court explained ‘[t]he forum-based approach for First Amendment analysis subjects to the highest scrutiny the regulation of speech on government property traditionally available for public expression.’ There is extensive (and by no means always consistent) case law as to whether or not specific locations are ‘public forums’. Streets and parks have been held to be ‘quintessential public forums, [in which] the government may not prohibit all communicative activity’. Other locations identified as public forums in the case law include sidewalks, and a public

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60 Benefit v City of Cambridge 424 Mass 918 (Mass, 1997). See also ACLU v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003) cert. denied, 540 U.S. 1110 (2004); Smith v City of Fort Lauderdale 177 F.3d 954 (11th. Circuit, 1999); State v. Dean, 170 Ohio App.3d 292, 2007-Ohio-91. See also Berger v City of Seattle, 569 F.3d 1029 (9th Cir. 2009) at 7774-75.

61 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, (1983). See also Leydon v. Town of Greenwich, 257 Conn. 318 (Conn, 2001) and Berger v City of Seattle, 569 F.3d 1029 (9th Cir. 2009). Where the property is not a traditional public forum and the Government has not dedicated its property to First Amendment activity, such regulation is examined only for reasonableness.

beach, but not the subway system, nor an airport terminal operated by a public authority.

In the case of communicative activity in a public forum, the Courts must examine whether the law in question (1) is necessary to serve a compelling state interest and is narrowly

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tailored to achieve that end; or (2) can be characterized as a regulation of the time, place and manner of expression that is content neutral, is narrowly tailored to serve significant government interests and leaves open alternate channels of communication. The Loper Court ruled that no compelling state interest was served ‘by excluding those who beg in a peaceful manner from communicating with their fellow citizens’. Even if the state were considered to have a compelling interest in preventing the evils sometimes associated with begging, the Court held that ‘a statute that totally prohibits begging in all public places cannot be considered “narrowly tailored” to achieve that end.’

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66 Perry Educ. Ass’n, 460 U.S. at 45. In general the US Courts have tended to the view that laws restricting begging are content neutral on the basis that the laws at issue are not enacted because of ‘disagreement with the message conveyed’: see United States v. Kokinda, 497 U.S. 720, 736 (1990); Los Angeles Alliance for Survival v. City of Los Angeles, 157 F.3d 1162, 1164 (9th Cir. 1998); ISKCON Miami, Inc. v. Metropolitan Dade Cty., Fla., 147 F.3d 1282, 1288 n.5 (11th Cir. 1998); Henry v City of Cincinnati, 2005 WL 1198814 (S.D. Ohio, 2005); State v. Dean, 170 Ohio App.3d 292, 2007-Ohio-91 (which involved a State challenge to the same law at issue in Henry); People v Barton. 2006 NY Int 166 (NY App., 2006). See also Gresham v. Peterson, 225 F.3d 899, 905-06 (7th Cir. 2000) (assuming without deciding that a ban on requests for immediate donations in public places is content-neutral); Smith v. City of Fort Lauderdale, Fla., 177 F.3d 954, 956 (11th Cir. 1999) (assuming without deciding that a ban on soliciting, begging, and panhandling that appears to pertain only to requests for immediate donations is content-neutral). The Californian Supreme Court agreed that this was also the position under the Californian constitution: Los Angeles Alliance for Survival v. City of Los Angeles, 993 P.2d 334 (Cal. 2000). However, in ACLU v. City of Las Vegas, 466 F.3d 784., 792 (9th Cir. 2006); Loper and Benefit the respective Courts held that restrictions were not content neutral. Where a law is content based, it must be shown that ‘is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.’

67 See also the similar approach in Benefit.
In general, sweeping bans on begging – such as those in *Loper* and *Benefit* – have generally been found unconstitutional.\(^{68}\) However, more narrowly tailored bans have frequently been upheld, such as restrictions on aggressive panhandling,\(^{69}\) and restrictions on soliciting from motor vehicles.\(^{70}\)

\(^{68}\) See also *ACLU v. City of Las Vegas*, 466 F.3d 784., 792 (9th Cir. 2006).

\(^{69}\) *Gresham v Peterson*, 225 F.3d 899 (7th. Circuit, 2000). See also *Smith v City of Fort Lauderdale* 177 F.3d 954 (11th. Circuit, 1999) in which the Court accepted that a total ban on begging on a five mile area of beach was ‘narrowly tailored to serve a significant government interest’ viz. providing a safe, pleasant environment and eliminating nuisance activity; and *State v. Dean*, 170 Ohio App.3d 292, 2007-Ohio-91. See generally D.C. Delmonico ‘Aggressive Panhandling Legislation and the Constitution: Evisceration of Fundamental Bights—Or Valid Restrictions Upon Offensive Conduct?’ (1996) 23 Hastings Constitutional Law Quarterly, 557-590. To the contrary, the Ninth Circuit ruled that a ban on active solicitation was a content-based regulation, and that it does not satisfy the exacting standards required: *Berger v City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) at 7774-79.

\(^{70}\) *People v Barton*. 2006 NY Int 166 (NY App. 2006). Though see, to the contrary, decisions by District Courts in *Lopez v Cave Creek*, F. Supp. 2d 1030 (D. Ariz. 2008); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952 (C.D. Cal. 2006); *Comite de Jornaleros de Glendale v. City of Glendale*, No. CV 04-3521, at 9 (C.D. Cal. 2005); *Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) v. Burke*, No. CV 98-4863, 2000 WL 1481467 (C.D. Cal. Sept. 12, 2000). These decisions are arguably inconsistent with ninth circuit precedent in *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986) (on which see the critical comments of M.K. Weaver, ‘Acorn v. City of Phoenix: Soliciting Motorists Is off Limits’, (1987-1988), 37 DePaul L. Rev. 50-518). These cases concern solicitation of employment by day labourers (although ‘begging’ would also be prohibited) though the judgements are not based on the type of solicitation involved. See G.W. Kettles ‘Day Labor Markets and Public Space’ Loyola LA Legal Studies Research Papers No. 2005-05. In *Berger v City of Seattle*, 569 F.3d 1029 (9th Cir. 2009), the majority distinguished Acorn but only by adopting a very tenuous reading of that decision.
Courts have come to different conclusions as to licensing requirements (which are analysed as involving ‘prior restraint’ on freedom of expression). On the one hand, the sixth circuit upheld an ordinance requiring all peddlers to pay a license fee.\(^7\) On the other, the Ohio Court of Appeals ruled that a law, which failed to provide for prompt judicial review, imposed an unconstitutional prior restraint;\(^2\) while in \textit{Berger v City of Seattle}, the Ninth Circuit struck down a ‘single-speaker’ permit requirement as ‘not sufficiently narrowly tailored to meet the standard for a valid time, place, and manner regulation.’\(^3\)

\textit{Due process}

A number of different challenges have been made under the Due Process clause of the US Constitution. Firstly, the void-for-vagueness doctrine forbids the enforcement of a law that contains ‘terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.’\(^\text{74}\) The Supreme Court (and lower Courts) have found a number of ‘vagrancy’ laws to be unconstitutional for vagueness.\(^5\) However, whatever their origin, these laws do not appear to have been enforced against homeless

\(^7\) \textit{Northeast Coalition for the Homeless v City of Cleveland} 105 F. 3d 1107 (6th. Circuit, 1997) holding that the fee was reasonably related to the costs of administering the ordinance, and the licensing program helps to prevent fraud by solicitors

\(^2\) \textit{State v. Dean}, 170 Ohio App.3d 292, 2007-Ohio-91. The District Court also expressed concerns about the licensing requirement in \textit{Henry} 2005 WL 1198814 (S.D. Ohio, 2005) and remitted the issue to the lower Courts.

\(^3\) \textit{Berger v City of Seattle}, 569 F.3d 1029 (9th Cir. 2009) at 7752-57.


people in particular. Challenges to more recent and more tightly drafted legislation have tended to be rejected especially where a narrow construction of the law would avoid constitutional problems. 76

_Cruel and unusual punishment_

There have been a number of challenges to restrictive legislation on the basis of the right to be free of ‘cruel and unusual punishment’. The Eighth Amendment states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

As explained in _Joel v. City of Orlando_, in addition to ‘limit[ing] the kinds of punishment that can be imposed on those convicted of crimes,’ and ‘proscrib[ing] punishment grossly disproportionate to the severity of the crime,’ the Eighth Amendment also ‘imposes substantive limits on what can be made criminal and punished as such.’ 77

In _Jones v City of Los Angeles_ it was argued that the Eighth Amendment right to be free from cruel and unusual punishment prohibited enforcement of a law which criminalised sitting, lying, or sleeping on the street as applied to homeless individuals involuntarily doing so due

76 See _Gresham_. In _BetonCourt v. Bloomberg_, 448 F.3d 547 (2nd Circuit, 2006), a majority of the second circuit rejected a vagueness challenge to legislation under which a man was convicted of erecting an obstruction in a public space by sleeping in a cardboard box. But this is an appalling decision and it is difficult to see how any reasonable Court could have convicted him of this offence. See the dissent of Calabresi J who described the law at issue as ‘a bizarre grab bag of loosely-related and imprecise proscriptions’.

77 232 F.3d 1353, 1357 (11th Cir. 2000) (citations omitted).
to the unavailability of shelter in Los Angeles. A majority of the ninth circuit upheld the challenge. Relying on the Supreme Court decisions in *Robinson v. California*, and *Powell v. Texas*, the Court held that

> The City could not expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment, nor can it criminalize acts that are an integral aspect of that status. Because there is substantial and undisputed evidence that the number of homeless persons in Los Angeles far exceeds the number of available shelter beds at all times, including on the nights of their arrest or citation, Los Angeles has encroached upon Appellants’ Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless. 

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79 370 U.S. 660 (1962)

80 392 U.S. 514 (1968)

81 *Jones* at p. 4443. The Court relied on the Cruel and Unusual Punishment Clause’s third protection, which differs from the first two in that it limits what the state can criminalize, not how it can punish.
However, the dissenting judge in that case strongly disagreed with the finding arguing that the law punished conduct rather than status.

Other Courts have rejected similar claims. Although such decisions can be distinguished on the facts (in Joel, for example unlike Jones, there were available shelter beds), they really represent different approaches to the interpretation of the cruel and unusual punishment clause.

Equal protection

Because of the particular structure of the US equal protection clause, it has played little part in protecting the rights of homeless people. If the law affects a suspect class (such as race, religion or national origin) or affects the exercise of a constitutional right, then Courts must apply strict scrutiny and ask whether the law serves a compelling governmental interest. If the law affects a quasi-suspect classification (such as gender) the Courts then apply intermediate scrutiny and ask whether the statute is substantially related to an important governmental interest. In all other cases, a ‘rational basis’ review applies in which the Courts must ask whether the law is rationally related to a legitimate government interest.

In practice, rational basis review involves a very loose level of scrutiny whereby legislation is upheld if the state can show any reasonable rational basis for its existence. Homelessness (and poverty generally) has not been recognised as a suspect class. Accordingly challenges


to differential treatment of homeless people will almost always satisfy rational review

*unless* the exercise of a fundamental right (such as freedom of expression) is involved. But in the latter situation, the case will normally be decided on the basis of the right itself rather than on the basis of the equal protection clause.

**Right to travel**

It has been argued that restrictions on homeless people can infringe their right to travel. In *Pottinger*, the District Court held that the right to travel included intra-state travel and that ‘anti-sleeping ordinances’ and ‘enforcement of laws that prevent homeless individuals who have no place to go from sleeping, lying down, eating and performing other harmless life-sustaining activities burdens their right to travel’. This approach would appear to find some support in the jurisprudence of the US Supreme Court which, although it has not expressly recognized a constitutional right of travel within a state, held in *City of Chicago v. Morales* that

... the freedom to loiter for innocent purposes is part of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this “right to remove from one place to another according to inclination” as

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86 *Pottinger* at p. 1580.
“an attribute of personal liberty” protected by the Constitution. Indeed, it is apparent that an individual’s decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is “a part of our heritage” or the right to move “to whatsoever place one’s own inclination may direct” identified in Blackstone’s Commentaries.  

However, a challenge to restrictive legislation on the basis of an intrastate right to travel has been rejected in a number of other cases. In *Joyce*, even assuming that the right to travel encompassed intrastate travel, the District Court doubted that facially neutral laws should be subject to strict scrutiny. In *Tobe*, the Californian Supreme Court took the view that ‘indirect or incidental burdens on travel’ resulting from otherwise lawful governmental action did not constitute impermissible infringements of the right to travel. Therefore, in equal protection analysis, strict scrutiny was not required and the law must only satisfy rational review (which the Court held it did).  

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Other arguments

Depending, obviously, on the particular issue involved, other constitutional arguments have been advanced including that pretextual arrests of homeless individuals can amount to unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution;\(^90\) and that seizures of homeless person’s property without probable cause are unreasonable and violate the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.\(^91\) However, the argument that arrests of homeless individuals for essential, life-sustaining activities violate their right to privacy and/or decisional autonomy in violation of the Fourteenth Amendment to the United States Constitution do not appear to have been accepted by the Courts.\(^92\) In certain contexts, however, it has been argued that homeless persons may have a right to privacy (under the search and seizure


\(^91\) See, for example, *Pottinger v. City of Miami*, 810 F.Supp. 1551, (S.D.Fla.1992) remanded for limited purposes, 40 F.3d 1155 (11th Cir.1994), and directed to undertake settlement discussions, 76 F.3d 1154 (1996); *Cash v. Hamilton County Dep’t of Adult Prob.*, 388 F.3d 539, 542 (6th Cir. 2004)

\(^92\) See *Pottinger* at p. 1575 (‘the law does not yet recognize an individual’s legitimate expectation of privacy in such activities as sleeping and eating in public’ under the Florida constitution which specifically includes a right to privacy. See also *Joyce* at p. 859 (no fundamental ‘right to sleep’).
clause of the Fourth Amendment)\textsuperscript{93} where they are, for example, living in a makeshift ‘home’ or in a homeless shelter.\textsuperscript{94}

**III. Implications for Canadian jurisprudence**

I reiterate that it is not suggested that Canadian jurisprudence should follow the approach(es) adopted in neighbouring jurisprudence.\textsuperscript{95} Nonetheless, given the relatively early stage of Canadian jurisprudence in this area, it may be interesting to examine the approach which has been taken in the USA.

*Freedom of expression*

The Canadian case law already accepts that begging is a communicative activity – a view fully supported by the US jurisprudence. One question might be the scope of activity which

\textsuperscript{93}As interpreted by the US Supreme Court in *Katz v United States* 389 US 347 (1967).

\textsuperscript{94}N. May ‘Fourth Amendment challenges to “camping ordinances”: a legal strategy to force legislative solutions to homelessness’ (2008) XI, *Richmond Journal of Law and the Public interest*, p. ???. Although this argument was rejected in *People v Thomas* 45 Cal Rptr 610 (Cal Ap, 1995) where the Court held that although the defendant may have had a subjective expectation of privacy while living in a makeshift cardboard home such an expectation was not objectively reasonable (for a critique see Townsend *op. cit.*). Such a right was, however, recognised in the context of a homeless shelter in *Community for Creative Non-Violence v Unknown agents of the US Marshall Services* 791 F. Supp 1, 797 F. Supp 7 (DDC, 1992) though cp. *Thomas v. Cohen* 304 F.3d 563 (6th Cir. 2006). See Steven R. Morrison, ‘The Fourth Amendment’s Applicability to Residents of Homeless Shelters’ *Hamline Law Review*, forthcoming (2009).

\textsuperscript{95}US case law is referred to in both *Vancouver (City)* and *Banks (SC)*.
will qualify as communicative. In the USA, for example, it has been held that the sale of newspapers by homeless people was communicative activity.\textsuperscript{96} The Connecticut Supreme Court held that access to a public park implicated First Amendment activity.\textsuperscript{97} The majority of a ninth circuit panel held that a ban on sitting and lying down on sidewalks were ‘not forms of conduct integral to, or commonly associated with, expression’ and rejected a facial First Amendment challenge to the law - while leaving open the possibility that a challenge could be made to the law ‘as applied’.\textsuperscript{98} However, the dissent argued that analysis should start with ‘the assumption that sitting or lying by people in a traditional public forum can have communicative content’. However, there is general acceptance that activity such as sleeping in public is not per se communicative nor is erecting a temporary shelter in which to sleep.\textsuperscript{99}

A further area where the US case law might be of interest is in relation to (a) whether the manner in which activity is carried out will take it outside the protection of the right to freedom of expression, and (b) the definition of public forum and the restrictions which can be placed on freedom of expression. As we have seen, the most recent statement of the law by (a majority of) the Canadian Supreme Court asks whether the method or location of this expression remove the protection of s. 2(b). In terms of the method of expression, it is

\textsuperscript{96} Northeast Coalition for the Homeless v City of Cleveland 105 F. 3d 1107 (6th. Circuit, 1997).

\textsuperscript{97} Leydon v. Town of Greenwich, 257 Conn. 318 (Conn, 2001).

\textsuperscript{98} Roulette v City of Seattle 97 F. 3d 300 (9th. Circuit, 1996). See W.L. Berg ‘Roulette v City of Seattle: a city lives with its homeless’ (1994-1995) 18 Seattle U. L. Rev. 147 (if somewhat mis-titled given that the city’s intent appeared to be to live without them insofar as possible).

\textsuperscript{99} Of course, even here, a public ‘sleep-out’ can clearly be a form of expression. As to shelter see Betancourt v. Bloomberg, 448 F.3d 547 (2\textsuperscript{nd}. Circuit, 2006).
suggested that the broader approach in Banks is preferable to the narrower approach adopted in the earlier FAPG ruling. Courts should be slow to rule that method of expression takes an activity outside the scope of the Charter and there does not appear to be any support in the US case law for an argument that 'obstructive' begging negates the right to freedom of expression (although it may well justify restrictions on that right). 100

As to location, the recent restatement by the Canadian Supreme Court which focuses on ‘whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve’ correctly places the emphasis on the right to freedom of expression rather than on the function of the place. In it is not clear that the US approach to forum analysis would help to add anything to this assessment. 101

The lack of clarity in US law as to whether or not restrictions are ‘content neutral’ or not might suggest caution in relation to the Canadian equivalent, the ‘purpose test’. In Irwin Toy the Supreme Court distinguished between laws ‘restricting the content of expression’ which necessarily limit free expression and control over ‘the physical consequences of certain human activity, regardless of the meaning being conveyed’. 102 While this distinction is perfectly clear in principle, the US case law indicates how much more difficult it is in practice

100 Clearly some forms of expression will not qualify for constitutional protection, see Irwin Toy Ltd. v. Quebec (Attorney-General) 1989 CanLII 87 (S.C.C.) at p. 000. In a US context see, for example, Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U. S. 376; United States v Williams 553 US 000 (2008).

101 Brennan J has questioned ‘whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand’. Perry Education Assn., 460 U.S at 62-63, n. 6.

to decide if, for example, solicitation is a restriction on the content of expression, i.e. the appeal for funds, or merely a time-and-place restriction on human activity (such as soliciting in a particular manner or place). As we have seen, this issue was discussed in *Banks* where the trial Court took the view that the purpose was to restrict communication while the Superior Court took the view that it was not. The difficulties in the US jurisprudence would suggest that the Ontario Court of Appeal was correct to focus on the effect of the legislation in the context of the nature of the communication rather than to enter into somewhat arid debates about its precise purpose.

**Protection of life, liberty and security of person**

S. 7 of the Charter has formed the basis of the only successful challenge to Canadian laws which restricted the rights of homeless persons. Despite the Canadian Courts' refusal – to date – to extend the scope of s. 7 to encompass positive obligations on the State, s. 7 seems likely to form an important basis for protecting the rights of homeless people in future challenges. The decision in *Adams* highlights the potential of s. 7 in the area of protecting the right to life, liberty and security of person. However, it may be that, in the absence of a recognition of positive State duties under s.7, that this will be confined to a rather limited range of issues.

**Equality**

It is clear that the equality provisions of the Canadian Charter (s. 15) are significantly stronger than the equivalent provisions of the US Constitution and might be expected to play a greater role in the protecting of the rights of homeless persons (notwithstanding the
lack of success to date). In the recent decision of *R v Kapp*\(^\text{103}\) the Supreme Court appears to have responded to its critics and moved away somewhat from the much criticised notion of ‘human dignity’ in the application of s. 15(1) and to have reemphasised the importance of ‘perpetuation of disadvantage and stereotyping as the primary indicators of discrimination’.\(^\text{104}\) This decision would seem to hold out some hope for a more rigorous approach to s. 15 analyses which might be expected to lead to a more demanding testing of legislation impacting on homeless persons.

A critical factor here would be to persuade the Courts that homelessness is an analogous ground under s. 15. In order to be considered as an analogous ground discrimination on the basis of homelessness would have to be shown to affect ‘the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms’ and it would have to be established that homelessness ‘possesses characteristics often associated with recognized grounds of discrimination under s. 15(1)’.\(^\text{105}\) It would seem strongly arguable that homelessness is capable of satisfying both these tests, although this is obviously a matter for empirical testing by the Courts.\(^\text{106}\) Assuming that one could establish homelessness (or vagrancy) as an analogous ground, one would also require a more sophisticated approach to comparison that that shown in either of the two

\(^{103}\) *R v Kapp* 2008 SCC 41 at paras. 13-25.

\(^{104}\) At para 23.


\(^{106}\) Though see *Boulter v. Nova Scotia Power Incorporation*, 2009 NSCA 17 leave to appeal dismissed 2009 CanLII 47476 (S.C.C.) and *Toussaint v. Canada (Citizenship and Immigration)*, 2009 FC 873 in which the Courts held that poverty was not an analogous ground under s. 15(1) of the *Charter* as it was not an immutable personal characteristic.
decisions to date. Given the recent restatement of the approach to s. 15(1) in *Kapp*, it would seem important that the Courts also adopt a purposive approach to comparison. It would seem clear that laws limiting the right of homeless people both draw a formal distinction between the claimant and others at least by effect, and fail to take into account the claimant’s already disadvantaged position in Canadian society resulting in substantively differential treatment.

**Vagueness**

As we have seen, the Canadian Courts have already recognised that vagueness is a component part of the protection provided by s.7 of the Charter as ‘it is a principle of fundamental justice that laws may not be too vague’.  

107 The Supreme Court has stated that the doctrine of vagueness can be summed up in the proposition that ‘law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate -- that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria.’  

108 Obviously such a concept could have a role in a challenge to restrictive legislation depending on the drafting thereof.  

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108 In the same case, the Court stated that the term ‘legal debate’ is intended to reflect and encompass standards and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

109 See, for example, s.2(2) of the Ontario *Safe Streets Act* which prohibits soliciting in an ‘aggressive manner’ which is defined to include ‘[p]roceeding behind, alongside or ahead of the person solicited during the solicitation or after the person solicited responds or fails to respond to the solicitation.’ This provision was
Overbreadth

The Canadian Supreme Court has also developed the concept of overbreadth as one of the component parts of s. 7. *R v Heywood* is an interesting case in this regard as it concerned a law outlawing ‘loitering’ although as applied to a convicted sex offender rather than to a homeless person. The Court struck down the provision on the basis of overbreadth because ‘it restrict[ed] liberty far more than [was] necessary to accomplish its goal’. Given that the application of the law was limited to convicted sex offenders, the judgement would strongly suggest that the Court would be likely to find that the criminalisation of homelessness per se through a loitering statute was also overbroad and in breach of s. 7. As we have seen above, in *Adams* the BC Courts also found that the restriction on erecting temporary shelter was overbroad and it seems likely that arguments concerning overbreadth may play an important role in s. 7 analysis. In many ways, this forms the functional equivalent of the third part of the USA’s prohibition on ‘cruel and unusual punishment’ whereby the constitution restricts what may be criminalised. It is arguable that, for example, a Canadian statute similar to that considered in *Jones v City of Los Angeles* (which criminalised sleeping outside in a city which had insufficient shelter beds) might be considered by the Canadian Courts to be a breach of the right to liberty or security of the person under s. 7 not in accordance with the principles of fundamental justice.

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upheld by the lower court in *Banks* subject to reading in the phrase ‘in the absence of evidence to the contrary: *R v. Banks* 2005 CanLII 605 (ON S.C.). However, the section (which was not considered by the Court of Appeal) arguably remains very vague and also possibly overbroad.

Cruel and unusual punishment

S. 12 of the Charter provides that

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Despite the similarity of the wording with the USA Eight Amendment, this provision as applied by the Courts has related more to how a crime is punished rather than what can be punished which is more likely to be addressed under s. 7. However, again subject to the wording of a particular law, s. 12 might have a role in limiting the punishment which can be imposed on a homeless person.

Right to travel

The Charter does, of course, specifically protect travel rights with s. 6 providing that

(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right:

a) to move to and take up residence in any province; and

b) to pursue the gaining of a livelihood in any province.

Thus the Canadian provisions corresponds to the first 2 aspects of the US approach limiting the kinds of punishment that can be imposed on those convicted of crimes and proscribing punishment grossly disproportionate to the severity of the crime.
Although the implications of s. 6(2) do not appear to have been considered yet in the context of homelessness, it might be that the right to move to and take up residence in any province might be relevant to restrictions on freedom of movement on homeless persons.

**Privacy**

The Canadian Charter – like the US Constitution – does not contain an explicit right to privacy. Nonetheless, aspects of privacy rights have been derived from several sections of the Charter: in particular s. 7 (discussed above) and s. 8 which provides that ‘Everyone has the right to be secure against unreasonable search or seizure’. Again s. 8 (or a right to privacy more generally) does not appear to have been considered in relation to the issue of homelessness. However, the Canadian case law in this area has already drawn on the US approach with, for example, a requirement that there be the existence of a subjective expectation of privacy and the objective reasonableness of the expectation. These provisions of the Charter could be expected to play some role in the protection of the rights of homeless persons in specific circumstances.

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112 In contrast the Québec Charter of Rights does contain specific provisions protecting private life and a person’s home: Charter of human rights and freedoms, R.S.Q. c. C-12, ss. 5 and 7.


Conclusion

This article has summarised the Canadian case law on the protection of the rights of homeless people under the Charter of Rights. Given the rather limited case law to date, it has also considered in some detail the corresponding constitutional case law in the United States of America. This indicates a number of areas where the US jurisprudence may help to inform the development of Canadian law. These include both areas (such as the scope of the right to free expression) where the Canadian Courts have already recognised the potential of the Charter and others (such as the right to travel and the right to privacy) where the implications of the Charter provisions have yet to be explored in the context of homelessness.