

The logo features a stylized graphic of a building with three vertical bars of varying heights on the left. To the right of this graphic, the word "TORONTO" is written in a large, bold, black, sans-serif font. Below "TORONTO", the words "STAFF REPORT" are written in a smaller, bold, black, sans-serif font. A horizontal line is positioned below the text.

# TORONTO STAFF REPORT

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September 6, 2006

To: Policy and Finance Committee

From: City Solicitor

Subject: Feasibility of Enacting a “Quality of Life” By-law to Address Panhandling

Purpose:

This report responds to a request from City Council for the City Solicitor to report on the feasibility of enacting a "quality of life" by-law that would include a provision to address panhandling.

Financial Implications and Impact Statement:

There are no financial implications associated with this report.

Recommendations:

It is recommended that this report be received for information.

Background:

At its meeting of June 27, 28 and 29, 2006, City Council adopted a Notice of Motion requesting that the City Solicitor report on the feasibility of enacting a "quality of life" by-law that would include a provision that "no person can impede any other person's reasonable enjoyment of day-to-day activities through panhandling" and directed that the report include a communications strategy and an enforcement strategy with respect to such a by-law. This report responds to the preceding request. With respect to the request in the Notice of Motion for a report relating to Nathan Phillips Square and other civic centres, City Council, in adopting the “Streets to Homes” report at its meeting of February 1, 2 and 3, 2005, authorized the amendment to the by-law governing Nathan Phillips Square to prohibit camping at the Square and also directed that Municipal Code Chapter 636, Public Squares be amended in a similar fashion. The by-law amending Chapter 636 to prohibit camping in other public squares was enacted by Council at its meeting of July 21, 2005.

Comments:

For the purposes of this report, it has been assumed that the intent of the “quality of life” by-law referred to in the Notice of Motion would be to regulate all forms of panhandling whether passive or aggressive. Accordingly, the analysis in this report will address panhandling generally.

**Authority of the City to enact a by-law relating to panhandling**

Generally speaking, municipalities can only exercise powers which are expressly conferred by statute or which, though not expressly set out, are necessary or implied for the exercise of an express power.

There are no statutory provisions which expressly give the City authority to enact by-laws for the purpose of addressing issues pertaining to the “quality of life” of its residents. While the improvement of the quality of life of its residents is undoubtedly a valid municipal concern it does not, of itself, give rise to authority to enact by-laws. There are no statutory provisions which expressly give the City authority to enact by-laws for the purpose of limiting or prohibiting panhandling. However, the City does have certain express powers on which it may be able to rely to address panhandling in various contexts. The following spheres of jurisdiction set out in the new *City of Toronto Act, 2006* (which is expected to be in force shortly after the commencement of the term of the new Council) may provide authority to enact by-laws relating to panhandling:

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

In order to rely on one of the preceding spheres of jurisdiction as authority to regulate or prohibit an activity, the City must demonstrate that there is a connection between the activity sought to be regulated or prohibited and the sphere of jurisdiction. Accordingly, if, for example, the City wished to regulate or prohibit panhandling on the basis of its authority to enact by-laws for the “economic, social and environmental well-being of the City”, the City would have to demonstrate that any limitations it imposes on panhandling enhance the economic, social or environmental well-being of the City.

Because of the necessity of demonstrating that there is a connection between the activity sought to be regulated or prohibited and the sphere of jurisdiction on which the City relies as authority for the regulation or prohibition, the City must carefully consider which activities associated with panhandling could be covered by a by-law. For example, one of the distinctions that is often made in this area is between passive and aggressive panhandling. The City would have difficulty relying on the “health, safety and well-being of persons” or the “protection of persons and property” spheres to address passive panhandling as it would be difficult to demonstrate that

passive panhandling affects the health, safety and well-being of persons or that it gives rise to a need to protect persons or property. However, these spheres would likely provide sufficient authority to address panhandling that is conducted in an aggressive or intimidating manner.

### **Possible limitations on the City's authority to enact a by-law relating to panhandling**

In addition to ensuring that it has statutory authority to enact a by-law relating to panhandling, the City would have to ensure that any such by-law did not infringe rights guaranteed under the Charter. Challenges under the Charter to by-laws or legislation imposing restrictions on panhandling (and associated behaviour) have most commonly alleged violations of the freedom of expression, the right to equal treatment or the right to life, liberty and security of the person.

The appeal decision of the Ontario Superior Court of Justice in *R. v. Banks*, involving a challenge to the *Safe Streets Act, 1999* (the "SSA") is informative in this regard. Broadly speaking, the SSA prohibits the solicitation of anything of value, including money, in an aggressive manner or to certain "captive audiences" such as persons in cars. (A copy of the SSA is attached as Appendix 1). The legislation was upheld by the Ontario Superior Court and in so doing, the Court made the following key findings with respect to Charter issues:

1. begging is expressive conduct which conveys meaning relating to a person's impoverished condition and need for assistance and as such is protected by the Charter's guarantee of freedom of expression;
2. while the Charter's guarantee of freedom of expression protects all content of expression, it does not protect all forms of expression such as violent or obstructive forms of expression;
3. the SSA did not restrict expression in that it did not restrict a person's ability to convey meaning but instead was limited to restricting manners of expression that threaten the safety and security of others and as a result the SSA did not infringe the freedom of expression;
4. restrictions on expression in public places will not violate the Charter if the restrictions are aimed at forms of expression which are inconsistent with the principal function or intended use of the place where the expression is made;
5. the ability to obtain income through aggressive begging or begging to captive audiences is not protected under the Charter's guarantee of life, liberty and security of the person; and
6. discrimination based on poverty is not covered by the Charter's guarantee of equality.

Based on the foregoing, it would appear that any attempt by the City to prohibit panhandling in general would not survive a challenge based on the Charter as panhandling would be found to have expressive content that is protected under the Charter's freedom of expression. In cases where restrictions on panhandling were upheld, the courts have placed particular importance on

the fact that the by-laws or legislation in question did not prevent people from conveying information about their impoverished condition but instead, the restrictions related to potentially harmful consequences of the form in which the message was conveyed such as forms of expression that were threatening or obstructive.

### **Restrictions on the time and location of panhandling**

It is difficult to predict whether restrictions on panhandling based on time and location would be upheld if challenged under the Charter. In light of the current case law, it would appear that broad restrictions on panhandling based on time and location are unlikely to be upheld. Broad restrictions are more likely to be construed by the courts as an attempt to legislate against panhandling itself, which is beyond the scope of authority of a municipality, as opposed to legislating against the possible negative consequences of panhandling which may be within a municipality's authority.

As well, as set out above, various courts have found that expressive behaviour such as panhandling may be limited in public places if the restrictions are aimed at forms of expression which are inconsistent with the principal function or intended use of a place. Thus, any by-law limiting panhandling in public places will ultimately involve a consideration of the use of a place and a balancing of the rights of panhandlers with the rights of other users of the place in question.

There have been cases where municipal or provincial restrictions on the location of panhandling have been upheld. In those cases, the courts have clearly been influenced by the fact that the restrictions were framed narrowly and were found to be enacted pursuant to valid municipal or provincial purposes such as the maintenance of public safety or ensuring the efficient and safe use of public sidewalks.

There are no cases which have directly dealt with challenges to by-laws such as Calgary's panhandling by-law, that limit the time in which panhandling can be conducted. Calgary's by-law contains a broad prohibition against panhandling during the hours of 8:00pm to 8:00am. However, in a case involving the City of Vancouver, the judge commenting on a similar time restriction (no panhandling between sunset and sunrise) in a repealed Vancouver by-law, expressed the opinion that such a provision would inevitably be struck down in the event of a Charter challenge.

Based on the above, it appears that it may be possible for the City to enact a by-law which imposed restrictions on the time and location of panhandling. The ability of the City to defend such a by-law, should it be challenged, would depend on the strength of the evidentiary basis put forward by the City in support of the by-law. For example, if the City wished to enact a by-law restricting panhandling in tourist areas based on the "economic, social and environmental well-being of the City" sphere of jurisdiction, the City would need to present evidence that panhandling in such areas has a negative impact on the City's economic, social or environmental well-being as well as evidence that the restrictions imposed by the by-law were aimed at reducing that negative impact.

In addition, the City will be required to demonstrate that the restrictions on panhandling based on time and location are as limited as reasonably possible in light of the sphere of jurisdiction on which the City relies to enact the by-law. Again, using tourism as an example, a general restriction on panhandling at a particular tourist destination would be less likely to be upheld by a court than a restriction on panhandling for a fixed number of hours before, during and after the opening hours of the destination.

### **Other Jurisdictions**

Should the City wish to enact a by-law relating to panhandling, it is useful to look at the experience of other jurisdictions. In addition to Ontario's *Safe Streets Act* which is referred to above, the by-laws of Calgary, Vancouver, Montreal, Halifax and New York City were considered in preparation of this report. None of the by-laws of the Canadian jurisdictions contain absolute prohibitions on panhandling. The by-laws address such issues as obstruction, repetitive soliciting, loitering and some of the by-laws include restrictions on panhandling at certain times or at specified locations. (A chart comparing the provisions of these by-laws is attached as Appendix 2 to this report.)

Of the by-laws referred to above, Vancouver's has been challenged and upheld. Vancouver's by-law prohibits soliciting "in a manner which causes an obstruction" which includes soliciting in groups of three or more persons, obstructing traffic by soliciting people in cars and also includes geographic restrictions similar to those found in the *Safe Streets Act*. Vancouver's by-law does not contain a restriction on the time during which panhandling can occur. The Court's decision to uphold the by-law was based on its findings that a) Vancouver was entitled to pass by-laws to ensure the safe and efficient use of its roads and sidewalks, b) the by-law did not cover all types of panhandling (passive panhandling was excluded), and c) the by-law did not limit the expressive content of panhandling but instead was directed at the negative consequences of certain forms of panhandling, such as obstructive or threatening panhandling.

New York City's State Penal Law contains a provision which imposes broad prohibitions on loitering and wandering in public places for the purpose of begging. The provision of the State Penal Law was successfully challenged as a violation of the freedom of speech guaranteed by the American Constitution. It does not appear that the relevant provision of the State Penal Law was amended or repealed after the successful court challenge. Subsequent to the decision striking down the previously mentioned provision of the State Penal Law, the New York City Administrative Code was amended by adding a provision prohibiting aggressive panhandling in public places and to impose a minimal number of limitations on the location of passive panhandling (e.g. bank entrances and exits, automated teller machines, motor vehicles). It would appear that the provisions of the Administrative Code were framed in a manner that takes into account the reasons of the court reviewing the State Penal Law. The relevant provisions of the Administrative Code have not been the subject of judicial review in any reported cases.

Conclusions:

The City does not have express statutory authority to enact by-laws related to the “quality of life” of its residents or to regulate or prohibit panhandling. However, it is likely that certain of the City’s express powers are broad enough to address panhandling and related conduct. Should the City decide to enact a by-law to limit panhandling, it should ensure that any limits are related to the powers under which it enacts the by-law and that the by-law does not infringe rights guaranteed under the Charter. Based on the existing case law, it would appear that limits aimed at the message conveyed by panhandlers would not be upheld in the event of a Charter challenge although limits on the manner or location of conveyance may be upheld, particularly if the limits address threatening, violent or obstructive forms of expression. The success of the City in defending a challenge to a by-law limiting panhandling will depend on the strength of the evidence connecting the limits set out in the by-law to the sphere of jurisdiction on which the City relies to enact the by-law

As a by-law has not yet been put forward, it is not possible at this time to advise on a communication or enforcement strategy.

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List of Attachments:

Appendix 1 - Safe Streets Act, 1999  
Appendix 2 – Comparison of By-laws in Other Jurisdictions

## APPENDIX 1

### Safe Streets Act, 1999

#### Definition

1. In sections 2 and 3,

“solicit” means to request, in person, the immediate provision of money or another thing of value, regardless of whether consideration is offered or provided in return, using the spoken, written or printed word, a gesture or other means. 1999, c. 8, s. 1.

#### Definition

2. (1) In this section,

“aggressive manner” means a manner that is likely to cause a reasonable person to be concerned for his or her safety or security. 1999, c. 8, s. 2 (1).

#### Solicitation in aggressive manner prohibited

(2) No person shall solicit in an aggressive manner. 1999, c. 8, s. 2 (2).

#### Examples

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

1. Threatening the person solicited with physical harm, by word, gesture or other means, during the solicitation or after the person solicited responds or fails to respond to the solicitation.
2. Obstructing the path of the person solicited during the solicitation or after the person solicited responds or fails to respond to the solicitation.
3. Using abusive language during the solicitation or after the person solicited responds or fails to respond to the solicitation.
4. Proceeding behind, alongside or ahead of the person solicited during the solicitation or after the person solicited responds or fails to respond to the solicitation.
5. Soliciting while intoxicated by alcohol or drugs.
6. Continuing to solicit a person in a persistent manner after the person has responded negatively to the solicitation. 1999, c. 8, s. 2 (3).

## Definitions

3. (1) In this section,

“public transit vehicle” means a vehicle operated by, for or on behalf of the Government of Ontario, a municipality in Ontario or a transit commission or authority in Ontario, as part of a regular passenger transportation service; (“véhicule de transport en commun”)

“roadway” has the same meaning as in the *Highway Traffic Act*; (“chaussée”)

“vehicle” includes automobile, motorcycle, van, truck, trailer, bus, mobile home, traction engine, farm tractor, road-building machine, bicycle, motor-assisted bicycle, motorized snow vehicle, streetcar and any other vehicle drawn, propelled or driven by any kind of power, including muscular power. (“véhicule”) 1999, c. 8, s. 3 (1); 2002, c. 17, Sched. F, Table.

## Solicitation of captive audience prohibited

(2) No person shall,

- (a) solicit a person who is using, waiting to use, or departing from an automated teller machine;
- (b) solicit a person who is using or waiting to use a pay telephone or a public toilet facility;
- (c) solicit a person who is waiting at a taxi stand or a public transit stop;
- (d) solicit a person who is in or on a public transit vehicle;
- (e) solicit a person who is in the process of getting in, out of, on or off a vehicle or who is in a parking lot; or
- (f) while on a roadway, solicit a person who is in or on a stopped, standing or parked vehicle. 1999, c. 8, s. 3 (2).

## Permitted fund-raising by charities

(3) Subsection (2) does not apply to fund-raising activities that meet the following conditions:

1. They are conducted by a charitable organization registered under the *Income Tax Act* (Canada) on a roadway where the maximum speed limit is 50 kilometres per hour.
2. They are permitted by a by-law of the municipality in which the activities are conducted. 2005, c. 32, s. 1.

## Definition

4. (1) In this section,

“outdoor public place” means,



(a) a place outdoors to which the public is ordinarily invited or permitted access and, for greater certainty, includes but is not limited to a sidewalk, street, parking lot, swimming pool, beach, conservation area, park and playground, and

(b) school grounds. 1999, c. 8, s. 4 (1).

### **Disposal of certain dangerous things prohibited**

(2) No person shall dispose of any of the following things in an outdoor public place:

1. A used condom.
2. A new or used hypodermic needle or syringe.
3. Broken glass. 1999, c. 8, s. 4 (2).

### **Defence**

(3) It is a defence to a charge under subsection (2) for the person who disposed of the condom, the needle or syringe or the broken glass to establish that he or she took reasonable precautions to dispose of it in a manner that would not endanger the health or safety of any person. 1999, c. 8, s. 4 (3).

### **Offence**

5. (1) Every person who contravenes section 2, 3 or 4 is guilty of an offence and is liable,

- (a) on a first conviction, to a fine of not more than \$500; and
- (b) on each subsequent conviction, to a fine of not more than \$1,000 or to imprisonment for a term of not more than six months, or to both. 1999, c. 8, s. 5 (1).

### **Subsequent conviction**

(2) For the purpose of determining the penalty to which a person is liable under subsection (1),

(a) a conviction of the person of a contravention of section 2 is a subsequent conviction only if the person has previously been convicted of a contravention of section 2 or 3;

(b) a conviction of the person of a contravention of section 3 is a subsequent conviction only if the person has previously been convicted of a contravention of section 2 or 3; and

(c) a conviction of the person of a contravention of section 4 is a subsequent conviction only if the person has previously been convicted of a contravention of section 4. 1999, c. 8, s. 5 (2).

## **Arrest without warrant**

**6.** A police officer who believes on reasonable and probable grounds that a person has contravened section 2, 3 or 4 may arrest the person without warrant if,

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

(b) the police officer believes on reasonable and probable grounds that it is necessary to arrest the person without warrant in order to establish the identity of the person or to prevent the person from continuing or repeating the contravention. 1999, c. 8, s. 6.

**7.** Omitted (amends or repeals other Acts). 1999, c. 8, s. 7.

**8.** Omitted (provides for coming into force of provisions of this Act). 1999, c. 8, s. 8.

**9.** Omitted (enacts short title of this Act). 1999, c. 8, s. 9.

**APPENDIX #2**

**Comparison of By-laws in Other Jurisdictions**

<b>City</b>	<b>By-Law</b>	<b>Types of Restrictions</b>
Calgary	No. 3M99 – Regulating Panhandling	<ul style="list-style-type: none"> <li>- Time (between hours of 8pm-8am)</li> <li>- Location (within 10 metres of a bank, credit union, atm, transit stop)</li> <li>- Obstructing traffic</li> <li>- Repetitive solicitation</li> <li>- Soliciting people in a vehicle</li> </ul>
Vancouver	No. 8309 s.70A – The Street and Traffic By-law (aka the panhandling by-law)	<ul style="list-style-type: none"> <li>- Obstructing traffic</li> <li>- Soliciting in a group of three or more persons</li> <li>- Location (within 10 meters of a bank, atm)</li> <li>- Soliciting from persons in a vehicle</li> </ul>
Halifax	City of Halifax Ordinances Number 180 - Respecting Streets	<ul style="list-style-type: none"> <li>- Obstructing a person</li> <li>- Loitering or congregating in a manner that disturbs others</li> </ul>
Montreal	RBCM, c. P-12.2 - Concerning Cleanliness and Protection of Public Property and Street Furniture	<ul style="list-style-type: none"> <li>- obstructing traffic</li> <li>- loitering</li> <li>- prowling</li> <li>- lying drunk</li> </ul>
New York	Section 240.35 of the New York State Penal Law	<ul style="list-style-type: none"> <li>- loitering, remaining or wandering in a public place for the purposes of begging*</li> </ul>
New York City	Section 10-136 of the New York Administrative Code	<ul style="list-style-type: none"> <li>- aggressive solicitation in public places</li> <li>- solicitation at certain locations such as a bank, atm, cheque cashing business</li> <li>- soliciting people in vehicles</li> </ul>

\* This provision was struck down in *Loper v. New York City Police Department* by the United States Court of Appeals for the 2<sup>nd</sup> Circuit which ruled that a ban on loitering and panhandling throughout the City was an infringement of the right to freedom of speech, as protected under the First Amendment to the American Constitution.