

THE JUDICIARIZATION OF THE HOMELESS IN MONTRÉAL: A CASE OF SOCIAL PROFILING

EXECUTIVE SUMMARY OF THE OPINION OF THE COMMISSION

Introduction

The mission of the Commission des droits de la personne et des droits de la jeunesse is to defend the principles set out in the *Charter of human rights and freedoms*. The legislator gives the Commission, whose members are appointed by the National Assembly, responsibility for promoting and upholding the principles set out in the *Charter*, and for receiving and examining suggestions, recommendations and requests made to it concerning human rights and freedoms with a view to making the appropriate recommendations to the Government.

During the summer of 2004, several groups asked the Commission to launch an investigation into allegations of systemic discrimination against the homeless in Montréal. A three-party taskforce made up of the Commission, the Réseau d'aide aux personnes seules et itinérantes de Montréal (RAPSIM), and the City of Montréal was created in 2005. The taskforce also brought together elected members of the City of Montréal's executive committee, the mayor of the Ville-Marie borough, public security and social development officials and advisors, representatives from Service de police de la Ville de Montréal (SPVM) and the Société de transport de Montréal (STM).

Members of the taskforce were unanimous in finding that that the issue of large numbers of tickets for minor offences affected the homeless in particular, and lead to a prison term, in a high percentage of cases, for non-payment of tickets. They agreed that imprisonment was not a solution to the problem of homelessness.

The problems connected with homelessness are complex and involve several stakeholders, including various levels of government. Some of the problems currently facing the itinerant population stem from the choice made by the State to use a repressive approach to manage homelessness in Montréal.

The main cause for the use of the courts to deal with the homeless is the enforcement of regulatory and legislative provisions concerning public spaces, and the manner in which these legal instruments are applied by the police.

Despite the efforts expended, the work of the subcommittee set up by the three-party group to analyze the discriminatory effect of City of Montréal by-laws did not produce any concrete results. The Commission therefore decided to assess to what extent the municipal by-laws and their enforcement are consistent with the *Charter of human rights and freedoms*.

In light of its responsibility under subparagraph 6 of the second paragraph of section 71 of the *Charter* and its undertaking as a member of the three-party taskforce, the Commission conducted the analysis of the *Charter* compliance of, first, the municipal by-laws on uncivil behaviour and, second, the institutional standards and practices of the SPVM that guide the enforcement of the by-laws.

The repression of homelessness

In the first part of its opinion, the Commission provides a sociological overview of homelessness and sketches the socio-historic background to the State-sanctioned repression of homelessness, paying

particular attention to the discourse focusing on the fight against “uncivil behaviour”. This discourse was first promoted by the Mayor of New York in the late 1990s, and is often used today in Montréal and other cities around the world to justify penal sanctions for the behaviour patterns associated with homelessness, based on the enforcement of municipal by-laws governing the use of public spaces.

The opinion also contains a quantitative overview of the use of the courts to deal with the homeless in Montréal. Citing a major study on the topic, the Commission shows that the number of tickets issued annually to the homeless under municipal and STM by-laws jumped by 327 % between 1994 and 2005. In 1998—the year following the introduction of neighbourhood policing in Montréal—the number of tickets issued to the homeless recorded its largest annual increase.

During the period studied, most of the offences under municipal by-laws concerned minor breaches of public order considered to be “uncivil behaviour” by the SPVM. These included drinking alcohol or being drunk in public, or being found in a park after closing time.

Based on the most recent data on the subject, the Commission observes that young homeless people are more likely to be penalized for actions that are considered to constitute a disturbance or to be inappropriate in a public space, such as lying on a public bench, loitering in a group, or jaywalking.

The Commission’s opinion shows that the intensive enforcement of municipal by-laws by the SPVM leads to a disproportionate number of tickets issued to the homeless. Although the homeless make up less than 1% of the Montréal population, they received 31,6 % of the tickets issued by the police under municipal by-laws in 2004, and 20,3 % in 2005.

Discriminatory impact of police standards, municipal by-laws and legislation

In the second part of its opinion, the Commission analyzes the *Charter* compliance of several factors whose interaction leads to discrimination against the homeless. It considers that the discrimination is systemic because it does not result from an isolated standard or practice, but rather from the combined effect of several standards, policies and police methods, and also from certain by-laws and legislative provisions. Among these inter-related factors, the Commission focused in particular on the institutional standards and policies of the SPVM, the way in which they are applied by police officers, certain by-laws concerning the use of public spaces, and certain legislative provisions imposing prison sentences for unpaid fines.

The Commission examines the institutional standards and policies of the SPVM that are meant to guide the enforcement, by police officers, of the various municipal by-laws dealing with the use of public space (including the report on the improvement of the neighbourhood policing system (*Rapport d’optimisation de la police de quartier*, 2003), the action plans and annual reviews of the SPVM from 2004 to 2009, the codes used to classify police calls and interventions, etc.).

The Commission shows that, taken as a whole, these factors have helped build, and then justify, a system of exclusion that forces the homeless out of public spaces.

It appears, from this analysis, that the standards and policies have made the fight against uncivil behaviour and “public disorder” a priority target for the police. In addition, the standards and policies assign responsibility for disorder and uncivil behaviour to certain groups, including the homeless, panhandlers, squeegees and prostitutes.

The SPVM standards and policies describe the presence of the homeless as “disturbing” and “causing insecurity”, and suggest that they have a propensity to disrupt public order and commit uncivil behaviour. In this way they reinforce the stereotypes that suggest that the homeless pose a threat to security and occupy public spaces in a socially deviant way that, in itself, calls for penal sanctions.

Social profiling

The homeless are at risk of social profiling because SPVM standards and policies make them designated targets for police monitoring and surveillance. In the view of the Commission, the excessive use of the courts to deal with the homeless results more from police bias, with the goal of clearing public spaces, than from a neutral and impartial enforcement of the law without regard to social condition.

If, in the case of racial profiling, skin colour is the factor that triggers police intervention, in the case of social profiling, the trigger is the visible signs of poverty or marginality.

The Commission shows, with examples, that social profiling occurs in particular when individuals are—or assumed to be – homeless, are ticketed for minor offences that are rarely, if ever, punished by the police when committed by other citizens (for example, loitering, spitting, dropping cigarette ends, lying on a public bench, being drunk in public, jaywalking, etc.).

Vaguely drafted by-laws can open the way to the targeting of the types of behaviour associated with homelessness. The opinion cites the case of a municipal court judge who was surprised to find that lying down on a public bench could result in being charged by the police under a municipal by-law prohibiting the use of street furniture for a purpose other than the one for which it is intended. The judge was even more uncomfortable with the fact that, for this offence, the minimum fine was \$500, completely out of proportion to the seriousness of the offence committed – lying down on a public bench.

It is also possible to infer social profiling when police officers behave unsuitably with the homeless, for example by making uncalled-for or offensive remarks concerning their social condition, or by issuing tickets repeatedly. The opinion cites an example given by the SPVM of five men aged between 27 and 48 who had received between three and five tickets on the same day for offences such as “loitering while drunk” or obstructing traffic.

Social profiling also occurs when police officers make unusual decisions concerning the homeless, for example by making identity checks without reasonable grounds or issuing fines that are disproportionate to the seriousness of the offences committed.

The Commission considers that the stigmatization of the homeless in SPVM standards and policies as well as the ensuing police profiling, undermines the rights of the individuals concerned to the safeguard of their dignity without discrimination based on social condition.

The Commission’s opinion shows that the discriminatory targeting of the homeless is not rationally linked to the objective pursued by the SPVM, which is to reduce the feeling of insecurity felt by citizens in the presence of the homeless, and to respond to complaints from citizens. This is problematic, since it shifts the justification for police actions from punishment for behaviour that objectively threatens security and public order to punishment for behaviour subjectively considered to be threatening by other members of the public.

For this reason, the homeless are more likely to be punished by police officers to quell fears based on prejudice than because of the actual degree of nuisance or danger created by their behaviour. In fact, the scientific data shows that there is no significant correlation between the rate of uncivil behaviour and the crime rate in a given neighbourhood.

In addition, the SPVM appears to have overestimated the degree of insecurity and number of complaints likely to be generated by the presence of the homeless in the downtown area. In any case, there is no evidence to support the conclusion that citizens support the priority use of repressive methods to deal with the cohabitation difficulties caused by the presence of the homeless in public spaces.

Discriminatory by-laws

Although most of the discrimination experienced by the homeless can be attributed to the standards that guide the enforcement of municipal by-laws by the police, the Commission considers that some of the by-laws themselves contain a discriminatory bias.

The discriminatory effect can be indirect, for example when apparently neutral provisions penalize behaviour associated with homelessness that does not constitute an actual nuisance. This type of offence may still, after analysis, be *Charter* compliant if the wording of the provision identifies an actual nuisance that justifies the prohibition of the behaviour concerned. If the provision does not identify the nuisance, it is up to the State to demonstrate on what conditions it is justifiable to punish an apparently inoffensive type of behaviour.

For example, one STM by-law states that a person loitering in the metro system, even without disturbing or obstructing other people, is guilty of an offence. In this case, the provision does not identify the nuisance caused, making a prohibition on loitering difficult to justify because the behaviour itself does not constitute a nuisance.

The Commission also considers that certain by-laws and municipal ordinances create discrimination towards the homeless because they were passed with the evident goal of restricting access by the homeless to public spaces. For example, one by-law enacted by the Ville-Marie borough closed its 15 remaining parks and squares that were still open at night, several of which were used by the homeless to sleep. As a result, several of them without a home to go to were placed in an illegal situation when they tried to snatch a few hours of sleep.

This by-law made by the Ville-Marie borough undermined the homeless' right to life and to personal security, inviolability and freedom, without discrimination, and also their right to the safeguard of their dignity. The Commission considers that closing public spaces completely to the homeless at night is not a reasonable measure and that the by-law should be repealed.

Similarly, the Commission analyzes the *By-law concerning dog and animal control*, amended by the Ville-Marie borough to ban dogs from Émilie-Gamelin park and Viger square, two public places frequented by the homeless with dogs. The provisions prohibiting dogs in these two parks are discriminatory and must be amended. The municipal by-law violates the right of the homeless to have access, without discrimination, to public spaces, and infringes their right to dignity and freedom, as well as causing them moral harm by, once again, reinforcing their feeling of exclusion.

This violation of rights is unjustified, since the nuisance caused by dogs in parks can be controlled by targeted provisions in by-laws, as is the case in other parks.

Imprisonment

The Commission has also looked at the consequences, for the homeless, of being imprisoned for unpaid fines in light of the rights recognized by the *Charter*.

It considers that this practice is extremely harmful for people with a very low, or no, income. For the homeless, the damage is even greater because imprisonment hinders the social reintegration process which many have started or are trying to start.

The Commission considers that the provisions of the *Code of Penal Procedure* that impose a prison sentence for unpaid fines have a discriminatory effect on the homeless. Nothing in the Code justifies this discrimination on the basis of social condition.

As a result, the Commission recommends that the *Code of Penal Procedure* be amended to eliminate the discriminatory effect on the homeless of the current provisions imposing a prison sentence for unpaid fines.

Prevention instead of repression

Last, in the third part of its opinion, the Commission recommends that the State drop its repressive approach to the problems connected with homelessness and focus on a preventive approach that respects the fundamental and socio-economic rights protected by the Charter.

The State must take all appropriate measures to protect the rights of its most vulnerable citizens. More specifically, the Québec government must introduce a policy on homelessness addressing various problems, including the lack of coherence and continuity in the assistance provided to the homeless by various agencies, the mental health and additional problems they experience, the lack of social integration support measures for young people leaving youth centres, the lack of support for labour market integration and schooling for the homeless or people at risk of homelessness, and the unsuitability and inadequacy of social assistance scales with regard to the basic needs of the poorest people in society.

Given the key importance of access to housing in the fight against homelessness, the Commission looked at this problem in more detail. It demonstrates that Québec has a duty, under its international commitments and the fundamental and socio-economic rights protected by the Québec Charter, to guarantee access to suitable housing for all the homeless. It points out that the right to suitable housing for the homeless will involve providing access to social housing along with community support. This is a time-tested and sustainable formula to allow the homeless “to get off the streets” because it allows them not only to have access to housing but more importantly to remain in it.

The public funding used to provide financial assistance for community support measures in social housing is insufficient. The Commission considers that more money must be invested in subsidized social housing to ensure the residential stability of a large number of unemployed people and people in low-security, low-pay jobs, whose limited financial resources place them at constant risk of becoming homeless.

The Commission recommends:

1. that the institutional standards and policies of the SPVM to combat uncivil behaviour be amended to remove any element that targets and stigmatizes the homeless;
2. that the use of repressive methods by the SPVM against the homeless be based, not on a perception that their presence might be disturbing or threatening, but on neutral behavioural criteria applicable to all citizens, such as the degree of nuisance or danger created by the behaviour;
3. that training on the social causes of homelessness and the risk of being profiled facing the homeless be provided for police officers employed by the City of Montréal;
4. that each municipality and borough, as well as the provincial government, review all the regulatory and legislative provisions that punish behaviour in public spaces to ensure that they identify a specific nuisance and that the provision is justified. In addition, the Commission recommends that the enforcement of by-laws that are not consistent with the Charter be suspended until amended or repealed by the relevant authority;
5. that the by-law enacted by the Ville-Marie borough to close the last remaining 15 parks that were still open at night be repealed;
6. that the provision of the *By-law concerning dog and animal control* introduced by the Ville-Marie borough to specifically ban dogs from Émilie–Gamelin park and Viger square be repealed;
7. that the *Code of Penal Procedure* be amended to eliminate the discriminatory impact, especially on the homeless, of the current provisions imposing a prison sentence for unpaid fines;

8. that the State strengthens the economic and social rights set out in the *Charter* at the earliest opportunity to protect the rights of the most vulnerable people in society, and in particular the rights of the homeless;
9. that a policy on homelessness be introduced to ensure that the State, its representatives and its service providers formally launch a joint and planned action to allocate targeted resources with priority given to the homeless;
10. that as part of the policy on homelessness, the government:
 - a. implements concrete measures to improve coordination between the stakeholders dealing with the homeless, thereby ensuring continuity of services and a better harmonization of the various categories of intervention;
 - b. strengthens and enhances existing measures to reach the homeless with mental health or addiction problems wherever they are, to ensure that they benefit from appropriate support and medical supervision from the health and social services network;
 - c. strengthens and increase the resources allocated to allow the homeless to benefit from personalized, long-term therapeutic supervision;
 - d. strengthens existing measures and programs supporting the social reintegration of young people leaving youth centres, especially when enrolled in education or seeking employment;
 - e. strengthens and enhances measures and programs to support the homeless or individuals at risk of homelessness when enrolled in educational or vocational integration programs;
 - f. uses the Market Basket Measure (MBM) to set the level of financial support for poor individuals provided by social assistance and social solidarity programs;
11. that the State give priority to a preventive and proactive approach to homelessness, in particular by providing sufficient and adequate housing for the homeless or individuals at risk of homelessness, if they so desire;
12. that the government increase and make recurrent the funding provided for new social housing projects through the various programs administered by the Société d'habitation du Québec;
13. that the government increase the budget of \$5 million allocated to the *Cadre de référence sur le soutien communautaire en logement social* to match the dollar estimates made by its partners in the social and community housing sector;
14. that the government provide stable and recurrent funding for the *Cadre de référence sur le soutien communautaire en logement social*, adjusted annually to reflect the actual needs of the public and private organizations offering community support for social housing.

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