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PICKETING IN SHOPPING CENTRES:

The Case of *Harrison* v. *Carswell*

By JOHN ULMER*

The split decision of the Supreme Court of Canada in the case of *Harrison* v. *Carswell*[1] is a singular example of the way in which progress in the law of labour relations has too often been constrained by the application of outmoded legal concepts to the policy issues that emerge in a rapidly changing industrialized and urbanized society. The majority reasons for judgment, delivered by Dickson, J., held than an employee in the course of a legal strike was properly convicted under the Manitoba *Petty Trespasses Act*[2] for peacefully picketing the premises of his employer located in a privately owned shopping centre. Mr. Justice Dickson expressly refused to come to grips with the competing societal interests raised by the issue of labour picketing in shopping centres. Instead, the learned judge chose to be bound by a somewhat less than convincing precedent,[3] and in an unusually introspective decision, he went on to discuss his interpretation of the limits of the judicial function in Canada. In direct rebuttal, Chief Justice Laskin's dissenting opinion, concurred in by Spence and Beetz, JJ., argues against the use of an ancient doctrine such as trespass which, in the circumstances of this case at least, is "a theory which does not square with economic or social fact".[4] It is a compelling plea to the other members of the Supreme Court to abandon mechanical deference to *stare decisis* and thereby to accept the duty and the challenge of being the court of last resort.

The facts of the *Carswell* case are uncomplicated. A legal strike was in progress against Dominion Stores Limited, which leased premises at the Polo Park Shopping Centre in Winnipeg from the landlord-developer, the Fairview Corporation Limited. Sophie Carswell, a striking employee of Dominion Stores, was picketing on the sidewalk in front of the store building. Peter Harrison, manager of the shopping centre, warned the respondent that she was on private property and asked her to leave. Carswell refused to comply and continued to picket; subsequently, the police were called and the respondent was charged with four offences (one for each of four days on which she picketed) under the provincial *Petty Trespasses Act* upon informations sworn by the appellant, Harrison.

The Provincial Court Judge who originally heard the case held that in the circumstances there was no trespass and dismissed the charges. That

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[1] Unreported, (decision handed down June 26, 1975) *rev'g* (1975), 48 D.L.R. (3d) 137 (Man. C.A.) *sub. nom. R.* v. *Carswell.*

[2] R.S.M. 1970, c. P50.

[3] Dickson, J., majority reasons, at 2.

[4] Laskin, C.J.C., dissenting reasons, at 8.

determination was reversed after a trial *de novo* in the County Court, and the respondent was fined $10 for each offence. On appeal to the Manitoba Court of Appeal, the convictions were set aside, and the present appeal followed by leave to the Supreme Court of Canada.

The issue of whether or not picketing should be permitted on shopping centre grounds is a classic case of the law being called upon to balance two rival interests in society — the phrase *the law* being carefully chosen, for a large part of the controversy in this case revolved around whether the judiciary or the legislature could best perform this balancing function. Strictly construed, the conflicting claims in shopping centre picketing are the primacy of the private property rights of the landlord, against the advancement of the union's interests and the process of collective bargaining generally by permitting the union to conduct its picketing at the most effective *situs*. The landlord of a shopping centre cannot be expected willingly to open his sidewalks and malls to any and every person seeking to picket. From his point of view, even slight obstructions would interfere with the orderly flow of customers that yields his profits. On the other hand, to deny the right of the employees to picket their employer's premises in a shopping centre because the sidewalks are privately owned is effectively to preclude any picketing at all in that labour dispute. Picketing on the adjoining roadways is not only practically valueless, it could be enjoined as illegal economic pressure against all of the shopping centre tenants.[5]

The underlying policy issues, of course, are much broader. Picketing is a specific form of communication, intended to convey information about a strike and, not incidentally, to gain public support in order to inflict economic losses on the employer. The right to picket, therefore, has important implications regarding freedom of speech. In fact, in the United States the issue is invariably dealt with on the basis of the first amendment constitutional guarantees.

In addition, there is the question of developing a more realistic conception of the sanctity of property rights in the modern world. A shopping centre extends a virtually unrestricted invitation to enter, and obviously depends on a constant flow of people for its very existence. Trespass on the 'private' property of a shopping centre could occur in only the most technical sense of the word. As one American court has said, it is "a property right worn thin by public usage."[6] The significant problem emerges, then, as to whether society is entitled to expect that changing attitudes to property be *consistently* reflected in the law. At a time when government regulation has created numerous nonpossessory interests in land, it is somewhat incongruous for a court to begin to preach the doctrine of absolute property rights. This is particularly so in the circumstances of this case where it could be said that it was a transparent disguise for a convenient way of disposing of a complicated question in the law of labour relations.

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[5] See *Hersees of Woodstock* v. *Goldstein* (1963), 38 D.L.R. (2d) 449 (Ont. C.A.).

[6] *Schwartz-Torrance Investment Corp.* v. *Bakery and Confectionery Workers' Union, Local 31* (1964), 394 P. 2d 921 at 926.

Admittedly, there is no easy answer to the problem of reconciling the union's demands for an effective forum with the traditional protections offered to the owner of private property. It would seem that the only rational approach would be to abandon the inflexible legal concepts that have generally been invoked in analyzing shopping centre picketing. Certainly, the attempt to assimilate what is clearly an important labour relations question into a strict view of property law is unlikely to be useful. The history of trespass to land is bound up with the need of an agricultural society to establish continuous and exclusive rights to the ownership of land. To apply this concept today without allowances for the entirely different socio-economic realities yields, in Chief Justice Laskin's words, "extravagant"[7] results. To cite a simplistic illustration, compare the interests of a shopping centre owner in preventing the picketing of one of his tenants, and that of a person wishing to enjoin picketing taking place on his front lawn. Clearly, the stake which society as a whole has in the outcome of these two fact situations is vastly different, and there is no reason why they should have the same legal result simply because the kind of estate involved in both cases happens to be a fee simple. By avoiding the attempt to pigeonhole the issue a workable solution could be reached for each case along the spectrum, and guidelines set for the resolution of future disputes. This is by no means an extraordinary role for appeal courts to play.

Unfortunately this approach, parts of which were effectively put forth by Freedman, C.J.M. in the decision handed down by the Manitoba Court of Appeal in this case,[8] did not find favour with the majority of the Supreme Court in dealing with *Harrison* v. *Carswell*. Mr. Justice Dickson flatly asserted that

> the submission that this court should weigh and determine the respective values to society of the right to property and the right to picket raise important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs.[9]

With respect, this statement of what many would regard as a truism of jurisprudence does little to conceal the fact that in choosing to do "nothing", the Supreme Court has in fact seen fit to vindicate the property rights of the shopping centre owner. The merits of that decision are of course debatable, but surely it is not unreasonable to suggest that the interests of society in the freedom of speech and the furtherance of the collective bargaining system deserve more consideration than they were given by Mr. Justice Dickson. Even if in a particular instance it is found that the right to property is the predominant value, the dismissal of the countervailing interests as if it were somewhat impetuous to have raised them is indefensible.

Dickson, J. based his decision on two grounds, precedent and the mandatory language of the statute. Neither of these bases appears very satis-

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[7] Laskin, C.J.C., dissenting reasons, at 2.

[8] See the majority opinion of Freedman, C.J.M.: (1975), 48 D.L.R. (3d) 137 (Man. C.A.) *sub. nom. R.* v. *Carswell*.

[9] Dickson, J., majority reasons, at 7.

factory on closer examination. Canadian case law on the subject of picketing on private property is less than extensive, although in two decisions in the early 1960's, the practice had apparently been sanctioned by the Appeal Courts of British Columbia and Saskatchewan.[10] In *Zeller's (Western) Ltd.* v. *Retail Food and Drug Clerk's Union, Local 1518*,[11] the British Columbia Court of Appeal reversed convictions for contempt arising out of the refusal of striking employees to obey an injunction enjoining picketing obtained at the suit of their employer — a tenant in a shopping centre — on the grounds that the application was improperly based on nuisance. Davey, J.A. held that as the picketing was lawful under the doctrine enunciated in *Williams* v. *Aristocratic Restaurants*,[12] it could not be transformed into an unlawful nuisance simply because it took place on property over which the employer had an easement. The learned justice did suggest, however, that an action in trespass might have been viewed more favourably. Less than a year later in *Grosvenor Park Shopping Centre* v. *Waloshin*,[13] a case more directly on point, the Saskatchewan Court of Appeal set aside an injunction against picketing granted to the landlord of a shopping centre, on the grounds that although owner of the fee he could not maintain an action in trespass. Culliton, C.J.S. also suggested that an alternate remedy might have been more successful — this time in nuisance.

The combined effect of these decisions is hardly dramatic. Because the policy implications of the case are not analyzed, there is no consideration of the matter in the context of labour law. Moreover, the reasoning used to arrive at the decisions exhibits the same tendency to be locked into conceptual legal terminology without regard to the reality of the situation, which is the major drawback of Mr. Justice Dickson's opinion. As such, although *Grosvenor Park* was the first Canadian case to recognize that the public character of a shopping centre ought to lead to a different legal result, the court carried that discovery too far. In deciding that an owner of a shopping centre did not have a sufficient degree of possession to bring an action in trespass, the court created far more difficulties than it solved, for such an allegation strikes at the roots of property law's notions of ownership. A more fruitful analysis would concentrate not on the landlord's possession but on the question of whether the actions complained of constitute a trespass in view of the unrestricted invitation to enter and the social value of the picketing.

The *categorical* rejection of a property owner's right to bring an action in trespass, without any well-reasoned formulation of the competing claims of public policy and private interest which led to that result in the particular instance, was bound to be disputed in later cases. The reaction was, unfor-

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[10] See the comment on these two cases: H. Arthurs, *Labour Law — Picketing in Shopping Centres* (1965), 43 C.B.R. 357.

[11] (1964), 42 D.L.R. (2d) 582 (B.C.C.A.).

[12] [1951] S.C.R. 762.

[13] (1965), 46 D.L.R. (2d) 750 (Sask. C.A.).

tunately, extreme. In *R.* v. *Peters*[14], the controlling authority in Mr. Justice Dickson's view, the Ontario Court of Appeal held that

> an owner who has granted a right of entry to a particular class of the public has not thereby relinquished his or its right to withdraw its invitation to the general public or any particular member thereof, and that if a member of the public whose invitation to enter has been withdrawn refuses to leave, he thereby becomes a trespasser and may be prosecuted under the *Petty Trespass Act*.[15]

The Supreme Court of Canada, in a five-line decision that neither accepted nor repudiated the reasoning of the Ontario Court of Appeal, agreed with that determination of the case and dismissed the appeal, which had been taken not at large, but only on two specific questions of law.[16]

Admittedly that statement, an unchallengeable tenet of property law a few centuries ago, may still be a perfectly valid exposition of today's law with respect to private dwellings. But to apply that formulation of the law to a shopping centre is unreasonable. In the following portion of his dissenting opinion in *Carswell*, one can sense the exasperation with that position felt by Chief Justice Laskin:

> What does a shopping centre owner protect, for what invaded interest of his does he seek vindication in ousting members of the public from sidewalks and roadways and parking areas in the shopping centre? There is no challenge to his title and none to his possession nor to his privacy when members of the public use those amenities. Should he be allowed to choose what members of the public come into those areas when they have been opened to all without discrimination? Human rights legislation would prevent him from discriminating on account of race, colour or creed or national origin, but counsel for the appellant would have it that members of the public can otherwise be excluded or ordered to leave by mere whim. It is contended that it is unnecessary that there be a reason that can stand rational assessment. Disapproval of the owner, in assertion of a remote control over the 'public' areas of the shopping centre, whether it be disapproval of picketing or disapproval of the wearing of hats or anything equally innocent, may be converted (so it is argued) into a basis of ouster of members of the public. Can the common law be so devoid of reason as to tolerate this kind of whimsy where public areas of a shopping centre are concerned?[17]

What the Chief Justice is saying is simply that the law can recognize limits to the ability of a landowner to invoke the remedy of trespass without necessarily impugning his ownership of the fee. As that position is crucial to a critical analysis of Mr. Justice Dickson's interpretation of the statute, the discussion of precedent will be put aside for a moment.

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[14] (1971), 17 D.L.R. (3d) 128 (S.C.C.) *aff'g* (1971), 16 D.L.R. (3d) 143 (Ont. C.A.).

[15] *R.* v. *Peters* (1971), 16 D.L.R. (3d) 143 at 146.

[16] The second question related to the constitutional validity of the provincial trespass act, and has no relevance to the *Carswell* case. The first question quoted by Dickson, J. at p. 2 of the majority reasons, read:

> Did the learned judges in Appeal err in law in determining that the owner of the property had sufficient possession of the shopping plaza sidewalk to be capable of availing itself of the remedy for trespass under The Petty Trespass Act, R.S.O. 1960, C. 294, S. 1(1)?

[17] Laskin, C.J.C., dissenting reasons, at 8-9.

Dickson, J. contended that the Manitoba *Petty Trespasses Act* embodies a statutory policy which ought to be altered only by the legislature. That position, of course, has great merit; and at first glance, the Act seems to leave little room for judicial manœuvring. But on further reflection it is arguable that such a view makes sense only if one has made a predetermination that a trespass has actually been committed. Obviously, to evaluate fairly the interests of both the picketer and the shopping centre owner, one must at least recognize that rather than being a given fact, the existence of a trespass is the central issue in the case. Section 2 of the *Petty Trespasses Act* deals with "unlawful trespass" only. In order to constitute a trespass under the Act, the entry into enclosed land or, failing that, land "upon or through which he has been requested by the owner, tenant or occupier not to enter, come or pass . . ." must be unlawful. In other words, liability follows only an *unjustified* invasion of the exclusive possession of the owner or occupier. The Act expressly sets out the defence of colour of right. Public and even private necessity would probably be valid defences as well. As Laskin, C.J.C. pointed out in the passage just quoted, a landowner who extends a general invitation to the public to enter, would thereby have relinquished his right to withdraw the invitation on the grounds of racial or religious discrimination. Clearly the limits to the protection to be afforded to a landowner must be set by the law; and even though common law trespass has been codified as an offence, it is still up to the courts to interpret the statute so as to determine what constitutes an unlawful entry against which the law will supply a remedy. To do so, of necessity, involves the court in an assessment of the impact of its decision on the affected interests in society.

For these reasons, it is difficult to justify the lack of policy analysis in the judgment of Dickson, J. The statute is not the absolute prohibition which he considers it to be, nor are the precedents especially valuable. In particular, the case which he considers to be controlling authority could be easily and logically distinguished. With respect, it does not seem fair to say, as did Mr. Justice Dickson, that the cases of *Peters* and *Carswell* arose out of the same fact situation. *Carswell* was an employee engaged in peaceful picketing during the course of a legal strike. The defendant in *Peters* was the President of the Brampton Labour Council; the incident giving rise to his conviction for trespass was an appeal to boycott a supermarket which sold California grapes. If one adopts the analysis postulated at the beginning of this comment, it will be readily seen that this situation does not present nearly as pressing a case for legal protection as does Sophie Carswell's. Without overcomplicating the question with the issue of secondary picketing, this is so for two reasons. Although *Peters* involved an issue pertaining to an important matter of labour relations, it was not a labour relations dispute. Because of this, the benefit of the argument that prevention of effective picketing would detract from the collective bargaining process is lost. With it goes much of the stake society has in permitting the picketing on private property, for once the identification with a specific objective of public policy is gone, the picketers must fall back on the more general claim of a civil right to protest. The second point distinguishing *Peters* is the availability of an alternative forum. The boycotting of California grapes was a public issue, and there was no vital reason why protesting with placards had to take place

on the shopping centre owner's sidewalks. As far as Carswell was concerned, on the other hand, there was no other place to go. The *Peters* case, therefore, could be read as covering the situation of the public protester only, not that of the legal striker. In fact, Laskin, C.J.C. called it unfair to consider the Ontario Court of Appeal's statement in *Peters* out of the context of its factual background.[18] Finally, the Supreme Court's dismissal of the appeal in *Peters* was in answer to a narrowly-framed question of law. There was no discussion whatsoever of the facts or of the policy considerations involved. Two of the justices sitting on the court that heard that appeal, Spence, J. and Laskin, J. (as he then was), dissented in the *Carswell* case, pointing out that the brief reasons for judgment in *Peters* would not have sufficed if the case actually stood for the legal point for which it had been cited in the majority opinion. The Chief Justice goes on to suggest that the simple fact of their disagreement "should give pause to any suggestion that the *Peters* case has concluded the issue now before us."[19]

In sum, *Carswell* was an unusual occasion for Mr. Justice Dickson to become the champion of *stare decisis*. Adherence to precedent ought not to be used as a substitute for an evaluation of the socio-economic issues at stake when the authorities relied on yield so little in terms of logical analysis. Chief Justice Laskin expressed concern with the adoption of a "timorous" and "mechanistic" approach in the application of precedent. He would much prefer, I believe, that the Supreme Court follow Lord Denning's exhortation in *Dutton* v. *Bognor Regis*:

> It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing.[20]

What this means is not that all respect for precedent be abandoned, but that the principles of law upon which the prior case was decided be carefully assessed before they are found to be conclusive in another case. In the Supreme Court at least, precedent ought to be the servant of judicial reasoning, not its master.

What, then, are the alternative approaches to shopping centre picketing? The United States provides a valuable source of comparison in spite of the differing constitutional framework. The California Supreme Court supplied the first complete analysis of the problem in the *Schwartz-Torrance Investment Corp.*[21] case. There, the court found that the interest of the state in encouraging collective bargaining was greater than the purely technical invasion of the shopping centre owner's private property. That reasoning was affirmed in the United States Supreme Court decision in *Logan Valley*.[22] The language in that case drew analogies between the public business district and

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[18] *Id.* at 3.

[19] *Id.* at 5.

[20] [1972] 2 W.L.R. 299 at 313.

[21] *Supra*, note 6.

[22] *Amalgamated Food Employees Union* v. *Logan Valley Plaza Inc.* (1968), 391 U.S. 308.

its modern functional equivalent, the shopping centre. But even with the extreme importance attached to first amendment rights, the United States Supreme Court saw that limits on the use of shopping centres as forums for free speech must be drawn. In the 1971 decision of *Lloyd Corp.* v. *Tanner*,[23] the court first asserted its right to examine carefully whether the private property urged as a public forum in fact fulfilled that role, and went on to prescribe two major tests as conditions precedent to the court's intervention to protect the activity: first, it must be shown that suitable alternative forums are not available, and second, that the activity bears a direct relation to the use to which the private property is being put. Applying those tests, the court held that persons who attempted to distribute handbills on the grounds of a shopping centre urging attendance at a political rally to protest the draft and the war in Vietnam, could properly be excluded as trespassers, without overruling its previous decision to permit peaceful picketing by employees during a labour dispute.

A position roughly analogous to this would have been reached in Canada, had the Manitoba Court of Appeal's decision in *Carswell* not been reversed. Freedman, C.J.M. began his analysis from the premise that a shopping centre owner's use of his remedy in trespass was subject to judicial control. Thus he held that whereas trespass could clearly be invoked against "a wrongdoer engaged in some illegal activity" and, following *Peters*, a person engaged in "gratuitous" protest, if the picketer is engaged in a legal strike with a tenant employer in the shopping centre no actionable trespass has been committed.[24]

A rationale for the underlying policy of these instances was supplied by Chief Justice Laskin in his dissenting opinion in the present case. The learned justice found that those members of the public who respond to the shopping centre owner's general invitation to enter have "a continuing privilege in using the areas of the shopping centre provided for public passage,"[25] which would avoid liability by constituting a defence to an otherwise valid action in trespass. The usefulness of this concept is its flexibility. This is perhaps best evident from the description of privilege cited by the Chief Justice from Prosser's treatise on the *Law of Torts*:

> [The defendant] is allowed freedom of action because his own interests, or those of the public require it, and social policy will best be served by permitting it. The boundaries of the privilege are marked out by current ideas of what will most effectively promote the general welfare.[26]

The learned justice did not commit himself to an elaborate discussion of what these limits should be, though he did indicate that aside from a general prohibition against any material damage, they would be determined by reference to both the nature of the activity and its object. "In the present case", he

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[23] (1972), 407 U.S. 551.

[24] *R.* v. *Carswell* (1975), 48 D.L.R. (3d) 137 at 138.

[25] Laskin, C.J.C., dissenting reasons, at 12.

[26] Prosser, *Law of Torts* (1971), 4th ed.) at 98, cited in Laskin, C.J.C., dissenting reasons, at 12.

concluded, "it is [Sophie Carswell] who has been injured rather than the shopping centre owner."[27]

Chief Justice Laskin's dissenting judgment is representative of the kind of sophisticated judicial reasoning seen too infrequently in Canadian jurisprudence. Recognizing that new social facts have rendered older concepts inapplicable, he set out on "a search for an appropriate legal framework"[28] in which direction the law could develop free of the constraints set out at a time when the fabric of society was essentially different. It is this constant reshaping of legal principles in order to apply them to new situations which, it has been said again and again, is the genius of the common law. The growth of labour organization in particular has forced changes in many of the more solidly entrenched areas of the law.[29]

The case of *Harrison* v. *Carswell* is perhaps most interesting for the dramatic way in which it demonstrates how the resolution of a relatively simple issue can touch on some of the vital conflicts of our time. Against the historical background of the shifting of the balance of power between capital and labour, one finds the pressing need for the law to evolve. On another level, these constant challenges to age-old doctrines are reflected in the philosophy of the law, particularly in its attitudes to precedent and to the role of the judge as law-maker. Finally, on a more personalized level, there is the growing polarization between individual judges on issues fundamental to the structuring of society. With this in mind, one can sympathize with the difficulties Mr. Justice Dickson found with this case, although disagreeing with his conclusion. We can only join him in asking "What are the limits of the judicial function?"

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[27] Laskin, C.J.C., dissenting reasons, at 14.

[28] *Id.* at 10.

[29] The abandonment of the use of the industrial tort of conspiracy to curb normal trade union activities in the famous *Crofter's* case [*Crofter Hand Woven Harris Tweed Co.* v. *Veitch*, [1942] A.C. 435 (H.L.)] is but one example of the inevitable evolution of the common law in the changed circumstances of the twentieth century. See W. Friedman, *Law in a Changing Society* (2d ed. New York: Columbia University Press, 1972) at 54.