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# TICKETING POVERTY: AN ANALYSIS OF THE DISCRIMINATORY IMPACTS OF PUBLIC INTOXICATION BY-LAWS ON PEOPLE EXPERIENCING HOMELESSNESS IN MONTREAL

Emily Knox, Jeanne Mayrand-Thibert, & Michelle Pucci\*

## ABSTRACT

Municipalities like Montreal penalize what they consider public disturbances through by-law infraction citations, or “tickets,” that are issued to people experiencing visible homelessness at a disproportionate rate. This is a pattern we observed over the course of two years during our time at a legal clinic providing legal information to people in precarious housing situations. In this article, we propose that Montreal’s by-laws prohibiting public drinking and public intoxication adversely impact unhoused people and are discriminatory under the *Quebec Charter of Human Rights and Freedoms*, a quasi-constitutional human rights instrument unique to Quebec. Drawing from research by criminologists and legal geographers, we explore how these by-laws and the judicialization of homelessness violate equality rights, specifically the right to be free from discrimination on the basis of social condition. We develop arguments that can be adopted by legal practitioners advocating for people experiencing various forms of homelessness. Although the *Quebec Charter* is our analytical starting point, we engage in a comparative discussion of other provincial and territorial human rights legislation—with an eye on developing case law regarding encampments and the use of public spaces across Canada. Moreover, a successful human rights claim using the *Quebec Charter* may contribute to

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interpretations of the *Canadian Charter of Rights and Freedoms* that are inclusive of economic and social rights. Indeed, we suggest that judicial recognition in Quebec that people experiencing homelessness are an equity-seeking group may be persuasive in Section 15 claims under the *Canadian Charter*, which to date does not recognize poverty or homelessness as analogous grounds of discrimination.

Les municipalités comme Montréal pénalisent ce qu'elles considèrent comme des troubles à l'ordre public par l'émission de constats d'infractions, ou contraventions, à des règlements municipaux, qui sont remis à un taux disproportionné aux personnes en situation d'itinérance visible. C'est une tendance que nous avons observée pendant deux ans, alors que nous travaillions dans une clinique juridique fournissant de l'information juridique à cette population. Dans cet article, nous proposons que les règlements de Montréal interdisant la consommation d'alcool et l'intoxication en public ont un impact négatif sur les personnes non logées et sont discriminatoires en vertu de la *Charte québécoise des droits et libertés de la personne*, un instrument quasi-constitutionnel de protection des droits de la personne unique au Québec. En s'appuyant sur la littérature développée par des criminologues et géographes juridiques, nous explorons comment ces règlements et la judiciarisation de l'itinérance violent les droits à l'égalité, en particulier le droit de ne pas être victime de discrimination fondée sur la condition sociale. Nous développons des arguments qui peuvent être adoptés par des juristes qui défendent les personnes vivant diverses formes d'itinérance. Bien que la *Charte québécoise* soit notre point de départ analytique, nous incorporons une discussion comparative des autres législations provinciales et territoriales en matière de droits de la personne, avec un regard sur le développement de la jurisprudence concernant les campements et l'utilisation des espaces publics à travers le Canada. De plus, nous suggérons qu'une demande fondée sur la *Charte québécoise* peut contribuer à étayer des interprétations de la *Charte canadienne des droits et libertés* qui englobent des droits économiques et sociaux. En effet, la reconnaissance judiciaire au Québec du fait que les personnes en situation d'itinérance constituent un groupe protégé pourrait être convaincante dans les demandes déposées en vertu de l'article 15 de la *Charte canadienne*, qui à ce jour, ne reconnaît pas la pauvreté ou l'itinérance comme des motifs analogues de discrimination.

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## INTRODUCTION

It's worse than it's ever been. I've never seen this level of ticketing [...] Everyone knows the tickets don't solve anything.

Céline Bellot, Director at the Observatoire des profilages, Université de Montréal<sup>1</sup>

In Montreal, napping on a park bench can be penalized by a \$100 fine, and although drinking in public parks is a summer past-time, without a picnic, consumers of alcohol can be ticketed \$150.<sup>2</sup> In their lifetime, many Montrealers might receive a couple of fines for breaking municipal by-laws. For those experiencing homelessness, however, the tickets and unpaid fines can add up to thousands of dollars.

The authors of this paper have, throughout their time at law school, been afforded opportunities to get to know people whose legal debt to the municipality continues to grow as a result of their reliance on public spaces. Since 2020, the authors have been part of a group of law students from McGill University providing legal information and court accompaniment for people experiencing homelessness in downtown Montreal.<sup>3</sup> Each week, those who shared their stories with us at the legal information clinic offered a glimpse of their reality: people experiencing homelessness in Montreal are ticketed at disproportionate rates for municipal by-law infractions.<sup>4</sup> These by-laws demonstrate not only penal laws' limits, as most of these fines are

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<sup>1</sup> Céline Bellot quoted in Christopher Curtis, "Lawsuit challenges Quebec curfew's criminalization of homelessness", *Ricochet Media* (25 January 2021) online: <<https://ricochet.media/en/3450/lawsuit-challenges-quebec-curfews-criminalization-of-homelessness>> [perma.cc/7T79-7UZA].

<sup>2</sup> See *Règlement sur la propreté et sur la protection du domaine public et du mobilier urbain* RRVM c P-12.2 ss 20, 30(1)(a) [c P-12.2] (*By-law concerning Cleanliness and Protection of Public Property and Street Furniture*); *Règlement concernant la paix et l'ordre sur le domaine public* RRVM c P-1 ss 2-3, 12-13 [c P-1] (*By-law concerning Peace and Order On Public Property*).

<sup>3</sup> The authors speak strictly on their own behalf. Hence, the legal information clinic and organization are not identified.

<sup>4</sup> See e.g. Céline Bellot et al "The Judicialization of Homelessness in Montréal: Alarming Evidence of Increased Social Profiling (2012-2019)" (2021), online (pdf): *Observatoire des profilages* <[www.observatoiredesprofilages.ca/wp-content/uploads/2021/12/Judicialization-of-homelessness-in-Montreal.pdf](http://www.observatoiredesprofilages.ca/wp-content/uploads/2021/12/Judicialization-of-homelessness-in-Montreal.pdf)> [perma.cc/4SW3-S9CS] ["Observatoire des profilages 2021 Report on the Judicialization of Homelessness"]. See also Emily Knox, "Poverty is not a crime, so why is Montreal still ticketing the unhoused?", *CBC News* (27 October 2021), online: <<https://www.cbc.ca/news/canada/montreal/first-person-by-law-infraction-unhoused-poverty-tickets-1.6221531>> [perma.cc/WY2W-DWD5].

unlikely to be paid, but also the way penal law contributes to the systemic oppression of precariously housed or unhoused people.

The scale of this issue is staggering. In recent years, nearly 40 percent of all tickets for municipal by-law infractions in Montreal have gone to people experiencing homelessness, according to research from the Observatoire des profilages based out of Université de Montréal, despite the fact that this group accounts for less than 1 percent of our city's population.<sup>5</sup> Hefty fines are issued for loitering, sleeping on park benches, being in parks overnight, and consuming alcohol on public property.<sup>6</sup> The recipients of these tickets are penalized for sleeping, urinating, and consuming alcohol in public—things that others do freely in the privacy of their own homes.

In this paper, we examine the judicialization of homelessness through an equality rights lens and propose a legal strategy to challenge the provisions that prohibit drinking in public and public intoxication—two of the most common infractions that we encountered at the legal information clinic. These behaviours are prohibited under Sections 2 and 3 of Montreal's *By-law concerning Peace and Order on Public Property*.<sup>7</sup> There

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<sup>5</sup> See “Observatoire des profilages 2021 Report on the Judicialization of Homelessness”, *supra* note 4 at 6; See also Antoni Nerestant, “Number of tickets issued to Montreal's homeless has skyrocketed in last 30 years, report finds”, *CBC News* (21 January 2021), online: <<https://www.cbc.ca/news/canada/montreal/spvm-homeless-tickets-1.5881785>> [perma.cc/2LEY-6D4T]. Estimates on the number of people experiencing homelessness in Montreal range from approximately 3,000 to 30,000. Despite the lack of consensus on the various methodologies, the estimates suggest that this group makes up less than 1 percent of the population, revealing the disproportionate penalization they are subjected to through ticketing practices. See Eric Latimer and François Bordeleau “Dénombrement des personnes en situation d'itinérance sur l'île de Montréal le 24 avril 2018” (2019) at 18, 85, online (pdf): *je compte MTL 2018* <<https://jecomptemtl2018.ca/wp-content/uploads/2019/04/rapport-montreal-rvision-8-avril-2019.pdf>> [perma.cc/8Y69-NVBJ]; Christine Campbell & Paul Eid “La judiciarisation des personnes itinérantes à Montréal” (6 November 2009) at 42, online (pdf): *Commission des droits de la personne et des droits de la jeunesse* <[www.cdpcj.qc.ca/storage/app/media/publications/itinerance\\_avis.pdf](http://www.cdpcj.qc.ca/storage/app/media/publications/itinerance_avis.pdf)> [perma.cc/5RTG-VPNB] [“Quebec Human Rights Commission 2009 Report on the Judicialization of Homelessness”].

<sup>6</sup> See e.g. c P-12.2, *supra* note 2, specifically s 20, which prohibits the use of urban property for uses other than those they were designed for. This by-law penalizes unhoused community members who are ticketed for sleeping on public benches; *Règlement sur les parcs* RRVM c P-3 [c P-3] (*By-law concerning Parks*), particularly s 3, prohibiting being in a park when it is closed. See also similar by-laws for the City of Westmount: *By-law 69 concerning Parks* and *By-law 1475 on Nuisances and Public Order* available at City of Westmount, “Municipal by-laws”, online: <[westmount.org/en/resident-zone/legal-services-city-clerks-office/bylaws/](http://westmount.org/en/resident-zone/legal-services-city-clerks-office/bylaws/)> [perma.cc/B27D-EW67].

<sup>7</sup> See c P-1, *supra* note 2, s 2, 3.

are exceptions listed in the by-law, and alcohol may be consumed on public property when accompanied by a meal in a park “where picnic tables have been set up by the city,” on restaurant patios, and at certain authorized events.<sup>8</sup> Drinking in public can lead to a fine of \$100 to \$150 for first time offences, \$150 to \$300 for second offences, and all subsequent offences can range between \$300 to \$1,000.<sup>9</sup> These ostensibly neutral municipal by-laws insidiously target people experiencing homelessness, contrary to equality rights protected by the *Quebec Charter of Human Rights and Freedoms* (“*Quebec Charter*”)<sup>10</sup> while ignoring the structural and systemic causes of homelessness.<sup>11</sup>

Challenging the validity of Sections 2 and 3 of Montreal’s *By-law concerning Peace and Order on Public Property* is one way to reduce the judicialization of homelessness. Seeking accountability for police profiling through litigation is expensive and it requires individuals to contest tickets in an *ad hoc* manner. However, the excessive ticketing of unhoused people is not merely the result of social profiling in the enforcement of by-laws. Although social profiling is important evidence of the discriminatory consequences of these by-laws, this strategy attempts to dismantle bad laws rather than target harmful enforcement.<sup>12</sup>

Our strategy relies on quasi-constitutional legislation, the *Quebec Charter*, for two reasons. First, the *Quebec Charter’s* broad scope of protected grounds within the equality rights provision extends protections against discrimination based on a person or group’s social condition, such as homelessness. When it was enacted in 1975, the *Quebec Charter* protected not only equality rights, but social and economic rights as well.<sup>13</sup> Notably, social condition has been a mainstay in Quebec’s equality provision

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<sup>8</sup> See c P-1, *supra* note 2, s 3(1)(2)(3).

<sup>9</sup> See c P-1, *supra* note 2, ss 12–13.

<sup>10</sup> *Charter of Human Rights and Freedoms*, CQLR c C-12 [*Quebec Charter*].

<sup>11</sup> See Evelyne Pedneault, Amina Triki-Yamani & Michèle Turenne, “Mémoire à la Commission sur le développement social et la diversité montréalaise et à la Commission sur la sécurité publique de la Ville de Montréal dans le cadre de la consultation sur la lutte au profilage raciale et au profilage social” (2017) *Commission des droit de la personne et de la jeunesse* at 11. See also Justin Douglas, “The Criminalization of Poverty: Montreal’s Policy of Ticketing Homeless Youth for Municipal and Transportation By-Law Infractions” (2011) 16 *Appeal* 49 at 50 [Douglas].

<sup>12</sup> See Dj Larkin, “How bad laws lead to harmful enforcement” (15 April 2016), online: *Pivot Legal Society* <[www.pivotlegal.org/bad\\_laws\\_are\\_worse\\_than\\_bad\\_enforcement](http://www.pivotlegal.org/bad_laws_are_worse_than_bad_enforcement)> [perma.cc/77WF-32ED]; See also *R v Beaudry*, 2007 SCC 5 in which the Supreme Court of Canada held that police have broad discretionary powers.

<sup>13</sup> David Schneiderman, “Dual(ling) Charters: the Harmonics of Rights in Canada and Quebec” (1992) 24:1 *Ottawa L Rev* 235 at 248.

since its adoption. In contrast, the *Canadian Charter of Rights and Freedoms* (“*Canadian Charter*”)<sup>14</sup> does not list social condition as a protected ground within Section 15 and there is judicial resistance toward recognizing poverty and homelessness as analogous grounds within the scope of the *Canadian Charter’s* equality provision.<sup>15</sup> Second, the *Quebec Charter* is unique among Canada’s human rights instruments because it applies to State actors and private actors and gains its quasi-constitutional status from the fact that it prevails over other laws.<sup>16</sup>

While our strategy uses Quebec provincial human rights legislation, we believe the arguments’ strengths have country-wide significance. The paper draws out the theoretical links that explain why social condition broadly, and homelessness more specifically, is a ground of discrimination under the *Quebec Charter*. This may be relevant for constitutional analysis under an “analogous grounds” framework of the *Canadian Charter*, as well as the statutory interpretation of other human rights codes across provinces. Indeed, the paper engages in a comparative analysis, by summarizing the possibility and limitations of transposing the strategy outlined here to other provinces.<sup>17</sup> Secondly, it outlines an argument as to why the State cannot meet the burden of proving these by-laws are justified in a free and democratic society, which could be adopted by plaintiffs in claims under the *Canadian Charter*.<sup>18</sup> In sum, while

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<sup>14</sup> *Canadian Charter of Rights and Freedoms*, s 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Canadian Charter*].

<sup>15</sup> See e.g. Colleen Sheppard, “‘Bread and Roses’: Economic Justice and Constitutional Rights” (2015) 5(1) *Oñati Socio-legal Series* 225 at 228 [Sheppard]; Jessica Eisen, “On Shaky Grounds: Poverty and Analogous Grounds under the Charter” (2013) 2 *CJ Poverty Law* 1 at 19 [Eisen]; Wayne MacKay & Natasha Kim, *Adding Social Condition to the Canadian Human Rights Act* (Halifax: Canadian Human Rights Commission, 2009), online: <<https://digitalcommons.schulichlaw.dal.ca/reports/19/>> [perma.cc/26UR-MVWY].

<sup>16</sup> *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*, 2000 SCC 27 at para 27 [CDPJ] *v City of Montreal*; See also “Overview of Human Rights Codes by Province and Territory in Canada” (2018) at 22, online (pdf): *Canadian Centre for Diversity and Inclusion* <[ccdi.ca/media/1414/20171102-publications-overview-of-hr-codes-by-province-final-en.pdf](http://ccdi.ca/media/1414/20171102-publications-overview-of-hr-codes-by-province-final-en.pdf)> [perma.cc/P2ZC-R6AQ]. The report explains that “Quebec is the only province that has a Charter of Rights and Freedoms that is not a simple anti-discriminatory statute, but rather a fundamental law that takes precedence over other laws and is only second to the Constitution of Canada.”

<sup>17</sup> Both under the *Canadian Charter* and provincial human rights statutes, plaintiffs have the burden of showing they are being subjected to discrimination. See e.g. *CDPJ v City of Montreal*, *supra* note 16 at para 65; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 81 [Law]; *Ont Human Rights Comm v Simpsons-Sears*, [1985] 2 SCR 536 at 558 [Simpson-Sears].

<sup>18</sup> The Quebec Court of Appeal recently reaffirmed that applying the *Quebec Charter* state justification provision follows the same structure as the *Oakes* test developed under the

we present a legal strategy guided by the *Quebec Charter*, the logic of the legal arguments drawn out here are intended to inspire claims across Canada.

Moreover, the strategy could be adapted to challenge similar public order and nuisance by-laws that have an adverse impact on people experiencing homelessness, such as those that prohibit loitering, sleeping on park benches, or being in parks overnight, for example, in Quebec or elsewhere in the country.

This paper contributes to legal scholarship and builds on the current state of the literature in two important ways. First, it centres an important yet understudied issue: ticketing for municipal by-laws infractions. Because tickets for drinking or being intoxicated in public do not carry the same stigma and legal consequences as convictions for criminal offences,<sup>19</sup> they have received less attention from advocates for criminal and penal law reform.<sup>20</sup> Nevertheless, tickets have drastic consequences on the lives and fundamental rights of unhoused people. In this paper, we seek to remedy this gap in legal scholarship and add to the work of scholars like Marie-Ève Sylvestre and Céline Bellot. Their research has produced important evidence of the impact of ticketing in the daily lives of unhoused people in Montreal, as well as literature on the role of judicialization in the maintenance of conditions of precarity and exclusion. This paper demonstrates how this important existing scholarship can be applied in practice. In that sense, we propose a proactive approach to the issue.

Second, the paper contributes to the current state of the literature by highlighting the usefulness of human rights legislation, which often sit in the shadow of the *Canadian Charter* even though they also attract a purposive and broad interpretation.<sup>21</sup> By drawing out the linkages between homelessness as a process of exclusion and the penal laws that exacerbate it, we explain why municipal by-laws that prohibit the consumption of alcohol in public spaces should be held inoperable. Our paper is situated at the intersection of the fields of law and poverty, penal law, and discrimination law.

Our goal is to develop a legal framework that can serve as a tool for practitioners to challenge the by-laws and those writing municipal policies to reform regulations

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*Canadian Charter* (*Association des cadres de la Société des casinos du Québec c Société des casinos du Québec*, 2022 QCCA 180 at para 177 [*Société des Casinos du Québec*]).

<sup>19</sup> *R v Sault Ste Marie*, [1978] 2 SCR 1299 at 1311.

<sup>20</sup> In the American context, it was said that municipal courts operate in the “intellectual sidelines” and are “largely ignored by judicial theorists.” See Alexandra Napatoff, “Criminal Municipal Courts” (2021) 134 *Harv L Rev* 964 at 965.

<sup>21</sup> See *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at paras 31, 103.



that adversely impact people experiencing homelessness. Going beyond theoretical reflection, we hope this paper can be taken up as a call to action to address the discriminatory effects that certain municipal by-laws have on some of the most marginalized community members in our cities: people who are unhoused, precariously housed, or living in poverty. The intersectional dimensions of the inequalities faced by people experiencing homelessness in Montreal make it that much more urgent to address. Indeed, a significant proportion of unhoused people are Indigenous, queer, and/or live with mental health issues or use substances and face a greater risk of discrimination and violence.<sup>22</sup>

This issue is especially salient given the rising level of homelessness and the expansion of encampments in Montreal during the COVID-19 pandemic.<sup>23</sup> As seen in cities across the country, “COVID-19 exacerbated both the housing crisis and pressures on overburdened shelters.”<sup>24</sup> The pandemic, in conjunction with a worsening housing crisis, rendered the crisis of homelessness more visible in public spaces.<sup>25</sup> Marie-Claude Landry, the Chief Commissioner of the Canadian Human Rights Commission, declared that “with the closure of public spaces, the reduction of services, and outbreaks in shelters, more people than ever before [found] themselves

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<sup>22</sup> For a recent demographic account of Canadians who have experienced homeless, see Sharanjit Uppal, “A portrait of Canadians who have been homeless” (14 March 2022), online: *Statistics Canada* <[www150.statcan.gc.ca/n1/pub/75-006-x/2022001/article/00002-eng.htm](http://www150.statcan.gc.ca/n1/pub/75-006-x/2022001/article/00002-eng.htm)> [perma.cc/ES6Q-VCB9].

<sup>23</sup> See e.g. Matt Gilmour, “Number of homeless Montrealers doubled in pandemic; Plante floats new approach on campaign trail”, *CTV News Montreal* (11 October 2021) online: <[montreal.ctvnews.ca/number-of-homeless-montrealers-doubled-in-pandemic-plante-floats-new-approach-on-campaign-trail-1.5619434](http://montreal.ctvnews.ca/number-of-homeless-montrealers-doubled-in-pandemic-plante-floats-new-approach-on-campaign-trail-1.5619434)> [perma.cc/882Z-LSYC]; See also Lindsay Richardson, “Homeless in Montreal fighting COVID-19, freezing temperatures and police”, *APTN National News* (22 January 2022) online: <[www.aptnnews.ca/national-news/homeless-in-montreal-fighting-covid-19-freezing-temperatures-and-police/](http://www.aptnnews.ca/national-news/homeless-in-montreal-fighting-covid-19-freezing-temperatures-and-police/)> [perma.cc/A3HQ-2ABH]. See also Jonathan Montpetit & Benjamin Shingler, “Quebec budget neglects housing crisis once again, with homelessness on the rise”, *CBC News* (29 March 2021) online: <[www.cbc.ca/news/canada/montreal/social-housing-crisis-quebec-budget-2021-1.5967589](http://www.cbc.ca/news/canada/montreal/social-housing-crisis-quebec-budget-2021-1.5967589)> [perma.cc/N3VW-QZND].

<sup>24</sup> Delaney McCartan et al, “Trespassing on the Right to Housing: A human rights analysis of the City of Toronto’s response to encampments during COVID-19” (2021) at 2, online (pdf): *Environmental Justice and Sustainability Clinic, Osgoode Hall Law School* <[ejclinic.info.yorku.ca/files/2021/12/trespassing-on-the-right-to-housing-city-of-toronto-report-20-december-2021.pdf](http://ejclinic.info.yorku.ca/files/2021/12/trespassing-on-the-right-to-housing-city-of-toronto-report-20-december-2021.pdf)> [perma.cc/MR26-AKG3] [McCartan].

<sup>25</sup> See Alison Smith, *Multiple Barriers: The Multilevel Governance of Homelessness in Canada* (Toronto: University of Toronto Press, 2022) at 4 [Smith].

living in tents and makeshift shelters.”<sup>26</sup> In the context of homelessness experienced by Indigenous people, Nadine Mailloux, the ombudsperson for Montreal, described it as “a humanitarian crisis at the very heart of our city.”<sup>27</sup>

This paper unfolds in three sections. The first section provides an overview of the regulation of public spaces in Montreal. In the second section, we present a legal strategy to dismantle the discriminatory by-laws and thereby constrain the State’s capacity to unjustly punish and displace people experiencing homelessness. This strategy aims to safeguard unhoused community members’ rights to equality, dignity, and security, as guaranteed in the *Quebec Charter*. Finally, in the last section, we discuss the strengths and limitations of the strategy and how it could be adapted to other jurisdictions across the country to strengthen the right to equality based on social condition.

## I. THEORETICAL FRAMEWORK: HOMELESSNESS AND TICKETING IN MONTREAL

### 1. The Quebec Definition of Homelessness: A Process of Social Exclusion

There exist a range of experiences of homelessness and varying definitions of it. The Quebec government broadly defines homelessness as:

A process of social disaffiliation and a situation of social exclusion characterized by a person’s difficulty in having a stable, safe, adequate and healthy home due to a lack of housing or his or her inability to maintain one and, at the same time, in maintaining functional, safe and stable relationships in the community. Homelessness is explained by a

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<sup>26</sup> Marie-Claude Landry, “Statement – Canada must uphold the rights of persons experiencing homelessness” (2 March 2021), online: Canadian Human Rights Commission <[www.chrc-ccdp.gc.ca/en/resources/statement-canada-must-uphold-the-rights-persons-experiencing-homelessness](http://www.chrc-ccdp.gc.ca/en/resources/statement-canada-must-uphold-the-rights-persons-experiencing-homelessness)> [perma.cc/GTT5-QMC3].

<sup>27</sup> Nadine Mailloux, “Don’t Look the Other Way: Homelessness among Indigenous and Inuit Persons Milton-Parc Area in Montréal” (2022) at 1, online (pdf): *Ombudsman de Montréal* <[https://ombudsmandemontreal.com/wp-content/uploads/2022/05/Investigation-Report-and-Recommendations\\_Dont-look-the-other-way.pdf](https://ombudsmandemontreal.com/wp-content/uploads/2022/05/Investigation-Report-and-Recommendations_Dont-look-the-other-way.pdf)> [perma.cc/L5N3-RQ2J] [Mailloux].

combination of social and individual factors that constitute the [person's] life experience.<sup>28</sup>

Quebec adopted a definition of homelessness that goes beyond the absence of shelter or housing, stressing that social exclusion is also a contributing factor.<sup>29</sup> For the purposes of the legal strategy outlined below, the situation of social exclusion central to Quebec's definition is important.

Homelessness can be visible and hidden, as well as chronic, cyclical, and situational.<sup>30</sup> The Canadian Observatory on Homelessness presents a typology that describes varying situations and experiences of homelessness: (1) unsheltered (for instance people who live on the streets); (2) emergency sheltered (e.g. those who rely on overnight shelters or shelters for people impacted by violence); (3) provisionally accommodated (such as people who don't have secure tenure and stay with friends, live in transitional housing, or institutional care); and (4) at risk of homelessness (those who are vulnerably or precariously housed).<sup>31</sup> At the legal information clinic, we worked with people from all four categories, and people may move cyclically through them.<sup>32</sup>

Alison Smith writes that "the causes of homelessness are complex and can be traced to the actions and inactions of various levels of government and sectors of society."<sup>33</sup> Indeed, structural and systemic factors, as well as colonialism, combine to

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<sup>28</sup> La Direction des communications du ministère de la Santé et des Services sociaux, "Ensemble pour éviter la rue et en sortir: Politique nationale pour la lutte à l'itinérance" (2014) at 30, online (pdf): *Gouvernement du Québec* <publications.msss.gouv.qc.ca/msss/fichiers/2013/13-846-03F.pdf> [perma.cc/4GZY-549K] ["Politique nationale pour la lutte à l'itinérance"]. The English translation can be found on the Government of Quebec's website: <www.quebec.ca/en/family-and-support-for-individuals/homelessness/about> [perma.cc/3MNT-6Z3H].

<sup>29</sup> See Smith, *supra* note 25 at 232.

<sup>30</sup> See Politique nationale pour la lutte à l'itinérance, *supra* note 28.

<sup>31</sup> See Stephen Gaetz et al, "Canadian Definition of Homelessness" (2012) at 2, online (pdf): *Canadian Observatory on Homelessness* <www.homelesshub.ca/sites/default/files/COHhomelesdefinition.pdf> [perma.cc/YBQ2-64JW].

<sup>32</sup> Marie-Ève Sylvestre & Céline Bellot, "Challenging Discriminatory and Punitive Responses to Homelessness in Canada" in Martha Jackman and Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) at 160 [Sylvestre & Bellot, "Challenging Discriminatory Responses to Homelessness"]. See also Kharoll-Ann Souffrant, "Homeless People Also Have a Right to the City" (30 March 2021), online: *Ricochet Media* <https://ricochet.media/en/3573/homeless-people-also-have-a-right-to-the-city> [perma.cc/DXZ3-AJGA].

<sup>33</sup> See Smith, *supra* note 25 at 15.

influence homelessness outcomes. Although individual-level factors can interact with larger structural and systemic barriers to housing, the causes of homelessness are rooted within broader systems and extend beyond individuals.<sup>34</sup>

To better reflect the experiences and causes of homelessness for First Nations people, Métis, and Inuit, Jesse Thistle, a Métis-Cree scholar with lived experience of homelessness, proposes an Indigenous definition of homelessness, one developed in partnership with Elders, people with lived experience, and Indigenous service providers:

Indigenous homelessness... is best understood as the outcome of historically constructed and ongoing settler colonization and racism that have displaced and dispossessed First Nations, Métis and Inuit Peoples from their traditional governance systems and laws, territories, histories, worldviews, ancestors and stories.<sup>35</sup>

Thistle's proposition recognizes that Indigenous homelessness is an outcome of historical and ongoing colonization and systemic racism.<sup>36</sup> Notably, this definition of homelessness purposefully excludes individual-level factors, such as those that focus on individual attributes.<sup>37</sup> In contrast, notions of personal responsibility are still central to Quebec's definition. Thistle, however, writes that:

Indigenous worldviews conceptualize home more deeply as a web of relationships and responsibilities involving connection to human kinship networks; relationships with animals, plants, spirits and elements; relationships with the Earth, lands, waters and territories; and connection to traditional stories, songs, teachings, names and ancestors.<sup>38</sup>

Within this broader understanding, Thistle's definition of Indigenous homelessness also captures a separation and disconnection from relations that extends beyond the built environment.

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<sup>34</sup> *Ibid* at 269.

<sup>35</sup> Jesse Thistle, *Indigenous Definition of Homelessness in Canada* (Toronto: Canadian Observatory on Homelessness Press, 2017) at 6.

<sup>36</sup> *Ibid* at 6.

<sup>37</sup> *Ibid* at 17.

<sup>38</sup> *Ibid* at 14.

## 2. Regulating Public Spaces: Public Order and the Regulation of “Uncivil Behaviour”

Municipalities are creatures of statute, and their powers are delegated by the provincial government.<sup>39</sup> Indeed, cities “rely on provincial legislatures to enable their capacity to define their mandate.”<sup>40</sup> As a result, municipalities are limited in their regulation of private law relations and are excluded from federal competencies of criminal law-making. However, they maintain control over the use of private and public property in their territory, for example, under the *Municipal Powers Act*, the City of Montreal can enact by-laws that govern public safety and regulate activities in public spaces.<sup>41</sup> While municipalities are granted the power to enact by-laws that are “genuinely aimed at furthering goals such as public health and safety,” the enabling provisions “do not confer an unlimited power.”<sup>42</sup> Using this regulatory power, Montreal enacted by-laws governing *Noise*,<sup>43</sup> *Cleanliness and Protection of Public Property and Street Furniture*,<sup>44</sup> *Parks*,<sup>45</sup> and *Peace and Order on Public Property*,<sup>46</sup> among others. These by-laws prohibit a long list of behaviours, such as loitering, being in a park overnight, and misusing public street furniture.

Many public nuisance by-laws prioritize the *perception* of order at the expense of the equality rights of unhoused people who may come to rely on public spaces.<sup>47</sup>

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<sup>39</sup> Section 92 of the *Constitution Act, 1867* sets out the scope of the provinces’ legislative authority: “In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein after enumerated; that is to say, ... (8) Municipal Institutions in the Province, (9) Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes”, *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*]. The Supreme Court of Canada clarified that cities are “creatures of provincial legislatures” and “exercise such powers as are granted to them by legislatures,” in *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40 at para 49 [*Spraytech Société d’arrosage*].

<sup>40</sup> Alan Broadbent & Elizabeth McIsaac, “Recommendations on strengthening the capacity of local governments to be effective in delivering on the obligations of the ICESCR” (2016) at 3, online (pdf): [Maytree <maytree.com/wp-content/uploads/Maytree\\_Submission\\_Geneva-1.pdf>](http://maytree.com/wp-content/uploads/Maytree_Submission_Geneva-1.pdf) [perma.cc/9VE9-HFMV].

<sup>41</sup> *Municipal Powers Act*, CQLR c C-47.1, ss 4(6)–(7) [MPA]; Emily van der Meulen & Mariana Valverde, “Beyond the Criminal Code: municipal licensing and zoning bylaws”, in Emily Van der Meulen et al, eds, *Selling sex: experience, advocacy, and research in Canada* (Vancouver, University of British Columbia Press, 2013) at 315.

<sup>42</sup> *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40 at para 20.

<sup>43</sup> *Règlement sur le bruit*, RRVM c B-3 (*By-law concerning Noise*).

<sup>44</sup> c P-12.2, *supra* note 2.

<sup>45</sup> c P-3, *supra* note 6.

<sup>46</sup> c P-1, *supra* note 2.

<sup>47</sup> See Douglas, *supra* note 11 at 54.

Municipal regulations often “intend to regulate ‘uncivil behaviour’ [...] in public spaces.”<sup>48</sup> This includes by-laws and regulations that prohibit drinking in public, described by some advocates as “quality of life” laws because they tend to “prohibit activities that would be non-criminal were they to occur on private property or within one’s home, [and] those experiencing homelessness are disproportionately impacted.”<sup>49</sup> Such policies attempt to “sanitize public spaces” through what Mariana Valverde calls spatial regulation and leave untouched the structural causes of homelessness.<sup>50</sup> Without access to adequate housing, many people who experience street homelessness rely on public spaces, such as parks, metro stations, and sidewalks.<sup>51</sup> In other words, they must live private lives in public spaces. However, in a social environment where by-laws govern public spaces, certain behaviours are penalized and over-policed in the context of homelessness.<sup>52</sup> This judicialization contributes to the marginalization and social exclusion of people in that situation.

Bill O’Grady et al describe the criminalization of homelessness as “the use of laws and practices to restrict the activities and movement of people who are homeless, often with the outcome being fines and/or incarceration.”<sup>53</sup> People experiencing homelessness are subjected to State control in ways that most people living in urban areas are not. Many unhoused community members describe situating themselves in

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<sup>48</sup> Chris Herring & Dilara Yarbrough “Punishing the Poorest: How the Criminalization of Homelessness Perpetuates Poverty in San Francisco” (18 June 2015) at 6, online (pdf): *Coalition on Homelessness San Francisco* <[www.cohsf.org/Punishing.pdf](http://www.cohsf.org/Punishing.pdf)> [perma.cc/Q2RX-WSVU].

<sup>49</sup> *Ibid.*

<sup>50</sup> See Mariana Valverde, “Beyond the Social Control of Space: Towards a Multidimensional Approach to Local Security Networks” in Ben Bradford et al, eds, *The SAGE Handbook of Global Policing* (London: SAGE Publications, 2016) 46 at 46 [Valverde]. See also Catherine Chesney, Marie-Eve Sylvestre & Céline Bellot, “Taming Disorderly People One Ticket at a Time: The Penalization of Homelessness in Ontario and British Columbia” (2013) 55:2 *Can J Corr* 161 at 164.

<sup>51</sup> Véronique Fortin, “The Control of Public Spaces in Montreal in Times of Managerial Justice” (2018) 15 *Champ pénal/ Penal field* at 4 [Fortin].

<sup>52</sup> See “Quebec Human Rights Commission 2009 Report on the Judicialization of Homelessness”, *supra* note 5. As Nicholas Blomley writes, “the sidewalk may be a public space [...] but it is not one that is fully open to all.” See Nicholas Blomley, “Begging to Differ: Panhandling, Public Space, and Municipal Property” in Eric Tucker, Bruze Ziff & James Muir, eds, *Property on Trial* (Toronto: Irwin Law, 2012) at 416.

<sup>53</sup> Bill O’Grady, Stephen Gaetz & Kristy Buccieri, “Can I See Your ID? The Policing of Youth Homelessness in Toronto” (2011) at 11, online (pdf): *The Homeless Hub* <[yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/29377/CanISeeYourID\\_nov9.pdf](http://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/29377/CanISeeYourID_nov9.pdf)> [perma.cc/Z36G-MUH7].

public spaces to increase their sense of security and to build a community.<sup>54</sup> This survival tactic, however, exposes them to elevated police surveillance, ticketing, and discriminatory treatment.<sup>55</sup> They are simultaneously dependent on public spaces and “vulnerable to discriminatory treatment in them.”<sup>56</sup>

The Service de Police de la Ville de Montréal (“SPVM”) is empowered to ticket individuals who violate City by-laws. A 2009 report by the Quebec Human Rights Commission found that the practice of ticketing people, including individuals experiencing homelessness, increased significantly since the introduction of public disorder and nuisance by-laws.<sup>57</sup> In the decade between 1994 and 2004, for example, the number of tickets issued to unhoused Montrealers went up by 327 percent, with the largest annual increase recorded in 1998, the year after the SPVM introduced its neighbourhood policing strategy.<sup>58</sup> In 2009, the SPVM established a brigade that patrols public spaces in the city, primarily in the summer months, known as the Brigade des espaces publics (“BEP”).<sup>59</sup> The BEP hands out a vast number of tickets to unhoused Montrealers in public spaces. In 2016, for example, they handed out 13.5 percent of all statements of offences, while constituting only .5 percent of members of the police force.<sup>60</sup> Since 1994, when researchers like Bellot and Sylvestre began compiling these statistics, the number of tickets issued to people experiencing homelessness increased eightfold by 2018.<sup>61</sup>

Most tickets are issued for by-law infractions for “minor breaches of public order considered to be ‘uncivil behaviour’ by the SPVM, [such as] drinking alcohol or being

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<sup>54</sup> See Sylvestre & Bellot, “Challenging Discriminatory Responses to Homelessness”, *supra* note 32 at 169, 180; See Part II.4.i.a. Element One: Distinction, Exclusion, or Preference.

<sup>55</sup> *Ibid* at 169.

<sup>56</sup> *Ibid* at 167.

<sup>57</sup> See “Quebec Human Rights Commission 2009 Report on the Judicialization of Homelessness”, *supra* note 5 at 33.

<sup>58</sup> *Ibid* at 2, 33.

<sup>59</sup> “Brigade des espaces publics”, online: *Service de police de la ville de Montréal* <[spvm.qc.ca/en/Pages/Discover-SPVM/Who-does-what/Brigade-des-espaces-publics](http://spvm.qc.ca/en/Pages/Discover-SPVM/Who-does-what/Brigade-des-espaces-publics)> [perma.cc/8ZT8-JQBR].

<sup>60</sup> See “Observatoire des profilages 2021 Report on the Judicialization of Homelessness”, *supra* note 4 at 19.

<sup>61</sup> *Ibid* at 14. The increase in ticketing and by-laws targeting homelessness is not a uniquely Canadian problem. The National Coalition for the Homeless and National Law Center on Homelessness and Poverty surveyed 67 American cities and found an increase of 14 percent in the number of laws prohibiting sitting or lying in designated public places between 2001 and 2006: Nicholas Blomley, “Homelessness, Rights, and the Delusions of Property” (2009) 30:6 *Urban Geography* 577 at 583 [Blomley, “Delusions of Property”].

drunk in public.”<sup>62</sup> Indeed, unhoused people are most commonly ticketed for infractions related to the consumption of alcohol in public spaces, public intoxication, and loitering.<sup>63</sup> In a sample of 655 tickets issued to 113 people experiencing homelessness in 2018 for municipal by-law infractions compiled by the legal clinic *Clinique Droits Devant*, over 16 percent of *all* the tickets were issued for consuming alcohol or being intoxicated in public.<sup>64</sup> More specifically, research conducted by the Observatoire des profilages revealed that 82.8 percent of the tickets handed out pursuant to Montreal’s *By-law concerning Peace and Order on Public Property* between 2012–2019 were issued for drinking in public and/or public intoxication.<sup>65</sup> Their research reveals that the “judicialization of homelessness is essentially due to the repression of substance and alcohol uses,” cycling unhoused people into the legal system.<sup>66</sup>

## II. LEGAL STRATEGY

### 1. Constitutional Exclusion: Limitations of the *Canadian Charter*

Section 15(1) of the *Canadian Charter* lists protected grounds of discrimination within the equality rights provision.<sup>67</sup> It reads:

(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.

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<sup>62</sup> See “Quebec Human Rights Commission 2009 Report on the Judicialization of Homelessness”, *supra* note 5 at 2; Commission des droits de la personne et des droits de la jeunesse, “The Judicialization of the Homeless in Montréal: A Case of Social Profiling. Executive Summary of the Opinion of the Commission” (6 November 2009) at 2 [“Executive Summary of the 2009 Report on the Judicialization of Homelessness”].

<sup>63</sup> See “Observatoire des profilages 2021 Report on the Judicialization of Homelessness”, *supra* note 4 at 23.

<sup>64</sup> Nadia Lemieux & Laury Bacro, “Nouvelles réalités, autant d’enjeux pour le respect des droits 5e portrait de la situation dans l’espace public montréalais” (2020) at 20, online (pdf): Réseau d’aide aux personnes seules et itinérantes de Montréal (RAPSIM) <[rapsim.org/wp-content/uploads/2020/12/RAPSIM-5eme-portrait-v3.pdf](http://rapsim.org/wp-content/uploads/2020/12/RAPSIM-5eme-portrait-v3.pdf)> [perma.cc/47W2-55AR] [Lemieux & Bacro].

<sup>65</sup> See “Observatoire des profilages 2021 Report on the Judicialization of Homelessness”, *supra* note 4 at 23.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Canadian Charter*, *supra* note 14, s 15.



Social condition, such as poverty or homelessness more specifically, are not explicitly listed as protected grounds within the scope of Section 15. Canadian jurisprudence has expanded the scope of protected grounds by recognizing grounds that are analogous, and similar in characteristic, to those enumerated in the provision.<sup>68</sup> Despite this possibility, there is “judicial resistance” toward recognizing poverty or homelessness as analogous grounds of discrimination under Section 15 of the *Canadian Charter*.<sup>69</sup> As Colleen Sheppard notes, courts have proven reluctant to “enter into the domain of socio-economic rights and remedies.”<sup>70</sup> The question of whether poverty or homelessness are analogous grounds under Section 15 remains unanswered by the Supreme Court, which has “left the door open to advancing substantive social rights claims under Section 15.”<sup>71</sup> Yet, a lack of clear direction from Canada’s highest Court has meant that lower courts often rule against recognizing poverty<sup>72</sup> or homelessness<sup>73</sup> as analogous grounds.

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<sup>68</sup> *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*] outlines the test for recognizing an analogous ground within the meaning of Section 15. At the time of this paper’s writing, the Supreme Court of Canada had only affirmed four analogous grounds: Non-citizenship (*Andrews v Law Society of British Columbia*, [1989] 1 SCR 143); sexual orientation (*Egan v Canada*, [1995] 2 SCR 513); non-marital status (*Miron v Trudel*, [1995] 2 SCR 418); and “Aboriginality-residence,” relating to whether First Nations people live off-reserve (*Corbiere*).

<sup>69</sup> See Sheppard, *supra* note 15 at 228; Eisen, *supra* note 15 at 19; Sylvestre & Bellot, “Challenging Discriminatory Responses to Homelessness”, *supra* note 32 at 157–158

<sup>70</sup> Sheppard, *supra* note 15 at 237.

<sup>71</sup> Martha Jackman & Bruce Porter, “Rights Based Strategies to Address Homelessness and Poverty in Canada: The Charter Framework” in Martha Jackman and Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) at 82 [Jackman & Porter].

<sup>72</sup> See e.g. *R v Banks*, (2007) ONCA 19 at paras 101, 104; See also *Federated Anti-Poverty Groups of BC v Vancouver (City)*, (2002) BCSC 105; *Affordable Energy Coalition (Re)*, 2008 NSUAR 11 at 181; *Boulter v Nova Scotia Power Incorporated*, (2009) NSCA 17.

<sup>73</sup> See *Abbotsford (City) v Shantz*, (2015) BCSC 1909 at para 231 [*Shantz*]. See also *Tanudjaja v Attorney General (Canada)*, (2013) ONSC 1878 [*Tanudjaja* ONSC], confirmed in *Tanudjaja v Attorney General (Canada)*, 2014 ONCA 872. In this case, the applicants brought a motion against the federal and provincial governments for making decisions and implementing changes to programs that eroded access to affordable housing, therefore infringing their Section 7 and 15 *Charter* rights. The Court of Appeal maintained the trial court’s decision to strike the application because it was not justiciable, on the basis it raised political rather than legal issues. The Court of Appeal maintained the trial judge’s finding that “the free-standing claim that homelessness might disproportionately affect persons such as ‘women, single mothers, persons with mental and physical disabilities, aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance’ did not engage s 15 of the Charter, in the absence of discriminatory laws, or discriminatory application of those laws” at para 17.

Bruce Ryder and Taufiq Hashmani point out that the Supreme Court repeatedly denies leave for cases that raise “the issue of whether poverty or receipt of social assistance is an analogous ground of discrimination.”<sup>74</sup> Indeed, leave was denied by the Supreme Court in *Boulter, Banks*, and, most recently, *Tanudjaja*, for example.<sup>75</sup> When it comes to poverty-related cases, claimants often struggle to get their day in court.<sup>76</sup> Consequently, forty years after the enactment of the *Canadian Charter*, claimants “still have no authoritative ruling from the top court on whether the poor can benefit from *Charter* equality rights.”<sup>77</sup>

Martha Jackman points out that complainants in poverty-related cases have had to “combat negative stereotypes and judicial preconceptions about homelessness.”<sup>78</sup> As a result, Jackman observes that poor and unhoused plaintiffs experience a form of “constitutional exclusion.”<sup>79</sup> Jackman and Bruce Porter argue that “[i]n view of the stigma and marginalization which poor people and the homeless experience, individually and as a group [...] judicial recognition of the social condition of poverty and homelessness as prohibited grounds of discrimination under section 15 is long overdue.”<sup>80</sup>

Although social condition is not a recognized analogous ground under Section 15, the prohibited grounds of race, sex and even disability may provide a possible basis for a discrimination claim pursuant to the *Canadian Charter* given the intersectional dimension of homelessness. Despite this possibility, even when there are claims based on enumerated grounds, “courts have been reluctant to recognize

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<sup>74</sup> Bruce Ryder & Taufiq Hashmani, “Managing Charter Equality Rights: The Supreme Court of Canada’s Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010” (2010) 51 SCLR (2d) 505 at 527 [Ryder & Hashmani].

<sup>75</sup> *Boulter v Nova Scotia Power Incorporated*, 2009 NSCA 17, application for leave denied in *Denise Boulter v Nova Scotia Power Incorporated and Attorney General of Nova Scotia*; *Yvonne Carvery, Wayne MacNaughton and Affordable Energy Coalition v Nova Scotia Power Incorporated and Attorney General of Nova Scotia*, 2009 CanLII 47476 (SCC); *R v Banks*, 2007 ONCA 19, application for leave denied in *David Banks, Casey James Brydges, Michael Naugle, Paul Batuszkień, James Beach, Robert Evans, Derek Leonard, Shawn Moran, Jeffrey Stevenson, David Barrington and Jesse Collins v Her Majesty the Queen*, 2007 CanLII 37182 (SCC); *Tanudjaja v Attorney General (Canada)*, 2014 ONCA 852, application for leave denied in *Jennifer Tanudjaja et al v Attorney General of Canada et al*, 2015 CanLII 36780 (SCC).

<sup>76</sup> Sheppard, *supra* note 15 at 237.

<sup>77</sup> See Ryder & Hashmani, *supra* note 74 at 527.

<sup>78</sup> Martha Jackman, “One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin” (2019) 39 NJCL 85 at 113.

<sup>79</sup> *Ibid* at 118.

<sup>80</sup> See Jackman & Porter, *supra* note 71 at 91.

discrimination when the claim is broadly linked to incidents of poverty, such as homelessness.”<sup>81</sup>

To circumvent some of these constitutional obstacles and increase the chances of successfully challenging the validity of discriminatory by-laws in Montreal, we propose a strategy that draws on provincial, quasi-constitutional human rights legislation that explicitly recognizes social condition as a protected ground, the *Quebec Charter's* equality provision.

## 2. Quasi-constitutional Inclusion: Introducing the *Quebec Charter*

The strategy explores the scope of Section 10 of the *Quebec Charter*. The quasi-constitutional legal instrument applies to “matters that come under the legislative authority of Québec.”<sup>82</sup> Quebec statutes cannot derogate from Sections 1 through 38 unless an act “expressly states that it applies despite the *Charter*.”<sup>83</sup> Municipal by-laws must comply with the rights and freedoms protected under the *Quebec Charter*.

Unlike the *Canadian Charter*, Section 10 of the *Quebec Charter* clearly protects against discrimination based on social condition, which is included in a broader set of protected grounds. It reads as such:

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, *social condition*, a handicap or the use of any means to palliate a handicap. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right. [emphasis added]

Section 10 jurisprudence clarifies that social condition is to be interpreted in a broad and liberal manner and is not limited to a person’s income.<sup>84</sup> This protected ground encompasses the conception of a person’s place or position in society by

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<sup>81</sup> Sheppard, *supra* note 15 at 236. See also *Tanudjaja v Attorney General (Canada)*, (Application), 2013 ONSC 5410 at para 134. There, the court writes: “Homelessness is not a term that, in the context of this case, can be understood. Without an understanding of the common characteristics which defines the group, it cannot be established as an analogous ground under s 15(1) of the Charter. Poverty or economic status, which is seemingly the only common characteristic, is not an analogous ground.”

<sup>82</sup> *Quebec Charter*, *supra* note 10, ss 54–55.

<sup>83</sup> *Ibid*, s 52.

<sup>84</sup> See *Modes Coboes Inc c Québec (Procureur général)*, [1993] RJQ 2801.

virtue of such things as: their origins, income, level of education, occupation, and the public perceptions influenced by such factors.<sup>85</sup>

The Quebec Human Rights Tribunal recognized both subjective and objective elements to this protected ground:

The definition of “social condition” contains an objective component. A person’s standing in society is often determined by his or her occupation, income or education level, or family background. It also has a subjective component, associated with the perceptions that are drawn from these various objective points of reference. A plaintiff need not prove that all of these factors influenced the decision to exclude. It will, however, be necessary to show that as a result of one or more of these factors, the plaintiff can be regarded as part of a socially identifiable group and that it is in this context that the discrimination occurred.<sup>86</sup>

The jurisprudence reveals that social condition can refer to a temporary and transitory state.<sup>87</sup> This is crucial for cases involving homelessness, a phenomenon that anti-poverty advocates describe as situational, cyclical, or chronic.<sup>88</sup>

The tactical advantage of turning to the equality provision in the *Quebec Charter*, rather than the *Canadian Charter*, is the former’s appreciation for economic rights. Social condition, which includes poverty, is an enumerated ground, and does not require any additional arguments or evidence to establish an analogous ground. The *Quebec Charter* also does not necessarily require evidence of a disadvantage arising from prejudice as does the *Canadian Charter*,<sup>89</sup> which can relieve some of the evidentiary burden on plaintiffs.

We believe the strategy outlined here, rooted in the Quebec human rights framework, could be persuasive in the interpretation of other equality provisions in

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<sup>85</sup> *Commission des droits de la personne (Larente) c Gauthier*, [1994] RJQ 253 at 10.

<sup>86</sup> *Québec (Comm des droits de la personne) v Gauthier*, [1993], 19 CHRR D/312 [English summary] cited in “Social condition: An option for human rights commissions” at 37, online (pdf): *Ontario Human Rights Commission*

<[www3.ohrc.on.ca/sites/default/files/attachments/Human\\_rights\\_commissions\\_and\\_economic\\_and\\_social\\_rights.pdf](http://www3.ohrc.on.ca/sites/default/files/attachments/Human_rights_commissions_and_economic_and_social_rights.pdf)> [perma.cc/FK8T-Q3BD].

<sup>87</sup> *Ibid.*

<sup>88</sup> Lemieux & Bacro, *supra* note 64 at 5. We note that the notion that homelessness is not “immutable” or “constructively immutable” is the most significant obstacle to a successful claim establishing homelessness as an analogous ground under s 15(1). See e.g. *Tanudjaja* ONSC, *supra* note 73 at paras 123–131.

<sup>89</sup> *Aluminerie de Bécancour inc c Commission des droits de la personne et des droits de la jeunesse (Beaudry et autres)*, 2021 QCCA 989 at paras 33, 44 [*Aluminerie de Bécancour inc.*].

provincial human rights statutes and Section 15 of the *Canadian Charter*. Indeed, successful claims under Section 10 of the *Quebec Charter* affirming that people experiencing homelessness are a protected, equity-seeking group may be persuasive to one day expand Canadian courts' analysis of constructive immutability within the interpretation of analogous grounds in Subsection 15(1). By building provincial case law, this strategy may contribute to an interpretation by the courts of the *Canadian Charter* and human rights statutes that is inclusive of economic and social rights in the future. Although speaking in the context of international human rights commitments, the Supreme Court affirmed in *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia* that "the [*Canadian*] Charter, as a living document, grows with society and speaks to the current situations and needs of Canadians."<sup>90</sup> Therefore, a consensus that homelessness is a protected ground within an equality rights framework in Quebec may eventually provide "a persuasive source for interpreting the scope of the [*Canadian*] Charter."<sup>91</sup>

The recognition of homelessness as an analogous ground under Subsection 15(1) would serve to remedy the constitutional exclusion this group has experienced since the *Canadian Charter's* enactment and extend protection from discrimination of this marginalized population. Indeed, this would support the purpose of Section 15 of the *Canadian Charter*, that is, to "prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice."<sup>92</sup>

### 3. Analytical Framework under Section 10 of the *Quebec Charter*

The analysis under Section 10 involves a two-part test. First, the plaintiff must establish the existence of *prima facie* discrimination. If successful, the onus then shifts to the defendant to justify their conduct.<sup>93</sup>

To establish *prima facie* discrimination in step one, the plaintiff must prove three elements: "(1) a distinction, exclusion or preference, (2) based on one of the grounds listed in the first paragraph of Section 10, and (3) which has the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or

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<sup>90</sup> *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 78 [*Facilities Subsector Bargaining Assn*].

<sup>91</sup> *Ibid.*

<sup>92</sup> *Law*, *supra* note 17 at para 51.

<sup>93</sup> *Commission des droits de la personne et des droits de la jeunesse v Bombardier*, 2015 SCC 39 at para 37 [*Bombardier*].

freedom,” outlined in the *Quebec Charter*.<sup>94</sup> *Prima facie* discrimination exists if the plaintiff establishes these three elements.

To establish a distinction, exclusion, or preference—the first element of the *prima facie* step—the plaintiff must prove that the challenged provision “affects [them] differently from others to whom it may apply.”<sup>95</sup> This can include “penalties, obligations, or restrictive conditions that are not imposed on others.”<sup>96</sup>

For the second element, the plaintiff must establish that a prohibited ground of discrimination “was a *factor* in the distinction, exclusion or preference.”<sup>97</sup> The prohibited ground merely needs to contribute in some way and the connection between the distinction and the prohibited ground need not be exclusive.

Finally, under the third element of step one, “the plaintiff must show that the distinction, exclusion, or preference affects the full and equal exercise of a right or freedom guaranteed to [them] by the [*Quebec*] *Charter*.”<sup>98</sup>

This third element is critical: unlike the *Canadian Charter*, equality *per se* is not protected under the *Quebec Charter*. Rather, the right to equality is only protected as it relates to “the exercise of the other rights and freedoms guaranteed by the [*Quebec*] *Charter*.”<sup>99</sup> This means that the right not to be discriminated against on its own is insufficient to ground an application; discrimination “must necessarily be attached to another human right or freedom recognized by law.”<sup>100</sup>

The onus then shifts to the defendant at the second step of the analysis, where they can “justify [their] decision or conduct on the basis of the exemptions provided for in the applicable human rights legislation or those developed by the courts.”<sup>101</sup> If the defendant cannot establish this, then the discrimination claim will succeed.

Courts, including those in Quebec, have clarified that the impact, rather than the intent, of a law is most relevant when assessing its discriminatory aspect. It is not necessary for rights-claimants to prove *intention* to discriminate, the focus is instead

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<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid* at para 42.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid* at para 52.

<sup>98</sup> *Ibid* at para 53.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid* at para 54.

<sup>101</sup> *Ibid* at para 37. The exemptions include ss 9.1, 14, 19, 20, 20.1 of the *Quebec Charter*.

on the adverse *effects* of the discriminatory conduct or provision.<sup>102</sup> The overall analysis is contextual, and the “[t]ribunal must take judicial notice of and bear in mind the history of discrimination that certain disadvantaged groups in Canadian society have suffered.”<sup>103</sup>

#### **4. Application to By-law P-1: Neutrality in Appearance, Discrimination in Effect**

Sections 2 and 3 of the *By-law concerning Peace and Order on Public Property* prohibit drinking in public and public intoxication. They read as follows:

2. Any person found lying or loitering drunk on a public thoroughfare or place, or any other place in the city, contravenes this by-law.
3. No liquor may be consumed on public property unless it is:
  - (1) in outdoor cafés set up on public property where the sale of liquor is authorized by law;
  - (2) at meals in the open air in a park section where picnic tables have been set up by the city;
  - (3) in certain circumstances or at events, celebrations or demonstrations, in accordance with an authorization given by ordinance.

The strategy we outline seeks a declaration of invalidity of these provisions by the Superior Court of Quebec, although claimants can also approach the Quebec Human Rights Commission, an administrative body that was created under the *Quebec Charter* to receive complaints from people who experience discrimination.<sup>104</sup> The Commission then investigates the complaints and can refer cases to the Quebec Human Rights Tribunal (“the Tribunal”).<sup>105</sup> Damages can usually be awarded to victims whose *Quebec Charter* rights are violated.<sup>106</sup> However, if the validity of a provincial statute or municipal by-law is being challenged, the Tribunal cannot award

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<sup>102</sup> See *Bombardier*, *supra* note 93 at para 40. See also *Québec (Ville de) c Commission des droits de la personne du Québec*, [1989] RJQ 831 (QCCA) at para 80; *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 69 [*Fraser*].

<sup>103</sup> *Commission des droits de la personne et des droits de la jeunesse (Miller et autres) c Ville de Montréal (Service de police de la Ville de Montréal) (SPVM)*, 2019 QCTDP 31 at para 156.

<sup>104</sup> *Quebec Charter*, *supra* note 10, s 74.

<sup>105</sup> *Ibid*, s 80.

<sup>106</sup> *Quebec Charter*, *supra* note 10, s 49.

damages, but can declare the provisions inoperative and unenforceable against the specific complainants.<sup>107</sup>

Notably, the Tribunal does not have the power to issue a general declaration of invalidity,<sup>108</sup> as this falls within the jurisdiction of the Superior Court of Quebec.<sup>109</sup> Importantly, the Tribunal does not have exclusive jurisdiction in discrimination cases, and complainants can bring claims pursuant to Section 10 of the *Quebec Charter* to the Superior Court at their own expense.<sup>110</sup>

### *i. Prima Facie Discrimination*

#### ***a. Element One: Distinction, Exclusion, or Preference***

At the time of this article's writing, the authors are aware of only one judgment in which a claimant challenged the validity of a public intoxication by-law for its discriminatory impact on people experiencing homelessness, using Section 10 of the *Quebec Charter*. The Municipal Court of Quebec City ruled in 2010 that a similar regulation in that city was not discriminatory in its *formulation or wording*, since the "intoxication criterion applies to all citizens, without distinction."<sup>111</sup> The Court declined to rule on whether the provision discriminated in its *effect* in relation to unhoused people, however, because the defendant was not himself unhoused. This issue, therefore, remains undecided, and the door is open for an unhoused claimant to bring such a claim.

Most by-laws' objectives, on the surface, are to prevent public nuisance and uphold order. Sections 2 and 3 of the *By-law concerning Peace and Order on Public Property*, while seemingly neutral in their substance, adversely impact unhoused Montrealers in their application and place them at a disadvantage. The Quebec Human Rights Commission found that their discriminatory effects can be indirect, especially because

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<sup>107</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal*, 2004 SCC 30.

<sup>108</sup> *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 154 [*Mouvement laïque québécois*].

<sup>109</sup> *Code of Civil Procedure*, CQLR c C-25.01, ss 33, 142 [CCP]; *Courts of Justice Act*, CQLR c T-16.

<sup>110</sup> *Mouvement laïque québécois*, *supra* note 108 at para 51.

<sup>111</sup> *Québec (Ville de) c Doyon-Lessard*, 2010 QCCM 76 at paras 116–117.



the provisions “penalize behaviour associated with homelessness that does not constitute an actual nuisance.”<sup>112</sup>

We identify two unequal effects of these provisions on unhoused people. First, these provisions discriminate against unhoused people through their exclusionary effects in public spaces.<sup>113</sup> Individuals who have received tickets and are unable to pay them often avoid law enforcement, putting their health and safety at risk, because their socio-economic and housing situation remains unchanged. In an Australian study, researchers concluded that public drinking bans contributed to social marginalization and loss of social connections by displacing people out of public spaces and preventing them from congregating with other community members on public property.<sup>114</sup> These exclusionary effects have been recognized by both the Quebec Human Rights Commission and the City of Montreal itself. The Commission found that certain public order by-laws regarding the use of public spaces, in conjunction with police practices, “have helped build [...] a system of exclusion that forces the homeless out of public spaces.”<sup>115</sup> In its *Plan d’action montréalais en itinérance 2018–2020* (“Montreal Action Plan on Homelessness,”) the City of Montreal recognized that certain municipal by-laws and the regulation of public spaces contribute to the judicialization, displacement, and exclusion of people experiencing homelessness.<sup>116</sup> Despite a growing awareness of this issue, more unhoused people are being ticketed than ever before.<sup>117</sup>

Second, they discriminate against unhoused people by disproportionately imposing economic disadvantage. Many of the people we encountered at the legal information clinic are so over-ticketed that they have accumulated thousands of dollars in debt to the City. Without the means to pay these fines, these tickets reinforce

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<sup>112</sup> See “Executive Summary of the 2009 Report on the Judicialization of Homelessness”, *supra* note 62 at 4.

<sup>113</sup> *Ibid* at 2.

<sup>114</sup> Amy Pennay et al, “Prohibiting public drinking in an urban area: Determining the impacts on police, the community and marginalised groups” (2014) at 63, online (pdf): *Turning Point Alcohol and Drug Centre* <[www.aic.gov.au/sites/default/files/2020-05/monograph49.pdf](http://www.aic.gov.au/sites/default/files/2020-05/monograph49.pdf)> [perma.cc/VF86-L4PX] [Pennay].

<sup>115</sup> “Executive Summary of the 2009 Report on the Judicialization of Homelessness”, *supra* note 62 at 2.

<sup>116</sup> “Parce que la rue a différents visages: Plan d’action montréalais en itinérance 2018-2020” (2018) at 23, online (pdf): *Ville de Montréal* <[numerique.banq.qc.ca/patrimoine/details/52327/3377619](http://numerique.banq.qc.ca/patrimoine/details/52327/3377619)> [perma.cc/8YUH-5PSJ].

<sup>117</sup> See e.g. “Observatoire des profils 2021 Report on the Judicialization of Homelessness”, *supra* note 4. See also Nerestant, *supra* note 5.

“the systemic barriers that keep them in homelessness and poverty.”<sup>118</sup> They are further marginalized by the City and justice system, with an increasing and insurmountable debt to the State.<sup>119</sup> Indeed, “the debt accumulated by homeless people at the Municipal Court of Montréal between 2012 and 2019 totaled more than \$17 million.”<sup>120</sup> The impacts of this economic hardship are significant. Relatedly, as Véronique Fortin highlights, such tickets can result in “stigmatization, difficulties in finding jobs, loss of housing, and deterioration of family relations.”<sup>121</sup> Excessive ticketing can “create significant financial barriers for unhoused people in accessing housing, employment and public services.”<sup>122</sup> The goal of the legal system is not to “impose enduring economic hardship,”<sup>123</sup> yet this is the effect of punitive by-laws that disproportionately target unhoused people in Montreal. The provisions against public drinking and intoxication “undermine socio-economic equality [...] and perpetuate the reproduction of poverty.”<sup>124</sup>

The exclusion and economic disadvantage outlined above amount to adverse impact discrimination. In *Fraser*, the Supreme Court affirmed that ostensibly neutral laws are discriminatory when they disproportionately impact people of a protected group.<sup>125</sup> The theory of adverse impact allows us to examine the systemic nature of discrimination and opens avenues to challenge structural oppression in penal law. In fact, the analysis of adverse impact is embedded in the language of Section 10 of the *Quebec Charter*, which specifies that “discrimination exists where such a distinction, exclusion or preference *has the effect* of nullifying or impairing [the right to equality.]”<sup>126</sup> Moreover, the Quebec Human Rights Commission clarifies that the concept of systemic discrimination is critical to understanding the scope of the exclusion

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<sup>118</sup> “No Fixed Address: The Intersections of Justice Involvement and Homelessness” (2022) at 17, online (pdf): *John Howard Society of Ontario* <[johnhoward.on.ca/wp-content/uploads/2022/05/No-Fixed-Address-Final-Report.pdf](http://johnhoward.on.ca/wp-content/uploads/2022/05/No-Fixed-Address-Final-Report.pdf)> [perma.cc/92ZK-KTZE].

<sup>119</sup> See Sylvestre & Bellot, “Challenging Discriminatory Responses to Homelessness”, *supra* note 32 at 181–183.

<sup>120</sup> See “Observatoire des profilages 2021 Report on the Judicialization of Homelessness”, *supra* note 4 at 34.

<sup>121</sup> See Fortin, *supra* note 51 at 8.

<sup>122</sup> Alison Brown et al, “Homeless Encampments through a Human Rights Lens: Municipal Policies and Recommendations” (2022) at 5, online (pdf): *Wilfrid Laurier University* <[www.homelesshub.ca/sites/default/files/attachments/homeless-encampments-through-a-human-rights-lens.pdf](http://www.homelesshub.ca/sites/default/files/attachments/homeless-encampments-through-a-human-rights-lens.pdf)> [perma.cc/6M9M-MJ47] [Brown].

<sup>123</sup> See John Howard Society of Ontario, *supra* note 118 at 8.

<sup>124</sup> Shepard, *supra* note 15 at 230.

<sup>125</sup> See *Fraser*, *supra* note 102.

<sup>126</sup> *Bombardier*, *supra* note 93 at para 32. The Court in *Bombardier* specified that Section 10 encompasses protections against systemic forms of discrimination.

experienced by unhoused people as a result of their judicialization in the application of these by-laws.<sup>127</sup>

Relatedly, when discussing the adverse effects of these by-laws, it also bears mentioning the intersectional dimension in the issuance of tickets: Indigenous people, in particular, are disproportionately targeted within the unhoused population. In a report mandated by the City using official data from the SPVM, Victor Armony, Mariam Hassaoui, and Massimiliano Mulone reported that Indigenous people received 9 percent of all the statement of offence issued under the by-laws they analyzed, a staggering 13 times more than their proportion in the population.<sup>128</sup>

Other researchers have noted that Indigenous women, more specifically, receive a disproportionate share of tickets. Between 2012 and 2019, among the population that was issued a statement of offence and gave an address for an Indigenous homelessness organization, 25.2 percent were women. Among the population that was issued a statement of offence but *did not* give an address for an Indigenous homelessness organization, only between 12 and 15 percent were women.<sup>129</sup> Experts have thus noted that “women who give the address of an Indigenous organization seem to be subject to a more intense judicialization, despite the known and documented vulnerability and marginalization.”<sup>130</sup> This raises issues of intersecting forms of discrimination, including sex and race. Indeed, not only are unhoused people as a group generally more likely to be targeted by these by-laws, unhoused Indigenous people and unhoused Indigenous women specifically, are more vulnerable to excessive ticketing and discriminatory treatment under these regulations.

In sum, Sections 2 and 3 of the by-law in question impact unhoused people differently by limiting access to public spaces, thereby exacerbating the process of social exclusion central to Quebec’s definition of homelessness and imposing economic hardship that perpetuates a disadvantage for the City’s most vulnerable

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<sup>127</sup> See “Quebec Human Rights Commission 2009 Report on the Judicialization of Homelessness”, *supra* note 5 at 47.

<sup>128</sup> See Victor Armony, Mariam Hassaoui & Massimiliano Mulone, “Les interpellations policières à la lumière des identités racisées des personnes interpellées : Analyse des données du Service de Police de la Ville de Montréal (SPVM) et élaboration d’indicateurs de suivi en matière de profilage racial” (August 2019) at 80, online (pdf): *Service de police de la Ville de Montréal* <spvm.qc.ca/upload/Rapport\_Armony-Hassaoui-Mulone.pdf> [perma.cc/2VX8-S7T2].

<sup>129</sup> See “Observatoire des profilages 2021 Report on the Judicialization of Homelessness”, *supra* note 4 at 28–29.

<sup>130</sup> *Ibid* at 29.

population. This amounts to adverse impact discrimination and satisfies the first element of step one of the test.

***b. Element Two: Prohibited Ground of Discrimination***

The second element requires the plaintiff to show that a prohibited ground of discrimination was a factor in the distinction or exclusion.<sup>131</sup> Because Quebec tribunals and courts have held that the meaning of social condition under Section 10 encompasses protection against discrimination based on poverty, which is inextricably linked to homelessness, this element does not pose a challenge. The Quebec Human Rights Tribunal clarified that the interpretation of social condition must be sufficiently flexible to ensure the protection of people who are disadvantaged.<sup>132</sup> Moreover, the Quebec Human Rights Commission has confirmed that people experiencing homelessness are a protected group on the basis of social condition under Section 10 of the *Quebec Charter*.<sup>133</sup> Importantly, social condition can include impermanent or temporary situations, including homelessness.<sup>134</sup> Therefore, while many people may experience homelessness temporarily, they are still a protected group within the meaning of Section 10.<sup>135</sup> Homelessness is a key contributing factor to unhoused people's exclusion under the by-law. For this reason, the second element of the test is met.

***c. Element Three: Resulting Impairment***

For the final element of step one, the plaintiff must show that the distinction has affected or impaired “the full and equal exercise of a right or freedom guaranteed by the *Charter*.”<sup>136</sup> The distinction affects three rights protected by the *Quebec Charter*.

First, the by-law further impairs their right to security of the person, guaranteed in Section 1 of the *Quebec Charter*. It places unhoused people at risk of harm, by pushing them “into dark corners of the city [to avoid constant surveillance], where they are at greater risk of assault and exposure.”<sup>137</sup> Indeed, some unhoused people

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<sup>131</sup> *Bombardier*, *supra* note 93 at para 49.

<sup>132</sup> *Commission des droits de la personne et des droits de la jeunesse (Bia-Domingo) c Sinatra*, 1999 CanLII 52 (QC TDP) at paras 36–46.

<sup>133</sup> See “Quebec Human Rights Commission 2009 Report on the Judicialization of Homelessness”, *supra* note 5 at 48.

<sup>134</sup> See *ibid* at 48–49. See also *Johnson c Commission des affaires sociales*, [1984] CA 61 (QC).

<sup>135</sup> *Ibid*.

<sup>136</sup> *Bombardier*, *supra* note 93 at 53.

<sup>137</sup> Scott Bernstein, “UN: Criminalizing Homeless Discriminates and Stigmatizes” (15 April 2013), online: *Pivot Legal Society*

have “reported avoiding certain areas of Montreal, even if this meant cutting themselves off from the organizations that provide them services,” to escape from being ticketed.<sup>138</sup> Research conducted in Australia revealed that public drinking bans “resulted in negative impacts to marginalized groups, particularly homeless [people].”<sup>139</sup> By preventing them from congregating in accessible public spaces, the bans and tickets displaced unhoused people into “more covert and less safe spaces to drink, making it harder to receive health and social support from their community health workers [who] were unable to locate them.”<sup>140</sup> Mariana Valverde describes this effect as spatial exclusion, which we argue impedes on the right to security.<sup>141</sup>

Second, the impugned provisions’ discriminatory effects against unhoused Montrealers impairs their “right to the safeguard of [their] dignity without distinction or exclusion,” contrary to Section 4 of the *Quebec Charter*.<sup>142</sup> The Supreme Court recently held that dignity is violated when “a person is stripped of their humanity by being subjected to treatment that debases, subjugates, objectifies, humiliates or degrades them” and that it “does no less than outrage the conscience of society.”<sup>143</sup> Sheppard describes social exclusion as a “tangible source of indignation” and social inclusion as “essential to the respect of human dignity.”<sup>144</sup> The economic hardship

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<[www.pivotlegal.org/un\\_criminalizing\\_homeless\\_discriminates\\_and\\_stigmatizes](http://www.pivotlegal.org/un_criminalizing_homeless_discriminates_and_stigmatizes)> [perma.cc/EU9B-XG3M].

<sup>138</sup> Fortin, *supra* note 51 at 8.

<sup>139</sup> Pennay et al, *supra* note 114 at 3.

<sup>140</sup> *Ibid.* For some, the expulsion of people experiencing homelessness from public spaces can be explained in part by interests in upholding and expanding property values. For example, Blomley writes that “[p]ut crudely, the goal is to move the homeless from areas of investment and profit to ensure that they do not threaten such investments.” See Blomley, “Delusions of Property”, *supra* note 61 at 584.

<sup>141</sup> See Valverde, *supra* note 50 at 48.

<sup>142</sup> *Quebec Charter*, *supra* note 10 at ss 4, 10.

<sup>143</sup> *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at paras 57–58 [*Ward*]. See also *Commission des droits de la personne du Québec v Lemay*, [1995] QC TDP 3240 at para 40; *Quebec (Public Curator) v Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 SCR 211 at para 104.

<sup>144</sup> Sheppard, *supra* note 15 at 228.

and exclusionary effects described above are humiliating and degrading.<sup>145</sup> This constitutes an affront to the safeguard of their dignity.<sup>146</sup>

Third, the impugned provisions have the potential to affect the right to liberty, as protected by article 24 of the *Quebec Charter*. Violations of Sections 2 and 3 of the by-law are penalized by fines ranging from \$100 to \$1,000, in cases of repeat offenses. As we noticed at the legal information clinic, many unhoused people do not have the resources to pay the tickets, or experience other significant administrative barriers to paying these fines.

The *Code of Penal Procedure* in Quebec permits imprisonment for unpaid fines. While limited to a maximum of two years,<sup>147</sup> the Code enables the City collector to apply to a judge for an order of imprisonment and a warrant of committal if the defendant refuses to pay a fine or enter into a compensatory work program.<sup>148</sup>

In 2018, a single mother of two was arrested in Quebec City and sentenced to 101 days of incarceration for unpaid fines amounting to \$2,120.88. Her tickets dated back to 2001 and 2006, while she was experiencing homelessness, for panhandling, squeegeeing, urinating in public, and loitering.<sup>149</sup> In the past, stories like hers have

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<sup>145</sup> Some theorists argue that people experiencing homelessness experience “unfreedom,” which is an affront to an individual’s dignity. For example: “Jeremy Waldron, adopting a negative conception of freedom, argues that homeless people’s unfreedom stems from the fact that ‘everything that is done has to be done somewhere,’ meaning on public property or on private property. The cumulative effect of private property rules and laws governing public property, however, forecloses homeless people’s liberty to pursue both options. Because homeless people lack private property rights, they can only be on others’ private property and alleviate their needs in those places with others’ permission. Furthermore, they may only exist on public property or perform certain acts in public if the law does not limit their presence or conduct in those places. Many cities, however, prohibit sleeping in subway stations, erecting temporary shelters in parks, and urinating on public property—acts that homeless people characteristically perform in public because they lack a private property right and other alternatives. As a result, homeless people generally lack the freedom to alleviate their basic needs both on public property and on private property without interference from the state or from other individuals.” See Terry Skolnik, “Homelessness and Unconstitutional Discrimination” (2019) 15 J of L & Equality 69 at 74 [Skolnik].

<sup>146</sup> *Ward*, *supra* note 143 at para 58.

<sup>147</sup> *Code of Penal Procedure*, CQLR c C-25.1, s 348 [CPP].

<sup>148</sup> *Ibid*, s 346.

<sup>149</sup> See Marc Allard, “Une mère monoparentale en prison pour des amendes”, *Le droit* (1 June 2018), online: <[www.ledroit.com/2018/06/01/une-mere-monoparentale-en-prison-pour-des-amendes-74671156e6a32f65b1ab97ee4b176f85](http://www.ledroit.com/2018/06/01/une-mere-monoparentale-en-prison-pour-des-amendes-74671156e6a32f65b1ab97ee4b176f85)> [perma.cc/6FKP-4UWU]; Marilyn Coupennie & Édith Perrault, “De la rue à la prison et de la prison à la rue : une analyse du caractère cruel et inusité de l’emprisonnement pour non-paiement d’amendes des personnes en situation d’itinérance” (2020) 50:1 RGD 285.

resulted in moratoriums on imprisonment for unpaid fines within municipal jurisdictions—regardless of a person’s capacity to pay—in Montreal (2004)<sup>150</sup> and Val-D’Or (2017).<sup>151</sup> In 2018, Quebec City issued a similar moratorium in response to public outrage, although it only applies to people experiencing homelessness at the time of the infraction, and advocates say that people experiencing hidden homelessness are still at risk of being imprisoned for “incivilities.”<sup>152</sup>

*An Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal*, commonly known as Bill 32, came into effect to narrow the use of imprisonment in the case of unpaid tickets.<sup>153</sup> According to this recent legislative amendment to the *Code of Penal Procedure*, a “judge may order imprisonment and issue the warrant only if [they are] satisfied that the defendant has, without a reasonable excuse, refused or neglected to pay those sums or settle them.”<sup>154</sup> Since 2020, judges in Quebec must consider a defendant’s social situation before ordering imprisonment for unpaid fines. In a letter dated December 2022, the department responsible for restorative justice initiatives of the Ministry of Justice reminded municipal court clerks of Quebec that fine collectors should no longer be requesting imprisonment for people who are unable to pay. The letter stresses that the purpose of imprisonment for non-payment of fines is to induce payment or performance of compensatory work and that such an incentive is illusory in this context. It remains the responsibility of the defendant, however, to

<sup>150</sup> See “L’Emprisonnement pour non-paiement d’amende (ENPA): Preuve documentaire” (22 August 2018) at 15, online (pdf): *Commission d’enquête sur les relations entre les Autochtones et certains services publics : écoute, réconciliation et progrès (CERP)* <[https://www.cerp.gouv.qc.ca/fileadmin/Fichiers\\_clients/Documents\\_deposes\\_a\\_la\\_Commission/PD-4.pdf](https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/PD-4.pdf)> [perma.cc/H4B5-8LBB].

<sup>151</sup> “La cour municipale de Val-d’Or suspend les emprisonnements pour amendes impayées”, *Radio-Canada* (24 September 2017) online: <[ici.radio-canada.ca/nouvelle/1058350/la-cour-municipale-de-val-dor-suspend-les-emprisonnements-pour-amendes-impayees](http://ici.radio-canada.ca/nouvelle/1058350/la-cour-municipale-de-val-dor-suspend-les-emprisonnements-pour-amendes-impayees)> [perma.cc/TEJ7-PTPK].

<sup>152</sup> See Marc Allard, “Encore la prison pour des amendes impayées”, *Le Soleil* (15 January 2020) online: <<https://www.lesoleil.com/2020/01/16/encore-la-prison-pour-des-amendes-impayees-081314dc29795282760de780a340269d>> [perma.cc/5UVS-XZCA].

<sup>153</sup> Bill 32, *An Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal*, 1st Sess, 42nd Leg, Quebec, 2020 (assented to 5 June 2020). The amendments introduced options for alternatives to penal proceedings for people who cannot afford to pay. In order to increase the efficiency of penal justice, the law amended the *Code of Penal Procedure* to take the social situation of certain defendants into account to, among other things, promote their rehabilitation, by introducing such options as their participation in an adaptation program that offers an alternative to penal proceedings or allows them to replace compensatory work by alternative measures.

<sup>154</sup> See *CPP*, *supra* note 147, s 347.

demonstrate a reasonable excuse to satisfy the court that they are unable to pay the sum.<sup>155</sup> While Bill 32 may limit the use of imprisonment as a response to unpaid fines in egregious circumstances, the amendments are still relatively new and it is hard to predict how Courts will evaluate a “reasonable excuse.” More importantly, the Code still leaves open the *possibility* of imprisonment, which would disproportionately target unhoused people and people with lower incomes who may not be able to demonstrate a reasonable excuse acceptable to the court. As such, these groups remain at risk of discriminatory deprivation of their liberty.

In sum, the by-law provisions have the effect of displacing unhoused people from public spaces and imposing disproportionate economic hardship, denying them their right to live in dignity, compromising their security and their liberty. The third element of step one is therefore met.

The conclusion of this section is that these provisions have a *prima facie* discriminatory effect on unhoused people. It bears mentioning here that this conclusion reflects the findings of research in the fields of public health and sociology. For example, a study published in 2012 analyzed the effects of public drinking bans in 13 locations across the United Kingdom, New Zealand, and Australia. The two primary findings were that “[s]treet drinking bans often: (1) negatively impact marginalized groups; and (2) result in displacement.”<sup>156</sup> Another review of evidence by a team based in the United States found that while being ineffective in reducing harm, bans on public drinking impacts specifically high-risk, young, and marginalized drinkers.<sup>157</sup>

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<sup>155</sup> Audrey Turmel, “Lettre adressée à l’Association des greffiers de cours municipales du Québec” (15 December 2022) at 6, online (pdf): *Justice Québec* <[https://www.justice.gouv.qc.ca/fileadmin/user\\_upload/contenu/documents/Fr\\_francais\\_/centredoc/rapports/ministere/acces\\_information/decisions-documents/2023/dai\\_no\\_BSM-2023-001901.pdf](https://www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr_francais_/centredoc/rapports/ministere/acces_information/decisions-documents/2023/dai_no_BSM-2023-001901.pdf)> [perma.cc/6KJS-DL2T]. The letter cites *R v Wu*, 2003 SCC 73 and *Chaussé c R*, 2016 QCCA 568, in which the courts found that inability to pay or carry out alternatives to settle a debt from a fine imposed under the *Criminal Code* constitutes a reasonable excuse.

<sup>156</sup> Amy Pennay & Robin Room, “Prohibiting public drinking in urban public spaces: A review of the evidence” (2012) 19:2 *Drugs: Education, Prevention & Policy* 91 at 91 [Pennay & Room].

<sup>157</sup> Thomas Babor et al, *Alcohol: No Ordinary Commodity: Research and Public Policy*, 2nd ed, (Oxford: Oxford University Press, 2010) at 239. See also Michael Nusbaumer, “Hitting the Skids: Social Policy and the Control of Public Intoxication” (1991) 21:2 *Sociological Focus* 165 at 167 [Nusbaumer], which documents arrests for public intoxication in the 1960s. Nusbaumer writes that “A more detailed look at these arrest statistics quickly indicates a high degree of bias in who is arrested. The most significant bias is in terms of class. Pittman and



We believe it is possible for practitioners adopting this strategy to argue that other *Quebec Charter* rights are impaired, such as the right to privacy (section 5), the right to public spaces (section 15) and even the right to be free from harassment (section 10.1), among others. For the purposes of this paper, we have focused on dignity, security of the person, and liberty.

## ii. Justification

If a claimant can establish that *prima facie* discrimination exists at step one, the onus then shifts to the defendant at the second step of the analysis, where they can “justify [their] decision or conduct on the basis of the exemptions provided for in the applicable human rights legislation or those developed by the courts.”<sup>158</sup>

The defendant—in our case, the State—can invoke Section 9.1 of the *Quebec Charter* to show that an infringement on a protected right “constitutes a reasonable and justified limit in a free and democratic society.”<sup>159</sup> Section 9.1 states:

9.1 In exercising [their] fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, State laicity, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

The jurisprudence on Section 9.1 states that a law that violates rights may be saved if it is justified by rational goals and reasonable means.<sup>160</sup> The analytical framework for the justification test under the *Quebec Charter* follows the same structure as Section 1 of the *Canadian Charter*, known as the *Oakes* test.<sup>161</sup> The justification analysis has two steps:

First, the state must prove that the infringing measure is prescribed by law and has a pressing and substantial objective. Second, the government must

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Gillespie (1967) simply describe public intoxication laws as class-based laws, *since they are enforced mainly against the lower classes*. Indeed, as Wiseman (1970:65) discovered in her study of Pacific City, skidrow men made up 40 to 45 percent of all public intoxication arrests while they represented only about 3 percent of the population” [emphasis added].

<sup>158</sup> *Bombardier*, *supra* note 93 at para 37.

<sup>159</sup> *Mouvement laïque québécois*, *supra* note 108 at para 89.

<sup>160</sup> *Syndicat des travailleurs(euses) de Bridgestone Firestone de Joliette (csn) c Trudeau*, [1999] QJ 3026 (CA).

<sup>161</sup> See e.g. *Société des casinos du Québec*, *supra* note 18 at para 177; *Ville de Montréal c Astral Media Affichage*, 2019 QCCA 1609 at para 207.

establish that, in the pursuit of this objective, the infringing measure does not disproportionately affect the right in question. This second step of the *Oakes* test has three components. The state must therefore prove in turn that (1) the impairment is rationally connected to the objective; (2) the means to achieve that objective impairs the right in question as little as possible; and (3) the salutary effects of the infringing measure outweigh its deleterious effects.<sup>162</sup>

### *a. Pressing and Substantial Objective*

The first prong of the test is relatively easy for the City to establish, since it must simply assert, rather than prove, a substantial and pressing objective.<sup>163</sup> The *Municipal Powers Act* gives cities powers “to respond to various changing municipal needs in the interest of their citizens” by, for example, enacting by-laws.<sup>164</sup> It also gives cities powers to enact such regulations to “ensure peace, order, good government, and the general welfare of its citizens.”<sup>165</sup>

The pressing and substantial objective should be defined in a way that allows a Court adjudicating a case under the *Quebec Charter* or *Canadian Charter* to evaluate whether the contested legislation is rationally connected to the stated objective. As the Supreme Court explained:

The appropriate level of generality, therefore, resides between the statement of an ‘animating social value’ — which is too general — and a narrow articulation, which can include a virtual repetition of the challenged provision, divorced from its context — which risks being too specific: An unduly broad statement of purpose will almost always lead to a finding that the provision is not overbroad [...].<sup>166</sup>

In other words, the objective should be both precise and succinct.<sup>167</sup>

Certainly, municipalities have a responsibility to manage public spaces, including sidewalks and roads, to keep people safe. However, Montreal’s *By-law concerning Peace and Order on Public Property* does not explicitly state an objective. Moreover, it may be the case that the objectives stated in the *Municipal Powers Act* such as the “interest of their citizens”<sup>168</sup> or “peace, order, good government, and the general welfare of its

<sup>162</sup> *Procureur général du Québec c Gallant*, 2021 QCCA 1701 at para 182 [*Gallant*].

<sup>163</sup> *R v Bryan*, 2007 SCC 12 at paras 32–37.

<sup>164</sup> *MPA*, *supra* note 41, s 2. Montreal also has additional competencies specified in the *Charter of Ville de Montréal, métropolis of Québec*, CQLR c C-11.4, s 87ss.

<sup>165</sup> *MPA*, *ibid*, s 85.

<sup>166</sup> *R v Moriarty*, 2015 SCC 55 at para 28.

<sup>167</sup> *Ibid* at para 26.

<sup>168</sup> See *MPA*, *supra* note 41, s 2.

citizens”<sup>169</sup> are too vague for courts to be able to properly analyze the connection between the means employed and the stated objective.

For example, the Quebec Court of Appeal in *Bérubé* expressed worry vis-à-vis a Quebec City by-law regulating protests that failed to show demonstrations on the City’s territory had been a source of disorder or threat to public safety. Nevertheless, in the absence of counter arguments presented by the plaintiffs, the Court found that the objective was valid as it met regulative goals recognized in the jurisprudence, such as, amongst others, free circulation of goods and people on public property, and control of auditory and visual pollution.<sup>170</sup>

Establishing an objective is not difficult for the State, which might explain the lack of evidence adduced at this stage by plaintiffs contesting by-laws in other cases.<sup>171</sup> Nevertheless, the Quebec Court of Appeal in *Bérubé* demonstrated a willingness to hear a full debate on this issue, particularly when the stated objective is too broad or vague.<sup>172</sup> With sufficient evidence that Montreal’s *By-law concerning Peace and Order on Public Property* does not pursue a pressing and substantial objective, plaintiffs may successfully counter the State’s argument at this stage.

### ***b.i Rational Connection***

At the first element of the proportionality step, the State must show that the rights-impairing means are rationally connected to the objective. The rational connection element requires that the measure not be “arbitrary, unfair, or based on irrational considerations.”<sup>173</sup> Once again, this element does not constitute a significant obstacle for the State, as the requirement is “not particularly onerous.”<sup>174</sup>

That said, we still argue that these provisions could be contested as arbitrary. Drinking in public, in and of itself, does not cause a nuisance or present “a specific threat to personal integrity or security” to the public.<sup>175</sup> Disruptive or harmful behaviours indirectly associated with the consumption of alcohol in public, such as

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<sup>169</sup> *Ibid*, s 85.

<sup>170</sup> *Bérubé c Ville de Québec*, 2019 QCCA 1764 at paras 82–86 [*Bérubé*]. We note here that the plaintiffs did not make submissions on the pressing and substantial objective element in this case.

<sup>171</sup> See e.g. *Victoria (City) v Adams*, 2009 BCCA 563 at para 128 [*Adams*]; *Shantz*, *supra* note 73 at para 240.

<sup>172</sup> *Bérubé*, *supra* note 170 at para 85.

<sup>173</sup> *R v Oakes*, [1986] 1 SCR 103 at para 70.

<sup>174</sup> *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 60.

<sup>175</sup> Sylvestre & Bellot, “Challenging Discriminatory Responses to Homelessness”, *supra* note 32 at 171.

mischief to property or vandalism,<sup>176</sup> causing a disturbance while drunk,<sup>177</sup> harassment,<sup>178</sup> uttering threats,<sup>179</sup> or assault,<sup>180</sup> are already prohibited under federal law.

On the other hand, the municipality could argue that these by-law provisions seek to minimize risks of harm, because public safety concerns are heightened when people are intoxicated. People may be more reckless and put themselves in dangerous situations. However, a blanket ban on public alcohol consumption does not deter people from drinking and cannot be said to be rationally connected to the goal of public safety and order, since the provisions in question push unhoused people out of public spaces. Marginalized members of the unhoused community must then navigate the threats that they face in hard-to-reach places, out of the eyes of law enforcement and service providers to avoid being ticketed, putting their safety at risk.<sup>181</sup>

### ***b.ii Minimal Impairment***

A law whose means are rationally connected to a pressing and substantial objective may still fail to be justified at the minimal impairment stage of the analysis. Here, the State must show that the impairment of the right is “reasonably required” to achieve the objective.<sup>182</sup> It must establish that the means chosen to pursue the objective “fall within a range of reasonable alternatives,” not that they were the least drastic available option.<sup>183</sup>

Decision-makers are not bound to consult with affected parties, but evidence of consultation can serve to inform whether the State has considered reasonable alternatives.<sup>184</sup> We are not aware of any alternatives the City has considered to achieve the goal that the prohibition on public drinking allegedly serves. Moreover, while comparison to other jurisdictions is not automatically persuasive in the justification analysis,<sup>185</sup> the Supreme Court has regularly used a cross-jurisdictional comparison to

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<sup>176</sup> *Criminal Code*, RSC 1985, c C-46, s 430(1).

<sup>177</sup> *Ibid*, s 175(1).

<sup>178</sup> *Ibid*, s 264.

<sup>179</sup> *Ibid*, s 264.1(1).

<sup>180</sup> *Ibid*, s 265(1).

<sup>181</sup> Pennay et al, *supra* note 114 at 3.

<sup>182</sup> *Gallant*, *supra* note 162 at para 213.

<sup>183</sup> *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160.

<sup>184</sup> *Facilities Subsector Bargaining Assn*, *supra* note 90 at para 157.

<sup>185</sup> See e.g. *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 62 [*Frank*].

ground a discussion about what the range of reasonable alternatives may include.<sup>186</sup> For instance, many cities across the world do not prohibit drinking in public or being intoxicated on public property and do not suffer higher crime rates or public disorder than Montreal.<sup>187</sup>

The extent of the prohibition is also relevant to the analysis. For example, in cases regarding freedom of expression, courts have often held that absolute bans will be harder to justify than partial limitations.<sup>188</sup> The Quebec Court of Appeal imported this principle to a Section 15 *Canadian Charter* case, and held that “absolute measures... are vulnerable to constitutional attacks.”<sup>189</sup> The ban on public drinking is quasi total—with exceptions for picnics in certain parks and outdoor terrasses—and the ban on public intoxication is total. The failure to consider reasonable alternatives to such bans demonstrates that the means employed are not minimally impairing and fall outside of the range of reasonable alternatives.<sup>190</sup>

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<sup>186</sup> See e.g. *Carter v Canada (Attorney General)*, 2015 SCC 5 paras 102–107, 121; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 19, 95–97.

<sup>187</sup> In Japan, for instance, there are no laws prohibiting the public consumption of alcohol or public intoxication. Many European countries and cities permit drinking in public spaces, including Denmark, Germany, Switzerland, and many cities in Austria, for example. See also Pennay & Room, *supra* note 156 on the ineffectiveness of public drinking bans. For an overview of the jurisdictions that permit drinking in public and those that ban it in the United States see Joe Satran, “The Secret History of the War on Public Drinking”, *Huffington Post* (14 December 2013), online: <[https://www.huffpost.com/entry/public-drinking-laws\\_n\\_4312523](https://www.huffpost.com/entry/public-drinking-laws_n_4312523)> [perma.cc/BB4J-BUPQ].

<sup>188</sup> See *Bérubé*, *supra* note 170 at para 111, nn 115–116.

<sup>189</sup> *Fédération des policières et policiers municipaux du Québec c Sûreté du Québec*, 2007 QCCA 1088 at para 207.

<sup>190</sup> For example, the city could increase support for harm reduction programming. For a discussion of policy options available to the city, see Mailloux, *supra* note 27. We also note that evidence shows that ticketing people for public intoxication or public drinking is not among the most efficient policy means to reduce alcohol-related harms. According to the Canadian Institute for Substance Use Research at the University of Victoria, “[t]he evidence shows that the most cost-effective, high-impact way to prevent and reduce the negative consequences of alcohol consumption in a population is through implementation of evidence-based alcohol policies. Known as the ‘best buys’ (WHO, 2018), these include minimum unit pricing and taxation measures, limitations on the retail availability of and access to alcohol, minimum legal drinking age, marketing and advertising controls, and impaired driving countermeasures.” See “Not Just a Walk in the Park: Unsupervised Alcohol Consumption on Municipal Properties in BC” (July 2021) at 12, online (pdf): *Canadian Institute for Substance Use Research* <[www.uvic.ca/research/centres/cisur/assets/docs/report-unsupervised-alcohol-consumption-municipal.pdf](http://www.uvic.ca/research/centres/cisur/assets/docs/report-unsupervised-alcohol-consumption-municipal.pdf)> [perma.cc/7SPG-2RUV]. We are nevertheless conscious that some of these measures could fall outside of municipal jurisdiction and would require input from provincial actors.

### ***b.iii Proportionality of Effects***

The last stage of the justification analysis is the proportionality of effects. The State must show that the salutary effects of the law outweigh the deleterious ones.<sup>191</sup> On the side of deleterious effects, the provisions effectively exclude unhoused people from public spaces, because it prohibits them from enjoying an activity that housed people have the privilege of doing in private spaces. As a consequence, the by-law pushes people out of the public eye and forces them to engage in these activities in settings that are unsafe, contrary to the objective of public safety. Moreover, ticketing unhoused people under these provisions creates economic hardship that has wide-ranging repercussions on their lives, like access to employment and credit.<sup>192</sup> This process of judicialization is likely to exacerbate many of the problems they face.

Any salutary effects do not outweigh the deleterious ones. Bans on public intoxication and public drinking do not contribute to community well-being. Research shows that there is “no evidence that street drinking bans reduce alcohol-related harm or benefit the community in the other ways (aside from *perceptions* of safety and improvement to amenity).”<sup>193</sup> Moreover, public safety does not exclude the interests of people experiencing homelessness. Rather, any public order by-law must encompass the interests and well-being of *all* community members using public spaces, especially the City’s most marginalized members.<sup>194</sup>

In sum, with proper evidence adduced, arguments can be made to counter the State’s justification at all four stages of the analysis. Although the State may surmount the pressing and substantial objective and the rational connection elements, there is sufficient evidence to show that the ban on public consumption of alcohol and public intoxication cannot meet the standards of minimal impairment or proportionality of effects. Therefore, the impugned provisions are not justified under Section 9.1.

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<sup>191</sup> *Frank*, *supra* note 185 at para 76.

<sup>192</sup> See Brown et al, *supra* note 122 at 5.

<sup>193</sup> Pennay & Room, *supra* note 156 at 3. See also Nusbaumer, *supra* note 157 at 167–168 on the ineffectiveness of punishment to deal with recidivism for public intoxication.

<sup>194</sup> On cities’ responsibilities to develop inclusive public spaces, see “Creating inclusive and equitable safety” (n.d.), online (pdf): *Canadian Commission for UNESCO* <unesdoc.unesco.org/ark:/48223/pf0000261409> [perma.cc/5QTC-EJMG]; “Advancing Equity and Inclusion: A Guide for Municipalities” (n.d.), online (pdf): *City for All Women Initiative* <<https://www.cawi-ivtf.org/wp-content/uploads/advancing-equity-inclusion-en.pdf>> [perma.cc/86H9-BXVZ].

### iii. Remedy Sought

An exhaustive discussion on remedies is beyond the scope of this paper. The proposed strategy would seek a declaration by the Superior Court of Quebec that the *By-law concerning Peace and Order on Public Property* Sections 2 and 3 violate Section 10 and are invalid pursuant to Section 52 of the *Quebec Charter*. A declaration of invalidity would allow defendants already charged with these infractions to seek a stay of proceedings under the *Code of Penal Procedure*. Although this may be procedurally cumbersome for some unhoused defendants, it nevertheless offers the possibility to resolve existing fines.<sup>195</sup>

## III. STRENGTHS AND LIMITATIONS OF THE STRATEGY

The provisions of the by-law prohibiting drinking in public and being intoxicated on public property in Montreal have never been challenged for their validity under Section 10 of the *Quebec Charter*. There is therefore space to craft persuasive and strategic legal arguments to challenge them.

A major strength of this strategy is that it seeks to dismantle a systemic factor that exacerbates the effects of homelessness, rather than challenging individual tickets in an *ad hoc* manner. It does so by focusing on bad laws rather than harmful enforcement. A declaration that Sections 2 and 3 of the *By-law concerning Peace and Order on Public Property* are invalid would improve the daily lives of unhoused Montrealers and help safeguard their dignity and security in public spaces.

A second strength of this strategy is that while it is based on the *Quebec Charter*, it may be persuasive for comparative analyses of equality rights claims in other jurisdictions. The *Quebec Charter* can contribute to the statutory interpretation of human rights codes across provinces in the same way that Quebec courts have interpreted it in light of other provincial human rights acts.<sup>196</sup> All human rights codes occupy a special place in the legislative hierarchy; they are “of a special nature, not quite constitutional but certainly more than the ordinary,” according to the Supreme

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<sup>195</sup> CPP, *supra* note 147, s 184(8) requires defendants to bring an application for a stay of proceedings before the Court in cases where the provision that creates an offence is contrary to the *Quebec Charter*.

<sup>196</sup> See *Aluminerie de Bécancour inc*, *supra* note 89 at para 74; *CDPDJ v City of Montreal*, *supra* note 16 at para 43.

Court.<sup>197</sup> Fleshing out the connection between homelessness, social condition, and equality rights could contribute to widespread recognition of homelessness as an analogous ground of discrimination under the *Canadian Charter*, which has so far been unsuccessful.<sup>198</sup> It bears mentioning that social condition or disadvantage is a protected ground in Manitoba, New Brunswick, and the Northwest Territories. Many other provinces and territories prohibit discrimination based on “receipt of public assistance” or “source of income.”<sup>199</sup> At the federal level, advocates for adding social condition as a protected ground to the *Canadian Human Rights Act*<sup>200</sup> have not yet succeeded in introducing a bill, save for a senate bill tabled in 1998.<sup>201</sup> Receipt of social assistance was ruled an analogous ground under Section 15 of the *Canadian Charter* by Ontario’s Court of Appeal in 2002.<sup>202</sup> All this points to the importance and relevance

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<sup>197</sup> *Simpsons-Sears*, *supra* note 17 at para 12. See Lamer J in *Insurance Corporation of British Columbia v Heerspink et al*, [1982] 2 SCR 145:

When the subject matter of a law is said to be the comprehensive statement of the “human rights” of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others.

And in *Winnipeg School Division No 1 v Craton*, [1985] 2 SCR 150 at para 8:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

See also Vanessa MacDonnell, “A Theory of Quasi-Constitutional Legislation” (2016) 53:2 *Osgoode Hall LJ* 508 at 526.

<sup>198</sup> Skolnik, *supra* note 145 at 86; Joshua Sealy-Harrington, “Should Homelessness be an Analogous Ground? Clarifying the Multi-Variable Approach to Section 15 of the Charter” (19 December 2019), online: *ABLAWG* <[ablawg.ca/2013/12/19/should-homelessness-be-an-analogous-ground-clarifying-the-multi-variable-approach-to-section-15-of-the-charter/](http://ablawg.ca/2013/12/19/should-homelessness-be-an-analogous-ground-clarifying-the-multi-variable-approach-to-section-15-of-the-charter/)> [perma.cc/T6CC-8YLF].

<sup>199</sup> See the discussion in *RO c Ministre de l’Emploi et de la Solidarité sociale*, 2021 QCCA 1185 at paras 59–68 and especially the footnotes.

<sup>200</sup> *Canadian Human Rights Act*, RSC, 1985, c H-6.

<sup>201</sup> Bill S-11, *An Act to amend the Canadian Human Rights Act in order to add social condition as a prohibited ground of discrimination*, 1st Sess, 36th Parl (third reading 9 June 1998), online: <<https://www.parl.ca/DocumentViewer/en/36-1/bill/S-11/third-reading/page-24>> [perma.cc/KW3F-UDYZ].

<sup>202</sup> *Falkiner v Ontario (Minister of Community and Social Services)*, 2002 CanLII 44902 (ON CA).



of developing arguments that advance poverty and homelessness as protected grounds of discrimination.

Despite a growing interest in preventing discrimination based on social condition, and a doctrinal optimism for human rights codes, a limitation of this strategy is that it might not be as effective outside Quebec due to the *Quebec Charter's* unique structure. Like Section 52 of the *Constitution Act, 1982*,<sup>203</sup> Section 52 of the *Quebec Charter*<sup>204</sup> can be used to hold inoperable provisions that interfere with the rights listed. The inoperability clause or paramountcy over other provincial legislation gives the *Quebec Charter* its quasi-constitutional status. In contrast, while other human rights codes may contain similar clauses, courts have not used them to render by-laws inoperable.<sup>205</sup> Indeed, we note a lack of case law in which equality provisions in human rights codes are applied to declare by-laws inoperable outside of Quebec.<sup>206</sup> In the rest of Canada, the most effective challenges to by-laws that target people experiencing homelessness have been achieved by using Section 7 of the *Canadian Charter*,<sup>207</sup> which our strategy does not speak to. Litigants in Quebec do not need to

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<sup>203</sup> *Constitution Act*, *supra* note 14, s 52(1): “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

<sup>204</sup> *Quebec Charter*, *supra* note 10, s 52. The section reads as follows: “No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.”

<sup>205</sup> Human rights laws in several provinces, including Manitoba, contain similar paramountcy clauses, which have not been interpreted as generously. See *Human Rights Code*, CCSM c H175 s 58 (Manitoba); *Saskatchewan Human Rights Code*, 2018, SS 2018, c S-24.2 s 52; *Alberta Human Rights Act*, RSA 2000, c A-25.5 s 1(1); *Human Rights Act*, RSPEI 1988, c H-12, s 1(2) (PEI); *Newfoundland and Labrador Human Rights Act*, 2010, SNL 2010, c H-13.1 s 5.

<sup>206</sup> See e.g. *Gale v Hominick*, 1997 CanLII 2561, [1997] CarswellMan 156 (MB CA):

Human rights legislation does not create and does not pretend to create a mechanism to determine the validity of or to strike down allegedly discriminatory provincial legislation. In other words, it is not a provincial Charter of Rights and Freedoms with the potential to limit the ability of the legislature to enact laws of general application. This is confirmed by an examination of the history of human rights legislation in Manitoba.

<sup>207</sup> In *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, 2023 ONSC 670, Justice MJ Valente found an anti-encampment by-law violated the s 7 rights of those who were camped on a vacant lot, but found no breach of s 15(1). Anti-encampment by-laws in British Columbia have previously been found to violate s 7 of the *Canadian Charter*: *Adams*, *supra* note 171 at para 74; *Shantz*, *supra* note 73 at para 188. The lack of adequate shelter space was a critical factor in these cases. For successful challenges to Quebec by-laws that limit the use of public space for protests, see also *Bérubé*, *supra* note 170; *Villeneuve c Ville de Montréal*, 2018 QCCA 321.

rely on this provision, because the *Quebec Charter* guarantees the right to life, security, and dignity within an anti-discrimination framework.<sup>208</sup> In other words, security and equality are not mutually exclusive bases.

Another limitation of this strategy are the costs associated with litigating this issue. Former Chief Justice McLachlan describes access to justice as a privilege of “corporations and the wealthy.”<sup>209</sup> Poor litigants can be represented by legal aid lawyers, although legal aid in Quebec has been described by some as “inadequate, inefficient and inequitable.”<sup>210</sup> Defendants of municipal by-law infractions are unlikely to qualify for legal aid services.<sup>211</sup> Such obstacles could be mitigated through mutual aid and community support to build solidarity and fund litigation.<sup>212</sup> Lawyer and activist Dean Spade writes that “[m]utual aid is essential to building social movements.”<sup>213</sup> While the proposed strategy may be a long and expensive process, it is not insurmountable with the power of a collective movement.

Finally, another barrier to this strategy is the practical difficulty for many people experiencing homelessness to take this issue to court, given that they may experience significant instability in their daily lives. Moreover, many of the individuals we met at the legal clinic express mistrust of the legal system. One way around this would be for advocacy groups or community organizations to bring a claim on their behalf by seeking public interest standing.<sup>214</sup> Courts have significant discretion in this regard and are guided by the Supreme Court to approach this in a “liberal and generous manner.”<sup>215</sup>

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<sup>208</sup> *Quebec Charter*, *supra* note 10, ss 1, 4.

<sup>209</sup> Kirk Makin, “Access to justice becoming a privilege of the rich, judge warns”, *The Globe and Mail* (10 February 2011), online: <[www.theglobeandmail.com/news/national/access-to-justice-becoming-a-privilege-of-the-rich-judge-warns/article565873/](http://www.theglobeandmail.com/news/national/access-to-justice-becoming-a-privilege-of-the-rich-judge-warns/article565873/)> [perma.cc/CUT4-69EJ].

<sup>210</sup> Allison Hanes, “Lawyers fighting for a better legal aid system”, *Montreal Gazette* (19 February 2020), online: <<https://montrealgazette.com/opinion/columnists/hanes-lawyers-fighting-for-a-better-legal-aid-system>> [perma.cc/7ND5-B7A5].

<sup>211</sup> See *Faucher c Comité de révision de la Commission des services juridiques*, 2006 QCCS 5515.

<sup>212</sup> This part of the strategy is inspired by Dean Spade, *Mutual Aid: Building Solidarity in This Crisis (and the Next)* (New York: Verso, 2020).

<sup>213</sup> *Ibid* at 12.

<sup>214</sup> *CCP*, *supra* note 109, s 85.

<sup>215</sup> *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 48.

## CONCLUSION

In this paper, we showed that Montreal's by-law provisions against drinking on public property and public intoxication adversely impact unhoused Montrealers and contravene applicable quasi-constitutional human rights legislation. The *Quebec Charter* offers the opportunity to develop creative strategies to invalidate discriminatory by-laws that impose both undue economic hardship on unhoused people and exclude them from public spaces.

We hope the strategy we outlined can serve to inform legal and policy reforms to amend municipal by-laws to “reduce their inequitable effects and promote more equitable outcomes.”<sup>216</sup> As such, we believe the arguments we developed here are more than just a purely legalistic strategy: they can help inform a broader set of reforms aimed at promoting social inclusion and eliminating structural factors that exacerbate homelessness. Moreover, the legal argument can be adapted to challenge other Montreal municipal by-laws that have a disparate impact on people experiencing homelessness in the city, such as those that prohibit sleeping on park benches or erecting temporary shelters, and to other jurisdictions beyond Quebec.

In addition to the fact that the by-laws in question are often enforced arbitrarily, they also undermine the City's penal justice system, which is overwhelmed by default judgments against indigent defendants who cannot afford to hire counsel.<sup>217</sup> The municipal court system experiences a financial strain as a consequence of the over-ticketing of people experiencing homelessness in Montreal.<sup>218</sup> Issuing tickets to unhoused Montrealers for consuming alcohol in public spaces and being intoxicated on public property “is a costly and ineffective response in that it has no deterrent or even moderating effect, but rather discriminates against homeless people who use alcohol or drugs.”<sup>219</sup>

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<sup>216</sup> Sheppard, *supra* note 15 at 232.

<sup>217</sup> See e.g. *L'Assomption (Ville de) c Laviolette*, 2007 QCCM 58. As Justice Sheilah Martin wrote for the majority of the Supreme Court in *R v Boudreault*, a decision that found the mandatory victim surcharge of \$100 to \$200 to be an unconstitutional fine: “... the enforcement of the surcharge against impecunious or impoverished offenders places a significant burden not only on these individuals but on our courts and penal institutions as well. These measures are likely to cost the government much more than it could ever recoup from this group of offenders and to add to the strain of an already overburdened criminal justice system.” *R v Boudreault*, 2018 SCC 58 at para 63.

<sup>218</sup> See “Observatoire des profilages 2021 Report on the Judicialization of Homelessness”, *supra* note 4 at 35.

<sup>219</sup> *Ibid* at 36.

The factors that contribute to homelessness are complex, and discrimination against unhoused people is a systemic and structural issue that extends far beyond the scope of municipal by-laws, and into provincial and federal jurisdictions.<sup>220</sup> However, cities have the “power to rethink how public space is regulated”<sup>221</sup> and municipal by-laws, practices, and policies must align with human rights standards,<sup>222</sup> including the right to adequate housing.<sup>223</sup> Indeed, “[m]unicipal governments play a critical role in advancing housing strategies and policies.”<sup>224</sup> The right to housing requires the State, at all levels including municipalities, to ensure that measures and policies are in place “to prevent homelessness, prohibit forced evictions, address discrimination, [and] focus on the most vulnerable and marginalized groups.”<sup>225</sup> Montreal, in collaboration with provincial and federal counterparts, “should allocate the maximum available resources to urgently end homelessness”<sup>226</sup> because fulfilling the right to housing is a

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<sup>220</sup> See Douglas, *supra* note 11 at 62.

<sup>221</sup> See McCartan et al, *supra* note 24 at 39.

<sup>222</sup> The *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 999 UNTS 171 art 28 (enter into force 23 March 1976, accession by Canada 19 May 1976) [ICESCR], stipulates that the provisions of the Covenant “extend to all parts of federal States without any limitations or exceptions,” including municipalities. The Human Rights Council, in the *Progress report of the Advisory Committee on the role of local government in the promotion and protection of human rights, including human rights mainstreaming in local administration and public services* (A/HRC/27/59), has clarified that municipalities “are obliged to comply, within their local competences, with their duties stemming from the international human rights obligations of the State.”

<sup>223</sup> See Leilani Farha, “Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context” (2017) United Nations Human Rights Council, A/HRC/34/51. The right to adequate housing is protected in Article 11 of the ICESCR, *supra* note 222, and Article 25 (1) of the *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71. Canada recognized the right to housing in domestic law in 2019 under the *National Housing Strategy Act*, SC 2019, c 29.

<sup>224</sup> See McCartan et al, *supra* note 24 at 31.

<sup>225</sup> Office of the United Nations High Commissioner for Human Rights, *The Right to Adequate Housing* (Geneva, Switzerland: United Nations, 2014) at 6. According to Prashan Ranasinghe and Mariana Valverde, “it appears that homelessness [...] cannot be meaningfully addressed and resolved by municipalities alone; it certainly requires the cooperation and active involvement of all three levels of government”: Prashan Ranasinghe & Mariana Valverde, “Governing Homelessness through Land-Use: A Sociolegal Study of the Toronto Shelter Zoning By-Law” (2006) 31:3 Can J Sociology 325 at 346.

<sup>226</sup> McCartan et al, *supra* note 24 at 76.

joint responsibility between all levels of government and is “essential for living with dignity.”<sup>227</sup>

Alison Smith stresses that “homelessness is political.”<sup>228</sup> Laws and policies can reinforce the process of social exclusion that unhoused people experience. However, the solutions will not be found only in the courts. While the proposed legal strategy cannot solve the homelessness crisis, we believe it is a crucial step toward eliminating one tangible barrier facing people experiencing homelessness in our City.

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<sup>227</sup> See Office of the Federal Housing Advocate, “Housing is a Human Right: The Office of the Federal Housing Advocate’s 2021-2022, Annual Report to the Minister” (2022) at 2, 27, online (pdf): *Canadian Human Rights Commission* <[https://housing.chrcreport.ca/pdfs/office\\_of\\_the\\_federal\\_housing\\_advocate-annual\\_report\\_2021.pdf](https://housing.chrcreport.ca/pdfs/office_of_the_federal_housing_advocate-annual_report_2021.pdf)> [perma.cc/X5G6-HWDY].

<sup>228</sup> See Smith, *supra* note 25 at 37.