CITATION: Fair Change v. His Majesty the King in Right of Ontario, 2024 ONSC 1895
COURT FILE NO.: CV-17-00577519-0000
DATE: 20240402

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Fair Change Applicant	Nicolas M. Rouleau and Chris Hummel, for the applicant
– and –	
His Majesty the King in Right of Ontario as represented by the Attorney General of Ontario Respondent	S. Zachary Green, Ravi Amarnath, Emily Owens, and Sean Kissick, for the respondent
	Frank Addario and Rebecca Amoah, for the intervener Canadian Civil Liberties Association
	Mary Birdsell, Stephanie Giannandrea, and Julia Huys, for the intervener Justice for Children and Youth
	Emily Hill and Christa Big Canoe, for the intervener Aboriginal Legal Services
	Anu Bakshi and Nabila F. Qureshi, for the intervener Income Security Advocacy Centre
	Reema Khawja and Nika Farahani, for the intervener, Ontario Human Rights Commission
	HEARD: February 6, 7, and 8, 2024

ROBERT CENTA J.

Overview

[1] Almost 25 years ago, the Legislative Assembly of Ontario passed the *Safe Streets Act, 1999*.[1] Section 2 of the Act prohibits the solicitation of money in a manner that is likely to cause a reasonable person to be concerned for his or her safety and security. Section 3 of the Act prohibits the solicitation of persons doing certain things in certain places. Section 5 of the Act provides that upon conviction for an offence under the Act, a person is liable to a fine or, upon a subsequent conviction a fine or imprisonment. Taken together, the Act "prohibits begging and panhandling in specific circumstances and, together with a provision of the *Highway Traffic Act*, entirely bans the activity of 'squeegeeing' and the solicitation of people in vehicles on a roadway."[2]

[2] The legal clinic Fair Change brings this constitutional challenge to ss. 2, 3, and 5 of the Act. Fair Change, supported by all of the interveners, submits that the Act violates several provisions of the *Canadian Charter of Rights and Freedoms*, including freedom of expression (s.2(b)), the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice (s. 7), the presumption of innocence (s. 11(d)), the right to be free from cruel or unusual treatment or punishment (s. 12), and the right to equality for individuals with mental health illnesses and addictions, Indigenous people, LGBTQ people, youth, and individuals in receipt of social assistance (s. 15).

[3] The role of the court on this application is limited. The court is not to determine the efficacy or advisability of the Act. The court is not to select which of the parties' competing perspectives on criminology it prefers. The court cannot determine whether or not social assistance rates in the province are set at a fair or optimal level. The court is not tasked with assessing if public funds could be spent better elsewhere than policing solicitation. The court's role is only to determine based on the evidence placed before it whether or not the Act is constitutional.

[4] First, I uphold the constitutionality of s. 2(2) of the Act, which prohibits soliciting in an aggressive manner, meaning one that is likely to cause a reasonable person to be concerned for his or her safety and security. In my view, that prohibition is a justified limitation on freedom of expression as it is a minimally impairing and proportionate limit on the right.

[5] The Act goes further, however, and, in s. 2(3) deems six of activities to be soliciting in an aggressive manner contrary to s. 2(2). For example, paragraph 2(3)5 of the Act states that a person soliciting while intoxicated by drugs or alcohol is deemed to be soliciting in a manner that is likely to cause a reasonable person to be concerned for his or her safety and security. With one exception, I find the deeming provisions in s. 2(3) to be unconstitutional violations of the presumption of innocence. Five of the deeming provisions violate well-

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[1] The long title is "An Act to promote safety in Ontario by prohibiting aggressive solicitation, solicitation of persons in certain places and disposal of dangerous things in certain places, and to amend the *Highway Traffic Act* to regulate certain activities on the roadways", S.O. 1999, c. 8.

[2] *R. v. Banks*, 2007 ONCA 19, 84 O.R. (3d) 1 ("*Banks* CA"), at para. 4.

established constitutional rules that prohibit legislation substituting proof of one fact for proof of an essential element of the offence except where proof of the substituted fact leads inexorably to the conclusion that the Crown has proved the essential element. Other than paragraph 2(3)1, the deeming provisions of the Act do not meet this high standard and the limitation on the presumption of innocence is not justified under s. 1 of the *Charter*.

[6] Second, I uphold the constitutionality of some, but not all, of the restrictions found in s. 3 of the Act, which prohibit soliciting persons doing certain things in certain places. This is not the first constitutional challenge to the Act. In 2007, the Court of Appeal upheld the constitutionality of s. 3(2)(f) of the Act, which prohibits squeegeeing.[3] Fair Change challenged that provision again before me on a broader range of constitutional grounds. For the reasons set out below, I do not accept Fair Change's submissions. The Act's prohibition against squeegeeing remains constitutional.

[7] Clauses 3(2)(a) to (e) of the Act, however, go further and prohibit the solicitation of persons doing things in places other than in a roadway. I find that those restrictions limit freedom of expression and are not minimally impairing of the right because they capture many solicitations that would not interfere with the free and safe use of public spaces and would pose no danger to or harassment of persons using those public spaces.

[8] As I will explain below, I do not accept that any provision of the Act constitutes cruel and unusual punishment contrary to s. 12 of the *Charter*. Other than paragraphs 2(3)2 to 6 of the Act, which violate the presumption of innocence, the Act does not violate anyone's right to life, liberty, or security of the person contrary to s. 7 of the *Charter*. Based on the evidence in the record, I find that Fair Change has not demonstrated that the Act has a disproportionate impact on members of a protected group contrary to s. 15 of the *Charter.*

[9] To the extent that I have found that some provisions of the Act are unconstitutional, I declare those provisions to be of no force and effect pursuant to section 52 of the *Constitution Act, 1982*.

[10] I will organize my reasons for decision as follows.

[11] First, I will address some preliminary issues and provide necessary context and background to the constitutional issues in dispute. I will organize this section of my reasons into the following parts:

1. Public interest standing for Fair Change
2. The evidence on the application: admissibility and weight
3. The scheme of the Act

[3] *Banks* CA.

4. The scheme of the *Provincial Offences Act*

5. The prior decisions in *R. v. Banks*

[12] I will then consider the specific *Charter* challenges Fair Change and the interveners advance in this application, including, where necessary, whether any limit on the right can be justified under s. 1 of the *Charter*. I will organize this section of my reasons into the following parts:

6. Section 11(d) - the presumption of innocence

7. Section 2(b) - freedom of expression

8. Section 12 - cruel and unusual treatment or punishment

9. Section 7 - life, liberty, and security of the person

10. Section 15 – the right to equality

11. Remedy

12. Costs

1. Public interest standing for Fair Change

[13] Fair Change is an Ontario not-for-profit corporation founded to provide free legal representation to people in the street community facing charges under the Act. Fair Change has a legal personality but has not been charged with an offence and its own constitutional rights have not been infringed by the Act. Fair Change does not, therefore, have direct legal standing to bring this application. For that reason, Fair Change seeks public interest standing. Importantly, Ontario did not oppose Fair Change's request.

[14] Public interest standing allows individuals or organizations to bring cases of public interest before the courts even though they are not directly involved in the matter and even though their own rights are not infringed.[4] The decision whether to grant or deny public interest standing is discretionary. When exercising its discretion, the court must assess and weigh three factors:

a. whether the case raises a serious justiciable issue;

b. whether the party bringing the application has a genuine interest in the matter; and

[4] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27, 470 D.L.R. (4th) 289, at para. 2.

c. whether the proposed application is a reasonable and effective means of bringing the case to court.[5]

[15] Each factor is to be weighed in light of the underlying purposes that justify limiting standing and applied in a flexible and generous manner that best serves the purposes of:

a. efficiently allocating scarce resources and screening out busybody litigants;

b. ensuring that courts have the benefit of the contending points of view of those most directly affected by the issues; and

c. ensuring that courts play their proper role within our democratic system of governance.[6]

[16] Courts must also consider the purposes that justify granting standing, which include:

a. giving effect to the principle of legality; and

b. ensuring access to the courts and access to justice.[7]

[17] In each case, the goal is to strike a meaningful balance between the purposes that favour granting public interest standing and those that favour limiting it.

[18] I have no doubt that this case raises a serious justiciable issue, and that Fair Change has a genuine interest in the matter. It is no busybody. Its work is important, recognized in the mainstream press and legal community, and of enormous credit to its founder and its volunteers. The evidence filed on this application demonstrates that Fair Change has provided significant assistance to its clients and furthered their access to justice.

[19] My concern is whether or not this proceeding is a reasonable and effective means to bring this matter to the court. I must ensure that the court plays its proper role in our democratic system of governance. Although I am prepared to grant Fair Change public interest standing, this was a close call.

[20] The constitutional challenges in this case could have been brought within proceedings where individuals faced charges and where the constitutionality of the Act could have been determined on the basis of actual factual disputes arising from specific acts of solicitation.

[21] The Court of Appeal identified this very concern in its decision in *Banks*. The court declined the invitation of interveners to convert the constitutional issues before the court into a broader challenge to the constitutionality of the entire Act. The Court of Appeal

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[5] *Council of Canadians with Disabilities*, at para. 28; *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, [2012] 2 S.C.R. 524, at para. 20.
[6] *Council of Canadians with Disabilities*, at para. 29; *Downtown Eastside*, at para. 1.
[7] *Council of Canadians with Disabilities*, at para. 30; *Downtown Eastside*, at paras. 20, 23, 36, 39-43, 49-50 and 76.

explained that there were other reasonable and effective means of bringing those issues before the court:

> Even if the court's jurisdiction to accord discretionary public interest standing had been properly invoked in this case, it could not be said that there was no other reasonable and effective manner in which the question could be brought before the court. Sections 2 and 3(2)(a) to (e) could be challenged by persons charged under them. Presumably, there are such persons among the many who counsel for the Associations stated have been charged under the Act. Such challenges, if and when they come before the court, will enable the court to decide constitutional questions on the basis of actual factual disputes, rather than on a hypothetical basis. As the Supreme Court of Canada has stated, "*Charter* cases should not be considered in a factual vacuum": *Vriend v. Alberta*, [1998] 1 S.C.R. 493, [1998] S.C.J. No. 29, at para. 199.[8]

[22] As noted above, Fair Change is a legal clinic founded to provide free legal representation to people in the street community facing charges under the Act. In support of its application, Fair Change filed three affidavits from its clients:

a. Gerry Williams deposed that in 2016, Fair Change represented him in an appeal that resulted in $65,000 worth of fines, including some under the Act, being reduced to zero;

b. Donald Dunbar deposed that with the help of the clinic, he was able to fight some of his tickets under the Act and to stay out of jail; and

c. Margaret Bunting deposed that she worked with Fair Change to have her tickets under the Act withdrawn or had the sentences suspended, including in a summons where incarceration was a potential sentence.

[23] The constitutional arguments advanced by Fair Change in this proceeding could have been marshalled in support of any of these three clients, or any of the clinic's other clients facing charges under the Act. Fair Change could then have played its natural role as counsel in a case involving its clients.

[24] I am mindful of the evidence of Joanna Nefs, founder and Executive Director of Fair Change, that it was difficult to raise the constitutional issues in cases involving her clients:

> In the past, on behalf of Fair Change clients, I have attempted to raise issues with the court relating to the application of the SSA. Specifically, I have brought issues relating to the use of ex-parte trials and the potential for jail for defendants with mental health

[8] *Banks* CA, at para. 24.

> disabilities under the [Act] and the *Provincial Offences Act*, R.S.O. 1990, c. p33, (the "POA"). In every case where these issues were raised, the Crown chose not to argue the law but rather decided that the case was 'not in the interests of justice' and withdrew the charges. While my individual clients were satisfied with these results, the Crown's approach has prevented the judicial examination of the current application of the [Act]; one cannot appeal a withdrawal. Further, these withdrawals do nothing to assist the situation of unrepresented accused, nor do they develop the jurisprudence for use by courts in other jurisdictions. These experiences demonstrate to me that Fair Change has no choice but to apply for public interest standing, as this is the only way the court will be able to hear these issues.

[25] With respect, I do not accept that Fair Change had no choice but to bring this application in its own name. Over 20 years ago, in *Banks*, 12 accused were able to mount a constitutional challenge to provisions of the Act with the assistance of counsel. Moreover, many of the constitutional issues advanced in this case would arise in each and every case where an individual faced charges under the Act and where that person may have been entitled to pursue a constitutional remedy under s. 24(1) of the *Charter* and/or the declarations of invalidity sought in this proceeding.

[26] Courts should not grant public interest standing readily, especially to legal clinics who could mount the challenge as counsel for their clients. In my view, constitutional litigation is best advanced in a case brought by an individual who has been subject to the challenged statutory provisions.[9] For example, Fair Change seeks to rely on evidence of the unconstitutional administration of the Act. Fair Change filed affidavits in which the deponents allege that police officers violently assaulted them, abused their official discretion to write tickets, or harassed them. If it occurred, such misconduct is deplorable. However, the allegations described in the affidavits are entirely devoid of particulars and the court cannot adjudicate these allegations in this application.

[27] As mentioned above, Ontario did not oppose Fair Change's request for public interest standing. Ontario was content to proceed with the factual record developed by the parties and to have these constitutional issues determined in this adversarial setting. The Attorney General of Ontario is the guardian of the public interest, even if it does not have a monopoly on that public interest.[10] Where the Attorney General of Ontario takes no issue with the court granting public interest standing to an applicant in a constitutional case, that is a significant factor in favour of the court exercising its discretion to grant public interest standing to the applicant. The Attorney General's considered view satisfies me that the

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[9] *Ontario (Attorney General) v. Bogaerts*, 2019 ONCA 876, at paras. 32 and 33.
[10] *Frank v. Canada (Attorney General)*, 2014 ONCA 485, at para. 18.

court will not be stepping outside of its proper role within our democratic system of governance by granting public interest standing to Fair Change.

[28] In addition, Fair Change commenced this application almost seven years ago. Many affidavits and expert opinions have been filed. The parties have cross-examined 16 people. Five interveners have made written and oral submissions. The parties and the court devoted three days of court time to this case. While judicial economy is a good reason to be careful about granting public interest standing, this matter has now had a full hearing and there is little efficiency to be gained by not deciding the case. All of these considerations also favour granting public interest standing.

[29] In all of the circumstances, I exercise my discretion to grant public interest standing to Fair Change.

2. The evidence on this application: admissibility and weight

[30] Before turning to the specific constitutional issues raised in this application, I will address certain issues with the evidence.

[31] Fair Change filed affidavits from four individuals about their background and experience receiving tickets under the Act: Gerry Williams, Margaret Bunting, Donald Dunbar, and Ashley Roberts. Fair Change also filed fact affidavits from Joanna Nefs (the founder of Fair Change) and Hannah Clow (Director of Operations for Fair Change). In addition, Fair Change filed five expert opinions:

a. Professor William O'Grady, a professor of sociology at the University of Guelph who teaches mainly in the area of criminology;

b. Dr. Sean Kidd, a clinical psychologist at the Centre for Addiction and Mental Health and a clinical scientist in CAMH's complex care and recovery program;

c. Professor Joseph Hermer, an associate professor of sociology at the University of Toronto;

d. Professor Jonathan L. Freedman, an emeritus professor of psychology; and

e. John Stapleton, the principal of Open Policy, a social policy consulting company.

[32] Ontario filed fact affidavits from Constable Christian Lamarche (Ottawa Police Service), Constable Douglas Schmidt (London Police Service), Staff Sergeant David McKenzie (Hamilton Police Service), Staff Sergeant Ed Winger (Toronto Transit Commission), Marty Williams (Ontario Business Improvement Area Association), and Pauline Larsen (Downtown Yonge Business Improvement Area). Ontario also filed three expert opinions:

a. Dr. Cheryl Cherpitel, senior scientist at the National Alcohol Research Center, California;

b. Professor David Thacher, associate professor of public policy and urban planning at the University of Michigan; and

c. Professor William Sousa, professor of criminology, University of Nevada Los Vegas.

The affidavit of Joanna Nefs

[33] Ms. Nefs' 35-paragraph affidavit addressed several topics: the origins and work of the clinic; the ticketing and court process under the Act and the *Provincial Offences Act*; some statistics on provincial offences activities; the clinic's representation of clients facing tickets under the Act; the "importance of panhandling for panhandlers;" the "negative stereotyping of panhandlers;" and the Act's "harmful effects on panhandlers." Much of Ms. Nefs' affidavit is unobjectionable. Some parts of the affidavit, however, raise concerns.

[34] Rule 4.06(2) restricts the contents of an affidavit to be used in a proceeding to "the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court." Rule 39.01(5), however, creates an exception to the general prohibition on hearsay established in rule 4.06(2) and permits an affidavit on an application to contain statements of the deponent's information and belief with respect to facts that are not contentious if the affiant specifies the source of that information.

[35] Sometimes, Ms. Nefs names the former client that provided her with the information that informed her belief. Occasionally, however, Ms. Nefs' affidavit is based on information and belief, but she does not identify the source of her information. For example, paragraphs 25 and 26 read as follows:

> 25. In particular, I had one client who had been diagnosed with schizophrenia and lived alone in community housing. His neighbours were involved in the drug trade and, as he was a recovering addict, he did his best not to interact with the people in his neighbourhood. He was therefore very socially isolated, but he always went to the same street corner to panhandle. He told me once that he would never stop panhandling because his regulars were the only people who would notice and miss him if he were to die.
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> 26. Signs that ask for 'smiles', or express wishes for the reader to "have a good day," have been treated by police as evidence of illegal solicitation under the SSA. For example, the client in the previous paragraph used a sign that only indicated he was hungry. The sign did not specifically ask for money. That person had multiple charges under the SSA for "soliciting" on a roadway. Before he was my client he was convicted several times after ex-parte trials. After I began representing him, some of his matters were

> withdrawn by the Crown. Other times, justices of the peace rendered a verdict of not guilty without providing reasons on the record.

[36] Ms. Nefs does not provide the identity of the client who was the source of her information and belief. In my view, the requirement to specify the source of the information requires, at a minimum, that the affiant provide the name of the person who provided the information to her.[11] I am also concerned that this information came from Ms. Nefs' former clients, to whom she continues to owe a duty of confidentiality and to maintain solicitor-client communication privilege. The court is placed in an awkward position when it is asked to receive and consider factual evidence from a witness who owes ongoing duties to the anonymous source of that information.

[37] I understand why Ms. Nefs wanted to put this type of evidence before the court. To some degree, this type of evidence flows from Fair Change's decision to bring this application using public interest standing. I will give Ms. Nefs' evidence less weight where it is based on hearsay and, in particular, hearsay where she does not identify the source of her information and belief.

The affidavits of Gerry Williams and Margaret Bunting

[38] Ontario challenges the admissibility of the affidavits of Mr. Williams (sworn April 14, 2018) and Ms. Bunting (sworn May 1, 2018) because those affiants were not available for cross-examination.

[39] For the reasons that follow, I am satisfied that the affidavits of Mr. Williams and Ms. Bunting are necessary and reliable, in the sense that there are sufficient procedural guarantees of reliability to meet the threshold test for reliability. Absent cross-examination, however, I am not prepared to give any weight to these affidavits.

<u>Gerry Williams' affidavit</u>

[40] In his 53-paragraph affidavit, Mr. Williams describes his difficult upbringing in Fort Albany First Nation, his experience of abuse at St. Anne's day school, his alcoholism and addition issues, his cyclical encounters with the criminal justice system, and his move to Toronto at age 32. Mr. Williams describes his transition to living on the streets, his diagnosis with post-traumatic stress disorder, his receipt of Ontario Works benefits, and the difficulty of living on the streets.

[41] In paragraphs 28 to 37 of his affidavit, he describes his experiences panhandling, deposing that he would earn on average $30 to $40 per day, and that he was often ticketed by the police for violations of the Act and other provincial offences. He describes that, at the time, the tickets and fines were meaningless to him. He explains that because of his alcoholism,

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[11] *1000425140 Ontario Inc. v. 1000176653 Ontario Inc*., 2023 ONSC 6688, at para. 72.

he did not attend his court dates and was convicted. He describes mistreatment by police officers and how his interactions with the police affected his ability to receive donations.

[42] Mr. Williams describes that in 2012, he began to take steps to escape the streets and to take better care of his health. He states that he has been sober for four years. In 2015, he approached Fair Change and learned that he had amassed over $65,000 in tickets for offences under the Act and other provincial statutes. He describes that in October 2016, he appeared with Fair Change to appeal all his convictions. He and the clinic successfully replaced the fines with community service and a period of probation. However, he subsequently learned that due to a spelling error in his first name on some tickets, he owed an additional $16,263 in unpaid fines. He explained that this caused him stress. Mr. Williams states that he has tried to avoid panhandling but has been forced to obtain expensive loans from payday lenders. He concludes his affidavit as follows:

> None of the progress I made was helped by tickets I was charged with under the Safe Streets Act. Over the years, these tickets only made me feel like I was being punished for being poor and made me feel like even more of an outcast. The fines did nothing to change my behaviour. If anything, they just made my life less stable. Since leaving the streets, the fines have been nothing but another barrier to recovery at times where I have been most at risk of returning to a life on the streets.

Margaret Bunting's affidavit

[43] In her 46-paragraph affidavit, Ms. Bunting, describes the challenges in her personal life including her experience of domestic violence and how that abuse damaged her mental health. She has not been able to work and relies on the Ontario Disability Support Program. In the late 1990s, her son was hit by a car and suffered a long-term spinal injury. He subsequently developed a heart infection, lost an eye to that infection, and developed a dependency on opioids. He remains addicted to painkillers and receives ODSP payments.

[44] Ms. Bunting turned 65 in 2014 and started to receive Canada Pension Plan payments. To supplement the family's income, she started to solicit donations. In paragraphs 35 to 43 of her affidavit she describes her experiences soliciting donations. She explains that she solicits donations near a street corner or, on the weekends, near the drive-through of a coffee shop. Ms. Bunting states that her daily income from soliciting donations varies significantly between $7.00 and $80.00. She states that almost all of her tickets under the Act relate to her solicitation near the coffee shop. She describes her interactions with the police and the owner of the coffee shop. She explains that with the help of Fair Change, she fought a charge for breaching probation for missing court dates. She explains that she misses court dates because "stopping panhandling for even one day puts my son in jeopardy." Ms. Bunting states that she would rather have money in her pocket from soliciting than worry about what is on her record.

Position of the parties

[45] Ontario submits that the affidavits are untested hearsay evidence that is neither necessary nor reliable. In the alternative, Ontario submits that that I should give little or no weight to the affidavits because the witnesses were not available for cross-examination.

[46] Fair Change acknowledges that it could not produce either Mr. Williams or Ms. Bunting for cross-examination. Fair Change filed evidence that, at some point after they swore their affidavits, the affiants fell out of contact with the legal clinic. Fair Change could not find any contact information for Ms. Bunting in its files. Between June and August 2021, volunteers at the clinic "called various shelters such as Good Shepherd and Fred Victor to see if the affiants had frequented either location or if the staff knew where they might be. No one did." The clinic tried unsuccessfully to contact Mr. Williams in March 2023 at his last known telephone number.

[47] Fair Change submits that it is necessary to admit the affidavits because Mr. Williams and Ms. Bunting cannot be located and the affidavits meet the test for threshold reliability because they were provided under oath.

Decision on admissibility

[48] Evidence on an application may be given by affidavit unless a statute or the *Rules of Civil Procedure* provide otherwise.[12] Rule 39.02 provides that a party may cross-examine the deponent of any affidavit served by a party and, thereby, creates a *prima facie* right to cross-examine upon an affidavit.[13] On an application such as this one, the opportunity to cross-examine the deponent takes place out of court and the court receives the transcript from the cross-examination.

[49] Fair Change submits that the affidavits of Mr. Williams and Ms. Bunting should be admitted for the truth of their contents under the principled exception to the hearsay rule.[14] Fair Change did not rely on any of the traditional common law exceptions to the hearsay rule.

[50] The essential defining features of hearsay are:

a. the fact that the statement is adduced to prove the truth of its contents; and

b. the absence of a contemporaneous opportunity to cross-examine the declarant.[15]

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[12] Rule 39.01(1), R.R.O. 1990, Reg. 194.
[13] *Ontario (Attorney General) v. $17,700.00 in Canadian Currency (In Rem)*, 2015 ONSC 4301, 126 O.R. (3d) 393, at para. 34.
[14] *Lata v. Rush*, 2012 ONSC 4543, at para. 21; *Cormack Animal Clinic Ltd. v. Potter* (2009), 306 D.L.R. (4th) 548 (Ont. S.C.); *Chandra v. CBC et al*, 2015 ONSC 4063.
[15] *R. v. Khelawon*, 2006 SCC 57, at para. 35; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, at para. 30.

[51] Hearsay evidence is presumptively inadmissible because of the difficulties inherent in testing the reliability of the declarant's statement. Courts have identified four specific concerns with hearsay evidence that relate to the declarant's perception, memory, narration, and sincerity.[16] In *Baldree*, the Supreme Court of Canada explained these concerns as follows:

> First, the declarant may have *misperceived* the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been *wrongly remembered*; third, the declarant may have narrated the relevant facts in an *unintentionally misleading manner*; and finally, the declarant may have *knowingly made a false assertion*. The opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination.[17]

[52] Under the principled exception, hearsay can be admitted into evidence when the party tendering it demonstrates that the evidence meets the twin criteria of necessity and threshold reliability on a balance of probabilities.[18] The court must act as a gatekeeper and only admit necessary and sufficiently reliable hearsay.[19]

[53] The criteria of necessity and reliability should not be assessed in isolation because they work in tandem. That does not mean, however, that reliability becomes more flexible as necessity increases. Threshold reliability must be established in every case.[20] There must be circumstantial guarantees of trustworthiness or a sufficient substitute basis for testing the evidence.[21]

Necessity

[54] Necessity is to be given a flexible definition and it is not to be equated with the unavailability of the witness.[22] A party seeking to meet the necessity standard must demonstrate reasonable necessity, not absolute necessity. The party must demonstrate that it is unable to obtain evidence of a similar quality from another source.

[55] In my view, Fair Change has met the necessity standard. There are three contextual factors that persuade me that it is reasonably necessary to admit the affidavits of Mr. Williams and Ms. Bunting.

[56] First, it is understandable that it may be more difficult to locate affiants living in impoverished and unstable circumstances. Ms. Clow explains how Fair Change lost contact

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[16] *Khelawon*, at para. 2; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, at para. 159.
[17] *Baldree*, at para. 32 [emphasis in original].
[18] *Khelawon*, at para. 47.
[19] *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, at para. 24.
[20] *R. v. Furey*, 2022 SCC 52, 476 D.L.R. (4th) 193, at para. 4.
[21] *Bradshaw*, at para. 31; *R. v. Smith*, [1992] 2 S.C.R. 915, at pp. 937-938; *Khelawon*, at para. 105.
[22] *Khelawon*, at para. 78.

with Mr. Williams and Ms. Bunting after they swore their affidavits. While Fair Change could have done more to collect and preserve the contact information of the affiants, there is no guarantee that the contact information would still have been accurate at the time of the cross-examinations. Given the circumstances of the affiants, I think it is appropriate to adopt a flexible approach to necessity.

[57] Second, and in a related point, this litigation was almost seven years old at the time of the hearing. Fair Change issued the notice of application on June 21, 2017. The affidavits at issue were sworn on April 14, and May 1, 2018. The cross-examinations did not take place until July and August 2023. It is unclear from the record why so much time passed, and I am not assigning blame. I do think it is a relevant contextual factor as I am assessing the necessity of the evidence. The likelihood that Mr. Williams and Ms. Bunting, given their precarious living conditions, would not be available for cross-examination increased as more and more time passed between the signing of the affidavits and the commencement of the cross-examinations.

[58] Third, I think it is important that the court have access to this evidence given the importance of the issue to Mr. Williams and Ms. Bunting. While Fair Change has also filed affidavit evidence from Donald Dunbar and Ashley Roberts, who were cross-examined by Ontario, I do not think the evidence of Mr. Dunbar and Ms. Roberts are a complete substitute for the evidence of Mr. Williams and Ms. Bunting. Each affiant experienced the restrictions imposed by the Act in their own way. Each affiant has their own story that they wanted to place before the court as it assesses the constitutionality of the Act. In these circumstances, I am satisfied that the affidavits of Mr. Dunbar and Ms. Roberts do not diminish the necessity of receiving the affidavits of Mr. Williams and Ms. Bunting.

[59] In conclusion, I am satisfied that it is reasonably necessary to admit the affidavits of Mr. Williams and Ms. Bunting.

Threshold reliability

[60] Fair Change can meet the threshold reliability requirement in one of two ways. It must demonstrate:

a. procedural reliability by showing there are adequate substitutes to test the truth and accuracy of the affidavits; or

b. substantive reliability by showing there are circumstantial or evidentiary factors that guarantee inherent trustworthiness of the affidavits.

[61] Procedural reliability is concerned with whether there is a "satisfactory basis to rationally evaluate the statement."[23] The primary procedural guarantee of reliability for these affidavits is that Mr. Williams and Ms. Bunting reviewed the written affidavits, took an

[23] *Bradshaw*, at para. 40.

oath, and swore that the statements contained in the affidavit were true.[24] The fact that the affidavits were written down is a procedural guarantee that, at a minimum, the affiants' statements were recorded accurately. This provides a more robust procedural guarantee of reliability than an oral statement. The fact that they were under oath provides a further procedural guarantee not present in an unsworn out of court statement.

[62] It is true that the statements were not videotaped, but that is not a significant concern in this application as I do not have the benefit of seeing any of the other witnesses testify. All that is before me are the affidavits and transcripts of cross-examinations.

[63] This case, however, is not like cases where transcripts of evidence from preliminary inquiries are admitted at trial. In those cases, the opportunity for contemporaneous cross-examination at the preliminary inquiry is a significant procedural guarantee of reliability.[25] Equally, cross-examination at trial can provide a significant procedural guarantee of reliability.[26] In this case, of course, there has been no cross-examination at all.

[64] The fact that Mr. Williams and Ms. Bunting swore to the truth of their written affidavits is a sufficient guarantee of procedural reliability to justify meet the test for threshold reliability.

Weight

[65] While the affidavits meet the test for threshold reliability, I am concerned that the absence of cross-examination will make it more difficult for me to assess factors relevant to ultimate reliability, namely, the affiants' credibility and reliability, including their perception, memory, narration, and sincerity.[27] Mr. Williams, in particular, admits to having problems with recollection.

[66] Constitutional litigation transcends the interests of the parties to the proceeding. Fair Change asks the court to strike down legislation that was passed almost 25 years ago. A sufficient evidentiary record is essential in constitutional litigation.[28]

[67] Here, it is unfair to the process to place weight on affidavits in the absence of cross-examination. This is particularly true for the affiants' description of their dealings with police officers, the circumstances under which they received tickets, and their soliciting activities. I would be more inclined to give weight to their description of their personal history and background, including their very challenging lives. These matters, however, do

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[24] *B. (K.G.)*, [1993] 1 S.C.R. 740; *R v. Hawkins*, [1996] 3 S.C.R. 1043.
[25] *Hawkins*, at para. 76.
[26] *R. v. Shaw*, 2024 ONCA 119, at para. 129; *Bradshaw*, at paras. 26, 28; *R. v. Pan*, 2014 ONSC 3800, at para. 53, rev'd on other grounds, 2023 ONCA 362, leave to appeal granted, [2023] S.C.C.A. No. 303; *R. v. Jama*, 2023 ONSC 2375, at para. 148
[27] *Shaw*, at para. 132.
[28] *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at paras. 12-20.

not address the issues at the core of the constitutionality of the Act and are of less assistance to me.

[68] Fair Change submits that Ontario did not cross-examine its other fact affiants extensively and, therefore, the absence of cross-examinations should not be determinative. I do not accept this submission. It is the complete absence of cross-examination that affects the reliability of the affidavits of Mr. Williams and Ms. Bunting. Whether the cross-examination would have been limited or extensive is not the issue. Rather, it is the absence of the opportunity to question the affiants that affects the ultimate reliability of their affidavits.

[69] While the affidavits of Mr. Williams and Ms. Bunting are admissible, I decline to give any weight to them.

The survey data appended to the affidavit of Pauline Larsen

[70] Ontario filed an affidavit from Pauline Larsen, the executive director of the Downtown Yonge Business improvement area. In paragraphs 22 to 28 of her affidavit, she describes survey data regarding whether or not survey respondents were feeling unsafe in the neighbourhood and, if so, why. The survey was designed by Dr. Doug Thomson of Humber College, who analyzed the data. Ms. Larsen attached the survey data from 2022 to her affidavit as an exhibit.

[71] On cross-examination, Ms. Larsen readily conceded that she is not an expert in the design, conduct, or interpretation of surveys and the resulting data. She was not able to answer any questions about how he designed the survey.

[72] I agree with Fair Change that the survey data cannot be admitted through Ms. Larsen. If Dr. Thomson filed an affidavit, he could have been meaningfully cross-examined on the survey data. I cannot be satisfied on the state of the evidence that the survey results are statistically significant. I will give no weight to this survey data.

Expert evidence

[73] The parties filed eight expert opinions. Fair Change filed opinions from the following five experts:

a. Professor William O'Grady, a professor of sociology at the University of Guelph who teaches mainly in the area of criminology. He states that he has conducted research on homelessness in Canada since the 1990s, with a focus on homeless youth in Toronto. He has examined the interaction between homeless youth and the criminal justice system, particularly the police. Fair Change asked Prof. O'Grady to answer three questions:

i. What are the origins of the Act?

ii. Why do people panhandle and what is their relationship with the homeless population?

iii. Does the Act disproportionately affect or harm Indigenous people, people with mental health issues, and people who are addicted to alcohol or drugs?

b. Dr. Sean Kidd, a clinical psychologist at the Centre for Addiction and Mental Health and a clinical scientist in CAMH's complex care and recovery program. Dr. Kidd states that his career has been focussed on marginality and service enhancement, with a focus on homeless youth and individuals with severe mental illness. Fair Change asked Dr. Kidd to answer the following questions:

i. Does the Act disproportionately affect Indigenous people, people with mental health issues, and people who are addicted to alcohol or drugs? If so, can you quantify the approximate extent of the disproportion?

ii. Do restrictions on panhandling under the Act and penalties for illegal panhandling under the Act affect the physical and psychological health of panhandlers?

iii. How difficult is it for panhandlers with addictions or mental health issues to challenge the tickets they receive under the Act?

iv. How difficult is it for panhandlers with addictions or mental health issues to modify their panhandling behaviour in response to tickets?

v. How difficult is it for panhandlers with addictions or mental health issues to get off the street and commit to treatment?

c. Professor Joseph Hermer, an associate professor of sociology at the University of Toronto. Prof. Hermer has researched the social character and meaning of begging in public spaces with specific references to English vagrancy law. Fair Change asked him to provide an opinion on "the extent and effects of the restrictions in the [Act] on what has traditionally been accepted as panhandling."

d. Professor Jonathan L. Freedman, an emeritus professor of psychology. Professor Freedman has studied social psychology, social influence, and social judgment. Fair Change retained Prof. Freedman to provide an opinion "commenting on the definition of 'aggressive manner' given in the Act, as well as how difficult it would be for police officers or courts to apply that definition."

e. John Stapleton, the principal of Open Policy, a social policy consulting company, who states that he has expertise in income support benefit design and social policy, in particular with respect to social assistance in Ontario. Fair Change asked him to provide an opinion on the following topics:

i. What is social assistance in Ontario, including the benefit rates? How have social assistance rates changed over approximately the last three decades?

ii. Is there evidence about how many people who panhandle or who are homeless, are also in receipt of social assistance or vice versa? Why might a person in receipt of social assistance panhandle?

iii. How easy or difficult is it to change one's status as a person in receipt of social assistance?

iv. Can you describe the demographic makeup of those who receive social assistance (e.g., based on race, indigeneity, gender, marital/family status, disability, immigration status, income or a socioeconomic status)?

v. What kind of prejudice, stigma, and/or stereotyping do those in receipt of social assistance face, from both the state and society?

vi. Can social assistance recipients be characterized as historically disadvantaged and if so, why?

vii. Is there any evidence of the extent to which receipt of social assistance may be intergenerational?

[74] In response, Ontario filed three expert opinions:

a. Dr. Cheryl Cherpitel, a senior scientist at the National Alcohol Research Center, Alcohol Research Group, Public Health Institute, was tendered as an expert in the epidemiology of alcohol, drug use, and injuries. Ontario asked her to provide her opinion on the following questions:

i. Is there a relationship between intoxication and aggression, violence or injury to self and/or others? Where relevant, please refer to your own publications, your review of the relevant literature, and any other relevant sources, publications or data.

ii. Section 2(3)(5) of the [Act] prohibits soliciting while intoxicated by alcohol or drugs. In your view, does this prohibition relate to the goal of reducing the risk of aggression, violence or injury in public places, and if so, how?

b. Professor David Thacher, associate professor of public policy and urban planning at the University of Michigan, was tendered as an expert in criminal justice policy and order maintenance. Ontario asked him to provide his opinion on the following questions:

i. Please explain the concept of "order maintenance" and any related terms used in the literature (e.g., "broken windows" policing; "quality of life" policing).

ii. What are the goals of order maintenance policing?

iii. Does this Act, particularly s. 2 and 3, relate to order maintenance and its goals?

iv. Please review the affidavits relied on by the Applicant in this matter, including in particular the affidavits of the four expert witnesses: Jonathan Freedman, Sean Kidd, William O'Grady and Joseph Michael Hermer. Please indicate where you agree and disagree with them and why, with reference to your own areas of expertise and publications, your review of the relevant literature, and any other relevant sources, publications or data.

c. Professor William Sousa, professor of criminology and criminal justice, and director of the center for crime and justice policy at the University of Nevada Las Vegas, was tendered as an expert in criminal justice policy and order maintenance. Ontario asked him to provide his opinion on the following questions:

i. Please explain the concept of "order maintenance" and any related terms used in the literature (e.g., "broken windows" policing; "quality of life" policing).

ii. What are the consequences of order not being maintained?

iii. Does this Act, particularly s. 2 and 3, relate to order maintenance and its goals?

iv. Please review the affidavits relied on by the Applicant in this matter, including in particular the affidavits of the four expert witnesses: Jonathan Freedman, Sean Kidd, William O'Grady and Joseph Michael Hermer. Please indicate where you agree and disagree with them and why, with reference to your own areas of expertise and publications, your review of the relevant literature, and any other relevant sources, publications or data.

[75] Professor O’Grady filed a reply affidavit responding to the affidavits of Prof. Thacher and Prof. Sousa. In this reply affidavit, Prof. O’Grady offered a critical appraisal of the criminological theory underlying “broken windows policing.”

Admissibility of expert evidence

[76] To be admissible on an application, an expert opinion must comply with rule 53.03(2.1), which requires, among other things, that the expert list every document relied on to provide the opinion: rule 53(2.1)6(iii). This information is necessary, but not sufficient for an expert report to be admissible at a hearing.

[77] Expert opinion evidence is presumptively inadmissible unless it meets the two-stage test for admissibility set out in *White Burgess*.[29] The first stage focuses on threshold requirements of admissibility. If the proposed expert evidence does not meet the threshold requirements, it is excluded. If the proposed evidence meets the threshold requirements, the evidence must still pass the second stage, which focuses on the judge's discretionary gatekeeper role. The judge must be satisfied that the benefits of admitting the evidence outweigh the costs of its admission.[30] Expert evidence is admissible when:

> 1. The evidence meets the threshold requirements of admissibility, which are that the evidence must:
>
> a. be logically relevant;
>
> b. be necessary to assist the trier of fact;
>
> c. not be subject to any other exclusionary rule;
>
> d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:
>
> i. impartial,
>
> ii. independent, and
>
> iii. unbiased.
>
> e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,

and

> 2. The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:
>
> a. legal relevance
>
> b. necessity,

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[29] *White Burgess Langille Inman v. Abbott and Haliburton C*o., [2015] 2 S.C.R. 182; see also, *R. v. Abbey*, 2017 ONCA 640 (*Abbey #2*); *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Abbey*, 2009 ONCA 624., 97 O.R. (3d) 330.
[30] *Abbey #2*, at para. 49.

c. reliability, and

d. absence of bias.[31]

[78] Neither Fair Change nor Ontario challenged the admissibility of the expert evidence tendered by the other party. I accept that all of the expert evidence meets the threshold requirements of admissibility.

[79] Nevertheless, it is incumbent on me as judge to act as a gatekeeper and determine whether the benefits of admitting the evidence outweighs its potential risks.[32] It is no longer sufficient to admit all expert evidence without any consideration and later on determine what weight to give to that evidence:

> The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.[33]

[80] The situation is somewhat different for a judge hearing an application. The experts gave their opinions only in writing and not through oral evidence in court. The parties and interveners have delivered factums based on the expert evidence. Nevertheless, I think it is important to exercise my role as gatekeeper and assess the benefits and risks of admitting such evidence because it will assist me not only to determine admissibility but also the weight that I will give to the evidence.

[81] I have two primary concerns about the expert evidence tendered by Fair Change. First, Fair Change has not clearly delineated the scope of the proposed expert evidence. Second, the experts have not clearly demonstrated the reliability of their opinions. The other factors at the gatekeeping stage are not of concern.

Scope of the expert evidence

[82] Even on an application, the admissibility inquiry is not conducted in a vacuum. As a first step in determining admissibility, the judge must determine the nature and scope of the proposed expert evidence.[34] This establishes the boundaries of the proposed evidence and ensures that the expert does not overreach and provide evidence outside the scope of their expertise:

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[31] *Abbey #2*, at para. 48, citing L. Dufraimont, Case Comment on *White Burgess Langille Inman v. Abbott and Haliburton Co.* (2015), 18 C.R. (7th) 312-313.
[32] *Canadian Alliance for Sex Work Law Reform v. Attorney General*, 2023 ONSC 5197, at para. 105; *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 102 O.R. (3d) 321, at para. 104, rev'd on other grounds, 2012 ONCA 186, 2013 SCC 72.
[33] *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 28
[34] *Abbey*, at para. 62.

> The admissibility inquiry is not conducted in a vacuum. Before deciding admissibility, a trial judge must determine the nature and scope of the proposed expert evidence. In doing so, the trial judge sets not only the boundaries of the proposed expert evidence but also, if necessary, the language in which the expert's opinion may be proffered so as to minimize any potential harm to the trial process. A cautious delineation of the scope of the proposed expert evidence and strict adherence to those boundaries, if the evidence is admitted, are essential. The case law demonstrates that overreaching by expert witnesses is probably the most common fault leading to reversals on appeal.[35]

[83] In my view, whether the hearing takes the form of a jury trial, judge alone trial, or an application, the party tendering the expert should provide a clear, concise, and detailed description of the nature and scope of the proposed expert opinion. The judge may then accept, modify, or reject the suggested scope of the expert opinion. Defining the limits of the expertise of an expert is an essential part of the judge's gatekeeping role. As the Hon. Stephen Goudge observed:

> The very act of defining the precise limits of a witness's expertise will have the salutary effect of ensuring that the evidence given is truly expert. Defining the limits of expertise is a key part of the trial judge's role as gatekeeper.[36]

[84] A clear and precise description of the proposed nature and scope of expert evidence is of significant assistance to the court when it is attempting to define the limits of the scope of the expert opinion. As the Hon. Mr. Goudge wrote,

> A final outcome from the admissibility process is a clear definition of the scope of the expertise that a particular witness is qualified to give. As discussed in the earlier part of this chapter, it will be beneficial to define the range of expertise with as much precision as possible so that all the parties and the witness are alerted to areas where the witness has not been qualified to give evidence. ... As I earlier recommended, the trial judge should take steps at the outset to define clearly the proposed subject area of the witness's expertise. At the conclusion of the *voir dire*, the trial judge will be well situated to rule with precision on what the witness can and cannot say. These steps will help to ensure that the witness's testimony, when given,

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[35] *Abbey*, at para. 62.
[36] Ontario, *Inquiry into Pediatric Forensic Pathology in Ontario, Report: Policy and Recommendations*, vol. 3 (Toronto: Queen's Printer, 2008), p. 474

> can be confined to permissible areas and that it meets the requirement of threshold reliability.[37]

[85] For example, it is not particularly helpful to advise the court that the scope of the expert's opinion will relate to "financial markets." Instead, a much more useful description of the scope and nature of the opinion was offered by the Crown in *R. v. Colpitts*:

> The Crown applied to qualify Mr. Evans as an expert capable of giving opinion evidence in the following area:
>
> > Mr. Evans will be qualified as an expert to provide opinion evidence related to the analysis and interpretation of stock market trading practices and techniques utilized to artificially affect and/or maintain the price of publicly traded shares and, in particular, has conducted an analysis of the trading practices involving the shares of Knowledge House Incorporated.[38]

[86] In this case, I discern that Ontario proposed the following scope for the experts it tendered:

a. Dr. Cherpitel: the epidemiology of alcohol, drug use, and injuries;

b. Prof. Thacher: criminal justice policy and order maintenance; and

c. Prof. Sousa: criminal justice policy and order maintenance.

[87] I find the scope of expertise offered for Dr. Cherpitel to be the most helpful. I am able to review her qualifications to determine whether or not she is qualified to give an opinion with the scope suggested by Ontario. As importantly, I can measure the evidence provided in her affidavit against the suggested scope and determine if her evidence strays beyond the permissible scope.

[88] The suggested scope of opinion for Prof. Thacher and Prof. Sousa is less helpful to me. The first half of the scope of the opinion is framed in very broad terms, namely, "criminal justice policy." To the extent that the scope of the opinion is limited by the phrase "order maintenance," that is somewhat helpful for me to understand the scope of the opinion Ontario seeks to admit.

[89] For example, it allows me to consider whether or not Prof. Thacher and Prof. Sousa should be permitted, as they were asked to do, to indicate where they "agree and disagree" with the opinion of Dr. Kidd, who is a clinical psychologist. It is not clear to me how Prof.

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[37] Inquiry into Pediatric Forensic Pathology, vol. 3, pp. 499-500.
[38] *R. v. Colpitts*, 2016 NSSC 210, at para 3.

Thacher or Prof. Sousa could properly comment on an opinion offered by Dr. Kidd (presuming, of course, that Dr. Kidd's opinion stayed within his expertise).

[90] It is more difficult to discern the proposed nature and scope for each of Fair Change's expert's opinions. I understand the academic credentials and research interest of each expert. I understand the topics or questions that Fair Change asked each expert to address. I have more difficulty, however, discerning the scope of the opinion to be offered. In turn, this makes it more difficult to assess whether or not the evidence offered by each expert strays outside of the limits of their expertise and the proper scope of the opinion.

[91] I will not exclude any of the expert evidence tendered by Fair Change because of my concerns about the scope of the expert's evidence. I will, however, be mindful of this issue when I consider their evidence. Where I conclude that the expert's opinion is straying into the penumbra of their expertise, I will scrutinize that evidence more closely and may give it less weight.

Concerns about the reliability of the evidence

[92] At the gatekeeper stage, the reliability of the proposed evidence is central to its probative value and, therefore, to the benefits of admitting it.[39] Expert evidence of dubious or questionable reliability has little probative value, offers little benefit to the legal process, and risks distorting and prejudicing the fact-finding process.[40]

[93] In assessing reliability, courts are to take an evidence-based approach to the evaluation of the reliability of expert evidence. The court is not simply to trust the expert. The court asks the expert to show and then persuade the court that the expert's opinion is reliable. Justice Laskin adopted the academic work of Paciocco J.A. and explained that:

> courts now take what he called, and what the Goudge Report called, an evidence-based approach to the evaluation of the reliability of expert evidence. [Prof. David Paciocco] wrote at p. 146: "In effect, the 'trust me' approach, once typical in Canadian courts, has been replaced by a 'persuade me' standard". And near the end of his article, at p. 155,…he wrote: "…the essence of an evidence-based approach is that the tribunal be given all of the data it needs to assess the opinion it is being asked to accept. Anything less and a 'trust me' approach is used."[41]

[94] Fair Change's experts ask me to trust them. The opinions of Prof. O'Grady, Dr. Kidd, Prof. Hermer, and Prof. Freedman contain very few citations to the academic work or studies on which they rely. I note that Prof. O'Grady's reply opinion, which critiqued the criminological theories relied on by Prof. Thacher and Prof. Sousa contained many more

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[39] *Abbey (#2)*, at para. 54; *Abbey*, at para. 87; *R v. J.-L.J.*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239.
[40] *R. v. Mohan*, at p. 21; *Abbey (#2)*, at para. 115.
[41] *Abbey (#2)*, at para. 119.

citations to the academic literature he discussed and attached some of the studies he considered.

[95] Each expert did attach to their opinion a "list of the documents I relied on in informing my opinion." While supplying that list complies with rule 53(2.1)6(iii), it does little to help me assess the reliability of the opinion. Moreover, those documents are not attached to their primary affidavits as exhibits. Finally, given the absence of pinpoint citations, I would have no way of easily checking which document supported which assertion contained in the opinion.

[96] There is no doubt that each of Fair Change's experts has impressive academic credentials. However, none of the experts provided the court with the data necessary to assess the opinion. They are saying, "trust me." I will provide some examples to illustrate the point.

[97] Prof. O'Grady offers the following opinion:

> 20. There is no doubt that many more Indigenous people are being ticketed in more recent years than was the case when the SSA was first put into place and that Indigenous people are disproportionately targeted under the SSA. Research indicates that being non-white (such as black or Indigenous) is a statistically significant predictor of whether a youth will be ticketed when just "walking down the street" or while "hanging around with friends." The latter (i.e., hanging around with friends) was found to be a particularly significant predictor of ticketing of Indigenous youth.
>
> 21. Research also shows that the SSA disproportionately affects people with mental health/addiction issues. One estimate suggests that 25-50% of homeless people in Canada have a mental health condition. Another study reports a number of over 92% in Vancouver (numbers are generally higher in the west, due to drug addictions). While the percentage of homeless people with a mental health/addiction issue depends on several variables, including the definition of "homelessness", what is clear is that it is much higher than in the general population, where approximately 8% of adults in Canada who will experience major depression at some time in their lives, and about 1% of Canadians will experience bipolar disorder (or "manic depression") in their lifetime.

[98] Nowhere in Prof. O'Grady's first affidavit does he specifically identify the studies he is relying on to support the opinions expressed in paragraphs 20 and 21 of his affidavit. I cannot check that he is even quoting the studies accurately, much less assess the validity of any of the data cited or the inferences that Prof. O'Grady has drawn. Moreover, as I will explain below, it is not clear to me that the data contained in the reports he listed support his opinions.

[99] Dr. Kidd offered the following opinion:

> 17. It is highly likely that restrictions on and penalties for panhandling under the SSA affect the physical and psychological health of panhandlers. The process of police engagement and surveillance and being charged in such circumstances is stressful and conducive of further marginalization for most of these individuals. A punitive response rather than one that involves connecting the individual with supports would create more stress and marginalization and, accordingly, could readily translate into a worsening of physical and psychological health across the board in this situation….

[100] Dr. Kidd does not explain if his opinion is informed by his own treatment of patients, his own statistical or clinical research, or other studies. No citations are offered in this paragraph. Dr. Kidd has not showed me his work. He is simply asking me to trust him.

[101] Dr. Freedman offered the following opinion:

> 17. The judgments police officers must make are considerably more difficult than these, because they are judging not overt aggressive acts, but whether an act is done in an "aggressive manner," that is, in ["]a manner that is likely to cause a reasonable person to be concerned for his or her safety or security". In making such judgments, it is inevitable that they will be affected by their personal beliefs and expectations. If they are inclined to distrust those who solicit, police officers will be more likely to see their actions as aggressive then if they do not distrust them. If they expect them to be aggressive, they will be more likely to perceive them as aggressive. If they have any prejudices against them, they will be more likely to perceive them as aggressive. This would be true of anyone making the judgments, and it is extremely unlikely that police officers will be immune to the effect of their own beliefs and expectations. In other words, where actions are not either the 'obviously aggressive' or 'obviously non aggressive' extreme, there will be no consistent standard applied by police officers.

[102] Dr. Freedman did not include any citations to the literature that supported of his opinion. It was only on cross-examination that Dr. Freedman acknowledged that none of the documents he relied on to form this opinion discussed police enforcement of soliciting under the Act or included any empirical or survey evidence about police attitudes towards people who solicit. In these circumstances, it is very difficult for me to assess the reliability of Dr. Freedman's opinion or to give it any weight.

[103] As noted above, Prof. O'Grady, Dr. Kidd, Prof. Hermer, and Prof. Freedman did not attach the documents they reviewed to their affidavits. Ontario exhibited some of these documents

during the cross-examination of these witnesses. But for that, I would not have any of the source material before me. As I will address below, the data contained in the studies undermine some of the opinions offered by the experts.

[104] Ontario did not ask me to exclude the affidavits as unreliable. For that reason, I will not do so. I accept the impressive academic qualifications of the experts tendered by Fair Change, but I cannot simply trust them. The modern approach to expert evidence, particularly in constitutional litigation, demands more. The failure to demonstrate the reliability of their opinions causes me to give the opinions significantly less weight than might otherwise be the case.

3. The scheme of the Act

[105] The Legislative Assembly of Ontario passed the Safe Streets Act in 1999 and it came into force on January 31, 2000.[42] The Act creates regulatory, not criminal offences. The objective of regulatory legislation is to protect the public from the potentially adverse effects of otherwise lawful activity. Regulatory legislation is designed to prevent future harm by enforcing minimum standards of conduct. In *R. v. Wholesale Travel Group,* Cory J. explained the objective of regulatory legislation this way:

> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.[43]

[106] In this application, Fair Change challenges the constitutionality of sections 2, 3, and 5 of the Act. Fair Change does not challenge the constitutionality of section 4, which relates to the disposal of certain items in an outdoor public space, or section 6, which provides authority in certain circumstances for a police officer to arrest a person whom the officer believes on reasonable and probable grounds has contravened the Act.[44]

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[42] *Safe Streets Act*, 1999, S.O. 1999, c. 8.
[43] [1991] 3 S.C.R. 154, at para. 219,
[44] Section 6 provides that: "A police officer who believes on reasonable and probable grounds that a person has contravened section 2, 3 or 4 may arrest the person without warrant if,

> (a) before the alleged contravention of section 2, 3 or 4, the police officer directed the person not to engage in activity that contravenes that section; or

[107] For the purposes of sections 2 and 3 of the Act, the term "solicit" is defined in broad terms to mean:

> to request, in person, the immediate provision of money or another thing of value, regardless of whether consideration is offered or provided in return, using the spoken, written or printed word, a gesture or other means.[45]

Section 2 prohibits solicitation in an aggressive manner

[108] Section 2 of the Act prohibits solicitation in an "aggressive manner," which is itself a defined term. Subsections 2(1) and (2) provide as follows:

> 2. (1) In this section,
>
> "aggressive manner" means a manner that is likely to cause a reasonable person to be concerned for his or her safety or security.
>
> (2) No person shall solicit in an aggressive manner.

[109] Subsection 2(3) of the Act deems six activities to be soliciting in an aggressive manner for the purposes of section 2. Subsection 2(3) provides that:

> (3) 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 purpose of this section:
>
> > 1. Threatening the person solicited with physical harm, by word, gesture or other means, during the solicitation or after the person solicited responds or fails to respond to the solicitation.
> >
> > 2. Obstructing the path of the person solicited during the solicitation or after the person solicited responds or fails to respond to the solicitation.
> >
> > 3. Using abusive language during the solicitation or after the person solicited responds or fails to respond to the solicitation.

(b) the police officer believes on reasonable and probable grounds that it is necessary to arrest the person without warrant in order to establish the identity of the person or to prevent the person from continuing or repeating the contravention."

[45] *Safe Streets Act*, s. 1.

> 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.

[110] I pause here to note that Ontario conceded that s. 2(2) of the Act is the only charging provision that is contained in section 2. This means that if a person solicits while intoxicated by alcohol, they are deemed to be soliciting in an aggressive manner and can be charged with violating s. 2(2); they will not be charged under paragraph 2(3)5. This also means that the Act provides that proof of one fact (soliciting while intoxicated) can substitute as proof of an element of the offence (soliciting in an aggressive manner). The Legislature's decision to structure the Act this way implicates the presumption of innocence guaranteed by s. 11(d) of the *Charter*, which I will address below.

Section 3 prohibits soliciting persons in certain places

[111] Section 3 of the Act prohibits the solicitation of people who are doing certain things in certain places.[46] Subsection 3(2) provides that:

> 3(2) No person shall,
>
> (a) solicit a person who is using, waiting to use, or departing from an automated teller machine;
>
> (b) solicit a person who is using or waiting to use a pay telephone or a public toilet facility;
>
> (c) solicit a person who is waiting at a taxi stand or a public transit stop;
>
> (d) solicit a person who is in or on a public transit vehicle;
>
> (e) solicit a person who is in the process of getting in, out of, on or off a vehicle or who is in a parking lot; or
>
> (f) while on a roadway, solicit a person who is in or on a stopped, standing or parked vehicle.

[46] Section 3(1) contains definitions of "public transit vehicle," "roadway," and "vehicle." Those definitions are uncontroversial, and it is not necessary to consider them in these reasons.

[112] In its 2007 decision that I will discuss below, the Court of Appeal for Ontario upheld the constitutionality of s. 3(2)(f).[47]

[113] The marginal note to section 3(2) reads "Solicitation of captive audience prohibited." Despite the evocative convenience of the "captive audience" shorthand, I will not use that phrase in my reasons. Section 70 of the *Legislation Act* provides that headings and marginal notes are inserted in an Act for convenience of reference only and do not form part of it.[48] Therefore, I cannot rely on the marginal note to interpret the meaning of subsection 3(2).[49] Moreover, I think it is important to focus on the text of the provision, rather than different words used in the heading or marginal note.

[114] Subsection 3(3) provides that the prohibitions on soliciting persons in certain places does not apply to fundraising activities conducted by registered charities on a roadway with a maximum speed limit of 50 kilometres per hour where such activities are permitted by an applicable municipal by-law. Fair Change does not challenge the constitutionality of subsection 3(3) but relies on this clause in support of some of its submissions regarding the constitutionality of section 3(2). There is no evidence in the record before me to explain how the exemption in s. 3(3) operates, how municipalities determine what conditions to place on this activity, or even if any municipality has passed an enabling by-law.

Section 5 sets out the applicable penalties for contraventions of the Act

[115] Section 5 of the Act provides that anyone who contravenes sections 2 or 3 of the Act commits an offence and is liable to certain sanctions.

[116] While section 5 provides that a person who contravenes sections 2 or 3 is liable to a fine, the Act does not create a mandatory minimum fine. Section 5 also provides that, if certain conditions are met, a person convicted of a subsequent offence may be subject to imprisonment for a term of not more than six months. Section 5 provides:

> 5. (1) Every person who contravenes section 2, 3 or 4 is guilty of an offence and is liable,
>
> (a) on a first conviction, to a fine of not more than $500; and
>
> (b) on each subsequent conviction, to a fine of not more than $1,000 or to imprisonment for a term of not more than six months, or to both.

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[47] *Banks* CA.
[48] *Legislation Act, 2006*, S.O. 2006, c. 21, Sch F, s. 70.
[49] *Mulmer Services Ltd. v. LIUNA, Local 183*, 2023 ONSC 4716 (Div. Ct.), at para. 50; *Hazineh v. McCallion*, 2012 ONSC 3833, at para 17; *Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717, at footnote 9 found in para. 7.

> (2) For the purpose of determining the penalty to which a person is liable under subsection (1),
>
> > (a) a conviction of the person of a contravention of section 2 is a subsequent conviction only if the person has previously been convicted of a contravention of section 2 or 3;
> >
> > (b) a conviction of the person of a contravention of section 3 is a subsequent conviction only if the person has previously been convicted of a contravention of section 2 or 3…..

4. The scheme of the *Provincial Offences Act*

[117] The Act creates the substantive regulatory offences and establishes the range of penalties that can be imposed upon conviction. The administrative and charging framework, however, is provided by the *Provincial Offences Act*.

[118] Fair Change did not challenge the constitutionality of any of the provisions of the *Provincial Offences Act*. As I will explain below, many of the arguments raised by the Fair Change and the interveners indirectly target the constitutionality or fairness of the provisions of the *Provincial Offences Act*. In my view, those arguments are not properly before me. I must proceed on the basis that the provisions and processes contained in the *Provincial Offences Act* are themselves constitutional. Nevertheless, to understand the applicant's submissions, I think it is helpful to sketch out how alleged violations of the Act are processed through the provisions of the *Provincial Offences Act*.

[119] Parts I and III of the *Provincial Offences Act* address the issuing of process.

Part I – Commencement of proceedings by certificate of offence

[120] Part I contains the more streamlined procedure.[50] If the police officer chooses to proceed under Part I, the maximum fine that can be imposed is $1,000, subject to the limits contained in the Act, and no term of imprisonment can be imposed.[51] The officer can initiate a proceeding either by serving the defendant personally within with a certificate of offence and either an offence notice indicating the set fine for the offence or a summons to appear.[52] The certificate must be filed with the court within 7 days.[53]

[121] If the officer serves an offence notice, the defendant may plead:

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[50] *2682283 Ontario Ltd (Volcano Café and Lounge) v. Durham (Regional Municipality)*, 2024 ONCA 132, at paras. 15-16.
[51] *Provincial Offences Act*, s. 12(1).
[52] *Provincial Offences Act*, s. 3(3).
[53] *Provincial Offences Act*, s. 4.

a. guilty in writing with full payment of the fine;[54]

b. guilty with representations as to penalty to be made before a justice;[55]

c. not guilty and have a trial;[56] or

d. dispute the charges in writing, if the defendant lives outside a designated jurisdiction where the charges were laid.[57]

[122] Part IV of the *Provincial Offences Act* set out the trial procedure and sentencing procedure for proceedings commenced under Part I of the *Provincial Offences Act*.[58]

[123] If the defendant does not plead in any of these ways within 15 days, or if the defendant fails to appear for trial or in response to the summons to appear, the defendant is deemed not to dispute the charges and, providing the certificate of offence is complete and regular, the defendant can be convicted in her or his absence.[59]

[124] Where a defendant was convicted without a hearing, the defendant can request that the conviction be struck out. The defendant must attend at the court office within 15 days of becoming aware of the conviction, file an affidavit affirming that the defendant was unable to appear for the hearing or that a notice or document relating to the offence was not delivered.[60] If the justice is satisfied that the defendant did not appear through no fault of their own, the justice will strike out the conviction and issue a notice of hearing or take a guilty plea and receive submissions on penalty.[61]

[125] An adult defendant may appeal a conviction or sentence to the Ontario Court of Justice, where it will be heard by a provincial court judge.[62] The judge may waive the requirement that the defendant must pay any fine before filing the notice of appeal.[63] The appeal court may affirm, reverse or vary the decision appealed from or where, in the opinion of the court, it is necessary to do so to satisfy the ends of justice, direct a new trial.[64]

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[54] *Provincial Offences Act*, s. 8(1).
[55] *Provincial Offences Act*, s. 7(1).
[56] *Provincial Offences Act*, s. 5(1).
[57] *Provincial Offences Act*, s. 6(1).
[58] *Provincial Offences Act*, ss. 28 to 75.
[59] *Provincial Offences Act*, ss. 9 and 9.1
[60] *Provincial Offences Act*, s. 11(1).
[61] *Provincial Offences Act*, s. 11, 7.
[62] *Provincial Offences Act*, s. 135(1). The appeal of a youth defendant lies to the Superior Court of Justice: s. 105.
[63] *Provincial Offences Act*, s. 111.
[64] *Provincial Offences Act*, s. 138(1)

Part III – Commencement of proceedings by information

[126] Part III contains the procedure for more serious offences. If the police officer chooses to proceed under Part III, the maximum allowable fine is $5,000 and imprisonment, subject to the limits contained in the Act. The complainant must swear to the truth of the allegations in the information before a justice.[65] If the justice accepts that the complainant has reasonable and probable grounds for believing that the defendant committed an offence, then the justice will endorse the information.[66] The justice must then decide whether to confirm or issue a summons to appear or whether to issue a warrant for the arrest of the defendant.[67]

[127] Part IV of the *Provincial Offences Act* set out the trial procedure and sentencing procedure for proceedings commenced under Part I of the *Provincial Offences Act*.[68]

[128] The provisions for appeals under both Parts I and III are set out in Part VII of the *Provincial Offences Act.*[69] Where the appeal is from a decision of a justice of the peace, a defendant may appeal to a provincial judge in the Ontario Court of Justice. Where the appeal is from the decision of a provincial judge, the appeal lies to the Superior Court of Justice.[70]

Sentencing

[129] Where a defendant who appears is convicted of an offence, the court is required to give the defendant or their representative an opportunity to make submissions as to sentence.[71]

[130] The maximum penalties in the Act take precedence over the maximum penalties set out in the *Provincial Offences Act*.[72] No penalty prescribed for an offence is a minimum penalty unless it is specifically declared to be a minimum.[73] Even then, the *Provincial Offences Act* gives the court the discretion to impose a fine that is less than any prescribed minimum or suspend the sentence where it finds exceptional circumstances that would make imposing the minimum unduly oppressive or otherwise not in the interest of justice.[74] When crafting an appropriate sentence, the court also has the discretion to make inquiries of and concerning defendant, including as to the defendant's economic circumstances.

[131] A fine that is imposed becomes due and payable 15 days later. Where the court imposes a fine, the court is required to ask if the defendant wishes an extension of time to pay the

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[65] *Provincial Offences Act*, s. 23.
[66] *Provincial Offences Act*, s. 24.
[67] *Provincial Offences Act*, s. 24.
[68] *Provincial Offences Act*, ss. 28 to 75.
[69] *Provincial Offences Act*, ss. 109 to 142.
[70] *Provincial Offences Act*, s. 116.
[71] *Provincial Offences Act* s. 57.
[72] *Provincial Offences Act*, s. 61, and 59.
[73] *Provincial Offences Act*, 59.
[74] *Provincial Offences Act*, s. 9.1.

fine, and such a request shall be granted unless the court finds that the request is not made in good faith or that it the extension would be used to avoid payment. Where a fine is imposed in the absence of the defendant, the clerk shall give notice to the defendant both of the fine and the right to apply in writing for an extension of time for payment.[75]

[132] If a fine is not paid, the clerk of the court may file a certificate, which shall be deemed to be an order of the court for purposes of civil enforcement.[76] The *Provincial Offences Act* permits the disclosure of a fine that has been outstanding for more than 90 days to a consumer reporting agency.[77] A justice may issue a warrant requiring that a person who has defaulted on paying a fine be arrested and brought before a justice if other reasonable methods of colleting the fine have been tried and failed or would not appear to be likely to result in payment within a reasonable period of time.[78] When brought before the court, the justice shall hold a hearing to determine whether the person is unable to pay the fine within a reasonable period of time.[79]

[133] If the justice is satisfied that the person who defaulted is unable to pay the fine within a reasonable period of time, the justice may:

a. grant an extension of the time allowed for payment of the fine;

b. require the person to pay the fine according to a schedule of payments established by the justice; or

c. in exceptional circumstances, reduce the amount of the fine or order that the fine does not have to be paid.[80]

[134] If the justice is not satisfied that the person who defaulted is unable to pay the fine within a reasonable period of time and that incarceration of the person would not be contrary to the public interest, the justice may issue a warrant for the person's committal or may order that such other steps be taken to enforce the fine as appear to him or her to be appropriate.[81] The term of imprisonment shall be for three days plus one day if the amount paid is not greater than $50. If the unpaid amount is more than $50, the term of imprisonment shall be for three days plus approximately one additional day for each $50 that is unpaid.

[135] Where a defendant is convicted of an offence under Part III, the court may suspend sentence and direct the defendant to complete a term of probation with various conditions.[82] Breach

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[75] *Provincial Offences Act* s. 66(1) to 66.0.1.
[76] *Provincial Offences Act* s. 68.
[77] *Provincial Offences Act*, s. 69.1.
[78] *Provincial Offences Act*, s. 69(6).
[79] *Provincial Offences Act*, s. 69(9).
[80] *Provincial Offences Act*, s. 69(15).
[81] *Provincial Offences Act*, s. 69(14).
[82] *Provincial Offences Act*, s. 72.

of probation is itself punishable by a fine of up to $1,000 or imprisonment of not more than 30 days, or both.[83]

5. The prior decisions in *R. v. Banks*

[136] As I mentioned above, this application is not the first constitutional challenge to the Act. Shortly after the Act was proclaimed in force, the case of *R. v. Banks* moved through three levels of court in Ontario.[84] It will be helpful to briefly describe what the cases did and did not decide.

Ontario Court of Justice

[137] In early 2000, eight persons were found offering to clean or cleaning windshields with the hope or expectation of receiving money from drivers. The defendants Banks, Barrington, Collins, and Coupal were charged with offences contrary to s. 177(2) of the *Highway Traffic Act*, as it had been amended by the Act. The defendants Naugle, Moran, Beach, and Stevenson were charged with offences under s. 3(2)(f) of the Act.[85] In addition, Brydges, Batuskin, Evans, and Leonard were all found approaching stopped vehicles asking for money, but without offering to perform a service. They were charged with offences under s. 3(2)(f) of the Act.[86] A thirteenth defendant, Hughes, was found soliciting on Bloor Street and following people for a short distance continuing to ask for money after a refusal. Hughes was charged with soliciting in an aggressive manner contrary to s. 2(2) of the Act.[87]

[138] The 13 defendants ranged in age from 16 to 50. All of them, except one, were described as being unhoused or having no fixed address. The defendants had a joint trial before Babe J. in the Ontario Court of Justice. Justice Babe released his reasons for decision on August 3, 2001.[88]

[139] The defendants challenged the Act on a number of grounds. First, they made a division of powers argument and asserted that the Act was not within the legislative jurisdiction of the province because it was in relation to criminal law, which is a federal head of power. Justice Babe rejected this challenge and characterized the law as legislation in relation to traffic, conduct in the streets, and the regulation of occupations. He held that the law was valid provincial legislation under the Constitution's division of powers.[89]

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[83] *Provincial Offences Act*, s. 75.
[84] *R. v. Banks et al.* (2001), 205 D.L.R. (4th) 340 (Ont. C.J.) ("*Banks* OCJ"), rev'd in part, *R. v. Banks* (2005), 248 D.L.R. (4th) 118 (Ont. S.C.J.), aff'd Banks CA.
[85] *Banks* OCJ, at p. 350
[86] *Banks* OCJ, at p. 351.
[87] *Banks* OCJ, at p. 351.
[88] *Banks* OCJ.
[89] *Banks* OCJ, at pp. 352 to 362.

[140] Second, the defendants asserted that the Act violated sections 2(b), 7, 11(d), and 15 of the *Charter*.

[141] With respect to the defendants' s. 2(b) challenge, Babe J. held that the defendants' activity did convey or attempt to convey meaning and that the purpose or effect of the government's action was to restrict expression.[90] He concluded that the expression was peripheral to the core values protected by 2(b) and was more akin to commercial speech than political expression. He held that the issue before him did "not reach passive panhandlers (noting that most of the "captive audience" sections are not raised on the facts before me)."

[142] Justice Babe found that the restrictions on the place and manner of soliciting were justified under s. 1 of the *Charter*.[91]

[143] Justice Babe rejected the challenge under s. 7 of the *Charter*. Justice Babe held that the Act imposed no limitation on the right to life, liberty or security of the person. Therefore, the Act's prohibitions on approaching cars stopped in traffic and solicitation did not infringe the defendants' s. 7 rights. [92]

[144] Justice Babe agreed that the Act, as drafted, appeared to violate 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. Because the Act provided for the possibility of imprisonment, the *Charter* required that the proof of guilt be beyond a reasonable doubt. Justice Babe noted that in s. 2(3) of the Act, the Legislature had deemed six activities to be soliciting in an aggressive manner for the purposes of s. 2. Justice Babe held that the section would be constitutional if the words "in the absence of evidence to the contrary" were read into s. 2(3). He held as follows:

> I am of the view, however, that the constitutionality of the section can be saved by reading into it the words "in the absence of evidence to the contrary", thereby permitting a defendant to escape conviction if he can raise a reasonable doubt on all the evidence that, in the particular circumstances, a reasonable person would be so concerned. I agree with the Crown that the activities described in s. 2(3), at least in those paragraphs engaged by the facts concerning the defendant Hughes, are closely connected to aggressive solicitation as defined in s. 2(1), so that they raise a reasonable inference that a reasonable person would be apprehensive, an inference that would usually be correct, so that the rational connection test is met. (It may be questionable that such an inference would arise strongly from soliciting while intoxicated as provided by para. 5 from that fact alone, but that subparagraph is not engaged

[90] *Banks* OCJ, at p. 377.
[91] *Banks* OCJ, at pp. 378 to 379.
[92] *Banks* OCJ, at pp. 366 to 368.

> by the facts before me.) Since a defendant could no longer be convicted despite the existence of a reasonable doubt as to the elements of the offence, the presumption of innocence would not be infringed.[93]

[145] Justice Babe rejected the defendants' challenge to the Act under s. 15(1) of the *Charter*. Justice Babe noted that the weight of authority suggested that extreme poverty should not be seen as an analogous ground under s. 15. He also expressed doubt that the defendants had made out their claim of discrimination or that the Act itself could be said to have a prejudicial effect on their essential human dignity by placing restrictions on the place and manner of solicitation.[94]

[146] Justice Babe noted that all of the defendants had admitted facts that established that each of them had contravened the Act or the *Highway Traffic Act*. Having upheld the Act as constitutional (subject to his reading-in of the words "in the absence of evidence to the contrary), he entered convictions for each of the 13 defendants.

Superior Court of Justice

[147] The defendants appealed their convictions to the Superior Court of Justice.[95] Justice Dambrot heard the appeals over two days and released his reasons for decision on January 14, 2005.

[148] Justice Dambrot stated that the appellants were challenging the constitutional validity of ss. 2, 3, and 7 of the Act.[96]

[149] The appellants submitted that the Act violated the division of powers between the federal and provincial government. Justice Dambrot held that the pith and substance of the Act fell within provincial jurisdiction and that the provisions were not *ultra vires* the province.[97] Justice Dambrot, therefore, dismissed the appeal based on the division of powers.

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[93] *Banks* OCJ, at p. 371.
[94] *Banks* OCJ, at pp. 371 to 375.
[95] Although the reasons for decision indicate that 13 defendants appealed their convictions, only five of the defendants had counsel appear for them on the appeal (Hughes, Beach, Evans, Leonard, and Collins). See *Banks* SCJ, at para. 4.
[96] *Banks* SCJ, at para. 4. At the time, s. 7 of the Act repealed s. 177 of the *Highway Traffic Act* and substituted the following provision. The only change was to add the words "or approach" to s. 177(2):
177 (1) No person, while on the roadway, shall solicit a ride from the driver of a motor vehicle other than a public passenger conveyance.
(2) No person, while on the roadway, shall stop, attempt to stop or approach a motor vehicle for the purpose of offering, selling or providing any commodity or service to the driver or any other person in the motor vehicle.
(3) Subsection (2) does not apply to the offer, sale or provision of towing or repair services or any other commodity or service, in an emergency.
[97] *Banks* SCJ, at paras. 18 to 35.

[150] Justice Dambrot held that that challenged provisions of the Act were not vague or overbroad in a way that violated s. 7 of the *Charter*.[98] Justice Dambrot deferred to the finding of Babe J. that the affidavit evidence did not establish that the Act affected the appellants' "right to survival in any fundamental sense" and agreed that s. 7 of the *Charter* did not protect economic rights.[99]

[151] Justice Dambrot also dismissed the appellants' submissions regarding s. 15 of the *Charter*.[100] He upheld the findings of Babe J. that the Act imposed no differential treatment on the appellants, that extreme poverty was not an analogous ground, and that the Act had no prejudicial effect on their essential human dignity.

[152] The appellants renewed their s. 11(d) *Charter* challenge to s. 2(3), which deemed six activities to be soliciting in an aggressive manner for the purposes of the Act. The appellants submitted that Babe J. correctly determined that the section violated s. 11(d) but should have struck the section down instead of reading in the words "in the absence of evidence to the contrary." Justice Dambrot held that the manner in which the law violated the *Charter* was simple to identify, and that the reading-in remedy granted by Babe J. solved the constitutional problem precisely. Justice Dambrot upheld the decision of Babe J. and found that there was no violation of 11(d) after he read those words in to s. 2(3).[101]

[153] The appellants also renewed their challenge under s. 2(b) of the *Charter*. Justice Dambrot conducted his own analysis of the alleged infringements. Justice Dambrot described the alleged conduct involving each appellant and concluded that all of the alleged conduct fell within the protections of s. 2(b) and concluded that the speech was neither peripheral to the core value protected by the section nor more akin to commercial speech than to political expression. Justice Dambrot concluded that the purpose of the Act was to promote public safety, not to restrict expression and that none of the impugned provisions had the effect of restricting expression within the meaning of s. 2(b).[102]

[154] Because Dambrot J. found that the Act did not violate the *Charter*, he did not conduct a complete section 1 analysis. Justice Dambrot observed that if there had been a breach, he would have upheld the violation under s. 1 of the *Charter*.[103]

[155] In the result, Dambrot J. dismissed all of the appeals, except for the appeal of Mr. Hughes, who was convicted of soliciting in an aggressive manner. Although Mr. Hughes admitted to certain acts that were deemed by s. 2(3)4 to amount to soliciting in an aggressive manner, that took place before Babe J. read the words "in the absence of evidence to the contrary" into the provision. Justice Dambrot felt that a trier of fact who heard all of the evidence in

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[98] *Banks* SCJ, at paras. 36 to 44.
[99] *Banks* SCJ, at paras. 45 to 53.
[100] *Banks* SCJ, at paras. 54 to 70.
[101] *Banks* SCJ, at paras. 71 to 83.
[102] *Banks* SCJ, at paras. 84 to 132.
[103] *Banks* SCJ, at para. 133.

Mr. Hughes' case may have been left with a reasonable doubt that Mr. Hughes solicited in a manner that was likely to cause a reasonable person to be concerned for her or his safety. Justice Dambrot set aside Mr. Hughes' conviction and, in all of the circumstances, exercised his discretion to enter an acquittal instead of ordering a new trial.[104]

Court of Appeal for Ontario

[156] Eleven of the defendants appealed the decision of the summary conviction appeal court to the Court of Appeal for Ontario.[105] With reasons for decision authored by Juriansz J.A., the Court of Appeal dismissed the appeal on January 16, 2007.

[157] The Court of Appeal emphasized the narrow scope of the appeal. They noted that all 11 of the appellants had been charged either with soliciting contrary to s. 177(2) of the *Highway Traffic Act* or soliciting a person on a roadway contrary to s. 3(2)(f) of the Act.[106] None of the appellants before the Court of Appeal were charged under s. 2 of the Act.[107]

[158] The Court of Appeal rejected the submissions of the interveners and held that the court could not determine the constitutionality of any provisions except for the provisions under which the appellants were charged.[108] Therefore, the court held that the appellants were limited to challenging the constitutionality of s. 3(2)(f) of the Act and s. 177(2) of the *Highway Traffic Act* and declared that there was no appeal concerning the constitutionality of s. 2, or 3(2)(a) to (e) of the Act before the court.[109] The court commented that neither Babe J. nor Dambrot J. should have commented on the constitutionality of any part of s. 3 of the Act, except s. 3(2)(f):

> I conclude that the scope of this appeal is limited to s. (3)(2)(f) of the Act and to s. 177(2) of the *Highway Traffic Act*. While the constitutionality of s. 2(2) was at issue in Hughes' trial and before the summary conviction appeal judge, it is not an issue on appeal before this court. The trial judge noted that the "captive audience" provisions of s. 3(2), except soliciting a person in a stopped vehicle under para. (f), were not engaged by the facts before him. In my view, neither the trial judge nor the summary conviction appeal judge ought to have commented upon the constitutionality of the captive audience provisions of the Act other than s. 3(2)(f) of the Act and s. 177(2) of the *Highway Traffic Act*.[110]

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[104] *Banks* SCJ, at paras. 134 to 135.
[105] Banks, Barrington, Collins, Batuszkin, Beach, Brydges, Evans, Leonard, Moran, Naugle and Stevenson.
[106] *Banks* CA, at paras. 2 and 3.
[107] *Banks* CA, at para. 17.
[108] *Banks* CA, at para. 9.
[109] *Banks* CA, at paras. 15 and 22.
[110] *Banks* CA, at para. 26.

[159] I will keep the Court of Appeal's caution in mind when I consider the decisions of Babe J and Dambrot J. in these reasons.

[160] The Court of Appeal dismissed the appellants' appeal from the summary conviction appeal court's decision that the Act was within the jurisdiction of the province. The Court of Appeal held that the Act was not criminal law and that the pith and substance of s. 3(2)(f) of the Act and s. 177(2) of the *Highway Traffic Act* 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.[111]

[161] The court held that the appellants' right to liberty under s. 7 of the *Charter* was engaged because they faced potential imprisonment for the conduct for which they were convicted.[112] The court found that the restriction on liberty was in accordance with the principles of fundamental justice and that that s. 3(2)(f) of the Act and s. 177(2) of the *Highway Traffic Act* were neither overbroad nor vague.

[162] The Court of Appeal also held that s. 3(2)(f) of the Act and s. 177(2) of the *Highway Traffic Act* did not violate the right to equality under s. 15 of the *Charter*.[113] The court rejected the appellants' submission that the provisions were enforced selectively against "beggars" and not against others who perform similar activities. The court found that the submission failed as a matter of fact and because the submission conflated discrimination in the administration of legislation with the discriminatory effects of legislation.[114] The court also rejected the submission that the substantive effect of the enforcement of the provisions is different for the appellants than for others based on the trial judge's finding that the Act, considered as a whole, did not affect the appellants' economic right to survival in any fundamental sense.[115] The Court of Appeal also found that the appellants' proposed ground (those poor enough to need to beg) was not analogous to the enumerated grounds in s. 15.[116] Finally, and in any event, the court held that the appellants did not establish that the provisions at issue demeaned their dignity in a manner that would constitute discrimination:

> Assuming these provisions fail to take into account the appellants' conditions of economic disadvantage, the provisions do not infringe their human dignity by prohibiting them from stepping onto a roadway or approaching a vehicle to solicit.[117]

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[111] *Banks* CA, at paras. 28 to 72.
[112] *Banks* CA, at para. 83.
[113] *Banks* CA, at paras. 89 to 107.
[114] *Banks* CA, at paras. 92 to 96.
[115] *Banks* CA, at para. 97.
[116] *Banks* CA, at paras. 98 to 102.
[117] *Banks* CA, para. 106.

[163] The Court of Appeal then considered the appellants' argument that s. 3(2)(f) of the Act and s. 177(2) of the *Highway Traffic Act* limited the right to freedom of expression found in s. 2(b) of the *Charter*.[118] The court held that the appellants' activity (soliciting) had expressive content that was not removed by the method or location of the expression, and the Act had the incidental purpose of restricting soliciting.[119] Therefore, the court held, the challenged provisions infringed s. 2(b) of the *Charter*.

[164] The Court of Appeal held, however, that the infringement was justified under s. 1 because:

a. the objective of regulating the interaction of pedestrians and vehicles on roadways was a pressing and substantial objective;

b. prohibiting persons from soliciting or approaching a vehicle while "on a roadway" is rationally connected to the legislative objective;

c. the provision impaired the appellants' right of expression as little as possible; and

d. the Act's deleterious effects do not outweigh its benefits.[120]

[165] The court concluded that the appellants failed to establish that s. 3(2)(f) of the Act and s. 177(2) of the *Highway Traffic Act* were criminal law, or that their rights under ss. 7, 15 or 2(b) of the *Charter* were unjustifiably infringed. The appeal was dismissed in its entirety and the Supreme Court of Canada dismissed the application for leave to appeal.[121]

[166] I will now turn to Fair Change's constitutional challenge to the Act.

6. Section 11(d) – the presumption of innocence

[167] Fair Change brings both a narrow and a broad challenge to ss. 2, 3, and 5 of the Act under s. 11(d). The narrow challenge focuses on the deeming provisions contained in s. 2(3) of the Act. Fair Change also mounts a broader challenge to the entire "procedural scheme of the Act." I will address each in turn.

[168] Section 11(d) of the *Charter* establishes the right of any person charged with an offence to be presumed innocent until proven guilty:

> 11 Any person charged with an offence has the right…

[118] *Banks* CA, at para. 127.
[119] *Banks* CA, at paras. 108 to 126.
[120] *Banks* CA, at paras. 129 to 132.
[121] *R. v. Banks*, [2007] SCCA No. 139.

> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[169] Before an accused can be convicted of an offence with the possibility of imprisonment, the trier of fact must be satisfied that the prosecutor has proved all of the essential elements of the offence beyond a reasonable doubt.[122] The parties agree that the *Charter* requires that no person be convicted under the Act if there is a reasonable doubt about any element of the offence. The overarching principle of the presumption of innocence and the correlative principle of the Crown's burden of proof must aways govern the fact-finding process.[123]

The narrow challenge to the deeming provisions in subsection 2(3)

[170] Subsection 2(2) of the Act states that no person shall solicit in an "aggressive manner", which is defined in subsection 2(1) to mean "a manner that is likely to cause a reasonable person to be concerned for his or her safety or security."

[171] Fair Change challenges the constitutionality of subsection 2(3), which contains six paragraphs that deem certain activities to be soliciting in an aggressive manner for the purposes of the Act. Subsection 2(3) of the Act provides as follows:

> 2(3) 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 purpose of this section:
>
> > 1. Threatening the person solicited with physical harm, by word, gesture or other means, during the solicitation or after the person solicited responds or fails to respond to the solicitation.
> >
> > 2. Obstructing the path of the person solicited during the solicitation or after the person solicited responds or fails to respond to the solicitation.
> >
> > 3. Using abusive language during the solicitation or after the person solicited responds or fails to respond to the solicitation.
> >
> > 4. Proceeding behind, alongside or ahead of the person solicited during the solicitation or after the person solicited responds or fails to respond to the solicitation.

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[122] *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at p. 654; *Banks* OCJ, at p. 369; *R. v. Roberts*, [2001] O.J. No. 4645 (C.J.) at para. 19; *R. v. Cerisano*, [2011] O.J. No. 6351 (C.J.), at para. 1.
[123] *R. v. Kruk*, 2024 SCC 7, at para. 59

> 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.

[172] Subsection 2(3) provides that proof of a basic fact, the activities described in paragraphs 2(3)1 to 6, is deemed to be proof of an essential element of the offence the charging s. 2(2), soliciting in an aggressive manner. For example, pursuant to paragraph 2(3)5, proof that a person was soliciting while intoxicated by drugs is deemed to be proof that a person was soliciting in a manner that is likely to cause a reasonable person to be concerned for their safety or security. Such provisions have long attracted close scrutiny under s. 11(d) of the *Charter* to ensure that they do not allow for a person to be convicted despite the existence of a reasonable doubt.[124]

[173] A provision that establishes a presumption whereby proof of the basic or substituted fact (intoxication) is deemed to be proof of the essential element of an offence (soliciting in an aggressive manner) will comply with s. 11(d) of the *Charter*, if and only if proof of the substituted fact leads inexorably to the existence of the essential element that it replaces.[125] This is necessarily a very stringent test. Otherwise, a provision would permit the conviction of an accused without proof of all of the essential elements of an offence beyond a reasonable doubt. The Supreme Court of Canada has emphasized that an inexorable link is one that necessarily holds true in all cases:

> To be clear, the nexus requirement for demonstrating that a statutory presumption does not offend the presumption of innocence is strict. It is not one of mere "likelihood" or "probability", nor is it one satisfied by a "common sense" or "rational" inference. Rather, this Court's jurisprudence demonstrates that the connection between proof of the substituted fact and the existence of the essential element it replaces must be nothing less than "inexorable". An "inexorable" link is one that necessarily holds true in all cases.[126]

[174] To return to my example, is it necessarily true in all cases that a person who solicits while intoxicated by drugs is soliciting in a manner that is likely to cause a reasonable person to be concerned for their safety or security? No. I do not accept that a reasonable person would fear for their safety and security if they walked past a person who was sitting cross-legged on the ground, intoxicated by marijuana, smiling blissfully, and holding a sign that said, "Please spare some change so that my baby and I can get something to eat."

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[124] *R. v. Whyte*, [1988] 2 S.C.R. 3, at pp. 18-19; *R. v. Downey*, [1992] 2 S.C.R. 10, at pp. 29-30; *R. v. Audet*, [1996] 2 S.C.R. 171, 1996 CanLII 198, at para. 44.
[125] *R. v. Morrison*, 2019 SCC 15, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 52.
[126] *Morrison*, at para. 53.

[175] Ontario does not dispute my conclusion. Instead, Ontario submits that I should affirm the decision of Babe J. (affirmed by Dambrot J.) to read the words "in the absence of proof to the contrary" into s. 2(3), as follows:

> Without limiting subsection (1) or (2), a person who engages in one or more of the following activities shall be deemed to be, *in the absence of evidence to the contrary*, soliciting in an aggressive manner for the purpose of this section: …

[176] Ontario submits that this is sufficient to solve the 11(d) problem and urges me to adopt this portion of Justice Babe's reasons:

> I am of the view, however, that the constitutionality of the section can be saved by reading into it the words "in the absence of evidence to the contrary", thereby permitting a defendant to escape conviction if he can raise a reasonable doubt on all the evidence that, in the particular circumstances, a reasonable person would be so concerned.[127]

[177] I do not accept Ontario's submission. In my view, the 2019 decision of the Supreme Court of Canada in *Morrison* demonstrates that reading in the words "in the absence of proof to the contrary" is insufficient to make the deeming provisions in s. 2(3) of the Act constitutional.

[178] *Morrison* concerned the constitutionality of s. 172.1 of the *Criminal Code*, which prohibited child luring through telecommunications. Mr. Morrison was charged with child luring under s. 172.1(1)(b) of the *Criminal Code* — the relevant secondary offence being invitation to sexual touching directed at a person under the age of 16 contrary to s. 152 of the *Criminal Code*. He brought a constitutional challenge to subsection 173.1(3), which contained the presumption regarding the accused's belief in the other person's age for the purpose of the prohibition against child luring:

> 172.1 (1) Every person commits an offence who, by a means of telecommunication, communicates with
>
> > (b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under [certain designated offences against the person] …
>
> (3) Evidence that the person referred to in paragraph (1)(a)…was represented to the accused as being under the age of…sixteen years…is, <u>in the absence of evidence to the contrary</u>, proof that the

[127] *Banks* OCJ, at para. 371.

> accused believed that the person was under that age. [emphasis added].[128]

[179] The trial judge agreed that the presumption under s. 172.3(3) violated the presumption of innocence under s. 11(d) of the *Charter*.[129] The Court of Appeal for Ontario upheld the decision of the trial judge.[130]

[180] The Crown appealed the decision to the Supreme Court of Canada, arguing that the presumption under s. 172.1(3) did not infringe s. 11(d) because the presumption was rebuttable where there is evidence to the contrary. The Supreme Court rejected the Crown's submission. The Court held that an accused's opportunity to raise or identify evidence to the contrary did not resolve the s. 11(d) violation created when proof of the basic fact did not lead inexorably to the acceptance of the presumed fact:

> The Crown maintains that the presumption under s. 172.1(3) does not infringe s. 11(d) because the presumption is rebuttable where there is evidence to the contrary. With respect, I cannot agree. A basic fact presumption will infringe s. 11(d) if proof of the basic fact is not capable, in itself, of satisfying the trier of fact beyond a reasonable doubt of the presumed fact. (This is another way of articulating the "inexorable connection" test). The accused's opportunity to raise or identify evidence to the contrary does not resolve or attenuate the s. 11(d) problem created when proof of a basic fact does not lead inexorably to acceptance of the presumed fact. This is because the presumption of innocence requires that the Crown "establi[sh] the guilt of the accused beyond a reasonable doubt before the accused must respond".[131]

[181] *Morrison* teaches that merely reading the words "in the absence of evidence to contrary" into s. 2(3) of the Act does not resolve or attenuate the s. 11(d) problem if proof of a basic fact in paragraphs 1 to 6 of s. 2(3) does not lead inexorably to acceptance of the presumed fact: that the person was soliciting in an aggressive manner, contrary to subsection 2(2).

[182] I find that proving that a person engaged in the activities listed in paragraphs 2(3)2 to 6 does not lead inexorably to the conclusion that the person was soliciting in a manner that is likely to cause a reasonable person to be concerned for his or her safety or security. For ease of reference, I repeat those provisions here:

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[128] *Criminal Code*, R.S.C. 1985, c. C-46; *Morrison*, at paras. 5 to 8.
[129] *R. v. Morrison*, 2014 ONCJ 673.
[130] *R. v. Morrison*, 2017 ONCA 582, 136 O.R. (3d) 545.
[131] *Morrison*, at para. 56; citations omitted.

> 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 purpose of this section:
>
> …
>
> 2. Obstructing the path of the person solicited during the solicitation or after the person solicited responds or fails to respond to the solicitation.
>
> 3. Using abusive language during the solicitation or after the person solicited responds or fails to respond to the solicitation.
>
> 4. Proceeding behind, alongside or ahead of the person solicited during the solicitation or after the person solicited responds or fails to respond to the solicitation.
>
> 5. Soliciting while intoxicated by alcohol or drugs.
>
> 6. Continuing to solicit a person in a persistent manner after the person has responded negatively to the solicitation.

[183] To be sure, a trier of fact *could* infer from the evidence before her that the accused who engaged in one of the activities listed in paragraphs 2(3)2 to 6 was soliciting in an aggressive manner. That, however, is not the test. The test is whether the connection between the activities listed in paragraphs 2(3)2 to 6 and the offence in subsection 2(2) is *inexorable*. It must necessarily hold true in every case. I find that paragraphs 2(3)2 to 6 do not meet that test. Even where an accused engaged in the activities described in those paragraphs, a trier of fact could be left with a reasonable doubt about as to whether or not the accused had solicited in manner that was likely to cause a reasonable person to be concerned for his or her safety or security. Using the respective paragraph numbers from the Act, here are just a few examples:

> 2. A person in a wheelchair could momentarily obstruct the path of the person they solicited on a busy sidewalk.
>
> 3. A person could use abusive language about their former employer whom they blame for their situation during a solicitation.
>
> 4. A person could solicit a pedestrian and follow them for a short distance after the solicitation. (Indeed, Dambrot J. held in *Banks* that “it was entirely possible” that on these facts a trier of fact could be left with a reasonable doubt about whether Mr.

> Hughes solicited in a manner that was likely to cause a reasonable person to be concerned for their safety or security).[132]
>
> 5. A person sitting cross-legged on the ground, intoxicated by marijuana, smiling blissfully, and holding a sign that said, "Please spare some change so that my baby and I can get something to eat."
>
> 6. A person holding a sign asking for spare change who bursts in to tears after a person walks by and says "Please, don't just walk past me, please help me."

[184] I find that proof of the facts in paragraphs 2(3) 2 to 6 do not lead inexorably to proof that the person was soliciting in an aggressive manner.

[185] I reach a different conclusion about paragraph 2(3)1. For ease of reference, paragraph 2(3)1 provides as follows:

> 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 purpose of this section:
>
> > 1. Threatening the person solicited with physical harm, by word, gesture or other means, during the solicitation or after the person solicited responds or fails to respond to the solicitation.

[186] If a person soliciting money threatens the person solicited with physical harm, that inexorably leads to the conclusion that the person is soliciting in a manner that is likely to cause a reasonable person to be concerned for his or her safety or security. It is helpful to recall that the *Criminal Code* defines an assault to include threatening acts or gestures. Section 265(1)(b) states:

> 265 (1) A person commits an assault when
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose;[133]

[187] A person who threatens to cause physical harm to another, by word, gesture or other means during a solicitation is engaged in profoundly anti-social behaviour. While it is possible that a person of made of unusually stern stuff may not subjectively be concerned for their safety if they are threatened with physical harm, that is not the statutory test. Any

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[132] *Banks* SCJ at paras. 134-135.
[133] *Criminal Code*, R.S.C. 1985, c. C-46, s. 265. See *R. v. Judge* (1957) 118 C.C.C. 410 (Ont. C.A.); *R. v. Byrne* [1968] 3 C.C.C. 179 (B.C.C.A.).

reasonable person threatened with physical harm during a solicitation will be concerned for his or her safety or security. Similarly, not every utterance, statement, or gesture will amount to a threat of bodily harm. However, I have no doubt that threats of physical harm would inexorably lead a reasonable person to fear for their safety and security.

[188] Therefore, I find paragraphs 2(3)2 to 2(3)6 limit s. 11(d) of the *Charter* but paragraph 2(3)1 does not. A finding that the Act limits s. 11(d) necessarily means that the Act also limits the rights under s. 7.[134]

[189] I will address whether or not this limitation can be justified under s. 1 of the *Charter* after I consider Fair Change's broader challenge to the Act.

The broad challenge to ss. 2 and 5 of the Act

[190] Fair Change also mounts a much broader challenge to the Act's "procedural scheme," which it submits "systemically deprives accused panhandlers of their presumption of innocence." Fair Change frames its submission in these terms:

> 85. Second, the [Act's] procedural scheme systemically deprives accused panhandlers of their presumption of innocence. As the concurring evidence of panhandlers, Ms. Nefs and police officers demonstrate, there is no assurance that individuals who panhandle, many of whom have no fixed address, will receive notices of their trial dates and locations. The prevalence of mental illness and addiction in the panhandling population further reduces the chance that they will remember getting ticketed or show up for their trial. The pervasiveness of these systemic problem has manifested in the statistic that less than 1% of those charged with [Act] tickets stand trial. This is the antithesis of "proof beyond a reasonable doubt": once a police officer lays a charge, it is virtually certain that a panhandler will be convicted in absentia.

[191] I do not accept Fair Change's submissions and I dismiss its broad challenge to the Act under s. 11(d).

[192] The Act does not contain a "procedural scheme." As set out in paragraphs [105] to [116], the Act creates the substantive regulatory offences and establishes the range of sanctions that can be imposed upon conviction. The administrative and charging framework, described, indeed the entire "procedural scheme" of the Act, is contained in the *Provincial Offences Act*, as described in paragraphs [117] to [135], above.

[193] Fair Change's notice of application neither alleges that any provision of the *Provincial Offences Act* is contrary to the any of the guarantees in the *Charter*, nor seeks any declaratory relief under s. 52(1) of the *Constitution Act* in respect of the *Provincial*

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[134] *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 96.

Offences Act. The originating document in constitutional litigation fulfills a number of crucial functions. It defines the issues, parties, remedies sought, and material facts or grounds supporting the application. The notice of application must be pleaded with sufficient particularity that the respondent can identify and respond to the essential elements of the constitutional claim, including the specific law that is challenged.[135]

[194] If Fair Change wished to challenge the procedural scheme for the administration, prosecution, and trial of offences under the Act, it needed to do so on proper notice to Ontario. For this reason, I also do not give effect to Justice for Children and Youth's submissions that the Act violates the *Charter* because it does not provide for enhanced procedural protections for those 12 to 18 years of age, such as those found in the *Youth Criminal Justice Act*.[136] Any such challenge must target the *Provincial Offences Act*, not the Act.

[195] I dismiss this portion of the application.

Section 1

[196] Where a person's *Charter* right has been limited by legislation, the government may seek to justify the limit under s. 1 of the *Charter*, which provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[197] The government bears the onus of establishing on a balance of probabilities that the law is a reasonable limit on the right. A law that limits a *Charter* right will only be justified if it meets the proportionality test first articulated in *Oakes*.[137] Ontario must establish that the impugned provisions have a sufficiently important objective and that the means chosen are proportional to that objective.[138] A law is proportionate if:

1. there is a rational connection between the means adopted and the objective;

2. it is minimally impairing in that there are no alternative means that may achieve the same objective with a lesser degree of rights limitation; and

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[135] Andrew K. Lokan and Christopher M. Dassios, *Constitutional Litigation in Canada* (Thomson Reuters), at §7.6; *Grant v. Canada (Attorney General)* (2005), 77 O.R. (3d) 481 (S.C.J.), 2005 CanLII 50882, at paras. 60 to 68.
[136] S.C. 2002, c. 1.
[137] *R. v. Oakes*, [1986] 1 S.C.R. 103.
[138] *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 94.

3. there is proportionality between the deleterious and salutary effects of the law.[139]

[198] Ontario did not attempt to justify the deeming provisions' infringement of s. 11(d), other than by submitting that the reading-in approach of Babe J. avoided the problem. For the reasons set out above, I do not accept that submission. In my view, the Act's infringement of s. 11(d) cannot be justified under s. 1 of the *Charter*.

[199] I accept that the legislature had a pressing and substantial objective in enacting paragraphs 2(3)2 to 2(3)6, and that the provisions are rationally connected to their objective.

[200] I find, however, that the deeming provisions fail the minimal impairment test. To show minimal impairment, Ontario must demonstrate that the impugned measure impairs the right in question as little as reasonably possible in order to achieve the legislative objective.[140] The impairment must be minimal in the sense that it impairs the right in question no more than necessary.[141]

[201] Ontario did not establish that absent the deeming provision, s. 2(2) of the Act will not operate effectively to achieve the purpose of the Act. Prosecutors may still ask the trial judge to infer from the evidence that the conduct of the person engaged in soliciting was unlawful because the person solicited in an aggressive manner.

[202] Ontario's expert in the epidemiology of alcohol, drug use and injuries, Dr. Cherpitel, opined that a "strong relationship has been found between alcohol consumption and risk of injury from all causes" including "a strong association" between alcohol use and injuries resulting from violence. Even if I accept her opinion that paragraph 2(3)5 "clearly relates to the goal of reducing the risk of aggression, violence and injury in public places," that is not a sufficient justification for infringing the presumption of innocence. There are many ways to advance this goal with far less impairment of the right.

[203] Doing away with the deeming provisions in paragraphs 2(3)2 to 2(3)6 and requiring the Crown to prove a breach of s. 2(2) on the evidence presented is a less intrusive way for Ontario to achieve its objective. As the Supreme Court held in *Morrison*:

> Put simply, a less intrusive means of achieving the state's overarching objective would be to do away with the presumption under s. 172.1(3) and instead rely on the prosecution's ability to secure convictions by inviting the trier of fact to find, based on a logical, common sense inference drawn from the evidence, that the accused believed the other person was underage. Indeed, this

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[139] *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 58.
[140] *RJR-MacDonald*, [1995] 3 S.C.R. 199, 1995 CanLII 64, at para. 160.
[141] *Morrison*, at para. 68; *RJR-MacDonald*, at para. 160.

> process of inferential reasoning is not unfamiliar to judges and juries, who engage in this type of reasoning day in and day out.[142]

[204] Because Ontario has not proved that the deeming provisions in s. 2(3)2 to 2(3)6 limit the right to be presumed innocent as little as reasonably possible in order to achieve the legislative objectives under the Act, those limitations cannot be justified under s. 1.[143]

[205] I also find that the deleterious effects of the deeming provisions in s. 2(3)2 to 2(3)6 outweigh the salutary benefits. To the extent that the deeming provisions would result in additional convictions that would not otherwise be obtained under s. 2(2), the only additional people convicted would be those about whom a reasonable doubt might remain. The expediency of that result cannot justify creating a risk of convicting the innocent.

7. Section 2(b) – freedom of expression

[206] In this application, Fair Change seeks "declarations that all of ss. 2, 3, and 5 of the [Act] violate s. 2(b) of the *Charter*" and that the limitation on the right is not justified under s. 1 of the *Charter*.

[207] In *Banks*, the Court of Appeal for Ontario has already found that s. 3(2)(f), the prohibition on squeegeeing, violates s. 2(b) but that this violation is justifiable under s. 1 of the *Charter*. I am bound to follow this decision on the basis of vertical *stare decisis*, which is the principle that courts are bound to follow precedent set by higher judicial authority.[144] There is nothing in the record that satisfies me that it would be necessary or appropriate to revisit the decision of the Court of Appeal.

[208] Although the Court of Appeal did not consider the amendment to the Act that provides that s. 3(2) of the Act does not apply to fundraising activities of charitable organizations that are permitted by municipal by-law, that does not affect my consideration of the Act.[145] As mentioned above, Fair Change provided no evidence to me regarding how the exemption operates including whether or not any municipalities have authorized such solicitation.

[209] Therefore, I find that I am bound by the decision of the Court of Appeal in *Banks* and I dismiss Fair Change's challenge under s. 2(b) of the *Charter* to s. 3(2)(f) of the Act.

[210] Section 2(b) of the *Charter* provides that everyone has the freedom of thought, belief, opinion and expression, including freedom of the press and other media communication. The constitutional protection for freedom of expression enables democratic discourse, facilitates truth seeking, and contributes to personal fulfilment.[146] Unlike other *Charter*

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[142] *Morrison*, at para. 70.
[143] *RJR-McDonald*, at para. 160; *Morrison*, at para. 71.
[144] *R. v. Sullivan*, 2022 SCC 19, at para. 59.
[145] The amendments were not in effect at the time the appellants committed their offences: *Banks* CA, at paras. 43 to 48.
[146] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 976-977.

rights, s. 2(b) is articulated in absolute terms, which suggests that the rights enshrined in s. 2(b) should only be restricted in the clearest of circumstances.[147]

[211] Ontario concedes, with one small exception, that sections 2 and 3 of the Act limit s. 2(b) of the *Charter*. Freedom of expression must always be considered in the context presented by each case.[148] The relative value of freedom of expression in the context in which it is presented affects the balancing that takes place under s. 1 of the *Charter*. For this reason, despite Ontario's concession, it is worthwhile to work through how the Act infringes s. 2(b) before considering whether or not the conceded limitations on the right are justified under s. 1 of the *Charter*.

[212] There is a three-part test to determine whether a law infringes s. 2(b) of the *Charter*:

1. Did the activity have expressive content, thereby bringing it within the s. 2(b) protection?

2. Does the method or location of the expression remove that protection?

3. If the expression is protected by s. 2(b), does the law infringe that protection, either in purpose or effect?[149]

[213] First, I find that the activity of solicitation has expressive content. In *Banks*, the Court of Appeal held that the solicitation limited by the Act was fundamental communication at the very core of the speech protected by s. 2(b):

> The act of begging is communication and is evidently expression. While I think the trial judge was correct in rejecting the argument that begging, without more, is a form of political speech, I would nevertheless characterize it as fundamental communication at the core of free speech. The message "I am in need and I am requesting your help" is primary communication that seeks and invites participation in the community.[150]

[214] I accept the evidence of Prof. Hermer that solicitation is a "highly social and communicative activity." The person asking for assistance makes themselves extremely vulnerable by revealing to strangers their immediate need of assistance. The solicitation, the personal appeal for help, is a profound and important form of social interaction.

[215] This form of solicitation is a form of expression that has historically been used by the poor. To request aid directly from members of the community is a longstanding and traditional

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[147] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336; *K Mart Canada Ltd. v. U.F.C.W.*, Local 1518, [1999] 2 S.C.R. 1083, at para. 21.
[148] *K Mart*, at para. 24.
[149] *Montreal (Ville) v. 2952-1366 Québec Inc*., 2005 SCC 62, (2005) 258 D.L.R. (4th) 595, at para. 56.
[150] *Banks* CA, at para. 112.

form of freedom of expression. It is inexpensive and it may be the only form of expression available to many individuals in order to influence the giving behaviour of those in more fortunate circumstances. I accept the evidence of Prof. Hermer that this form of solicitation fulfils significant social and psychological needs.

[216] Second, with one exception, the method or location of the expression limited by the Act does not remove the protection afforded by s. 2(b). Although the language of s. 2(b) is unqualified and has been given broad interpretation by the courts, there are several internal limits to the right including location and method of the expressive activity.

[217] In my view, the location of the expressive activity at issue (sidewalks, transit vehicles, parking lots) does not remove the protection of s. 2(b). In *Banks*, the Court of Appeal held that even though the activity at issue in that case involved solicitation on the traveled portion of a roadway, and even though it may have endangered traffic safety and impeded efficient circulation, the expression did not undermine the purposes of s. 2(b) is intended to serve and did not lose the protections afforded by the section.[151] I see no basis to distinguish the provisions before me from s. 3(2)(f), which the Court of Appeal was describing. Streets and sidewalks serve as venues of public communication where society has long tolerated expression of many varieties.[152] If anything, the Court of Appeal's holding would apply with greater force to the locations at issue on this application, which do not raise the safety issues posed by people entering traffic. Sidewalks are a place where free expression not only has traditionally occurred but can be expected to occur in a free and democratic society.

[218] However, I find that the method of expression prohibited by paragraph 2(3)1 is excluded from the protections of s. 2(b). That paragraph prohibits solicitation by "threatening the person solicited with physical harm, by word or gesture." Threats of violence do not come within the scope of s. 2(b).[153] I do not accept the applicant's submission that conduct falling within the scope of s. 2(3)1 attracts the protections of s. 2(b). A person who threatens violence against another takes away free choice and undermines freedom of action in the same manner as if the person actually committed the threatened act of violence.[154] Threats of violence are far beyond words spoken without civility, or words that merely cause subjective feelings of disquiet, unease, or fear in the listener.[155] Threats of violence are not protected by s. 2(b) of the *Charter*.

[219] Third, I find that ss. 2 and 3 of the Act have the incidental purpose of controlling expressive activity.[156] Sections 2 and 3 of the Act effect a direct and express restriction on freedom of

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[151] *Banks* CA, at paras. 114 to 123; see also, *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at p. 198.
[152] *City of Montreal* at paras. 67, 68 and 81.
[153] *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at para. 7; *Bracken v. Fort Erie*, 2017 ONCA 668, 137 O.R. (3d) 161, at paras. 28 to 31.
[154] *Bracken*, at para. 31.
[155] *Bracken*, at para. 49.
[156] *Epilepsy Canada v. Alberta (Attorney General)* (1994), 115 D.L.R. (4th) 501 (Alta. C.A.), at pp. 503-504.

expression: the Act bans all requests for the immediate provision of money in certain ways (an aggressive manner, s. (2)) or to people doing certain things in certain places (s. 3). Put differently, section 3 of the Act is a complete ban on any solicitation by any means of people doing certain things at certain locations. Section 2 of the Act applies everywhere but restricts only a certain type of soliciting (that which would cause a reasonable person to be concerned for his or her safety and security).

[220] In *Banks*, the Court of Appeal considered the larger statutory context of the Act and concluded that s. 3(2)(f) of the Act was intended to control the expressive activity of soliciting while on a roadway, which limited freedom of expression:

> The larger statutory context of the impugned provisions, which addresses soliciting more directly, leads me to the conclusion that s. 3(2)(f) of the Act and s. 177(2) of the *Highway Traffic Act* were intended to control the expressive activity of soliciting while on a roadway. This conclusion does not detract from my earlier finding that their dominant aspect is 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. It is simply that in achieving that overall objective the legislation has the incidental purpose of restricting soliciting which is an expressive activity.[157]

[221] Again, this holding of the Court Appeal applies with equal if not more force to the provisions under consideration in this application.

[222] In conclusion, I make the following findings:

a. s. 2(2) limits a person's rights under s. 2(b);

b. s. 2(3)1 does not limit a person's rights under s. 2(b); and

c. s. 2(3)2 to 6 limit a person's rights under s. 2(b); and

d. 3(2)(a) to (e) limit a person's rights under s. 2(b);

Section 1

[223] I rely on, but will not repeat, the section 1 framework, found above at paragraphs [196] and [197].

[157] *Banks* CA, at para. 126.

The provisions have a sufficiently important objective

[224] A law that limits a constitutional right must do so in pursuit of a sufficiently important objective that is consistent with the values of a free and democratic society.[158] The Court of Appeal for Ontario recently reiterated the importance of precisely and succinctly stating the purpose of the law as distinguished from the means chosen to implement it:

> The Supreme Court has explained that the objective of a law must not be stated in too general terms because, otherwise, "it will provide no meaningful check on the means employed to achieve it: almost any challenged provision will likely be rationally connected to a very broadly stated purpose": *R. v. Moriarity*, 2015 SCC 55, [2015] S.C.R. 485, at para. 28; see also *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 46. On the other hand, an articulation that is too narrow "may merely reiterate the means chosen to achieve it": *Frank*, at para. 46. On this basis, the Supreme Court has stated that a law's purpose should be "both precise and succinct" and distinguished from the means chosen to implement it: *Moriarity*, at para. 29; see also *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877, at para. 23.[159]

[225] Ontario and Fair Change agree that the objectives of the Act are those found in the decisions of the Court of Appeal and the Superior Court of Justice in *Banks*. The Court of Appeal described the overall purpose of the Act as

> legislation regulating the use of streets, sidewalks and public spaces by the public, whether in vehicles or on foot, in the interests of safety, efficient circulation, and public enjoyment and convenience.[160]

[226] Justice Dambrot, correctly in my view, held that the Legislative Assembly of Ontario sought to achieve the purpose identified by the Court of Appeal through several means, each of which had its own purpose, which needed to be considered in the context of the Act in its entirety.[161] Justice Dambrot identified the following purposes:

> Section 2, including s. 2(3), is intended to promote the safe use of public places without the danger or harassment posed by interaction with those who solicit in an aggressive manner.

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[158] *K.R.J.* at para. 61.
[159] *Ontario English Catholic Teachers Association v. Ontario (Attorney General)*, 2024 ONCA 101, at para. 158.
[160] *Banks* CA, at para. 32.
[161] See also, *Gordon v. Canada (Attorney General)*, 2016 ONCA 625, at paras. 197-198.

> Section 3 is intended to promote the safe use of public places without the danger or harassment posed by interaction with those soliciting at places where members of the public are not free to leave and be free from the solicitation.[162]

[227] I do not accept the opinion of Prof. O'Grady that the aim of the Act was "to discipline the homeless and other marginalized groups in society who were professed to be unproductive and burdensome to society." This statement is unsupported by the text of the Act and is inconsistent with the decision of the Court of Appeal in *Banks*.

[228] I do not accept the submissions of Fair Change that the purposes of the Act are not pressing and substantial because "there is no reason why individuals who panhandle should be treated more harshly than other individuals." In my view, this submission is better considered at the proportionality stage of the inquiry. At this stage, the court is only concerned with ensuring that "objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection."[163]

[229] I also do not accept Fair Change's submission that the objectives of the Act are not pressing and substantial because the *Criminal Code* protects sufficiently against criminal acts of solicitation. The Court of Appeal in *Banks* concluded that the Act fell within provincial jurisdiction. There is nothing constitutionally inappropriate about each level of government addressing the same subject from a different perspective, provided that each is acting within the bounds of its own constitutional jurisdiction. The fact that there may be some overlap in how Ontario and the federal government have addressed these issues does not render the legislature's objective insufficiently important to limit a constitutional right.

[230] Finally, I do not accept Fair Change's submission that Ontario did not file evidence to prove that "a meaningful portion of the public is afraid of or intimidated by non-criminal acts of intimidation." The Court of Appeal has held that this stage of the analysis "is not usually an evidentiary contest."[164] The question to be determined is whether Ontario "has asserted a pressing and substantial objective…[a] theoretical objective asserted as pressing and substantial is sufficient for purposes of the s. 1 justification analysis…."[165]

[231] I find that the infringing measures of the Act, considered in their legislative context, have a sufficiently important objective.[166] In a free and democratic society, the government may legitimately attempt to regulate the use of streets, sidewalks, and public spaces in the interests of safety and efficiency. Promoting the safe use of public spaces is undeniably an

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[162] *Banks* SCJ, at para. 108.
[163] *Oakes*, at p. 138.
[164] *Gordon*, at para. 196.
[165] *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at paras. 25-26, citations omitted.
[166] *Gordon*, at para. 198.

important objective, and one that is integrally linked to the social health, vibrancy, and viability of those public spaces.

The infringing measures are rationally connected to the purpose

[232] At the first step of the proportionality inquiry, Ontario must demonstrate that the means used by the infringing measures are rationally connected to the purpose they were designed to achieve.[167] Ontario need only show on the basis of reason or logic that there is a causal connection between the infringement and the benefit sought.[168] This step is not particularly onerous.[169]

[233] I find that each of s. 2 and 3(2)(a) to (e) meet the rational connection test. First, with respect to s. 2, it is reasonable to suppose that prohibiting aggressive solicitation may further Ontario's legitimate goal of promoting the safe use of public spaces.[170] Section 2 is, therefore, rationally connected to the objective of the infringing measure. Second, with respect to section 3, it is reasonable to suppose that prohibiting the solicitation of persons at certain public places which those solicited persons are not free to leave may further Ontario's legitimate purpose of promoting the safe use of public spaces.

[234] I do not accept Fair Change's submission that there is no rational connection between s. 3 and the legislative objective. Fair Change focusses on the lack of connection between perceived aggression and solicitation in public spaces. In my view, Ontario does not need to demonstrate a connection between perceived aggression and the legislative objective of s. 3(2)(a) to (e). In my view, the legislative objective in s. 3 is different from the legislative objective in s. 2. It is only section 2, in my view, that directly targets aggressive solicitation. Section 3 has its own, but different, rational connection to the legislative purpose. The purpose of section 3 is to promote the safe use of public spaces that members of the public are not free to leave. The provisions in s. 3 are rationally connected to that purpose. As I will point out below, however, the broad framing of the provisions in s. 3, while rationally connected to the legitimate legislative objective raise concerns about the minimal impairment of the right.

[235] Further, even if Fair Change was correct that the Act has "virtually no deterrent effect," in my view that is not relevant to the rational connection stage of the proportionality analysis. A rational connection may be found on the basis of reason or logic and there is no need for direct proof of a relationship between the infringing measure and the legislative

[167] *K.R.J.*, at para. 68.
[168] *Carter*, at para. 99.
[169] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228.
[170] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567, at para 48.

objective.[171] I am satisfied that there is a rational connection between the s. 3 prohibition on solicitation in the specified public spaces and the legislative objective.

Subsection 2(2) of the Act minimally impairs freedom of expression

[236] At this stage of the proportionality analysis, Ontario must prove on a balance of probabilities that there are no less harmful means of achieving its legislative goal. In *Carter*, the Supreme Court of Canada described the test this way:

> At this stage of the analysis, the question is whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal" (*Hutterian Brethren*, at para. 53). The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner" (ibid., at para. 55). The analysis at this stage is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's object.[172]

[237] The court will show deference to the legislature's choices, but Ontario must still prove that the law is carefully tailored so that rights are impaired no more than necessary.[173] This does not mean, however, that the court should find a law minimally impairing simply because it can conceive of an alternative that might better tailor the objective to the infringement.[174]

[238] I do not accept Fair Change's submission that the provisions are not minimally impairing because Ontario could simply rely on the existing provisions in the *Criminal Code*. Not only would I be reluctant to endorse expanding the application of the *Criminal Code* to situations where the police have not felt compelled to use those powers, but I also do not find that the *Criminal Code* is an apt limit on Ontario's constitutional interests.

[239] I find that the restriction on aggressive solicitation in s. 2(2) of the Act is minimally impairing of the right freedom of expression. Soliciting in a manner that would cause a reasonable person to be concerned for his or her safety and security has a coercive component. Not every solicitation, of course, is coercive. The state has placed a limit on freedom of expression at the point where the expression (the solicitation) would cause a reasonable person to be concerned for their safety or security. Solicitation that does not have that effect is permitted. The limit chosen by the Legislative Assembly of Ontario is minimally impairing of the right to freedom of expression.

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[171] *RJR-MacDonald*, at paras. 154 and 184; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 776; *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 504; *K.R.J.*, at para. 228
[172] *Carter*, at para. 102.
[173] *K Mart*, at paras. 62-64; *RJR-MacDonald*, at para. 160.
[174] *RJR-MacDonald*, at para. 160.

[240] The motivation of the person doing the solicitation is irrelevant to the minimal impairment analysis.[175] The relevant issue is the effect of the solicitation on the reasonable person. Solicitation and aggressive solicitation have fundamentally different effects on their audience. Aggressive solicitation is coercive in ways that justify its limitation. Certainly, where the coercive activity approaches "borderline robbery," to use the colourful phrase from one of Ontario's affidavits, regulation and restriction is proportional to the legitimate objectives of the state. A restriction on aggressive solicitation, as defined by the Act, is minimally impairing of the right to freedom of expression.

[241] I do not accept the submission of the Ontario Human Rights Commission and the CCLA that s. 2(2) of the Act permits prosecutions based on subjective fears of the person being approached. Such an interpretation is foreclosed by the text and meaning of s. 2(2). Indeed, I find that the use of the reasonable person standard in s. 2(2) addresses many of the legitimate concerns expressed by Fair Change and the interveners regarding the potential for the prejudicial application of the Act. Let me explain.

[242] Section 2 is only violated where a reasonable person would be concerned for their safety and security. The reasonable person is a judicial construct. This person must be reasonable and right minded.[176] In this case, the reasonable person must be fully aware of the social and cultural context relevant to the solicitation.[177] This would include the prevalence of racism, gender bias, and prejudices against the mentally ill.[178]

[243] The Supreme Court of Canada described prejudices as follows:

> Prejudice is the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member. Stereotyping, like prejudice, is a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities. Attitudes of prejudice and stereotyping can undoubtedly lead to discriminatory conduct, and discriminatory conduct in turn can reinforce these negative attitudes….[179]

[244] The reasonable person would understand that racism and other prejudices and biases can affect the way a person experiences a solicitation and would discount those prejudices.[180] In other words, a person who subjectively experiences concern for their safety and security during a solicitation because of prejudices or stereotypes held about the person soliciting

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[175] *K Mart*, at para. 47.
[176] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394.
[177] *Peart v. Peel Regional Police Services*, 2006 CanLII 37566 (Ont. C.A.), at para. 41; *R. v. Brown*, (2003), 64 O.R. (3d) 161, at para. 38.
[178] *Peart v. Peel Regional Police Services*, 2006 CanLII 37566 (ON CA), at para 41, citing *R. v. S. (R.D.)*, [1997] 3 SCR 484.
[179] *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 SCR 61, at para. 326.
[180] *Peart*, at para 42.

them would not be acting reasonably. Such a person would not be a reasonable person within the meaning of s. 2(2) of the Act.

[245] It is helpful to illustrate this by considering an incident described in the record in this proceeding. In his affidavit, Ashley Roberts described his experience with soliciting on a TTC streetcar. For the moment, I will disregard the fact that s. 3(2)(d) of the Act explicitly prohibits soliciting on a public transit vehicle and consider that the incident only through the lens of s. 2(2) of the Act. Mr. Roberts described his experience this way:

> For example, I used to beg people for money on the TTC because the TTC is usually safe, warm and there are lots of people with change to spare. I remember one time being on a streetcar and a lady got upset with me and thought I was being aggressive. I think it's just because of the way I looked because all I did was turn to look at her. Because of my mental illness I sometimes stare at people. I believe she was scared because my hair and my beard looked messy, or because I'm a black man and over 6 feet tall. Even though I hadn't done anything to this woman, the driver stopped the streetcar, told everyone to get off except me, and called the police. Luckily there were people with me who were able to help explain what happened when the police came and the police let me go.

[246] In this case, the fact that the woman on the streetcar was subjectively afraid of Mr. Roberts would not be sufficient to make out an offence under s. 2(2) of the Act. Mr. Roberts would only have violated s. 2(2) of the Act if a reasonable person would be concerned for their safety and security as a result of his solicitation. Here, the views of the other passengers and their evidence about the interaction would be relevant to the determination of whether or not a reasonable person would be concerned for their safety and security. Moreover, the reasonable person's concern would not be informed by prejudices regarding Mr. Roberts' race, beard, or hair. A reasonable person would not be influenced by society's prejudices against people with mental illness and would focus on the effect of Mr. Roberts' conduct. It would be for the police at first instance and ultimately the court to determine, based on the evidence and the circumstances, whether or not a reasonable person would have been concerned for his or her safety and security. If not, no conviction under s. 2(2) could follow, regardless of the complainant's subjective level of concern.

[247] When assessing whether or not a particular solicitation would cause a reasonable person to be concerned for their safety or security, it would be appropriate to consider all of the relevant circumstances: location, time of day, level of darkness, persistence of request, impeding of ability to walk away, and any peculiar vulnerabilities of the person solicited, such as age or disability.

[248] For the reasons set out above, I find that s. 2(2) of the Act minimally impairs the right to freedom of expression. The Legislature must be given some discretion to reach a sensible balance among the interests of all of the affected parties. In my view, prohibiting expression at the point where a reasonable person would be concerned for their safety and

security falls within constitutionally permissible parameters of reasonable alternatives.[181] This is equally true for s. 2(3)1, which prohibits threatening the person solicited with physical harm.

[249] I have already found that the deeming provisions found in s. 2(3)2 to 6 limited the presumption of innocence in s. 11(d) and that the limitation was not justified under section 1 of the *Charter*. For completeness, and for largely the same reasons, I would also find that the deeming provisions are not minimally impairing of the right to freedom of expression. Because the deeming provisions capture conduct that would not, considering all of the circumstance, prove beyond a reasonable doubt that a reasonable person would have been concerned for their safety and security, those provisions are not minimally impairing of the right to freedom of expression.

Subsections 3(2)(a) to (e) of the Act do not minimally impair the right

[250] I reach a different conclusion about s. 3(2)(a) to (e) of the Act and find that those provisions of the Act are not minimally impairing of the right of freedom of expression.

[251] Recall that the accepted purpose of s. 3 is to promote the safe use of public places without danger or harassment:

> Section 3 is intended to promote the safe use of public places without the danger or harassment posed by interaction with those soliciting at places where members of the public are not free to leave and be free from the solicitation.[182]

[252] Subsections 3(2)(a) to (e) are not carefully tailored to achieve this purpose. Section 3 provides as follows:

> 3(2) No person shall,
>
> > (a) solicit a person who is using, waiting to use, or departing from an automated teller machine;
> >
> > (b) solicit a person who is using or waiting to use a pay telephone or a public toilet facility;
> >
> > (c) solicit a person who is waiting at a taxi stand or a public transit stop;
> >
> > (d) solicit a person who is in or on a public transit vehicle;

[181] *K Mart*, at para. 63.
[182] *Banks* SCJ, at para. 108.

> (e) solicit a person who is in the process of getting in, out of, on or off a vehicle or who is in a parking lot…

[253] The section imposes a blanket ban on soliciting persons who are doing certain things at certain public places. It prohibits solicitation even if the solicitation:

a. was conducted in a manner that was not coercive, intimidating, threatening, persistent, or otherwise unlawful or tortious;

b. was passive, for example by holding up a sign;

c. did not impede access to or egress from the listed public places;

d. did not otherwise interfere with the use of the facilities in the listed public places;

e. was welcomed by the recipient of the solicitation; and

f. would not cause a reasonable person, or any person, to have concern for their safety or security.

[254] Clauses 3(2)(a) to (e) are not minimally impairing of freedom of expression because they capture many solicitations that would not interfere with the safe use of public spaces and would pose no danger to, or harassment of the person solicited. For example, there is no doubt that an armed forces veteran or air cadet selling poppies on the sidewalk outside of a bank's ATM is captured by ss. 3(2)(a) to (e). Similarly, a person sitting cross-legged on the sidewalk holding a sign asking for spare change outside of a bank's ATM is captured by ss. 3(2)(a) to (e). Indeed, on cross-examination Dr. Thacher admitted that a person could respectfully solicit money from someone waiting to use an ATM. The blanket approach in ss. 3(2)(a) to (e) of the Act is not minimally impairing of the right to free expression.

[255] The mere presence of a homeless person soliciting gifts from persons doing certain things at a prohibited site does not, on its own and without more, pose any danger or impediment to the safe use of public space. Soliciting is of fundamental importance to persons in need and has a real social value. Even if the presence of persons soliciting is annoying or even offensive, a blanket ban on all solicitations it is not a proportional limit on freedom of expression. I find that ss. 3(2)(a) to (e) are not minimally impairing of the right.

[256] This total prohibition on the solicitation of persons doing certain things in certain places is not carefully tailored to the objective of the provision.[183] It is a broad sweep that captures more conduct than is justified by Ontario's legitimate objective.[184] This is particularly so given the constitutional prohibition on aggressive solicitation in s. 2 of the Act. It is not

[183] *K Mart*, at para. 74.
[184] *Committee for the Commonwealth of Canada*, at p. 248.

minimally impairing of the right to prohibit all solicitation because some solicitations may give rise to conduct that may be properly regulated and restricted.

[257] Ontario did not provide any evidence to prove that no provision less impairing than s. 3 would accomplish its legislative objectives. Through the opinions of Prof. Thacher and Prof. Sousa, Ontario explained that "order maintenance policing or quality of life policing" is the police role regulating the fair use of public spaces. Its main purpose is to safeguard the fair use of public spaces by enforcing standards of behavior that make those public spaces accessible to everyone on reasonable terms and ensures that they can serve the purposes that led to their creation. Ontario's experts were of the opinion that the provisions of the Act related to order maintenance and its goals.

[258] Even if one accepts the premise of order maintenance policing, there was no evidence that tailoring the provisions of s. 3 to be less impairing of freedom of expression would defeat the legitimate legislative objective.

[259] In his cross-examination, Dr. Thacher candidly acknowledged that "panhandling" might or might not be an unfair use of public space, depending on the details. I agree, but Dr. Thacher's evidence does not support the necessity of a blanket ban on all forms of solicitation of people in certain public spaces.

[260] Moreover, in his affidavit, Dr. Thacher cited a model statute from the United States based Criminal Justice Legal Foundation that prohibited "panhandling" at certain public locations. He stated that section 3 of the Act served a similar purpose:

> The provisions in section 3 of the *Safe Streets Act* appear to serve a similar purpose (though they may serve other purposes as well). People who are waiting to use an ATM, public bathroom, taxi, or public transit vehicle; people getting into or out of their cars; and people driving cars who have stopped on a roadway or in a parking spot may all be captive audiences in the sense I have been describing. Since they may not feel free to leave the encounter (or can only leave by abandoning their intended and lawful use of the public space, as when a person gets off the bus to avoid a panhandler), they may experience solicitation in these contexts as more coercive than solicitation elsewhere. In that respect, narrow rules prohibiting solicitation in these specific circumstances serve to address significant concerns about more coercive forms of solicitation while still permitting other forms of solicitation.

[261] During his cross-examination, Dr. Thacher properly conceded that the definition of "panhandling" in the model statute excluded "passively standing or sitting with a sign or any indication that one is seeking donations without addressing any solicitation to any specific person, other than in response to an inquiry by that person." It appears to me, therefore, that the model statute relied on by Ontario's expert in his affidavit was, in fact, significantly less impairing of the right to freedom of expression than is section 3 of the

Act. For clarity, I do not suggest that I would find the model statute to be constitutional. I simply point to it to demonstrate that Ontario's evidence does not prove on a balance of probabilities that ss. 3(2)(a) to (e) minimally impairs the right.

[262] In conclusion, I find that ss. 3(2)(a) to (e) of the Act do not minimally impair freedom of expression.

Deleterious effects and benefits of the restriction

[263] The final stage of the proportionality analysis is the "balancing step." The question is this: are the overall effects of the law on the claimants disproportionate to the government's objectives?[185] The crux of the issue is whether the limit on the right is proportionate in effect to the public benefit of the measure.[186] The court should consider key questions, such as: What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?"[187]

[264] First, with respect to s. 2, I find that the limit on the right is proportionate to the governments' objectives. The speech at issue, aggressive solicitation as defined by the Act, is of marginal value. While not excluded from protection under s. 2(b) like violence or threats of violence, solicitations that cause a reasonable person to be concerned for their safety or security lie far from the core of the right to free expression. The benefits to society of regulating and restricting such behaviour, and being seen to do so, are significant. In my view it is of no moment that some people who violate the Act do not think it is an effective deterrent. I would not give effect to such a submission. I find that the limitation found in s. 2(2) is justified.

[265] Second, I need not consider this stage of the test with respect to s. 3(2)(a) to (e) because I found that the requirement of minimal impairment was not met. It is not necessary to consider the final stage of the proportionality analysis under s.1 of the *Charter* because "a finding that the law impairs the right more than required contradicts the assertion that the infringement is appropriate."[188] In any event, when I weigh the collective good to be achieved against the importance of the limitation on the right, I conclude that the limitation is not justified.

Conclusion

[266] In conclusion, I make the following findings:

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[185] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [2009] 2 SCR 567, at para 73; *Ontario English Catholic Teachers Association v. Ontario (Attorney General)*, 2024 ONCA 101, at para 339, per Hourigan J.A. (dissenting, but not on this point).
[186] *Hutterian Brethren*, at para. 73-78
[187] *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 45.
[188] *R.J.R.-Macdonald*, at para. 175; *K Mart*, at para. 78.

a. subsection 2(2) limits a person's rights under s. 2(b) but that limitation is justified under s. 1 of the *Charter*;

b. paragraph 2(3)1 does not limit a person's rights under s. 2(b);

c. paragraphs 2(3)2 to 6 limit a person's rights under s. 2(b) and those limitations are not justified under s. 1 of the *Charter*;

d. clauses 3(2)(a) to (e) limit a person's rights under s. 2(b) and those limitations are not justified under s. 1 of the *Charter*; and

e. clause 3(2)(f) limits a person's rights under s. 2(b) but that limitation is justified under s. 1 of the *Charter*.

8. Section 12 – cruel and unusual treatment or punishment

[267] Fair Change submits that the penalties imposed by s. 5 of the Act are grossly disproportionate punishments and violate section 12 of the *Charter*. I disagree.

[268] For convenience, s. 5 of the Act provides as follows:

> 5. (1) Every person who contravenes section 2, 3 or 4 is guilty of an offence and is liable,
>
> > (a) on a first conviction, to a fine of not more than $500; and
> >
> > (b) on each subsequent conviction, to a fine of not more than $1,000 or to imprisonment for a term of not more than six months, or to both.
>
> (2) For the purpose of determining the penalty to which a person is liable under subsection (1),
>
> > (a) a conviction of the person of a contravention of section 2 is a subsequent conviction only if the person has previously been convicted of a contravention of section 2 or 3;
> >
> > (b) a conviction of the person of a contravention of section 3 is a subsequent conviction only if the person has previously been convicted of a contravention of section 2 or 3; and
> >
> > (c) a conviction of the person of a contravention of section 4 is a subsequent conviction only if the person has previously been convicted of a contravention of section 4.

[269] Section 12 of the *Charter* provides that "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." Section 12 will be infringed where:

a. there is a state action that constitutes treatment or punishment; and

b. that treatment or punishment is cruel or unusual.

Section 5 of the Act is punishment

[270] State action will constitute a punishment where it is:

a. a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence; and either

i. is imposed in furtherance of the purpose and principles of sentencing; or

ii. has a significant impact on an offender's liberty or security interests.[189]

[271] I accept that s. 5 of the Act constitutes a punishment and I do not understand Ontario to disagree. The next step is to determine whether or not the punishment imposed by s. 5 of the Act is cruel and unusual.

Section 5 of the Act is not cruel and unusual

[272] The phrase "cruel and unusual" captures two categories of punishment:

a. punishments that are cruel or unusual by nature or intrinsically; and

b. punishments that are grossly disproportionate.[190]

Section 5 is not intrinsically cruel and unusual

[273] The first inquiry asks, "whether a particular form of treatment or punishment is intrinsically cruel and unusual."[191] The punishments contained in s. 5 of the Act, fines and the possibility of imprisonment, are not intrinsically cruel and unusual. Indeed, they are the paradigmatic methods of punishment in Canadian society.[192] Even a minimum mandatory term of imprisonment, which s. 5 does not impose, is "obviously not in and of itself cruel and unusual."[193]

[274] I find that the punishments contained in s. 5 of the Act are not intrinsically cruel and unusual.

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[189] *K.R.J.*, at para. 41.
[190] *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1072 to 1074, per Lamer J.; *R. v. Bissonnette*, 2022 SCC 23, paras. 60-69.
[191] L. Kerr and B. Berger, "The Two Tracks of Section 12" (2020), 94 S.C.L.R. (2d) 235, at 239.
[192] Kerr, at footnote 25.
[193] *Smith*, at p. 1077.

Section 5 does not impose grossly disproportionate penalties

[275] The second inquiry asks whether a sentence is grossly disproportionate to the offender before the court or if the reasonably foreseeable application of the provision will impose grossly disproportionate punishments on others. Demonstrating that a punishment breaches s. 12 because it is grossly disproportionate is a high bar.[194] The challenged punishment must be more than merely disproportionate or excessive. Rather, "it must be 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable to society.'"[195]

[276] Fair Change places great emphasis on the decision of the Supreme Court of Canada in *Boudreault*.[196] In my view, neither the methodology nor the result in *Boudreault* assist the applicant.

[277] In *Boudreault*, the Supreme Court of Canada considered a provision of the *Criminal Code* that required anyone who is discharged, pleads guilty, or is found guilty of an offence to pay monies to the state as a "mandatory victim surcharge." The amount was set by law and was owed for each and every summary conviction or indictable offence. As of October 2013, the amount of the surcharge was 30% of any fine imposed, or, where there was no fine, $100 for every summary conviction count and $200 for every indictable count.[197] The surcharge applied regardless of the severity of the crime, the characteristics of the offender, or the effects of the crime on the victim.[198] Judges had to impose the surcharge in every case. They had no discretion to decrease or waive the surcharge.

[278] In *Boudreault*, the Supreme Court applied the test from *Nur* to determine whether or not the mandatory victim surcharge violated s. 12.[199] As a first step, the court was required to assess the individuals before the court. This is the first methodological problem for Fair Change.

[279] On this application, there is neither an offender nor a specific sentence before the court. This is a direct consequence of how Fair Change chose to mount this application. If Fair Change had acted as counsel for one of its clients facing a charge under the Act, the court would have had a specific case to consider. Instead, Fair Change brought this application with public interest standing. There is, therefore, no individual before the court with a factual record to inform a consideration of whether a specific sentence was grossly disproportionate for a specific offender in their particular circumstances for their particular offence. Fair Change has not met the test at the first stage of the inquiry.

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[194] *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 24.
[195] *Lloyd*, at para. 24, citing *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 26; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 14.
[196] *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599.
[197] *Criminal Code*, ss. 737(1) and 737(2).
[198] *Boudreault*, at para. 1.
[199] *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773.

[280] The Court in *Boudreault* then moved to the second stage of the inquiry. The Court asked what a fit sentence would be for the representative offenders according to the general principles of sentencing. The court asked, "what sentencing judges would impose if they retained their discretion to consider the individual circumstances of the offenders and the nature of their sentences."[200] The key question for the court in *Boudreault* was, therefore, whether a judge who had a choice would impose the surcharge. The Supreme Court held that if the sentencing judge had the discretion not to impose the mandatory victim surcharge on the individuals before the court, the judge would not have done so. The Court emphasized the importance of individualized discretion in sentencing:

> This is because sentencing is first and foremost an individualized exercise, which balances the various goals of sentencing, while taking into account the particular circumstances of the offender as well as the nature and number of his or her crimes. When sentencing, the crucial issue on the surcharge is whether or not the particular individuals before the courts are able to pay, and in this case they are not. In a constitutional context, the court is also called upon to consider the rights of particular individuals who may be affected by this punishment in a way that is grossly disproportionate, understanding that people have varied life situations and many are impecunious, impoverished, ill, disabled, addicted and/ or otherwise disadvantaged. Given this focus, it is less important that other individuals who are differentially situated may be able to pay, that some other fines set by law may be higher or that the amount of the surcharge depends on the number of offences committed.[201]

[281] The Court held that the disproportionate financial consequences of the surcharge arose because judges imposing the surcharge could not exercise any discretion in the event that the offender was unable to pay or in the event an offender's moral culpability was so low that the sentencing judge decided that they ought to be absolutely or conditionally discharged.[202] In doing so, the victim surcharge regime ignored proportionality, which is the fundamental principle of sentencing, mitigating factors, principles of parity, and rehabilitation.[203] The fatal flaw in the mandatory victim surcharge scheme was the fact that it left judges with no choice and no ability to exercise their discretion to tailor the sentence to the circumstances of the offender:

> It leaves sentencing judges with no choice. They must impose the surcharge in every case. They cannot consider the most marginalized offenders' inability to pay, the likelihood that they will face a repeated deprivation of liberty for committal hearings, or the indefinite nature of the punishment. They cannot apply the

[200] *Boudreault*, at para. 56.
[201] *Boudreault*, at para. 58.
[202] *Boudreault*, at paras. 66 and 68.
[203] *Boudreault*, at para. 81.

> fundamental principles of sentencing, seek to foster rehabilitation in appropriate cases, or adjust the sentence for Indigenous offenders. To return to the ultimate question in these appeals, the impact and effects of the surcharge, taken together, create circumstances that are grossly disproportionate, outrage the standards of decency, and are both abhorrent and intolerable. Put differently, they are cruel and unusual, and, therefore, violate s. 12.[204]

[282] Section 5 of the Act, however, is nothing like the mandatory victim surcharge struck down in *Boudreault*. Section 5 provides that a person found guilty of contravening section 2 or 3 is liable to a fine, but the Act does not specify a minimum fine. Even on a subsequent conviction, the Act still does not provide for a minimum fine. Section 5 of the Act also does not provide for a minimum term of imprisonment.

[283] As noted above, if the offence proceeds under Part I, an accused may plead guilty with representation as to penalty to be made before a justice or may plead not guilty and have a trial. The *Provincial Offences Act* gives the court the discretion to impose a fine that is less than any prescribed minimum or suspend the sentence where it finds exceptional circumstances that would make imposing the minimum unduly oppressive or otherwise not in the interest of justice.[205] The court has the discretion to make inquiries of and concerning defendant, including as to the defendant's economic circumstances, when crafting an appropriate sentence. Where the court imposes a fine, the court is required to ask the defendant if they wish an extension of time, and such a request shall be granted unless the court finds that the request is not made in good faith or that it the extension would be used to avoid payment. The sentencing justice under the *Provincial Offences Act* is obliged to impose a fit sentence in every case.[206] This includes consideration of *Gladue* factors and the ability to pay. Nothing in the Act limits that obligation or constrains the sentencing judge in the exercise of their discretion to impose a fit sentence. The same is true for each court hearing an appeal from a sentence imposed for a violation of the Act.

[284] Fair Change submits that, even if the sentencing justices have this discretion, they rarely exercise it because most hearings proceed in the absence of the accused and the sentencing judges typically impose the set fine amounts. Justice for Children and Youth emphasize this point with respect to youths and submit that the fact that "almost all SSA tickets are prosecuted *ex parte* is but one specific demonstration of the ways in which young people's *Charter* rights are violated by the Act." I do not accept these submissions.

[285] First, nothing about s. 5 of the Act speaks to the process by which the sentence is imposed. The procedure for charging, processing, findings of guilt are contained in the *Provincial Offences Act*, not s. 5 of the Act.

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[204] *Boudreault*, at para. 94.
[205] *Provincial Offences Act*, s. 9.1.
[206] *R. v. Cotton Felts Ltd*., 1982 CanLII 3695 (Ont. C.A.), at p. 294.

[286] Second, the fact that many accused persons do not exercise their right to a hearing before a sentencing justice who has the discretion to impose a fit sentence cannot convert an otherwise constitutional sentencing regime into one that violates s. 12 of the *Charter*.

[287] Third, the set fine amounts are not imposed by the Act. Under s. 91.1 of the *Provincial Offences Act*, the Chief Justice of the Ontario Court of Justice may specify an amount as the set fine for the purpose of proceedings under Part I of the *Provincial Offences Act*.[207] There is no obligation on a sentencing justice to impose the set fine amount. Fair Change has not challenged s. 91.1 of the *Provincial Offences Act* or any particular set amount.

[288] Fair Change submits that the Act imposes "astronomical fines and lengthy jail terms" on vulnerable people. I disagree. The text of s. 5 does not prescribe a minimum fine, much less one that is "astronomical," even considering the very limited means demonstrated by Fair Change's affiants. Section 5 also does not prescribe "lengthy jail terms."

[289] I accept that the affidavit evidence of Mr. Dunbar and Mr. Roberts demonstrates that they incurred many fines under the Act and that those fines added up to a significant amount owing. However, I do not accept that this eventuality transforms the open-ended sanctioning regime created by s. 5 of the Act into one that imposes cruel or unusual punishment contrary to s. 12 of the *Charter*.

[290] I dismiss Fair Change's challenge to s. 5 of the Act under s. 12 of the *Charter*.

9. Section 7 – the right to life, liberty and security of the person

[291] Section 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. Life, liberty and security of the person are interests protected by s. 7, but the section is only violated if the infringement of those interests is not in accordance with the principles of fundamental justice.

[292] Fair Change submits that sections 2, 3, and 5 of the Act violate the rights to life, liberty, and security of the person. Fair Change submits that these deprivations violate the principles of fundamental justice because the impugned provisions of the Act are arbitrary, overbroad, and grossly disproportionate.

[293] I have already found that ss. 2(3)2 to 2(3)6 violate s. 11(d) of the *Charter* but paragraph 2(3)1 does not. A finding that s. 11(d) has been infringed necessarily entails that s. 7 has also been infringed.[208] I rely on my conclusions above and reiterate that ss. 2(3)2 to 2(3)6 violate the right to liberty and do so in a manner that is not in accordance with the principles of fundamental justice.

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[207] *2682283 Ontario Ltd*, at para. 9.
[208] *Rose*, at para. 96.

The Act implicates the right to liberty

[294] Both parties agree that because a person charged under the Act faces potential imprisonment for that conduct if an offence is charged under Part III of the *Provincial Offences Act*, that is sufficient to engage an accused person's s. 7 right to liberty.[209] In *Banks*, the Court of Appeal confirmed that the Act engages the s. 7 right to liberty.[210]

The Act does not implicate the right to life or to security of the person

[295] I do not accept Fair Change's submissions that the Act implicates either the right to life or security of the person. I also do not accept the submission by the CCLA that the prohibitions under the Act "criminalize the only way they can meet their basic needs."

[296] The Court of Appeal in *Banks* considered and rejected similar submissions.[211] The Court of Appeal held that the Act did not deny persons the economic means necessary for their survival. The Court of Appeal held that the Act left "the appellants free to beg or provide a service in exchange for alms in any circumstances and settings not prohibited by the Act."[212] Although the Court of Appeal was only considering s. 3(2)(f), the reasoning of the Court of Appeal squarely applies to the submissions made in this case. Similarly, I do not accept that the decision in *Gosselin*, which held that the right to security of the person may be infringed by deprivations of "economic rights fundamental to human…survival," applies to the prohibitions in the Act.[213] I do not accept the submission that the Act prohibits the "only way" that persons can solicit donations. The text of the Act and the Court of Appeal's decision in *Banks* make that clear.

[297] I disagree with the submission of Fair Change and several interveners that the decision of the Supreme Court of Canada in *Bedford* undermines the reasoning of the Court of Appeal. The evidence presented does not persuade me that the Act makes the lawful activity of soliciting more dangerous.[214] I do not accept the submission that the Act imposes death or an increased risk of death, directly or indirectly. In my view, I remain bound by the reasoning of the Court of Appeal.

[298] I also do not accept the submissions of the Income Security Advocacy Centre that adopting an "intersectional equality lens" assessing barriers imposed by disability and social assistance means that security of the person is implicated in this case. Even accounting for the "intersecting vulnerabilities of social assistance recipients with disabilities," the Act does not implicate security of the person and the Act's "intrusions on physical and psychological integrity" are not sufficiently serious to engage security of the person. The

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[209] Section 12 of the *Provincial Offences Act* provides that a sentence of imprisonment is not available where a proceeding is commenced under Part I of the *Provincial Offences Act* despite any other penalty set out in legislation.
[210] *Banks* CA, para. 83.
[211] *Banks* CA, paras. 77 to 82.
[212] *Banks* CA, para. 82.
[213] *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, at para. 80.
[214] *Canada (Attorney General) v. Bedford*, 2015 SCC 5, at para. 62.

Court of Appeal has found, contrary to the submissions of the intervener, that the Act does not deprive persons of the right to meet their basic needs. Whether or not courts have "recognized state deprivations to basic necessities of life as breaching security of the person," the Act does not have that effect.

[299] I find that the Act does not implicate the rights to life or security of the person that are protected by s. 7 of the *Charter*.

Any deprivation of the right to liberty does not violate the principles of fundamental justice

[300] Whether or not a law complies with s. 7 of the *Charter* turns on a proper assessment of the law's objective.[215] Laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal.[216] The Supreme Court explained how these principles address two different evils:

> The case law on arbitrariness, overbreadth and gross disproportionality is directed against two different evils. The first evil is the absence of a connection between the infringement of rights and what the law seeks to achieve — the situation where the law's deprivation of an individual's life, liberty, or security of the person is not connected to the purpose of the law. The first evil is addressed by the norms against arbitrariness and overbreadth, which target the absence of connection between the law's purpose and the s. 7 deprivation.
>
> The second evil lies in depriving a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms.[217]

[301] Fair Change submits that the Act violates the right to liberty because s. 2 and 3 are arbitrary, overbroad, and grossly disproportionate. For the reasons that follow, I disagree.

[302] For convenience, I restate the objectives of the Act. Ontario and Fair Change agree that the objectives of the Act are those found in the decisions of the Court of Appeal and the Superior Court of Justice in *Banks*. The Court of Appeal described the overall purpose of the Act as:

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[215] *R. v. N.S.*, 2022 ONCA 160, 169 O.R. (3d) 401, at para. 43.
[216] *Bedford*, at para. 105.
[217] *Bedford*, at paras. 108 and 109.

> legislation regulating the use of streets, sidewalks and public spaces by the public, whether in vehicles or on foot, in the interests of safety, efficient circulation, and public enjoyment and convenience.[218]

[303] Justice Dambrot held that the Legislature sought to achieve the purpose identified by the Court of Appeal through several means, each of which had its own purpose, which needed to be considered in the context of the Act in its entirety.[219] Justice Dambrot identified the following purposes:

> Section 2, including s. 2(3), is intended to promote the safe use of public places without the danger or harassment posed by interaction with those who solicit in an aggressive manner.
>
> Section 3 is intended to promote the safe use of public places without the danger or harassment posed by interaction with those soliciting at places where members of the public are not free to leave and be free from the solicitation.[220]

The Act is not arbitrary

[304] A law is arbitrary if there is no rational connection between the object of the law and the limit it imposes on the liberty of the person.[221] A law that imposes limits on s. 7 interests in a way that bears no connection to its objective arbitrarily impinges on those interests.[222] This is a very high threshold.

[305] The evidence tendered by Fair Change has not proved that the effect of the Act undermines its objective or that there is no connection between the effect and the objective. Fair Change has not proven that the Act is inconsistent with its objective or that the Act is unnecessary.

[306] As I have explained above, I find that ss. 2(3)2 to 6 violate the presumption of innocence and limit the right to freedom of expression and that the limitations are not justifiable under s. 1 of the *Charter*. I disagree, however, with Fair Change's submission that s. 2(3)2 to 6 are arbitrary. In my view, those paragraphs are not arbitrary. Those provisions are connected the object of s. 2 and are capable of fulfilling its purposes.

[307] In my view, both s. 2 and 3 are capable of fulfilling the objectives of the Act.[223] I rely on my reasons in paragraphs [232] to [235], which explain why I found that s. 2 and 3 were

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[218] *Banks* CA, at para. 32.
[219] See also, *Gordon*, at paras 197 to 198.
[220] *Banks* SCJ, at para. 108.
[221] *Carter*, at para. 83.
[222] *Bedford*, at para. 111.
[223] *Carter*, at para. 83.

rationally connected to the objectives of the legislation for the purposes of the s. 1 analysis. Those reasons also explain why the Act is not arbitrary.

The Act is not overbroad

[308] Overbreadth is a distinct principle of fundamental justice that is related to arbitrariness. The question in both cases is whether there is no connection between the effects of a law and its objective. The overbreadth principle "allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.[224]

[309] Subsection 2(2) is not overbroad. I find that prohibiting solicitation in a manner that is likely to cause a reasonable person to be concerned for his or her safety or security does not capture conduct that has no relation to the objective of the statute. I disagree with Fair Change's submission that the deeming provisions of ss. 2(3)2 to 6 demonstrate overbreadth. Those provisions do not sweep conduct into their ambit that bears no relations to their objective. There is a relationship between the objective and the deeming provisions, even if those provisions violate both of s. 2(b) and s. 11(d) of the *Charter*.

[310] I also disagree with Fair Change's submission that s. 3(2) is overbroad because it captures conduct that "does not generate fear and intimidate others." Fair Change errs by comparing the objective of s. 2 (prohibiting aggressive solicitation) with the reach of s. 3 (prohibitions on soliciting persons doing certain things in certain places). For example, the prohibition on soliciting on roadways upheld in *Banks* does not merely target solicitation that generates fear and intimidates others (although it also captures that conduct in certain places). When s. 3 is measured against its own objective, it is not impermissibly overbroad.

[311] Fair Change submits that the provisions are overbroad because persons with "mental illnesses, cognitive challenges and impairments…are unable to understand and process the short and long-term implications of fines." The evidence tendered by Fair Change does not support such a sweeping conclusion. Moreover, by extension, this submission would have the effect of declaring every regulatory offence and *Criminal Code* provision overbroad. No such conclusion is warranted.

[312] Finally, I do not accept Fair Change's submission that the Act is overbroad because, in cases that are not before the court, police officers may have issued "fake tickets." The improper or unlawful administration of an otherwise constitutional law does not render that law unconstitutionally overbroad. The court expects police officers to comply with their obligations and to discharge their duties in a manner that is consistent with their constitutional obligations. A person facing charges as a result of unlawful or unconstitutional conduct by the police may seek an individual remedy under s. 24(1) or s.

[224] *Bedford*, at para. 117.

24(2) of the *Charter*, but such misfeasance does not render unconstitutional an otherwise constitutional law.[225]

[313] I conclude that ss. 2 and 3 of the Act are not overbroad.

The Act is not grossly disproportionate

[314] The rule against gross disproportionality applies only in extreme cases where the seriousness of the deprivation of liberty is totally out of sync with the objective of the measure. The Supreme Court expressed the idea of gross disproportionality in the following hypothetical: a law with the purposes of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk.[226]

[315] Even if I accept Fair Change's submission that the objective of the Act and its prohibitions on solicitation are analogous to the Supreme Court's hypothetical law against spitting on the sidewalk, the comparison falters when one examines the penalties in the Act and compares them to life imprisonment.

[316] Section 5 of the Act states that a person convicted of an offence under the Act is liable to a fine of not more than $500 or $1000. There is no minimum fine. There is no minimum term of imprisonment. In certain cases, a person convicted of an offence under the Act could be sentenced to imprisonment for a term of not more than six months, which is a far cry from a sentence of life imprisonment. I rely on my reasons in paragraphs [275] to [290] to explain why I find that the Act does not impose grossly disproportionate penalties.

[317] I am satisfied that the connection between the objectives of the Act and its impact cannot fairly be described as draconian or outside the norms accepted in our free and democratic society.[227] This is particularly true given the lack of mandatory minimum fines or terms of imprisonment.

[318] I find that the Act is not grossly disproportionate. This is not a case where the seriousness of the deprivation of liberty is totally out of sync with the objective of the measure.

Conclusion

[319] I find that paragraphs 2(3)2 to 6 violate s. 7 of the *Charter* because they violate the presumption of innocence, contrary to s. 11(d). Otherwise, I dismiss Fair Change's challenge to s. 2, 3, and 5 of the Act pursuant to s. 7 of the *Charter*.

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[225] *R. v. Khawaja* (2010), 103 O.R. (3d) 321, 2010 ONCA 862, at para. 134.
[226] *Bedford*, at para. 120.
[227] *Bedford*, at para. 120.

10. Section 15 – the right to equality

[320] Fair Change submits that the Act violates s. 15 of the *Charter* because it discriminates against "individuals with mental health illnesses and addictions, Indigenous people, LGBTQ people, youth, and individuals in receipt of social assistance." Section 15(1) of the *Charter* states:

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

[321] To succeed in proving that the Act breaches s. 15(1) of the *Charter*, Fair Change must meet a test with two steps. It must prove on a balance of probabilities that:

a. the Act creates a distinction, on its face or in its impact, on the basis of an enumerated or analogous ground (Step One); and

b. the distinction imposes a burden or denies a benefit in a discriminatory manner, by having the effect of reinforcing, perpetuating or exacerbating disadvantage (Step Two).[228]

[322] The analysis in each step must remain distinct because the two steps ask different questions. Even if I conclude that the Act has a disproportionate impact, that does not automatically mean that the distinction is discriminatory.

[323] It is important to note that, on its face, the Act does not draw any distinctions based on an enumerated or analogous ground protected by s. 15 of the *Charter*. The Act requires all persons to refrain from doing certain things.

[324] Fair Change alleges that the Act, although neutral on its face, violates s. 15 because of its adverse effects. Fair Change must show, therefore, that the Act has a disproportionate impact on members of a protected group.[229] This can be demonstrated in several ways, including if there are clear disparities in how a law affects the claimant's group as compared to other comparator groups.[230] Where a claimant alleges indirect discrimination, the claimant will have "more work to do" at the first step.[231]

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[228] *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 2 S.C.R. 113, at para. 27; *Ontario v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at paras. 40 to 42; *R. v. Sharma*, 2022 SCC 39, 165 O.R. (3d) 398, at paras. 28, 188.
[229] *Ontario Teacher Candidates' Council v. Ontario (Education)*, 2023 ONCA 788, at para. 67.
[230] *Fraser*, at paras. 62-63.
[231] *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 64.

Step One

[325] The first step in the analysis asks whether the Act created or contributed to a disproportionate impact on the claimant group based on a protected ground. This necessarily involves drawing a comparison between the claimant group and other groups, or the general population.[232]

[326] Fair Change did not specify who the proper comparator group should be for the purpose of the s. 15 analysis. The first step of the s. 15 test requires Fair Change to establish that the Act creates or contributes to a disproportionate impact on the basis of a protected ground. This requirement of a disproportionate impact involves some element of a comparison with others. It is difficult to assess Fair Change's submissions for any of the protected groups without a carefully defined comparator group.

[327] All laws are expected to impact individuals, including members of protected groups. It is not sufficient for Fair Change simply to show that the law impacts groups of individuals protected by section 15. Instead, Fair Change must prove on a balance of probabilities that the Act created or contributed to a disproportionate impact on a protected group as compared to non-group members.[233] It must do so by presenting sufficient evidence to prove that the Act creates or contributes to a disproportionate impact on the basis of a protected ground. At Step One, causation is the central issue, and it is important to distinguish between adverse impacts caused or contributed to by the impugned law and those that exist independently of it.[234] Justice Abella explained it this way:

> … [I]ntuition may well lead us to the conclusion that the provision has some disparate impact, but before we put the [government] to the burden of justifying a breach of s. 15…, there must be enough evidence to show a *prima facie* breach. While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct.[235]

[328] To prove that legislation creates or contributes to a disproportionate impact on members of a protected group, an applicant may provide evidence about the circumstances of the claimant group as well as evidence about the results produced by the challenged law. Ideally, an applicant should provide both.[236] This could include statistical evidence showing a disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance.[237]

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[232] *Sharma*, at para. 32, citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 164.
[233] *Sharma*, at para. 40.
[234] *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 765; *Sharma*, at para. 44
[235] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at para. 34.
[236] *Fraser*, at para. 60; *Sharma*, at para. 49
[237] *Ontario Teacher Candidates*, at para. 54; *Fraser*, at paras. 59 to 60.

[329] I am mindful that applicants face hurdles to collecting data and that they have less knowledge than the state about how laws operate. However, an applicant must still fulfill the evidentiary burden. A sufficient evidentiary record is not "a mere technicality."[238] I will follow the Supreme Court's guidance from *Sharma* regarding the evidence at step one of the inquiry, which includes that:

> (a) No specific form of evidence is required.
>
> (b) The claimant need not show the impugned law or state action was the only or the dominant cause of the disproportionate impact — they need only demonstrate that the law was a cause (that is, the law created or contributed to the disproportionate impact on a protected group).
>
> (c) The causal connection may be satisfied by a reasonable inference. Depending on the impugned law or state action at issue, causation may be obvious and require no evidence. Where evidence is required, courts should remain mindful that statistics may not be available. Expert testimony, case studies, or other qualitative evidence may be sufficient. In all circumstances, courts should examine evidence that purports to demonstrate a causal connection to ensure that it conforms with standards associated to its discipline.[239]

[330] As noted above, I have significant concerns about the reliability of some of the expert evidence that Fair Change relies on to support its s. 15 *Charter* challenge. I will address these concerns below but in general, I give that evidence little weight where I am not satisfied that the evidence is reliable.

Age

[331] Fair Change submits that the Act "contributes to a disproportionate impact on…youth," which it explains is a protected group falling within the listed category of age.

[332] Fair change appears to define "youths" as those persons between the ages of 16 and 24. Fair Change did not explain why adults from age 18 to 24 should be considered "youths" for the purpose of the s. 15 analysis.[240] In its factum, relying on academic articles that did not form part of the record, Justice for Children and Youth explained that people between

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[238] *Ontario Teacher Candidates Council*, at para. 81.
[239] *Sharma*, at para. 49, citing *R. v. J.-L.J.*, at para. 33; see also *R. v. Trochym*, at para. 36.
[240] Section 94 of the *Provincial Offences Act* specifies that no person shall be convicted of an offence committed while he or she was under 12 years of age.

the ages of 18 and 25 are in a period of "emerging adulthood." Without accepting this proposition, I will use Fair Change's age range.

[333] Although Fair Change submits that its affiants were "broadly representative of those who panhandle" it did not file an affidavit from any person who could plausibly be described as a youth.[241] There is, therefore, no first-hand evidence in the record regarding the effect of the Act on youths.

[334] In its factum, Fair Change summarizes the evidence it has tendered in support to its submission that the Act discriminates against youth as follows:

> Finally, youths aged 16 to 24… are overrepresented among the homeless and, by implication, those who panhandle. Youths make up 20-30% of the homeless population compared to 13% of all Canadians…. Youths…who are homeless are particularly vulnerable to criminal victimization.

[335] I will address the final submission, that youths experiencing homelessness are particularly vulnerable to criminal victimization, first. This appears to be an interpretation of the evidence of Dr. Hermer. In its factum, Justice for Children and Youth also placed great emphasis on the fact that street youth are victims of violent crime at a very high rate. While the vulnerability of homeless youth to themselves becoming the victims of crime is obviously disturbing, that evidence is not relevant to whether or not the Act creates or contributes to a disproportionate impact on youths.

[336] The first two points above are drawn from the affidavit of Dr. O'Grady. In preparing his opinion, Dr. O'Grady reviewed a 2013 publication he co-authored called *Tickets… And More Tickets: A case study of the enforcement of the Ontario Safe Streets Act*.[242] This study was not exhibited to his original opinion, but was exhibited to his reply affidavit. This study reviewed official police statistical data on the number of tickets issued by the Toronto Police Service under the Act from 2000 to 2010, and concluded that tickets were given more often to adults than to youths. He wrote:

> As shown in Table 1, there is little doubt that [Act] tickets issued by the TPS between 2005 and 2009 were given more often to adults (25 and over) than to youth. In fact, the modal age of those who were ticketed over this period was 43 years. This fact is likely attributable to the higher number of adults than youth in Toronto's homeless

[241] At the time they swore their affidavits, Gerry Williams was 46, Donald Dunbar was 52, Margaret Bunting was 68, and Ashley Roberts was 65.

[242] Bill O'Grady, Stephen Gaetz, and Kristy Buccieri, "Tickets… And More Tickets: A case study of the enforcement of the Ontario Safe Streets Act," Canadian Public Policy, Vol. 39, No. 4 (December 2013), pp. 541-558.

population. Adults may also have acquired more tickets as a result of extended time spent on the street.

[337] Table 1 contained the following data:

TABLE 1
OSSA Tickets Issued by Toronto Police Service by Age, 2005–09

Year	2009	2008	2007	2006	2005
	N %	N %	N %	N %	N %
Ages 16–24	525 4.8	578 5.0	484 4.8	315 5.0	226 6.3
Ages 25+	10,822 95.2	11,486 95	10,027 95.2	6,144 95	3,589 94.7
Missing cases	(58)	(61)	(73)	(38)	(9)
Total	11, 405	12, 125	10, 584	6, 497	3,824

Note: There was a significant difference in the number of tickets for the 16–24 age group (M=425.6, SD=148.82) and the 25+ group (M=8413.60, SD=3401.37). t= –5.247 p<.001.

Source: Data were provided by the Toronto Police Service through an Access to Information request in 2010.

[338] The Table 1 data do not support Fair Change's submission that that Act has a disproportionate impact on youths. Fair Change submits that youths make up 13% of Canada's population and between 20% and 30% of the homeless population. The data in Table 1 indicate that youths received between 4.8% and 6.3% of the tickets under the Act during the period of the study.

[339] Dr. O'Grady reviewed one other report that contained data on youths receiving tickets under the Act. That study was titled "Can I see your ID?"[243] This study consisted of interviews with 244 homeless youth between the ages of 16 and 25. The study participants self-identified as persons with the following characteristics:

a. 65% identified as male, 32% identified as female, and 2.3% identified as transgender;

b. 23% identified as LGBTQ persons;

c. 52% identified as non-white and 15% specifically identified as Aboriginal or Indigenous persons.

[243] Bill O'Grady, Stephen Gaetz, and Kristy Buccieri, "Can I see your ID? The policing of youth homelessness in Toronto," The Homeless Hub Report Series, Report #5, Justice for Children and Youth and Homeless Hub Press.

[340] In that study, Dr. O'Grady concluded that "Homeless adults are much more likely than street youth to receive tickets" under the Act.

[341] Table 5 of the study indicated that during the prior 12 months, 94.3% of youths identifying as female reported that they had never come in to contact with the police because they were panhandling or squeegee cleaning and only 3.00% had come in to contact with police more than once for that reason. In the prior 12 months, 85.4% of youths self-identifying as male reported that they had never come in to contact with the police because of panhandling or squeegeeing and 9.00% reported more than one incident of contact with the police for that reason. In contrast, 34.3% of female identifying youths and 49% of male identifying youths reported being arrested by the police in the prior year.

[342] Table 9 of the study reported survey results from 215 youths and described the percentage of street youth receiving tickets from the police in the prior 12 months. The data were not broken down by gender of the survey respondent. Of the 215 respondents:

a. 90.3% reported never receiving a ticket for panhandling or squeegeeing;

b. 4.1% reported receiving one ticket for panhandling or squeegeeing;

c. 2.8% reported receiving 2-5 tickets for panhandling or squeegeeing; and

d. 2.8% reported receiving more than five tickets for panhandling or squeegeeing.

[343] The study noted that it appeared that there were few youths in the sample who received tickets under the Act. Indeed, fewer than 10% of the youth in the study received a ticket under the Act. The study concluded:

> The type of behaviour that warranted the most ticketing attention from the police was drinking in public, as 22% of the sample reported that they had received at least one ticket from the police over the last year for drinking in public. This was followed by "hanging around with friends" "walking down the street," "sitting in a park" and "doing drugs in public." Interestingly, it appears there were few youth in the sample who received [Act] tickets. According to our survey data, fewer than 10% of the sample received at least one ticket that could be related to the [Act] (e.g, aggressive panhandling and squeegee cleaning). As we discussed earlier, these numbers correspond with the data obtained from the Toronto Police Service on SSA tickets issued, by age of accused. These figures show that from 2004 to 2010 10.2% of [Act] tickets were issued to those 24 years of age and under (data obtained from the Toronto Police Service and the Ministry of the Attorney General, Court

> Services Division as a result of an Access to Information request filed in 2009 and 2011).[244]

[344] On cross-examination, Dr. O'Grady admitted that the survey data revealed that "basically, [there] is virtually no association" between age and receiving tickets under the Act.

[345] I do not accept the submission of Justice for Children and Youth that the Act's "*Charter* violations are particularly apparent and egregious and are brought into sharp relief when considered as they relate to young people." There is no evidence in the record to support this submission.

[346] Justice for Children and Youth submits that "Children and young people who are homeless and street-involved are disproportionately affected by the SSA, both in its application and by the consequences of its enforcement." Even if I accept Justice for Children and Youth's submission that a "contextual and intersectional analysis is required to properly consider the impact of the [Act] on the *Charter* rights of young people," I am not satisfied that the evidence presented by Fair Change demonstrates that the Act creates or contributes to a disproportionate impact on a protected group on the basis of age.

[347] Justice for Children and Youth also submits that I should ground my analysis in the *United Nations Convention on the Rights of the Child*, the General Comment No. 21 (2017), and the best interests of the child test. Leaving aside the methodological challenge of using a best interest of the child test in assessing the constitutionality of this Act, based on the evidence before me, I do not see how that approach, or the convention, demonstrates that the Act discriminates on the basis of age.

[348] To prove that legislation creates or contributes to a disproportionate impact on members of a protected group, an applicant may provide evidence about the circumstances of the claimant group as well as evidence about the results produced by the challenged law. Ideally, an applicant should provide both.[245] I find that Fair Change has not proven that the Act creates or contributes to a disproportionate impact on youths.

LGBTQ persons

[349] Fair Change submits that the Act "contributes to a disproportionate impact on…LGBTQ people." There is no doubt that sexual orientation is a ground of discrimination that is analogous to those enumerated in s. 15 of the *Charter*.[246] There is also growing judicial recognition of the rights of transgender individuals in Canada.[247]

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[244] O'Grady, Gaetz and Buccieri, "Can I see your ID?," at p. 49.
[245] *Fraser*, at para. 60; *Sharma*, at para. 49
[246] *Egan v. Canada*, [1995] 2 S.C.R. 513; *M. v. H.*, [1999] 2 S.C.R. 3.
[247] *Hansman v. Neufeld*, 2023 SCC 14, at paras. 82 to 88 and the cases cited therein. Specifically, C*entre for Gender Advocacy v. Attorney General of Quebec*, 2021 QCCS 191, 481 C.R.R. (2d) 273, at paras. 104 and 106, recognized gender identity as a ground of discrimination analogous to the grounds listed in s. 15 of the *Charter*.

[350] None of Fair Change's affiants self-identifies as an LGBTQ person, so there is no first-hand evidence in the record. Fair Change summarizes its evidence on this point as follows:

> Finally… LGBTQ people are overrepresented among the homeless and, by implication, those who panhandle…. LGBTQ people constitute 25-40% of the street youth population in Canada, yet only comprise 5-10% of all Canadians. Youths and individuals with non-conforming sexual and gender identity (as well as Indigenous people, women, and black males) who are homeless are particularly vulnerable to criminal victimization.

[351] Fair Change makes the following submissions in support of its argument that the Act has a disproportionate impact on LGBTQ persons:

> At the first step of the s. 15 test: the enforcement of ss. 2, 3, and 5 of the SSA contributes to a disproportionate impact on…LGBTQ people…. These groups are all significantly overrepresented among the population of individuals who panhandle….While there are no statistics showing that, when enforcing the SSA, the police disproportionately targets…LGBTQ people…identical treatment by police officers and courts of individuals who panhandle has an unequal impact on these groups because of their overrepresentation.

[352] I do not accept Fair Change's submission. Simply demonstrating that LGBTQ persons are overrepresented among homeless persons is insufficient to demonstrate that the Act has a disproportionate impact on members of that protected group.

[353] Fair Change asks the court to infer from the fact that LGBTQ persons are overrepresented among homeless persons that they are also overrepresented among those who panhandle In its factum, the applicant writes that "LGBTQ persons are overrepresented among the homeless and, *by implication*, those who panhandle" [emphasis added]. From there, Fair Change asks me to infer that the law has an unequal impact on them. Fair Change has not presented evidence to justify these inferences.

[354] There is no evidence in the record that LGBTQ persons are more likely to engage in soliciting or soliciting that is captured by the Act. There is no evidence that LGBTQ persons are charged with violating the Act at a disproportionate rate. Indeed, although Dr. O'Grady's study "Can I see your ID?" identified the proportion of the survey respondents who self-identified as LGBTQ, it contained no data on how many of them received tickets.

[355] It is important to recall that, at Step One, causation is the central issue. The court must distinguish between adverse impacts caused or contributed to by the impugned law and

those that exist independently of it.[248] With respect to LGBTQ persons, however, the evidence does not amount to more than a web of instinct.[249]

[356] I find that Fair Change has not proven that the Act creates or contributes to a disproportionate impact on LGBTQ persons.

Individuals in receipt of social assistance

[357] Fair Change submits that the Act "contributes to a disproportionate impact on…individuals in receipt of social assistance." Based on the Court of Appeal's decision in *Falkiner*, I accept that receipt of social assistance is a personal characteristic analogous to a ground protected by s. 15 of the *Charter*.[250]

[358] The Income Security Advocacy Centre submits that the court must adopt "an intersectional lens focussing on the analogous ground of receipt of social assistance and mental disability." I accept that people may experience many different types of inequalities that work together to limit their opportunities and increase disadvantage. Even if I apply an intersectional lens to the evidence before me, Fair change has not met the test at Step One for individuals in receipt of social assistance.

[359] *Falkiner* concerned a challenge to the definition of spouse in the *Family Benefits Act*.[251] Between 1987 and 1995, the definition of "spouse" in the regulations under the *Family Benefits Act* mirrored the definition of "spouse" under the *Family Law Act*.[252] Persons were deemed to be spouses if they had lived together continuously for at least three years. In 1995, the definition of spouse in a regulation under the *Family Benefits Act* was amended.[253] The amendment defined spouse to include persons of the opposite sex living in the same place who had "a mutual agreement or arrangement regarding their financial affairs" and a relationship that amounted to cohabitation. Under this amended definition, once persons of the opposite sex began living together, they were presumed to be spouses unless they provided evidence to the contrary.

[360] Each of the claimants in *Falkiner* was an unmarried woman with one or more dependent children and was in a "try on" relationship with a man with whom she had lived for less than a year. Each claimant had received social assistance until the 1995 definition of "spouse" came into effect, whereupon the Director of the Income Maintenance Branch of the Ministry of Community and Social Services reclassified each respondent as a spouse, and each respondent lost her eligibility to receive family benefits as a "sole support parent."

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[248] *Symes*, at p. 765; *Sharma*, at para. 44.
[249] *Kahkewistahaw*, at para. 34.
[250] *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.), at pp. 503-504.
[251] R.S.O. 1990, c. F.2.
[252] R.S.O. 1990, c. F.3.
[253] R.R.O. 1990, Reg. 366, s. 1(1)(d).

[361] The Court of Appeal accepted that the claimants had been treated unequally on the basis of the personal characteristic of being a social assistance recipient:

> First, the respondents allege that they have been treated unequally on the basis of the personal characteristic of being a social assistance recipient. As I stated above, the respondents urge a comparison between themselves and persons who are not on social assistance. In my view, the respondents' claim of differential treatment on the basis of being a social assistance recipient can best be assessed by comparing their treatment to the treatment of single persons not on social assistance. Framing the comparison in this way shows that the respondents have been treated unequally. They have suffered adverse state-imposed financial consequences because they began living in try-on relationships. By contrast, single people who are not on social assistance are free to have these relationships without attracting any kind of state-imposed financial consequences. These adverse consequences visited on the respondents represent one aspect of the differential treatment they have received.[254]

[362] As noted, neither Fair Change nor the Income Security Advocacy Centre has identified a comparison group.

[363] Fair Change makes the following submissions in support of its argument that the Act has a disproportionate impact on persons in receipt of social assistance:

> At the first step of the s. 15 test: the enforcement of ss. 2, 3, and 5 of the SSA contributes to a disproportionate impact on…individuals in receipt of social assistance …. These groups are all significantly overrepresented among the population of individuals who panhandle….While there are no statistics showing that, when enforcing the SSA, the police disproportionately targets…individuals on social assistance …identical treatment by police officers and courts of individuals who panhandle has an unequal impact on these groups because of their overrepresentation.

[364] Fair Change points to the following evidence in support of its submission that the Act has a disproportionate impact on individuals on social assistance:

> Second, panhandling is linked to the receipt of social assistance. Dr. Stapleton, an expert on social assistance in Ontario, notes that social assistance rates are inadequate to cover recipients' basic needs. Recipients thus turn to panhandling to pay for food, alcohol/drug habits, or housing.

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[254] *Falkiner*, at pp. 503-504.

[365] Dr. Stapleton's opinion reads as follows:

> 22. In my own experience, a significant proportion of those who panhandle receive social assistance. I am aware that the 2007 Panhandling Pilot Project conducted by the City of Toronto found that of the 233 individuals who panhandled and who were surveyed, 44% received social assistance. I am also aware of emerging data from a study in Windsor where 29 out of 34 panhandling individuals surveyed were recipients of social assistance, and the other 5 individuals surveyed expressed interest in accessing social assistance or had received it in the past. In general, there is limited data available on income sources for panhandlers in Ontario.
>
> 23. Some social assistance recipients turned to panhandling as a way to survive because current social assistance rates are so low.

[366] However, the cross-examination of Dr. Stapleton demonstrated the frailty of the evidence he relied on in support of his opinion. First, he candidly admitted that the Panhandling Pilot Project surveyed 233 people who panhandled. The study revealed that 44% of those individuals received social assistance. Dr. Stapleton acknowledged that the report concerned people who were legally panhandling, not those who solicited in a manner prohibited by the Act. The study stated:

> A distinction is made between legal panhandling and illegal or aggressive panhandling. People who panhandle in a legal manner are the focus of this report, and the proposed enhanced street outreach service is designed to respond to their needs. Illegal panhandling, which is defined as either being aggressive or to a captive audience, as defined in the *Safe Streets Act*, is the purview of the Toronto Police Service, who enforces the *Safe Streets Act*. Unless otherwise noted the act of panhandling referenced in this report is assumed to be legal, and not in violation of the Safe Streets Act ... "[255]

[367] Dr. Stapleton acknowledged that the study stated that all 233 persons in the study panhandled legally, there was no way to know how many of the individuals were panhandling illegally, and there was no way to know if any of the 233 persons received tickets under the Act. I find that this study provides no support for Fair Change's submissions.

[368] Second, Dr. Stapleton's affidavit did not provide a citation for the Windsor study to which he referred in his affidavit. The only information provided about the Windsor study is reproduced above. I give no weight to this evidence as I am completely unable to evaluate

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[255] Toronto, *Enhancing Streets to Homes Service to Address the Needs of People Who Are Street Involved, Including Those Who Panhandle*, Staff Report to the Executive Committee (April 21, 2008), at p. 4.

the parameters of the study or to assess its utility to the question before me. There is no way to know, for example, if any of the 34 individuals surveyed had ever received a ticket under the Act.

[369] I find that Fair Change has not proven that the Act creates or contributes to a disproportionate impact on persons in receipt of social assistance.

Individuals with mental health illnesses and addictions

[370] Fair Change makes the following submission in support of its argument that the Act has a disproportionate impact on persons with mental health illnesses and addictions:

> At the first step of the s. 15 test: the enforcement of ss. 2, 3, and 5 of the SSA contributes to a disproportionate impact on individuals with mental health illnesses and addictions…. These groups are all significantly overrepresented among the population of individuals who panhandle….While there are no statistics showing that, when enforcing the SSA, the police disproportionately targets individuals with mental health and addiction issues …identical treatment by police officers and courts of individuals who panhandle has an unequal impact on these groups because of their overrepresentation.

[371] Fair Change did not specify the relevant comparator group and summarizes the evidence in support of its submission as follows:

> Additionally, some groups of individuals who panhandle are directly targeted by the SSA or in its enforcement. For example, individuals with addiction issues are targeted by s. 2(3)(5), which deems solicitation while intoxicated by alcohol or drugs to be aggressive. Similarly, individuals with mental health illnesses that cause involuntary offensive utterances, such as Tourette syndrome, are targeted by s. 2(3)(1). More generally, according to Dr. Kidd, many of the behaviours that attend mental illness and addiction, such as impulsivity, social skill challenges, talking more loudly than expected, engaging as old friends with people they haven't met before, or standing more closely to an individual, could be considered offences under the SSA, because they can be interpreted as aggressive in the context of social engagement. The evidence of Mr. Williams, Mr. Roberts, and Mr. Dunbar confirms that their mental illnesses or addictions have directly led to many of their SSA tickets. Finally, Dr. Kidd also opines that it is more likely that homeless individuals with mental health problems and addictions will be stereotyped as aggressive and will face higher levels of police surveillance – the same may be said more generally of all other visibly homeless individuals who panhandle (which would result in a further unequal impact on overrepresented groups).

[372] I will deal first with Fair Change's submissions that "individuals with addiction issues are targeted by s. 2(3)(5), which deems solicitation while intoxicated by alcohol or drugs to be aggressive." As explained above, I have found that s. 2(3)5 is unconstitutional because it violates the presumption of innocence in s. 11(d) of the *Charter*, the right to freedom of expression in s. 2(b) of the *Charter*, and in neither case is that infringement justified under s. 1 of the *Charter*.

[373] In my view, it is preferable to deal with the constitutionality of s. 2(3)5 under those other provisions. I do not believe I have the record before me to assess whether or not s. 2(3)5 infringes s. 15 of the *Charter*. I also do not think I have received complete submissions on the complex issues raised by the regulation of activity while intoxicated. There are statutory restrictions on engaging in many activities while intoxicated. For example, driving under the influence of alcohol is prohibited by s. 320.14 of the *Criminal Code*. In addition, it is a provincial offence to be intoxicated in a public place.[256] In my view, this is not an appropriate case to consider the constitutionality of s. 2(3)5 under s. 15 of the *Charter*, as it is unnecessary to do so.

[374] As can be seen, Fair Change primarily relies on the affidavit of Dr. Kidd, a clinical psychologist. In his affidavit, Dr. Kidd provided his opinion that homeless individuals with mental health challenges face frequent charges under Act and that it is highly likely that persons living with mental illness or addiction are disproportionately ticketed under the Act. His opinion contained the following:

> 12. A number of studies confirm that homeless individuals with mental illnesses face frequent charges under the SSA. …
>
> 13. There is further evidence to suggest a high rate of charges for minor, nonviolent crimes (in which category the SSA terms are relevant) accrued by homeless individuals with severe mental illness (in the literature such charges are variably referred to as nuisance, minor, non-violent, or misdemeanor depending on the source and location of the information). A systematic review has found that among such individuals the rate of one or more nonviolent/ summary charges ranges from 52-80% across representative studies.
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> 14. A large study of Canadian homeless individuals with severe mental illnesses identified a proportion of 12% who experience frequent arrests for non-violent offenses such as those within the

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[256] *Liquor Licence and Control Act*, 2019, S.O. 2019, c. 15, Sched. 22, s. 31(1), which provides that

31 (1) No person shall be in an intoxicated condition in,

(a) a place to which the general public is invited or permitted access; or

(b) any part of a residence that is used in common by persons occupying more than one dwelling in the residence.

(2) A police officer or conservation officer may arrest without warrant any person who is contravening subsection (1) if, in the opinion of the officer, it is necessary to do so for the safety of any person.

> SSA (particularly for individuals with depression and addictions) with a larger proportion experiencing non-violent offence arrests along with arrests for more serious offences.
>
> 15. While there is no direct study to indicate that Indigenous status or mental illness and addictions are causes of disproportionate ticketing under the SSA, it is highly likely that disproportionate ticketing is occurring under this act and more broadly for the types of offences it addresses.

[375] As discussed above, Dr. Kidd's affidavit did not contain any citations or references. Instead, it listed seven studies or articles that he consulted when preparing his opinion. On cross-examination, Dr. Kidd admitted that none of the studies or articles that he consulted discussed the enforcement of the Act, including enforcement against persons with disabilities, mental illnesses, or addictions. Dr Kidd acknowledged that none of the studies he consulted included any statistics about:

a. the proportion of individuals receiving tickets under the Act that had a mental illness;

b. the proportion of homeless individuals in Ontario that had a mental illness;

c. the proportion of homeless individuals in Ontario that have an addiction; or

d. the types of behaviour that are captured by the Act;

[376] Dr. Kidd also conceded that the study from which he obtained the data in the last sentence of paragraph 13 ("A systematic review has found that among such individuals the rate of one or more nonviolent/ summary charges ranges from 52-80% across representative studies") involved 21 studies, none of which were conducted in Canada.

[377] While I accept that it will not always be necessary to have statistical evidence to support a s. 15 argument, from what I can tell, Dr. Kidd had no evidence or data before him that drew a direct link between the Act and persons with a mental illness or shed any light on the question of how the Act is enforced in Ontario in cases involving persons with disabilities or mental illnesses.

[378] Fair Change also relies on Dr. Kidd's opinion that the behaviours that attend mental illness and addiction "would be considered offences under the [Act]." Dr. Kidd reached this opinion without relying on any studies that addressed the Act or how it is enforced in Ontario. He did not grapple with the meaning of "reasonable" in the definition of aggressive solicitation. Dr. Kidd's opinion that persons with mental health problems will face higher levels of police surveillance relates only to the administration of the Act, not the constitutionality of its provisions.

[379] In these circumstances, I place no weight on Dr. Kidd's opinion. He has offered opinions that are not anchored in the academic literature that he reviewed. I am unable to verify or

assess the reliability of the opinions he has offered. Dr. Kidd is asking the court to "trust me" contrary to the guidance in *Abbey #2*.[257]

[380] I also do not think that the affidavit evidence of Mr. Roberts or Mr. Dunbar is sufficient to demonstrate that the Act has a disproportionate impact on individuals with mental illnesses or addictions. I accept that their evidence establishes that each of them is living with mental illness and have, at times, been addicted to drugs and or alcohol.

[381] Mr. Roberts' affidavit states that he has been convicted of 434 offences under the *Provincial Offences Act*. Of those 434 offences, 85 (or 19.6%) related to violations of the Act. Mr. Roberts' affidavit also states that his 434 convictions resulted in $64,876.25 in fines. Of that amount $8913 (or 13.7%) related to fines for violations of the Act. Mr. Roberts' conduct appears to implicate a range of regulatory prohibitions well beyond those contained in the Act.

[382] In Mr. Dunbar's case, it appears that his offending is primarily under the Act. Mr. Dunbar's evidence is that between 2003 and 2015, he had been convicted of approximately 350 offences and that he currently owed approximately $45,000 in fines. He states that "almost all of these were *Safe Streets Act* tickets for panhandling." His affidavit indicates that, with the help of Fair Change, he has successfully challenged some of the tickets he received and that both prosecutors and judges have withdrawn or dismissed the allegations against him:

> With the help of Fair Change Community Legal Clinic, I fought some of these tickets and stayed out of jail. When judges and prosecutors drop my tickets it's because they know I've been poor, homeless, addicted to drugs and I do community service at the Fred Victor center. I have been helping at Fred Victor for years. I live there and clean-up the clinic during their drop-in hours. I am friends with the staff there and they help to keep me on track in my life.

[383] However, neither the evidence of Mr. Roberts nor Mr. Dunbar establishes that the Act created or contributed to a disproportionate impact on a claimant group based on a protected ground. All laws, including the Act, are expected to impact individuals, including members of protected groups like Mr. Roberts and Mr. Dunbar. It is not sufficient for Fair Change simply to show, as it has through the affidavits of Mr. Dunbar and Mr. Roberts, that the law impacts groups of individuals protected by section 15. At Step One, causation is the central issue, and it is important to distinguish between adverse impacts caused or contributed to by the impugned law and those that exist independently of it.[258]

[384] As noted above, the causation analysis at Step One necessarily involves drawing a comparison between the claimant group and other groups, or the general population.[259] Fair

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[257] *Abbey #2*, at para. 119.
[258] *Symes*, at p. 765; *Sharma*, at para. 44.
[259] *Sharma*, at para. 32, citing *Andrews*, at p. 164.

Change must prove on a balance of probabilities that the Act has a disproportionate impact on a protected group as compared to non-group members.[260] It must do so by presenting sufficient evidence to prove that the Act creates or contributes to a disproportionate impact on the basis of a protected ground.

[385] I find that Fair Change has not proven that the Act creates or contributes to a disproportionate impact on persons with mental health illnesses and disabilities.

Indigenous people

[386] Fair Changes submits that the enforcement of the Act contributes to a disproportionate impact on Indigenous people because they are significantly overrepresented among the population of people who solicit.

[387] Fair Change filed the affidavit of Mr. Williams, who was born in Fort Albany First Nation and stated that his entire family, including himself, were victims of the residential school system. For the reasons explained above, I do not give any weight to Mr. Williams evidence regarding his soliciting and proceedings under the Act because he was not made available for cross-examination. None of Fair Change's other affiants indicated that they were an indigenous person.

[388] Fair Change summarizes its evidence this way:

> Indigenous individuals are also over-represented among those experiencing homelessness and, by implication, those who panhandle. In Toronto, for example, they make up 4.5% of the Toronto population and 16% of Toronto's homeless population. More generally, 6.97% of the urban Indigenous population in Canada – 1 in 15 – is homeless, as compared to a national average of 0.78%. This means that urban Indigenous individuals are eight times more likely to experience homelessness than non-Indigenous individuals.

[389] While I accept that Indigenous persons are overrepresented among those experiencing homelessness, that alone is insufficient to demonstrate that the Act causes or contributes to a disproportionate impact on a protected group.

[390] Fair Change submits that "Interactions with the police traumatise panhandlers, particularly Indigenous persons." Even if this is true, it is a matter that is relevant to the administration of the Act, not the constitutionality of its provisions. This evidence does not support Fair Change's submission that the Act has a disproportionate impact on Indigenous persons.

[391] Aboriginal Legal Services submits that the Act violates s. 15 of the *Charter* because it contributes to a disproportionate number of tickets being given to Indigenous people and,

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[260] *Sharma*, at para. 40.

therefore, the operation of the law has a disproportionate impact on this group. I do not accept this argument as it is unsupported by the evidence before me.

[392] I note that Prof. O'Grady states in his opinion that:

> There is no doubt that many more Indigenous people are being ticketed in more recent years than was the case when the SSA was first put into place and that Indigenous people are disproportionately targeted under the SSA.

[393] Prof. O'Grady did not provide a citation to the evidence that supported his opinion. It does not appear that any of the studies relied on by Prof. O'Grady contained any data regarding Indigenous persons receiving tickets under the Act:

a. In the study "Making Money: Exploring the Economy of Young Homeless Workers," 29 persons identified as panhandlers, but none of them self-identified as Aboriginal or Métis. A further 39 individuals listed squeegeeing as their main source of income. Of that group, 3% identified as Aboriginal or Métis. This study contained no data on whether or not any of the participants in the study received a ticket under the Act.

b. In "A Social and Economic Impact Study of the Ontario Safe Streets Act on Toronto Squeegee Workers", the study surveyed 50 youths. The study did not contain any information or data about the race, ethnic origin, or Indigeneity of the survey participants.

c. In "Can I see your ID?", the study surveyed 244 homeless youth, 15% of whom identified as Aboriginal or Indigenous persons. That study concluded that 10% of all youth surveyed received a ticket under the Act in the prior year, but Prof. O'Grady conceded on cross-examination that there was no statistically significant connection between identifying as an Aboriginal or Indigenous person and receiving a ticket under the Act.

d. In "Tickets and More Tickets," there were no data on Indigeneity and ticketing practices.

[394] Prof. O'Grady's opinion that that the enforcement of the Act has a disproportionate impact on Indigenous persons appears to be unsupported by the evidence he reviewed in the preparation of his report. If there is a basis for his opinion, it is not in evidence before me. Following the guidance of *Abbey #2*, I give no weight to Dr. O'Grady's opinion.

[395] The record does not contain any statistical evidence to support the submissions of Fair Change and Aboriginal Legal Services that the Act has a disproportionate impact on Indigenous persons.

[396] Aboriginal Legal Services submits that widespread negative stereotypes about Indigenous people, including that they are disorderly and engaged in criminal activity, make it more

likely that they will be perceived as aggressive and thus more likely to receive tickets for aggressive panhandling than non-Indigenous panhandlers. I do not accept this argument as there is no evidence in the record to support the submission that Indigenous persons are more likely to receive tickets than non-Indigenous persons engaging in the same type of solicitation.

[397] Finally, Aboriginal Legal Services submits that because convictions may be entered without the accused appearing in court, the judicial officers imposing sanctions have no opportunity to consider the *Gladue* factors.[261] In my view, this argument is misplaced. As set out above, the procedures for findings of guilt and sentencing are set out in the *Provincial Offences Act*, not the Act. Fair Change did not challenge the constitutionality of the *Provincial Offences Act*. Moreover, any individual who wants to make submissions to the court regarding their guilt or innocence, or the appropriate sanction in all of the circumstances, is free to do so.

[398] I find that Fair Change has not proven that the Act creates or contributes to a disproportionate impact on Indigenous persons.

Conclusion

[399] For the reasons that follow, I conclude that Fair Change has failed to meet the burden at Step One with respect to any of the claimant groups.

[400] There is no reason to continue on to Step Two, and I decline to do so.

11. Remedy

[401] Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency." I have found that the entirety of:

a. paragraphs 2(3)2 to 2(3)(6) of the Act limit sections 2(b), 7, and 11(d) of the *Charter* and those limitations are not justified under s. 1; and

b. clauses 3(2)(a) to 3(2)(e) limit section 2(b) and those limitations are not justified under s. 1.

[402] Depending on the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in.[262] For the reasons set out above in paragraphs [170] to [188],

[261] *R. v. Gladue*, [1999] 1 S.C.R. 688.
[262] *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 695.

reading-in would not be an appropriate remedy. In my view, striking down the unconstitutional provisions in the Act is the most appropriate remedy.

[403] Ontario did not suggest that a delayed declaration of invalidity was necessary to protect the rule of law, public safety, or any reliance interests.[263]

[404] Therefore, I declare that paragraphs 2(3)2 to 2(3)(6) and clauses 3(2)(a) to 3(2)(e) of the Act are without force or effect, pursuant to s. 52(1) of the *Charter*.

12. Costs

[405] If the parties are not able to resolve the costs of this application, Fair Change may email its costs submission of no more than three double-spaced pages to my judicial assistant on or before April 9, 2024. Ontario may deliver its responding submission of no more than three double-spaced pages on or before April 16. No reply submissions are to be delivered without leave.

Robert Centa J.

Released**:** April 2, 2024

[263] *Schacter*, at pp. 715 to 716.

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DATE: 20240402

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Fair Change

Applicant

– and –

His Majesty the King in Right of Ontario as represented by the Attorney General of Ontario

Respondent

REASONS FOR JUDGMENT

Robert Centa J.

Released: April 2, 2024