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TRESPASS—TEN YEARS LATER[©]

BY PATRICK M. CASE* AND DAVID R. DRAPER**

Parkdale Community Legal Services' work on trespass, ten years ago, was a lesson in the fickleness of political agendas and the need for advocacy strategies to respond to changing times. It is difficult to imagine the problems of youth and minority access to publicly-used property making it onto the current provincial political agenda. In the mid-1980s, however, the issue briefly gained a public profile with the Ontario Liberal government's decision to establish a "Task Force on the Law Concerning Trespass to Publicly-Used Property as it Affects Youth and Minorities,"¹ chaired by Commissioner Raj Anand.

We at PCLS were never sure where the impetus for the creation of the task force originated, but its relevance to PCLS's client community was obvious. At that point, trespass to property was not an area covered by PCLS's caseload criteria. It was one of those issues that was out there, but those affected generally did not use any legal services. Therefore, the first step was to go into the community to get a better sense of the problems faced by youth and minorities in using publicly-used property in the community, particularly the malls. PCLS's caseload criteria were also amended to allow us to represent clients charged under Ontario's *Trespass to Property Act*.²

The *TPA* is based on traditional notions about property. It affirms the rights of property owners without addressing the needs of property users in an age of large publicly used, but privately owned, spaces. This view was expressed by Laskin C.J. in his dissent in *Harrison v. Carswell*,³ in which he rejected the application of "the ancient legal concept"⁴ of

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¹ See Ontario, *Report of the Task Force on the Law Concerning Trespass to Publicly-Used Property as it Affects Youth and Minorities* (Toronto: Ministry of the Attorney General, 1987) (Chair: R. Anand) [hereinafter *Report*].

² R.S.O. 1980, c. 511 [hereinafter *TPA*] (now R.S.O 1990, c. T.21).

³ [1976] 2 S.C.R. 200 [hereinafter *Harrison*].

⁴ *Ibid.* at 206.

trespass "in all its pristine force"⁵ to the modern shopping centre, and characterized the property owner's position as "extravagant."⁶ However, he was in the minority. The majority of the Supreme Court of Canada concluded that any changes to the traditional laws of trespass should come from the legislature, not the courts.⁷

Our outreach and casework convinced us that Chief Justice Laskin was right. The *TPA* and the position of many owners of publicly-used property were extravagant and outdated. The sheer arbitrariness of the law was difficult to accept. Property owners could invite the public in, but then exclude individuals for any reason or no reason at all. It was also disturbing to see how many trespass charges went unanswered, despite increasing fines and the eventual possibility of jail if the fines were not paid.

Together, clinic staff and students were able to inform themselves and make submissions to the task force addressing both the law and its impact on the low income residents of Parkdale. We argued that exclusion from publicly used property should not be based on the whim of property owners, but on specific grounds that related to unacceptable uses of the property. We also addressed the prosecution of trespass offences, arguing that the possibility of jail for nonpayment of fines should be eliminated.

The task force's report was extremely encouraging. Anand recognized the importance of publicly-used property such as modern town squares.⁸ He recommended that property owners bear the onus of showing why the person should not have been on the property.⁹ He also recommended the elimination of jail as a possible consequence of the nonpayment of fines imposed due to trespass offences.¹⁰

Following the release of the report, the Liberal government initiated a broad-based consultation¹¹ which continued after the New Democratic Party (NDP) came to power. The consultation involved representatives of mall owners, the chamber of commerce, Native

⁵ *Ibid.*

⁶ *Ibid.* at 203.

⁷ *Ibid.* at 201.

⁸ *Supra* note 1 at 118.

⁹ *Ibid.* at 113.

¹⁰ *Ibid.* at 139.

¹¹ No report documenting the consultations has ever been produced. The opinions and concerns of the various groups mentioned here are based on the authors' recollection of events while attending the consultations from 1989 to 1990.

groups, labour, community legal clinics, the police and various social agencies.

The *TPA* is significant to labour groups due to its importance during picketing and other union activities. While no one argued that the labour issues were unimportant, they swamped the original purpose of the task force and significantly complicated the political issues involved in changing the *TPA*.

The consultation found little consensus. Labour argued for a legislative extension of the principles set out in Laskin C.J.'s dissent in *Harrison*, but only with respect to labour; mall owners and the chamber of commerce denied that malls resemble or are treated by the public as "public streets;" clinic representatives doggedly attempted to bring the agenda back to its original mandate; the police tried to separate their tactics in dealing with trespassers from those of "thuggish" private security forces; and Native people tried largely without success to place rural and traditional rights of access to land on the agenda.

Anand navigated these dangerous shoals with considerable skill and tact, but was unable to keep the issue on the NDP government's political agenda. For a minor issue, it had become highly contentious and other "more weighty matters" were given priority. There was never any indication that the government was unsympathetic to the recommendations of the report, only that it was not prepared to allocate the time and resources needed to complete the reform process. As a result, the work of the task force was abandoned, leaving Ontario with outdated trespass legislation "in all its pristine force."¹²

Ten years have passed. Many malls appear to have extensive programs for senior citizens. Some malls, such as the Dufferin Mall, have received attention for innovative approaches to security, including programs for young people. It is hard to believe, however, that the problem has disappeared. The question is how it might be approached in current times.

The *Canadian Charter of Rights and Freedoms*¹³ is no longer new. It has changed the role of the courts in reviewing legislation, making the deference shown the legislature in *Harrison* less likely today. If it has not already been done, an analysis of the *TPA*'s consistency with *Charter* rights seems in order.

On the political side, it would be wise to learn from our experience. The *TPA* will not be amended without input from organized

¹² *Harrison*, *supra* note 3 at 206.

¹³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

labour. Although its agenda is somewhat different, there may be enough common ground for advocates of those particularly affected by the legislation—youth, minorities, people with psychiatric disabilities, Native people and poor people—to work with the more powerful labour groups.