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Trespass to Property: Shopping Centres

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RÉSUMÉ
Dans cet article, l'auteur suggère que les centres d’achat sont devenus les terrains communaux des temps modernes. Elle considère que les centres d’achat privés remplacent désormais les trottoirs publics et les parcs publics dans la mesure où c’est là que, de nos jours, les gens “s’expriment”. Elle précise qu’il est crucial de conserver un forum public dans des endroits qui, même s’ils sont privés, servent au bien public. En effet, c’est grâce à ce genre de forum que les voix des pauvres et des marginaux pourront se faire entendre. L’auteur rappelle que les pauvres n’ont pas le même accès aux médias que les autres classes plus privilégiées de la société. Elle ajoute que, si l’on veut vraiment respecter les droits à la liberté d’expression, on doit préserver et protéger les lieux à usage public, même s’ils sont privés, car ils sont propices aux activités d’expression.

L’auteur passe en revue la jurisprudence canadienne en matière d’activités d’expression sur des lieux privés à usage public mais remarque que cette jurisprudence est loin d’être adéquate. L’auteur considère que les tribunaux canadiens n’ont pas su confronter les questions relatives aux activités d’expression se déroulant sur des lieux privés à usage public à cause de la sacro-sainte notion de propriété privée; ils ne semblent pas capables, jusqu’à date, de se détacher de ce concept. L’auteur cite aussi certaines décisions prises aux États-Unis et, bien qu’elle conserve un regard critique sur la jurisprudence américaine, elle salue l’approche analytique adoptée par les tribunaux américains lorsqu’ils ont décidé d’accorder la protection fédérale constitutionnelle non seulement aux activités se déroulant sur des lieux publics proprement dit mais aussi aux activités se déroulant sur des lieux privés à usage public. Pour finir, l’auteur explique comment une telle approche pourrait servir à lancer un défi à la Loi sur l’entrée sans autorisation, conformément à la Charte canadienne des droits et libertés.

* Copyright © 1992 Lisa Loader, B.A. LLB., Lisa Loader is a student-at-law at Golden, Green & Chercover, Toronto, Ontario. She is a graduate of Osgoode Hall Law School, York University, Downsview, Ontario.
In this article Lisa Loader argues that shopping centres have become the modern day commons. She asserts that privately owned shopping centres have taken over the role of public sidewalks and squares as the places where people can engage in expressive activity. She asserts that we must preserve a public forum in areas that are publicly-used regardless of private ownership because it is through this sort of forum that the voices of the poor and marginalized are most likely to be heard. Loader points out that the poor do not have the same access to the media as the more economically privileged. She goes on to argue that in order to ensure meaningful rights to freedom of expression, publicly-used areas, even if they are privately owned, must be preserved and protected as places where expressive activity is allowed.

Loader reviews Canadian case law on expressive activity on publicly-used private property and concludes that most of it is completely inadequate. She asserts that Canadian courts have failed to come to grips with the issues involved in cases regarding expressive activity on private property because they are too steeped in the notion of the sanctity of private property and they have not been able to let go of absolute notions of ownership. Loader also reviews American decisions and although she is critical of much of the American jurisprudence she does cite with approval the approach the United States Supreme court initially took when they extended federal constitutional protection to expressive activity on publicly-used private property. Loader concludes by explaining how this sort of approach could be used to mount a Charter challenge to Ontario’s Trespass to Property Act.

INTRODUCTION

Shopping centres have become an integral part of our community life. In fact, they are now so much a part of our community life that we rarely give their existence a second thought. And yet, their influence has been far from uniformly beneficial. This paper will examine the impact of shopping centres on expressive activity.

Shopping centres are the creatures of the suburbanization that larger cities experienced in the post-war period. Gallion notes that, in order to serve a scattered suburban population, it was most convenient to establish clusters of stores in shopping centres.\(^1\) Typically, suburban shopping centres are more attractive than downtown shopping areas. They offer ample parking, protec-

tion from the weather and less traffic. In response to the threat which suburban shopping centres pose, many cities with downtown shopping districts have improved their shopping facilities. The renewal of the downtown areas has often involved replacing the stores which line public streets—traditional shopping districts—with privately owned shopping centres. Toronto's Eaton Centre is an example of this trend.

Increasingly, shopping centres provide all the types of stores and services of the traditional shopping district, and more. Sternlieb notes a trend towards "mixed use" in shopping centres "including recreation, community and cultural services, art, music and food—catering to evening and weekend activities in appealing enclosed environments". There is ample evidence of mixed use in Canadian shopping centres. An example is West Edmonton Mall, Canada's largest shopping centre. This mall really does provide one-stop shopping. It is difficult to imagine any standard consumer good which cannot be purchased there. Groceries, clothing and even cars are all readily available. Most services are available as well including those of travel agents, restaurants, hairdressers, banks, and trust companies. Furthermore, West Edmonton Mall contains much more than stores and services: it offers extensive recreational and entertainment facilities including a skating rink, an amusement park, miniature golf, a hotel, numerous movie theatres, a water-park, an aquarium, a submarine ride, an aquatic show, and more.

Although West Edmonton Mall may be viewed as excessive, the goods and services and many of the other amenities proffered there are available in other large shopping centres. Put simply, most large shopping centres can provide people with all their material needs as well as access to most of the recreational and cultural pursuits which they may wish to undertake. As a result, in communities where there has been no traditional shopping district, the shopping centre has become the centre of the community. It is hardly surprising, therefore, to find municipal government offices located near the city's largest shopping centre. For example, the Scarborough municipal government offices are connected to the Scarborough Town Centre.

Although the designs of shopping centres vary, it seems that most shopping centre architects and designers attempt to emulate traditional shopping districts. Typically, stores and services are located along, and generally face onto

2. Ibid. at 304.
interior sidewalks. Benches, fountains, artwork and plants are usually grouped in central points throughout the shopping centre, often in front of a department stores or at the hub of the building. The shopping centre thus tends to mirror the shopping district of a town in an idealized way, not only in what it offers but also in its design.

As noted, suburban shopping centres normally provide parking. Most people drive directly onto the shopping centre premises and enter from the parking lot. In some cases, municipal or regional transit stations have entrances which lead directly into the suburban shopping centre. The Yorkdale Shopping Centre and Scarborough Town Centre are both connected to the underground municipal transit, as well as to the regional GO Transit. Downtown shopping centres tend to have little or no parking, but are generally accessible by means of public transit. Further, there is a trend in downtown Toronto to link shopping centres by underground tunnels. It is now possible to walk from City Hall to Union Square through tunnels and shopping centres. It is thus possible to go directly from one’s home to a shopping centre, spending little or no time on public sidewalks.

Shopping centres have become quite attractive. They provide stores, services, entertainment and recreation in one location easily accessible to most people. In the design of shopping centres, there has been an attempt to create a comfortable, yet familiar, environment for all these activities. It is not surprising then that shopping centres are fast replacing our traditional shopping districts.

A shopping centre, however, differs from a traditional shopping district in one crucial way: the areas of the shopping centre used by the public are all privately owned. Public sidewalks and squares are owned by the municipality and regulated by municipal by-laws enforced by the police. Restrictions upon the use of public spaces can be challenged by members of the public either through the courts or through the political process. Sidewalks in a shopping centre are generally controlled by the owner acting in its own interests. Chief among the owner’s interests is profit. To ensure profitability, the owner

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5. *Ibid.* at 57. Anand notes that in 1985 there would be an estimated 3.2 billion transactions carried out at shopping centres.

6. *Ibid.* at 61. Anand suggests that some shopping centre owners have accepted an obligation to provide assistance to community groups, but most have not recognized the need to provide services unrelated to profit-seeking.
wants to protect its tenants and promote their goods and services to potential buyers. The result is that the sidewalks on which many of us now walk are controlled by consumerism and the search for profit.

What importance does the privatization of our sidewalks have? I suggest that privatization has had quite serious consequences. In the report of Ontario’s “Task Force on the Law Concerning Trespass to Publicly-Used Property as it Affects Youth and Minorities” Chair Raj Anand emphasized the discriminatory treatment which visible minority youth receive at the hands of private security officers employed by shopping centre owners.\(^7\) I would like to focus on the effect of privatization on the development of community values, particularly with respect to freedom of speech.

**SIDEWALKS AND FREE SPEECH**

Jane Jacobs describes the importance of sidewalks in establishing contacts among people who live in a city. She suggests that sidewalks “bring together people who do not know each other in an intimate, private social fashion”.\(^8\) In effect, the sidewalks help to create a sense of community. Jacobs admits that most contact on our sidewalks is trivial yet notes that:

> The sum of such casual, public contact at a local level ... is feeling for the public identity of people, a web of public respect and trust, and a resource in time of personal or neighbourhood need.\(^9\)

Jacobs believes that building such trust is a partial solution to one of the greatest ills plaguing American cities: segregation and racial discrimination.\(^10\) Simply put, casual contact creates awareness and helps to build the kind of trust necessary to begin bridging the differences between races.

It is just as plausible that it is not only racism which may be overcome by trust born of casual contact in public places. The same analysis can be applied to poverty. For those who are not poor, awareness of poverty generally does not come from work or private life. Rather, this awareness—to whatever extent it exists—comes from exposure to poverty and for many people the most direct exposure they get to the poor comes from walking down the

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7. Ibid.
9. Ibid. at 55.
10. Ibid. at 70-71.
sidewalks of our cities. For an increasing number of people, however, the sidewalks they normally use are privately owned, and, on most of these sidewalks, poverty is not visible.

Shopping centres, by definition, exclude the poor. The poor do not participate in the consumerism which shopping centres embody. Further, the owner of the shopping centre strives to attract paying clientele by providing a safe and comfortable environment. To entice people to spend money, it keeps out what is ugly: poor weather, traffic congestion and the most visible reminders of poverty. It is not uncommon to encounter security guards removing people from shopping centres who do not look like they are there to buy. The homeless, panhandlers and the mentally ill are among those who are not welcome. The effect is to insulate a large part of the public from poverty. If you spend your public time in shopping centres, you never see the poorest people. To illustrate, consider the difference between the public sidewalk along Bloor Street, where people are panhandling and sleeping in doorways, and the private sidewalk of the Holt Renfrew Centre a few blocks away. These are two separate worlds. I do not suggest that all the poor panhandle or live on the streets. I do suggest, however, that those who beg are the starkest reminders of the poverty that is all around us, and that shopping centres—with their private sidewalks—make it too easy for the relatively privileged to ignore that poverty.\(^{11}\)

The privatization of sidewalks threatens to make the poor invisible, not just by removing them from sight, but also by silencing them. Our sense of community and our community values should not come exclusively from those who are relatively privileged. Instead, our sense of community, if it is to be workable, must be informed by the ideas and concerns of people from all parts of our society. It is critical, therefore, that we preserve sidewalks as a place where all members of the community may express their concerns. Our sidewalks are not just places on which to walk. They have been and must continue to be, places where ideas are exchanged.

For the poor to make their concerns known to the community as a whole is not an easy task. People tend to become very isolated by poverty. For many who are struggling to live on little money, the price of a subway token to get to a meeting may be too much. Even those who are not physically isolated

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11. The United States Court of Appeals, Second Circuit, found that the right to beg was not expressive activity protected by the First Amendment in Young v. New York City Transit Authority, 903 F.2d 146 (2nd Cir. 1990). Leave to appeal to the United States Supreme Court was denied. The issue has not been decided in Canada.
may feel too alienated from the community as a whole to believe that organizing would make a difference in their lives. A further obstacle to organizing is the diversity of experiences within the group that is called "the poor". For example, an elderly couple living on an inadequate pension have little in common with a single mother of three children living on family benefits. In some respects, the poor have only one common characteristic: they have no money.

Although the obstacles to organizing are enormous, poor people do organize. People with similar concerns, such as promoting good childcare in poor families, or with an interest in a particular issue, such as housing, do come together.12 The problem they face is finding a means by which to express their position to the rest of the community. Obviously, being poor, they cannot buy media time. What they must turn to is the more traditional method of using public places—the modern day commons—for expressive activities.

There are those who disparage the value of protecting speech in public places. It is argued that such speech reaches very few people and is discounted because most people believe that those who use the sidewalks must be "cranks". For example, Moon argues that protecting free speech in public places legitimates "a system in which the means of effective communication are monopolized by a small portion of the population". To Moon, what is really important is access to the media.13

Moon’s analysis is problematic. The rich and poor do not have equal access to the media. For the poor, organizing is difficult. Accordingly, protecting free speech in publicly-used areas is critical. To denigrate this means of communication is to suggest that the poor might as well not bother to organize. I suggest that this is a recipe for maintaining the status quo. Expression in public places is not just geared towards informing those who pass by of one’s position. It can be used to generate media attention, and, there are, for example, community organizers who are quite adept at doing this. This may be a roundabout way of bringing the interests of the poor into

12. Clearly, organizing of the poor is best done by identifying particular issues. In these examples, I was thinking of L.I.F.T. (Low Income Families Together), an organization started by a group of single parents on welfare with the purpose of providing information to others like them about childcare and related concerns. As housing is a major concern in Toronto, particularly for the poor, organizations having to do with housing (for example, the tenants’ organization in Parkdale), have been particularly vital.

the thoughts of the more economically privileged, but it is nonetheless important. For these reasons, our sidewalks—public and private—must be recognized and protected as places where those without other resources can make their concerns known.

As shopping centres increasingly take on the role of the modern day commons, access to private sidewalks for expressive activity becomes increasingly important. I suggest that not only do restrictions on such activity harm those who wish to speak, they also harm the community as a whole. Information is vital to the democratic process, and information must come forward from all parts of the community. McIntyre J. recognized the value of free speech in *Dolphin Delivery v. R.W.D.S.U.*, where he wrote:

> Freedom of expression is ... one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

The challenge now is to find a way, given the existing hierarchy of legal rights and interests, to ensure that freedom of expression is not sacrificed to the rights of property owners.

**OWNERSHIP RIGHTS VERSUS FREE SPEECH**

The owners of a shopping centre have property rights at common law which attach to their premises. These rights may be grouped into three general categories: alienation, use, and exclusion. It is the latter category which is of particular interest here. Boland J. in *Russo V. Ontario Jockey Club* described the common law right of the owner to exclude as follows:

> There is a general principle in common law ... that a landowner has the exclusive right to decide who is allowed to remain on his or her land. The landowner is not compelled to give a reason when the visitor is asked to leave the land. Furthermore, the landowner is not under any duty to follow the principles of natural justice when excluding any person.

At common law, the right to exclude others gives rise to the action of trespass. The deprivation of the right to enjoy one's property by another's trespass means that the owner is entitled to a remedy, even if there is no material damage to the property. The remedy is normally an injunction.

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In Ontario, the common law right to exclude has also been codified in the *Trespass to Property Act*. Section 2 of the Act establishes three offenses with respect to trespass: entry onto the premises without the express permission of the occupier; engaging in activity on the premises without the express permission of the occupier; and failing to leave the premises after being directed to do so by the occupier (or someone authorized by the occupier). A person convicted of an offence is liable to a fine of not more than $2000. The Act contains provisions for arrest including arrest without warrant on the premises by the occupier (or someone authorized by the occupier) of any person believed “on reasonable and probable grounds to be on the premises in contravention of section 2” (s. 9).

The Act applies to any privately owned property, and, as Anand notes, like the common law, it makes no distinction between different kinds of private property. “Premises” is defined as land or structures and includes: water; ships and vessels; trailers and portable structures designed or used for residence, business or shelter; and, trains; railway cars; vehicles and aircraft; except while in operation. The definition of “occupier” in sub-s. 1(1) of the Act includes a person “in physical possession of premises” or a person who has “responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises”.

Anand suggests that trespass rests upon “absolute notions of private property and its attributes.” This interpretation has been borne out in a number of cases. In *Grosvenor Park Shopping Centre Ltd. v. Cave*, at issue was the picketing of a grocery store by striking employees on the parking areas and on a sidewalk belonging to the shopping centre. At the trial level, it was held that the picketers were trespassers. Bence C.J.Q.B. of the Saskatchewan Queen’s Bench rejected the argument that the shopping centre could be characterized as “quasi-public property”. He wrote:

> Whatever may be the view of the Courts in the United States, I am of the opinion that in this Province there is no such thing as quasi-public property. It is either public or private, and in this instance it is indisputably private.

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As it was private property, the owner had the right at common law (there was no trespass statute in Saskatchewan) to refuse entry to any persons.

The same line of reasoning was followed by Haines J. of the Ontario High Court in *R. v. Page.* Haines J. found that the *Petty Trespass Act*, as it was then called, applied to shopping centres. He held that there was no such thing as quasi-public property, only private property or public property. As the shopping centre in question was privately owned, the owner had the right to exclude a person at common law, and the right to invoke the *Petty Trespass Act*. In *Page*, and at the trial level in *Grosvenor Park*, a shopping centre was treated no differently than, for example, a private residence. Legal title was wholly determinative of whether trespass could occur. If the property were found to be privately owned, the owner could exclude anyone it wanted. The same rights were found to attach to all private property, no matter what its purpose or use, purely because it was private property.

This approach lacks subtlety. Property rights are rarely absolute. We are quite accustomed to restricting property rights for various purposes which broadly relate to our concept of the public good. For example, family law statutes limit the right of alienation of a matrimonial home in the best interests of the child through provision for exclusive possession. Building codes and zoning by-laws regulate the use of property to ensure safety and maintain aesthetic values. The right to exclude persons from certain places has been limited by provincial human rights codes in an attempt to reduce discrimination. The question to be asked therefore ought not to be whether the property is privately owned but, rather, what rights attach to a particular kind of property. The Ontario Court of Appeal in *R. v. Peters* indicated a willingness to look not just at title, but also at what rights the property owner in fact exercised over its property. The accused, Peters, had been demonstrating peacefully in front of a grocery store at a shopping centre, protesting the store's sale of California grapes. The court inquired into whether the owner's possession was sufficient to maintain an action for trespass. At common law, the essential element in an action for trespass is possession. Halsbury states that:

> Any form of possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support an action of trespass against a wrongdoer.

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Further, the Act defines "occupier" in terms of physical possession or control over entry.

The court admitted that the owner had granted a right of entry to "a particular class of the public", presumably meaning those willing to buy. In doing so, however, the owner had not "relinquished its right to withdraw its invitation to the general public or any particular member thereof". The court stated further that "possession does not cease to be exclusive so long as there is the right to control entry of the general public". The court ruled that in this case the owner had not relinquished the right to control entry.

Peters appealed to the Supreme Court of Canada on the grounds that the owner did not have sufficient possession to invoke a remedy under the Act. In a very brief decision—the brevity of which was perhaps indicative of how self-evident this all seemed to the court—the Supreme Court concurred with the decision of the Ontario Court of Appeal.

The issue of expressive activity on publicly-used private property went to the Supreme Court of Canada again in the case of Harrison v. Carswell. In Harrison v. Carswell, the court considered whether peaceful picketing on the premises of a shopping centre in the course of a labour dispute with one of the tenants constituted trespass. Dickson J. determined the issue by following Peters, finding that the shopping centre owner had sufficient control or possession of the premises to maintain an action in trespass against the picketers.

The same line of inquiry had been followed earlier by the British Columbia Court of Appeal in Zeller's (Western) Ltd. v. Retail Food & Drug Clerks Union, Local 1518, however, with the opposite result. In Zeller's, the court held that peaceful picketing on the sidewalk of a shopping centre did not constitute trespass. The shopping centre owner had extended a general invitation to the public and the court found that the picketers were not "exceeding the terms of the invitation to use the sidewalk held out to the public by the owner in fee".

23. Supra, note 20 at 600.
24. Ibid. at 600.
27. Zeller's (Western) Ltd. v. Retail Food & Drug Clerks Union, Local 1518 (1963), 42 D.L.R. (2d) 582 (B.C.C.A.).
28. Ibid. at 586.
By the same reasoning, the Saskatchewan Court of Appeal reversed the decision of Bence C.J.Q.B in *Grosvenor Park*.\(^{29}\) It found that the shopping centre owner, while having legal title, had allowed easements to its tenants and had extended "an unrestricted invitation to the public to enter upon its premises".\(^{30}\) The court ruled that to maintain an action in trespass, an owner had to have sufficient possession of property. The sufficiency of possession was to be determined on the facts of each case. The court referred to *Lord Advocate v. Lord Lovat* in which Lord O'Hagan stated that:

> As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts, implying possession in one case, may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests—all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession.\(^{31}\) (emphasis added)

The court found that the shopping centre owner was not in "actual possession" of the property. Instead, the owner was, at most, exercising control over the premises, but not exercising this control to the exclusion of other persons. As such, the owner did not have sufficient possession to maintain an action in trespass against the picketers. The court did note, however, that an action in nuisance could be initiated by the shopping centre owner against persons engaging in unlawful acts or interfering with the rights of the owner or others in the shopping centre. In determining whether a particular activity could be carried out lawfully on the premises, the court would consider whether harm to the owner or to others using the shopping centre resulted from the activity in issue.

The same result was reached in *Wildwood Mall Ltd. v. Stevens*.\(^{32}\) Noble J. of the Saskatchewan Queen's Bench considered an application for an interlocutory injunction to restrain union members from picketing in a shopping centre. Noble J. distinguished the case from *Peters and Harrison v. Carswell*, on the grounds that Saskatchewan did not have a trespass statute analogous to those of Ontario and Manitoba. He thus followed the decision in *Grosvenor Park*, and dismissed the application.

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Implicit in the approach taken in the decisions above is an assumption that rights differ as they attach to different types of private property. Regrettably, however, even with this assumption in place, the courts have generally allowed owners far too much influence in defining their own property rights. Canadian courts have erred because they have posed the wrong question. The courts have concentrated on whether the owner relinquished its control of entry. Approaching the issue in this way focuses too much attention on the intention of the property owner and too little attention on the public’s right to freedom of expression. Property rights thus appear to be determined by the person owning the property while little or no consideration is given to the kind of activity being prohibited by the owner’s exercise of its right to exclude.

The approach of the Manitoba Court of Appeal in *R. v. Carswell,* a decision which was later reversed by the Supreme Court of Canada, was to balance the property interests of the shopping centre owner and the interests of the alleged trespasser. As was noted above, the trespasser was a worker who was picketing in the course of a labour dispute with a tenant of the shopping centre. Freedman C.J.M. first determined that the property interest of the owner had been eroded by the fact of its invitation to the public. He stated:

> In weighing the property right one cannot consider naked title alone, divorced from the reality of its setting in a shopping centre. The continuing invitation which the landlord-owner has extended to the public to come there for proper purposes has already resulted in inroads upon that property right and qualified its exercise to some degree. (emphasis added)

Again, it was the owner’s action—extending an invitation to the public—which resulted in the court’s finding that it had qualified its property rights. Next, Freedman C.J.M. examined the nature of the competing interest. After *Peters,* it was clear that a shopping centre owner might withdraw its invitation in certain circumstances. *Peters,* however, involved a “personal crusade” against a tenant of the shopping centre, a protest against Safeway’s sale of California grapes; *Carswell* involved peaceful picketing during a trade union dispute. Freedman C. J. M. noted that “[t]o deny a striking employee access to the sidewalk in question for the purpose of peaceful picketing is to prevent the exercise of picketing at the one point where it can be really effective”. Picketing at the perimeter of a large shopping centre would be ineffective and, if the union were forced to picket there, “[t]he whole purpose of peaceful picketing—the communicating of information to the public—is thus to a

34. *Ibid.* at 140.
great degree defeated". Freedman C.J.M. referred to a California Supreme Court decision, *Schwartz-Torrance Investment Corp.*, in which constitutional protection was extended to picketing in shopping centres. When the interest of the picketers was balanced against the property interest of the shopping centre owner "worn thin by public usage", the California court found that the picketing must be allowed. He also referred with approval to the United States Supreme Court decision in *Logan Valley*, which is discussed at length below. Freedman C.J.M. thus weighed the property right of the shopping centre owner against the "policy right" of the worker to engage in peaceful picketing in the course of a lawful strike, and found that the interests of the picketers prevailed because of "considerations both of public policy and good sense dictate such a conclusion".

A similar approach was taken by Laskin C.J.C. in his dissent in *Harrison v. Carswell*. Laskin C.J.C. suggested that, instead of being concerned only with the infringement of the owner’s property rights, it was more appropriate to balance the interests of the property owner against the interests of persons wishing to use the public areas of the shopping centre. Laskin C.J.C. asked what interest the shopping centre owner was protecting in prohibiting picketing on its premises, and thereby considered the exact nature of the owner’s property rights. He found that in picketing there was "no challenge to his [the property owner’s] title and none to his possession nor to his privacy when members of the public use those amenities”. He rejected the argument that, other than the restrictions placed upon the owner by human rights legislation, the law allowed the owner to exclude anyone from the premises on any grounds. Laskin C.J.C. stated:

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?

35. Ibid. at 140.
37. Supra, note 32 at 143.
38. Supra, note 25.
39. Ibid. at 74.
Laskin C.J.C. held that the worker, as a member of the public, was entitled to enter the shopping centre and “remain in the public areas to carry on as she did (without obstruction of the sidewalk or incommmoding of others)”. Further, the worker’s right to remain in the public areas of the shopping centre arose out of her status as a worker involved in a labour dispute with a tenant of the shopping centre. She thus had “an interest, sanctioned by the law, in pursuing legitimate claims against her employer through the peaceful picketing in furtherance of a lawful strike”.

Asserting the need to balance the interests of the property owner with the interests of the person seeking to use the premises for a particular activity, Laskin C.J.C. proposed an approach which recognized a “continuing privilege” in the public to use the public areas of shopping centres. The privilege would be limited by the nature of the proposed activity and its object. Further, it would be subject to a limitation against material damage. It would be left to the courts to determine on the particular facts what activity could be carried out on the premises.

The majority in *Harrison v. Carswell* specifically rejected Laskin C.J.C.’s approach of considering competing interests. Dickson J., for the majority, found the court to be ill-suited to the task of engaging in the kind of balancing which would be required. He wrote:

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

The Manitoba Legislature had enacted a statute which made trespass upon property unlawful. If that law were to be changed, Dickson J. wrote:

> ... it would seem ... that such a change must be made by the enacting institution, the Legislature, which is representative of the people and designed to manifest the political will, and not by this court.

42. *Ibid.* at 76.
43. *Ibid.* at 82.
44. *Ibid.* at 83.
Dickson J.'s judicial conservatism in *Harrison v. Carswell* seems somewhat jarring after becoming accustomed, since the *Charter*, to a court which regularly balances such values. An approach which aspires to balance competing interests is, however, also problematic. Although, property rights, as noted, are restricted in a myriad of ways, property is still an enormously powerful concept in our law and in our society. Even where a court may determine that property rights have been diminished by the use to which the owner has put the property, it might well be that there are few interests which can, in fact, compete with property. For example, Guy J. of the Manitoba Court of Appeal, dissenting in *R. v. Carswell*, accepted the balancing approach but was dismissive of the importance of picketing during a labour dispute. He wrote:

As far as I am concerned it seems to me that the Canadian law protecting the sanctity of an owner's right to govern over his own private property is to be preferred to that of the California Supreme Court; or the Supreme Court of the United States for that matter, which considers an owner's right over his own property of less importance than a labour dispute as to hours of work, pension schemes and the like.45

If the rights of labour, recognized by statute, are insufficient to compete against property rights, what chance would the poor have in defending their right to expressive activity?

In general, the Canadian courts have failed to protect expressive activity on publicly-used private property. Clearly, some judges have no desire to protect such activity. Those judges who might wish to protect such expression have not come up with an approach which offers protection. The courts have focused excessively on interests of individual parties and, in too many cases, on one party's interest. Even more enlightened judges such as Freedman C.J.M. construe the problem in terms of *A* versus *B*: *A* has property rights defined by its own actions and *B* has an interest in picketing during a strike or protesting the sale of California grapes. While the court may acknowledge that it is more practical for *B* to picket in a shopping centre, it fails to ask what it is about the shopping centre itself which makes *B*, who wants to protest the sale of grapes, prefer the shopping centre to public sidewalks. The courts have failed to evaluate the social and economic trends which have made expressive activity on publicly-used private property an issue in the first place.

45. *Supra*, note 32 at 144.
FUNCTIONAL APPROACH

I suggest that the approach the United States Supreme Court took, at least initially, in extending federal constitutional protection to expressive activity on certain privately-owned property is much better than any approach taken by a Canadian court. Although the United States Supreme Court did inquire into the nature of the property rights of the owner, it did not determine those rights purely on the basis of whether the owner, by its own actions, had restricted its rights. Instead, the court took a functional approach in defining property rights. The court explicitly recognized both the property rights of the owner and the role of publicly-used private property in the community. The court became prepared, in certain circumstances, to grant constitutional protection to expressive activities carried out on such property. The genesis of this sort of analysis is found in the 1946 United States Supreme Court case of *Marsh v. Alabama*.46

In *Marsh v. Alabama*, the United States Supreme Court considered an appeal by a Jehovah’s Witness who was convicted of violating an Alabama statute (essentially a trespass provision) for distributing religious literature on the sidewalks of Chickasaw, Alabama. The town of Chickasaw was owned by the Gulf Shipbuilding Corporation. Black J., for the majority, described the town as follows:

In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.47

Black J. noted that if Chickasaw had been a public corporation, rather than a private one, a person could not be completely barred from distributing literature having to do with religious or political beliefs on the sidewalks. The question for the court was then whether the fact that a town was owned by a private corporation meant that its inhabitants could not enjoy the same rights of expression as residents of a public town.

Black J. found that ownership did not mean absolute dominion. He stated that “[t]he more the owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it”.48 Black J. went

further, asserting that state regulation of certain types of property, such as bridges and ferries, was justifiable "[s]ince these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function".49 Under Black's analysis, the property rights of the owner are to be determined by the function of the property itself, not by how the owner chooses to define its rights.

Historically, the American Constitution has protected the rights of American people to enjoy freedom of press and religion with respect to public property. Black J. held that although the state did not have title to the sidewalks of Chickasaw:

... the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.50

The state acted to permit the corporation to govern the community and the state enforced restrictions made by the corporation. These elements, as well as the public function of the property, were found to be sufficient to trigger constitutional protection. Black J. also examined the importance of freedom of press (and religion). To be "good citizens" of the community and to make decisions requires access to uncensored information. He stated:

... the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and ... appraise the ... reasons ... in support of the regulation ... of the rights".51

Thus, when balancing property rights which are constitutionally protected in the United States, against the right to enjoy freedom of press and religion, freedom of press and religion have a "preferred position".52

In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza Inc.*53, the United States Supreme Court focused on the public function

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49. Ibid. at 506.
50. Ibid. at 509.
51. Ibid. at 509.
52. Ibid. at 509.
argument, although the court did acknowledge an element of state action in the state trespass law. The court considered whether peaceful picketing of a non-union grocery store, which was located in a shopping centre, constituted trespass and could thus be enjoined. Peaceful picketing in a public place was held to be at least partially protected by the First Amendment. The court determined that in situations where a shopping centre is the major business area of a municipality, expressive activity cannot be completely prohibited. Marshall J. noted:

... streets, sidewalks, parks, and other similar places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.54

Unlike the situation in Chickasaw, the Logan Valley picketers could have distributed their information in the surrounding residential area. Marshall J., however, found that there was an important similarity between the two cases. Both the business block of Chickasaw and the Logan Valley Plaza functioned as “business district[s]”.55 Although the power to exclude persons is:

“part and parcel of the rights traditionally associated with ownership of private property, ... because the shopping center serves as the community business block “and is freely accessible and open to the people in the area and those passing through,” Marsh v. Alabama, 326 U.S., at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.56

The court found that the owner of the shopping centre was not completely prohibited from making regulations with respect to activities on its property. Instead, the owner’s power was found to be analogous to the powers of the state or the municipality to regulate the use of public property so as to “prevent interference with the use to which the property is ordinarily put”.57 Further, the court determined that private property could be regulated to prevent interference with the rights of others using the property. The shopping centre owner did not raise the issue of interference with its business or with the rights of others using the premises. Accordingly, the court determined

54. Ibid. at 315.
55. Ibid. at 308.
56. Ibid. at 319.
57. Ibid. at 320.
that picketing had to take place on the shopping centre premises in order to be effective, hence the majority found in favour of the picketers.

Marshall J. noted that the majority felt the approach taken in *Marsh*, and its extension in *Logan Valley*, was correct. In Marshall J.'s view, this approach took proper note of the suburbanization of American cities and the subsequent growth of shopping centres across the United States. Marshall J. was concerned that as shopping centres began to dominate traditional shopping districts, businesses would be able to create a "cordon sanitaire" of parking lots. He feared that this cordon sanitaire would allow business to avoid criticism of their labour or business practices unless constitutional protection was extended to rights of expression on publicly-used private property.58

The United States Supreme Court began to limit the effect of *Marsh* and *Logan Valley* in *Lloyd Corp. v. Tanner*.59 The Lloyd Center was a 50 acre shopping centre in Portland, Oregon. It contained 60 commercial tenants, 20 acres of opened and covered parking facilities, private sidewalks, stairways, escalators, gardens, an auditorium, and a skating rink. At issue was the peaceful distribution in the Lloyd Center of handbills inviting the public to a meeting to protest the Vietnam war and the draft.

Powell J., for the majority, refused to extend the doctrine that had begun with *Marsh* and continued in *Logan Valley*. The court distinguished the distribution of handbills in the Lloyd Center from the incursion onto private property allowed in *Logan Valley*. The fact situation in *Logan Valley* involved picketing which, the court stated, was "directly related in its purpose to the use to which the shopping center was being put".60 Also, in *Logan Valley* the store being picketed was inside of the shopping centre "with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available".61 In the case of the Lloyd Center, Powell J. found that no open-ended invitation had been made by the shopping centre owners, only an invitation to come to the Lloyd Center to do business with its tenants. Powell J. found that there was no direct relationship between the purpose and use of the shopping centre and the Vietnam war. Further, he found that the protestors, unlike the picketers, could have distributed the handbills just as effectively on public streets as in the shopping centre. Powell

60. *Ibid.* at 563.
J. also held that it was inappropriate to allow parties to invoke First Amendment protection with respect to private property as there was no state action.

Powell J.'s analysis of the issue of freedom of expression rights versus ownership rights on publicly-used private property is reminiscent of the reasoning in *Peters* and in *Harrison v. Carswell*. The owner determined its property rights by the nature of its invitation to the public to shop. No inquiry was made into other functions that property might have, nor into what restrictions on the owner's property rights might be appropriate given these other possible functions. Further, Powell J. did not consider whether the alternative that he suggested that the protestors might take—distributing the handbills on public sidewalks—would be at all effective. The decision of the majority in *Lloyd Corp.* can only be called disappointing.

The dissent in *Lloyd Corp.*, however, held that the doctrine in *Marsh* and in *Logan Valley* applied. Marshall J. found that the Lloyd Centre, which had been built on land cleared by the municipality for the "development of a general retail business district", was "even more clearly the equivalent of a public business district than was Logan Valley". As in the case of *Logan Valley*, he found that the expressive activity was peaceful and non-disruptive and involved "traditionally acceptable modes of speech". The Lloyd Center had been opened by its owners to a broad range of expression, including football rallies, speeches by presidential candidates, Veterans' Day ceremonies, and solicitation of money by charitable organizations. As the owners of the shopping centre had opened its premises to the American Legion, Marshall J. held that the premises ought to be open to those who wished to distribute leaflets inviting people in the centre to attend a meeting where an opposite point of view was to be expressed. The activities of the protestors were thus "directly related in purpose to the use to which the shopping center was being put".

I suggest that Marshall J.'s ruling that handbilling was "directly related in purpose to the use to which the shopping center was being put" was somewhat specious. The connection between permitting the American Legion to use the centre to sell poppies and handbilling against the draft is tenuous and seemingly, rather artificial. Further, to require such a direct relationship would create an incentive for shopping centre owners to restrict all expressive

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64. *Ibid.* at 579.
activity on their premises, a result which, given his analysis of the importance of shopping centres to the community, I suspect Marshall J. would have resisted.

I believe, instead, that Marshall J. allowed handbilling because he recognized that shopping centres have become the functional equivalents of public places where expressive activity has traditionally been protected by the courts. As he did in his judgement in the *Logan Valley* decision, in *Lloyd Corp.* Marshall J. took time to explain why the extension of constitutional protection to public expression in shopping centres was necessary and he did so with reference to social changes which Americans were undergoing. He noted that, for many people, the Lloyd Center “will so completely satisfy their wants that they will have no reason to go elsewhere for goods or services”, and, thus, “[i]f speech is to reach these people it must reach them in the Lloyd Center”. 65 Marshall J. recognized that prohibiting handbilling in the centre would have a negative impact on those with fewest resources. He stated:

For many person who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, or to handbill or to utilize other free or relatively inexpensive means of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent. 66

In *Logan Valley*, Marshall J. wrote of the changes resulting from suburbanization, including the growth of shopping centres. In *Lloyd Corp.*, he wrote of the further privatization of publicly used spaces. He noted how the growth of suburban shopping centres had led to the development of shopping centres in downtown areas. He described the trend by which municipalities such as Portland—interested in renewing the downtown area with the smallest public expenditure possible—had turned over the renewal of the urban core to private corporations. Marshall J. suggested that the increased reliance on private development would make it “harder and harder for citizens to find means to communicate with other citizens”. In short, he predicted that only the wealthy would have access to effective communication unless the court adhered to the doctrine in *Marsh v. Alabama*. 67

Although the majority decision in *Lloyd Corp.* did not extend federal constitutional protection to expressive activity on publicly-used private property, the Supreme Court of California did extend state protection to such activity. *Robins v. Pruneyard Shopping Center* involvement the solicitation by high school students of signatures on a petition in support of their opposition to the United Nations resolution against Zionism. The court read *Lloyd Corp.* to mean that although there was no federal protection of such activity, law could still be made in California to require that expressive activity be permitted in shopping centres. The court examined data about the growth of shopping centres in the San Jose planning area. It noted a decline in the traditional shopping district in favour of shopping centres. It found that, as most people live in rural and suburban areas where shopping centres are located, these people now shop at shopping centres which "provide the location, goods, and services to satisfy those needs and wants". As a result, the court determined that prohibiting expressive activity in shopping centres would amount to an infringement of freedom of speech and speech-related conduct. The court denied the right of the shopping centre owner to prohibit expressive activity, but allowed that shopping centre owners had the capacity to regulate the activity with respect to time, manner and place "to assure that these activities do not interfere with normal business operations". The United States Supreme Court upheld the decision of the California Supreme Court.

I suggest that the sort of functional analysis the court applied in *Robins v. Pruneyard Shopping Center* is the best approach for courts to take in order to protect expressive activity. Using this sort of approach, the rights of the property owner are determined, not based upon how the owner defines its rights, but rather, based upon the use to which the property is put. Implicit in this approach is a recognition of what is at stake; namely, the right of the poor to free speech. This functional approach creates a presumption in favour of protecting expressive activity. With this presumption in place, the notion of the sanctity of property can be overcome. The questions in issue can be reformulated: instead of focusing only on whether expressive activity in a shopping centre violates the property owner's rights, the courts can be asked

to consider if and how expressive activity on publicly-used private property can be properly regulated.

CHARTER CHALLENGE

This functional approach could be used to construct a Charter challenge to the Trespass to Property Act. The Ontario government struck a Consultation Committee to review this Act in November 1990, perhaps recognizing the legislation's vulnerability to Charter review. An argument based on the functional approach would, of course, highlight the increasing importance of publicly-used private property in the life of the community. How such an argument might be presented is illustrated by the Supreme Court of Canada decision, Committee for the Commonwealth of Canada v. Canada. In this case the court discussed the limits of freedom of expression in public places. I shall focus on the judgement of L'Heureux-Dube J. to illustrate how a functional approach might be useful in arguing that expressive activity ought not to be prohibited in shopping centres, but merely regulated.

The Committee for the Commonwealth of Canada alleged that the management of Dorval Airport had violated its members' rights to freedom of expression. Two members of the committee had gone to Dorval Airport with placards and literature in order to promote their group and were asked to leave by the airport management. L'Heureux-Dube J. held that an inquiry into whether there was a reasonable restriction on freedom of expression considering factors such as time and place should be done under s. 1 and not under s. 2(b). Lamer C.J.C. considered these factors under s. 2(b), putting the onus on the party asserting Charter protection to show why its activity ought not to be prohibited. L'Heureux-Dube proposed that the following factors be considered in deciding whether a place qualifies as a "public arena":

1. the traditional openness of the property for expressive activity (although an absence of tradition does not preclude the declaration of a public arena);
2. whether the public is ordinarily admitted to the property as of right;
3. the compatibility of the property's purpose with such activities;


4. impact of the availability of the property for expressive activity on the achievement of s. 2(b)'s purposes;

5. the symbolic significance of the property for the message being communicated; and,

6. the availability of other public arenas in the vicinity for expressive activity. 74

I suggest that similar factors should be considered if the court were asked to determine the constitutional validity of the Trespass to Property Act. Briefly, a functional approach could be used to show the inadequacy of alternative public arenas such as the sidewalks outside of the shopping centre (as Marshall J. pointed out in Lloyd Corp.) and statistics about the use of shopping centres could be introduced to show that denying access to the premises would have a negative impact on freedom of expression (as was done in Pruneyard Shopping Center).

Even if such arguments were successful and the Act were struck down as unconstitutional, there would remain a common law right to exclude. This right gives rise to a common law action in trespass. Since the Supreme Court of Canada decision in Dolphin Delivery v. R.W.D.S.U. 75, the Charter is of little value in dealing with the issue of freedom of expression when the common law rights of property owners are in question. Dolphin Delivery involved secondary picketing. The company being picketed brought an action against the union alleging that the picketing constituted inducing breach of contract, a common law tort. McIntyre J. stated that freedom of expression pre-dated the Charter and found that peaceful picketing involved the exercise of the right to freedom of expression. The issue was then whether the protection of the Charter could be extended to the union against the company. Section 32(1) provides that the Charter applies to the Parliament and government of Canada and to the legislature and government of each province. McIntyre J. interpreted "government" to mean executive and found that the Charter applied to the legislative, administrative and executive branches, but not the judicial branch. Thus, although the common law was not exempt from the Charter, the Charter did not apply to actions between two private parties. McIntyre J. wrote:

74. Ibid. at 429-430.

75. Supra, note 14.
Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply.\(^76\)

As there was no offending statute but only a common law tort which gave rise to the action between the company and the union, the Charter could not be invoked to protect the union's freedom of expression in secondary picketing. What would be sufficient to trigger Charter protection would be "any exercise of or reliance upon governmental action".\(^77\)

The decision in Russo v. Ontario Jockey Club\(^78\) illustrates the impact of Dolphin Delivery. The case involved the exclusion of Russo, (who had won a lot of money by betting through the Ontario Jockey Club's pari mutuel betting system), by the club from its premises. Russo argued that exclusion from the race-track was a violation of her right to equality contrary to s. 15 of the Charter. The Charter, it was argued, applied because the Jockey Club was "a governmental agent because its activities are so extensively regulated by the government".\(^79\) The court found that the Jockey Club was "a private body and forms no part of the Government of Canada or of Ontario". The club was thus a private actor relying on its common law right to exclude anyone it chose, and thus, following Dolphin Delivery, the court found that the Charter did not apply. As a shopping centre is not as extensively regulated as a betting facility, the dicta in Dolphin Delivery appears to be a serious bar to the extension of Charter protection to expressive activities in shopping centres. Clearly, while the Trespass to Property Act might be the subject of a Charter challenge, the common law action of trespass between two private parties cannot be.

In Dolphin Delivery, however, McIntyre J. did observe that there was a relationship of sorts between the Charter and actions between private parties. While there can be no Charter causes of action or defences between private parties, McIntyre J. found that the Charter had some place in the determination of issues between such parties. He wrote:

I should make it clear, however, that this is a distinct issue [the interpretation of s. 32(1)] from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the

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76. Ibid.
77. Ibid.
78. Supra, note 15.
79. Ibid. at 736.
fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative.\textsuperscript{80}

Although the sentiment is a worthy one, it is somewhat difficult to understand what practical application this might have. Certainly in \textit{Dolphin Delivery} the sentiment appears to have had no effect on the outcome.

In \textit{281845 B.C. Ltd. v. Kamloops, Revelstoke Okanagan Building Trades Union},\textsuperscript{81} a trade union association attempted to assert just such an argument. At issue was whether members of a trade union association could hand out leaflets in a shopping centre asking the public to shop elsewhere while non-union workers were carrying out renovations. The trade union association argued that the decision in \textit{Harrison v. Carswell} could not stand given the entrenchment of the \textit{Charter}. The British Columbia Court of Appeal noted that no “freedom of expression” argument was made in \textit{Harrison v. Carswell} and it might be that the Supreme Court of Canada would view the matter differently given the \textit{Charter}. The court held, however, that it was not the place of a provincial court of appeal, on an application for an interlocutory injunction, to over-rule the Supreme Court of Canada. Although the British Columbia Court of Appeal left the question open, it is likely that only if \textit{Dolphin Delivery} were explicitly over-ruled would the Canadian courts feel free to apply \textit{Charter} standards to what is characterized as a common law action between private parties.

**CONCLUSION**

Ontario’s Consultation Committee on the \textit{Trespass to Property Act} has not yet submitted its recommendations to the Attorney General. This group is not the first in this province that has been asked to make recommendations on the \textit{Act}. In 1987, the “Task Force on Law Concerning Trespass to Publicly-Used Property as it Affects Youth and Minorities” presented its report to the Attorney General. Based on this report, legislation was drafted and presented to the legislature in 1988. The draft legislation, Bill 149, got no further than first reading, due, in part, to stiff opposition from business interests.

Dickson J. asserted in \textit{Harrison v. Carswell} that the matter of trespass on publicly-used private places ought to be left to the legislature. Unfortunately, as the recent history of Ontario’s trespass legislation suggests, change

\textsuperscript{80} Supra, note 14.

through the political process is not always easy. Political change can be very hard to achieve, particularly when the concepts in issue are as unwieldy as property and, especially, of course, when those opposed to change are wealthy and powerful. Ideally, the current Consultation Committee will recommend that the *Trespass to Property Act* be reformed to reflect changes in the role of publicly-used private property and legislation will be passed following from these recommendations. If this does not come to pass and the courts are left to decide whether expression will be protected in shopping centres we must hope that the courts will approach their task with an appreciation of the importance of these places for freedom of expression, for the poor, and for us all.