

Slides

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At the end of Week 1, I asked you to consider *similarities* in the judges' arguments in *Harrison v Carswell*, rather than focus only on their disagreements. This week, we delve into those similarities in order to see how the deeper patterns of common law argument structure and constrain the way judges and other legal actors think, write and speak.

Common law arguments are highly patterned, and the structure of those arguments — though not necessarily the outcome of arguing — is fairly predictable. These patterns of argument recur again and again in the cases we will read this year. Becoming proficient in common law arguments means being able to recognize and make use of these patterns.

The patterns I am talking about here occur at two different levels. At one level are the specific forms of argument and counter-argument we commonly see in courtroom settings and judicial decisions. For example, one party argues:

Plaintiff has a right to do X (such as, exclude other people from their property).

The other party responds:

True, but these facts justify a limitation on plaintiff's right to do X in the circumstances.

There may be many possible argument pairs like this based on any set of facts, but because they are patterned we should be able to situate them in more general categories.

At another level are the broader historical currents in legal thought that determine which forms of argument and counter-argument are more likely to be seen as persuasive in context at any given time.

A good way to think about all this is to draw an analogy to language.¹ Learning to speak a new language requires you to learn a whole new set of words that make up the language—i.e., its *vocabulary*. But to actually learn the language, you need to learn not only its vocabulary but also its *grammatical structure*—i.e., how the words fit together to form coherent thoughts expressed in that language.

The recurring forms of legal argument and counter-argument we will study — what we'll call "argument types" — are the basic units of common law vocabulary. This week and next, we will develop a preliminary list or lexicon of these argument types and learn how to use them to analyze and make legal arguments in the common law tradition.

Next, in Unit 2, we will start to uncover the deeper "grammatical" structure of common law property by studying how changing ideas about the market and the state influence and constrain the legal

¹Justin Desautels-Stein, "The property course as critique", *Law and Political Economy Project* (2018): <https://lpeproject.org/blog/the-property-course-as-critique/>

vocabulary of judges and lawyers during different historical eras. But for now, you can set to one side this idea of legal grammar and focus on the new vocabulary you need to learn first.

To reiterate: the “vocabulary” of common law property is limited to a number of patterned argument types that come together to make what we typically call “legal arguments”. Our task this week is to describe some of the main argument types that you’ll encounter most frequently in property law and to practice identifying these argument types in judicial decisions.

We are going to start off working with just four main argument types. Not every argument you encounter in the common law will necessarily fit into one of these types—there are no doubt others—but using only these four we can identify and characterize a surprisingly large range of common law arguments.

This list of arguments types—and the broader analytical framework we are using this week—was developed by Duncan Kennedy in the early 1990s.² While Kennedy’s approach has not been widely used in first-year legal education in Canada, I think it offers an invaluable tool for understanding the structure of legal arguments.

The four key argument types we will be working with this week are:

- Denial of Premise
- Symmetrical Opposition
- Counter-Theory
- Mediation

In this approach, we will see that each “argument” we want to classify is actually made up of a couplet of “argument bites”. You can think of these argument bites as “sides” of the argument, or the dynamic of opposing argument and counter-argument we normally ascribe to the plaintiff and defendant on opposite sides of a dispute.

Denial of Premise

Denying the premise of an opposing argument bite is an attempt to undermine either the factual or normative basis of that opposing bite. Denying a factual premise might look something like this:

Plaintiff: I have a right to exclude other people from my land.

Defendant: Yes, but you do not own the land.

²Duncan Kennedy, “A semiotics of legal argument” (1991) 42 *Syracuse Law Review* 75.

In this example, the first argument bite asserts a principle (“plaintiff has a right to exclude”) based on the factual premise that plaintiff owns the land. The opposing argument bite accepts the principle, but denies the factual premise of land ownership. If plaintiff does not own the land, the asserted principle does not apply in the circumstances.

Alternatively, denying a normative premise is a type of argument that addresses the principle itself:

Plaintiff: I have a right to use my land in any way I choose, even if it means harming others or destroying the land itself.

Defendant: I acknowledge that you own the land, but no such right to unconstrained use of land exists in the common law.

In this second example, the question of who owns the land is not in dispute. Instead, the parties are taking opposing positions on the property rights associated with ownership of land.

Symmetrical Opposition

In denial-of-premise-type arguments, both argument bites are in direct conflict: it seems that for one to be true, the other must be false. Each argument bite directly attacks a factual or normative foundation of its opponent. Symmetric opposition works somewhat differently. Here, neither argument bite works to undermine its opponent directly. Instead, in symmetric opposition each party appeals to their *own respective interests*, without directly attacking or undermining the interests of the other party. The result, in many cases, is the appearance of “talking past one another”, as in this example:

Plaintiff: I have a right to do what I want on my land without interference from others.

Defendant: I have a right to freely express myself wherever I choose.

Clearly, the argument pair above begs the question of whose “right” should win out under the circumstances. Nevertheless, it is important to understand that—as with each of the argument types—the point of this argumentative structure is not to resolve the dispute itself but rather to throw into relief *what the dispute is actually about*.

Counter-Theory

Like in denial-of-premise-type arguments, counter-theories present a direct conflict between plaintiff’s and defendant’s positions. But rather than attacking an underlying premise of the opposing argument

bite, counter-theory-type arguments present directly conflicting theories that favour the preferred outcomes on opposing sides. In this way, the argumentative structure can also look similar to symmetrical opposition.

Here is a frequent example of this argument type surrounding the institutional role of common law courts:

Plaintiff: the proper role of common law courts is to apply the law as they find it, not to make it.

Defendant: the proper role of common law courts is to adapt to the law to meet changing conditions and the needs of society.

Or, to give another example:

Plaintiff: first possession is the basis of property in land.

Defendant: formal title, backed by the authority of the state, is the basis of property in land.

Mediation

Mediation offers a sharp contrast to both symmetrical opposition and counter-theory because, in this form of argument, the opposing parties explicitly acknowledge a conflict between plaintiff's and defendant's claims, and offer different ways to resolve that conflict in their favour:

Plaintiff: I have a right to exclude other people from my land.

Defendant: You have a right to exclude other people from your land, but only when you can offer a legitimate reason for doing so.

Here, unlike in denial-of-premise-type arguments, there is no attempt by defendant to undermine a factual or normative premise put forward by plaintiff. Instead, defendant extends or qualifies plaintiff's argument in a way that favours their preferred outcome.

Above, I have presented each of the four argument types in terms of an exchange between two parties, plaintiff and defendant. This might in fact be the way you encounter these argument types in a courtroom setting where the parties put forward their positions. But these same argument types also underpin judicial decisions in which judges consider the different positions of the parties or offer their own reasons for reaching a result (sometimes leaving opposing argument bites implicit or available to be taken up by a dissenting judge).

Last week you encountered our first case, the Supreme Court of Canada's decision in *Harrison v Carswell*. You practiced quickly reviewing the case and then, after a deeper read, we discussed the facts and some of the case's main issues.

Your key task this week is to read *Harrison* again — closely — with a different goal in mind. Each of the different argument types described above appear in *Harrison*. I have colour-coded each argument bite as it appears in the text. Each colour corresponds to one argument type above. For each argument bite, you can jump to the related counter-argument of the opposing judge by clicking the link at the end of that bite.

Read each pair of colour-coded arguments and counter-arguments together, then try to identify which argument type is being used on this <https://opensourcelaw.limesurvey.net/695789?newtest=Y&lang=title='worksheet'>>.

Your goal in this exercise is to learn how the abstract argument types I described earlier are actually applied by the judges in practice. The arguments made by the judges are clearly much more complex than the simplified examples given above, but the basic patterns of argument and counter-argument are undoubtedly there. These patterns will become easier for you to recognize with practice.

[Worksheet: Spotting Argument Types](https://opensourcelaw.limesurvey.net/695789?newtest=Y&lang=title='worksheet'>) <https://opensourcelaw.limesurvey.net/695789?newtest=Y&lang=title='worksheet'>>

Dickson J. (Martland, Judson, Ritchie, Pigeon, and de Grandpré JJ. concurring) —

The respondent, Sophie Carswell, was charged under *The Petty Trespasses Act*, R.S.M. 1970, c. P50, with four offences (one on each of four days) of unlawfully trespassing upon the premises of the Fairview Corporation Limited, trading under the firm name and style of Polo Park Shopping Centre, located in the City of Winnipeg, after having been requested by the owner not to enter on or come upon the premises. The appellant, Peter Harrison, manager of Polo Park Shopping Centre, swore the informations. The charges were dismissed by the Provincial Judge but on a trial de novo in the County Court Mrs. Carswell was convicted and fined \$10 on each of the charges. The convictions were set aside by the Manitoba Court of Appeal [1974] 4 W.W.R. 394 (Freedman C.J.M. and Matas J.A., with Guy J.A. dissenting) and the present appeal followed by leave of this Court.

With great respect, I am unable to agree with the majority reasons, delivered in the Court of Appeal by Freedman C.J.M., for I find it difficult, indeed impossible, to make any well-founded distinction between this case and *Peters v. The Queen* (1971), 2 C.C.C. (2d) 339n, 17 D.L.R. (3d) 128, decided by this Court four years ago in a unanimous decision of the full bench. The constitutional issue raised in *Peters* no longer concerns us; the only other issue was whether the owner of a shopping plaza had sufficient control or possession of the common areas, having regard to the unrestricted invitation to the public to enter upon the premises, as to enable it to invoke the remedy of trespass. The Court decided it did.

That case and the present case came to us on much the same facts; picketing within a shopping centre in connection with a labour dispute. In *Peters* the picketing was carried out by the president of the Brampton Labour Council and seven other persons, carrying placards and distributing leaflets in front of a Safeway store, seeking a boycott of Safeway for selling California grapes. In the present case the picketing was carried out by Mrs. Carswell and 11 other persons carrying placards and distributing leaflets in front of the premises of their employer, Dominion Stores. In both instances the picketing was peaceful. Although the question posed in *Peters* did not recite the facts upon which the case rested, the question was worded thus:

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, Chapter 294, Section 1(1)? (The italics are mine.)

In my view it is so expressed, with repeated use of the definite article, as to relate the question to the circumstances in respect of which the Judges made their determination.

The judgment of the Ontario Court of Appeal in *Peters*, [1971] 1 O.R. 597, 2 C.C.C. (2d) 336, 16 D.L.R. (3d) 143:

With respect to the first ground of appeal, it is our opinion 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* [R.S.O. 1960, c. 294 (now R.S.O. 1970, c. 347)]. Here, the invitation extended by the owner was of a general nature and included tenants, employees, agents and all persons having or seeking business relations with the tenants. However, notwithstanding the general nature of the invitation, the owner did not thereby lose its right to withdraw the invitation from the general public or any particular member thereof. In addition, it is also our view with respect to trespass that possession does not cease to be exclusive so long as there is the right to control entry of the general public, and here the owner had not relinquished that right of control.

The brief judgment in this Court, answering in the negative the question asked, neither adopted nor repudiated the reasons delivered in the Court of Appeal but it should not be overlooked that when the *Peters* case was before the Ontario Court of Appeal, counsel for *Peters* relied upon the decision of the Court of Appeal for Saskatchewan in *Grosvenor Park Shopping Centre Ltd. v. Waloshin* (1964), 49 W.W.R. 237, 46 D.L.R. (2d) 750. That case arose out of injunction proceedings during a strike of employees of

Loblaw Groceries Co. Ltd. in Saskatoon who were picketing with placards on the sidewalks adjacent to store premises located in a shopping centre. The pertinent part of the judgment of the Saskatchewan Court of Appeal reads [p. 755]:

Learned counsel for the appellant argued that the respondent did not have that degree of possession essential to an action in trespass.

The area upon which it is alleged the appellants have trespassed is part of what is well known as a shopping centre. While legal title to the area is in the respondent, it admits in its pleadings that it has granted easements to the many tenants. The evidence also establishes that the respondent has extended an unrestricted invitation to the public to enter upon the premises. The very nature of the operation is one in which the respondent, both in its own interests and in the interests of its tenants, could not do otherwise. Under these circumstances, it cannot be said that the respondent is in actual possession. The most that can be said is that the respondent exercises control over the premises but does not exercise that control to the exclusion of other persons. For that reason, therefore, the respondent cannot maintain an action in trespass against the appellants: *vide* 38 Hals., 3rd ed., p. 743, para. 1212. Support, too, for this view may be found in *Zeller's (Western) Ltd. v. Retail Food & Drug Clerks Union, Local 1518* (1963), 45 W.W.R. 337, 42 D.L.R. (2d) 582 (B.C. C.A.).

Gale C.J.O., in *Peters*, offered this observation with respect to *Grosvenor Park*, *supra* [p. 146]:

The solicitor for the appellant relied very heavily upon a decision of the Court of Appeal for Saskatchewan in *Grosvenor Park Shopping Centre Ltd. v. Waloshin* [*supra*]. If our view in this appeal does not harmonize with the reasoning of the Court in the *Grosvenor Park* case, we must respectfully disagree with that reasoning.

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So when the *Peters* case came to this Court for consideration the Court had before it the reasoning of the Court of Appeal for Ontario in that case and the reasoning, difficult to reconcile, of the Court of Appeal for Saskatchewan in *Grosvenor Park*; the reasoning of the Ontario Court prevailed. There has been no suggestion that *Peters* was wrongly decided; therefore, I would think it must be regarded as controlling unless it can properly be distinguished from the case at bar. No distinction can be made on the ground of contract; there is a copy of the lease from Fairview to Dominion Stores among the papers but it would not appear, nor has it been argued, that any distinction can rest on that document. As to a possible statutory distinction, the Petty Trespass Acts of Manitoba and Ontario do not differ in any material

respect and indeed s. 24 of The Labour Relations Act, 1972 (Man.), c. 75, specifically preserves rights against trespassers. Therefore it would seem that the appeal must succeed unless a valid distinction can be drawn on the ground that the president of the Brampton Labour Council in *Peters* was a mere member of the general public from whom permission to remain on the premises could be withdrawn at will, whereas Mrs. Carswell was an employee of one of the tenants of the shopping centre on strike in support of a current labour dispute from whom permission to remain on the premises could not, as a matter of law, be withdrawn. I find myself unable to accept that any ground in law supports such a distinction.

The evidence discloses that distribution of pamphlets or leaflets in the mall of Polo Park Shopping Centre or on the parking lot has never been permitted by the management of the centre and that this prohibition has extended to tenants of the centre. The centre, as a matter of policy, has not permitted any person to walk in the mall carrying placards. There is nothing in the evidence supporting the view that in the present case the owner of the centre was acting out of caprice or whimsy or mala fides. In a comment entitled “Labour Law — Picketing on Shopping Centres” (1965), 43 Can. Bar Rev. 357 at 362, H. W. Arthurs referred to the following as one of the legitimate concerns of the landlord of a shopping centre:

... while public authorities may, on behalf of the community, strike a reasonable balance between traffic and picketing on public sidewalks and streets, the shopping centre owner can hardly be expected to make such a choice; he has no authority to speak for the community; to grant picketing or parading privileges to all would invite chaos, while to do so selectively would invite commercial reprisals. He is thus driven to adopt a highly restrictive approach to granting permission to groups who wish to parade or picket in the shopping centre.

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It is urged on behalf of Mrs. Carswell that the right of a person to picket peacefully in support of a lawful strike is of greater social significance than the proprietary rights of an owner of a shopping centre and that the rights of the owner must yield to those of the picketer. The American example has been cited but I cannot say that I find the American cases to which we have been referred of great help. The facts in *Schwartz-Torrance Investment Corp. v. Bakery and Confectionery Workers’ Union, Local 31* (1964), 394 P. 2d 921, 85 S. Ct. 888, decided by the Supreme Court of California, are almost identical with those in *Grosvenor Park* but I think it not unimportant to note that in *Schwartz-Torrance* Tobriner J., early in his judgment, drew attention to the fact that the Legislature of the State of California had expressly declared that the public policy of the state favoured concerted activities of employees for the purpose of collective bargaining and had enacted the policy into an exception to the criminal trespass law. Construing that exception, the California Supreme Court in a case antedating *Schwartz-Torrance* had

concluded that the Legislature, in dealing with trespasses, had specifically subordinated the rights of the property owner to those of persons engaged in lawful labour activities. *Schwartz-Torrance* is, therefore, of small aid in this case and indeed can be said to support, in a negative sense, a position inimical to that of Mrs. Carswell. And one need only read *Amalgamated Food Employees' Union, Local 590 v. Logan Valley Plaza Inc.* (1968), 391 U.S. 308, and then read *Lloyd Corp'n. v. Tanner* (1972), 407 U.S. 551, 92 S. Ct. 2219, to apprehend the uncertainties and very real difficulties which emerge when a court essays to legislate as to what is and what is not a permissible activity within a shopping centre.

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 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. It raises also fundamental questions as to the role of this Court under the Canadian constitution. The duty of the court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts. I do not for a moment doubt the power of the court to act creatively — it has done so on countless occasions; but manifestly one must ask: what are the limits of the judicial function? There are many and varied answers to this question. Holmes J. said in *Southern Pacific Co. v. Jensen* (1917), 244 U.S. 205 at 221, 37 S. Ct. 524, 61 L. Ed. 1086.

I recognize without hesitation that judges do and must legislate, but they can do it only interstitially; they are confined from molar to molecular actions.

Cardozo, *The Nature of the Judicial Process* (1921), p. 141, recognized that the freedom of the judge is not absolute in this expression of his view:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.

The former Chief Justice of the Australian High Court, Sir Owen Dixon, in an address delivered at Yale University in September 1955, "Concerning Judicial Method", had this to say:

But in our Australian High Court we have had as yet no deliberate innovators bent on express change of acknowledged doctrine. It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more

than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content. The latter means an abrupt and almost arbitrary change.

(See also Jaffe, *English and American Judges as Lawmakers* (1969); McWhinney, *Canadian Jurisprudence* (1958), pp. 1-23; Friedmann, *Law in a Changing Society*, 2nd ed. (1972), pp. 49-90; and Allen, *Law in the Making*, 7th ed. (1964), pp. 302-11.)

Society has long since acknowledged that a public interest is served by permitting union members to bring economic pressure to bear upon their respective employers through peaceful picketing, but the right has been exercisable in some locations and not in others and to the extent that picketing has been permitted on private property the right hitherto has been accorded by statute. For example, s. 87 of The Labour Code of British Columbia, 1973 (2nd Sess.) (B.C.), c. 122, provides that no action lies in respect of picketing permitted under the Act for trespass to real property to which a member of the public ordinarily has access.

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Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law. The Legislature of Manitoba has declared in The Petty Trespasses Act that any person who trespasses upon land, the property of another, upon or through which he has been requested by the owner not to enter, is guilty of an offence. If there is to be any change in this statute law — if A is to be given the right to enter and remain on the land of B against the will of B — it would seem to me 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 the court.

I would allow the appeal, set aside the judgment of the Court of Appeal for Manitoba and restore the judgment of the County Court Judge.

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Laskin CJC. (dissenting) (*Spence* and *Beetz JJ.* concurring) —

I would be content to adopt the reasons of Freedman C.J.M. [1974] 4 W.W.R. 394 and, accordingly, to dismiss this appeal without more if I did not feel compelled, in view of the course of argument, to add some observations bearing on the decision of this Court in *Peters v. The Queen* (1971), 2 C.C.C. (2d) 339n, 17 D.L.R. (3d) 128, dismissing an appeal from the judgment of the Ontario Court of Appeal, [1971] 1 O.R.

597, 2 C.C.C. (2d) 336, 16 D.L.R. (3d) 143. The observations I am about to make about the *Peters* case carry into two areas of concern respecting the role of this Court as the final Court in this country in both civil and criminal causes. Those areas are, first, whether this Court must pay mechanical deference to stare decisis and, second, whether this Court has a balancing role to play, without yielding place to the Legislature, where an ancient doctrine, in this case trespass, is invoked in a new setting to suppress a lawful activity supported both by legislation and by a well-understood legislative policy.

The factual setting for these issues in the present case needs no great elaboration. The locale is a shopping centre in which a large number of tenants carry on a wide variety of businesses. The shopping centre has the usual public amenities such as access roads, parking lots and sidewalks which are open for use by members of the public who may or may not be buyers at the time they come to the shopping centre.

There can be no doubt that at least where a shopping centre is freely accessible to the public, as is the one involved in the present case, the private owner has invested members of the public with a right of entry during the business hours of his tenants and with a right to remain there subject to lawful behaviour. Counsel for the appellant owner in this case stated that members of the public entered and remained in the shopping centre at the owner's whim, under what may be called a revocable licence, and were subject to liability for trespass if they did not leave when requested regardless of how proper their conduct was at the time. This is an extravagant position. It is a sufficient demonstration of its hollowness to point out that a member of the public who came to the shopping centre at the express invitation of a tenant for business reasons could not lawfully be excluded by the private owner. I need not pursue the extreme of the appellant's submission but put it to one side to deal with the specific trespass claim that arose here.

An employee of a tenant in the shopping centre participated in a lawful strike and then proceeded to picket peacefully on the sidewalk in front of the tenant's premises. The struck employer took no action to prohibit the picketing and, on the record, an action by the employer would probably have been unsuccessful. The owner of the shopping centre introduced himself into the situation and told the picketer, the respondent in this appeal, that picketing was not permitted in any area of the shopping centre and if she did not leave she would be charged with trespass. He advised her to move to a public sidewalk which was some distance away. She continued to picket on the shopping centre sidewalk and charges against her under The Petty Trespasses Act, R.S.M. 1970, c. P50, followed.

The *Peters* case, *supra*, also involved picketing in a shopping centre. However, the picketing there arose not out of a labour dispute with an employer tenant of premises in the shopping centre but was by way of a boycott appeal against the selling of California grapes. The oral reasons of Gale C.J.O. for the Ontario Court of Appeal were undoubtedly geared to the specific facts before him and it is therefore unfair, in my view, to read, without that context, his general statement that [p. 146]:

... 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* [R.S.O. 1960, c. 294].

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Be that as it may, the case came to the Supreme Court of Canada not at large but on two specific questions of law, the second of which concerned the constitutional validity of the provincial *Petty Trespass Act*, a matter which did not become an issue here. That was made clear to the sole intervenant in the present case, the Attorney General for Saskatchewan, who appeared to defend the validity of such legislation.

The first question put to this Court in the *Peters* case was framed as follows:

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*, section 1(1)?

This question, a strictly legal one without any context of fact, was answered unanimously in the negative by the full Court of which I was a member. The Court gave the briefest of oral reasons and I regarded the answer as a response to a narrow question of whether a shopping centre owner can have sufficient possession of a sidewalk therein to support a charge of trespass under the provincial Act. The question, to me, was whether the owner had divested itself of possession so as to make the shopping centre sidewalk a public way upon which there could be no trespass as against such owner in any circumstances.

It is, of course, open to others to read this Court's disposition of the *Peters* case differently but I can say for myself that the brief reasons would not have sufficed had the question that was asked been put in a factual frame as is often done when questions are formulated for the consideration of this Court. For me, it follows that the *Peters* case is neither in law nor in fact a controlling authority for the present case which came to this Court not upon specific questions of fact but at large so as to enable this Court to consider both law and fact as they bear on the position inter se of the shopping centre owner and of the lawful picketer in a legal strike.

My brother Spence, who also sat as a member of this Court in the *Peters* case, associates himself with me in the view of it that I have put forward, and I would think that this should give pause to any suggestion that the *Peters* case has concluded the issue now before us, an issue arising on different

facts and on a broader question of law than that to which an answer was sought and given in the *Peters* case.

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This Court, above all others in this country, cannot be simply mechanistic about previous decisions, whatever be the respect it would pay to such decisions. What we would be doing here, if we were to say that the *Peters* case, because it was so recently decided, has concluded the present case for us, would be to take merely one side of a debatable issue and say that it concludes the debate without the need to hear the other side.

I do not have to call upon pronouncements of members of this Court that we are free to depart from previous decisions in order to support the pressing need to examine the present case on its merits. Pressing, because there are probably many hundreds of shopping centres in this country where similar issues have arisen and will arise. The Saskatchewan Court of Appeal has dealt with a picketing situation in a shopping centre in a different way than did the Ontario Court of Appeal in the *Peters* case, albeit on different facts and in respect of civil action rather than in a penal proceeding: see *Grosvenor Park Shopping Centre Ltd. v. Waloshin* (1964), 49 W.W.R. 237, 46 D.L.R. (2d) 750 (Sask. C.A.). There are judgments in related cases, that were cited to us in argument, that need to be taken into consideration in order to enable this Court to begin to draw lines which courts are habitually called upon to do. There should be, at least, some indication that the Court has addressed itself to the difficult issues that reside in the competing contentions that were made in this case and to which I will refer later on in these reasons. But, above all, this Court has not shown itself to be timorous in tackling important issues where it could be said, with some justification, that an important consideration was absent from an earlier judgment, even a recent one, upon which reliance was placed to foreclose examination of a similar issue in a subsequent case.

I refer to the judgment of this Court in *Augustine's Farm Dairy v. Milk Commn. of Ont.*, [1973] S.C.R. 131, as evidence of the approach which I think is compelled in the present case. Of course, it was a different case and turned on the neglect of this Court to consider earlier conflicting decisions when deciding the case that was pressed as an authority to conclude the decision in the *Augustine's Farm Dairy* case itself. What is important, however, is not whether we have a previous decision involving a "brown horse" by which to judge a pending appeal involving a "brown horse", but rather what were the principles and, indeed, the facts, upon which the previous case, now urged as conclusive, was decided. I need only add that there can be no doubt on the question whether the present case provides a developed set of facts that raise the important issues of law that require decision here. It certainly does.

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I come then to those issues, and they can only be understood if we look at the present case not only from the position asserted by the shopping centre owner but as well from the position asserted by the lawful picketer. An ancient legal concept, trespass, is urged here in all its pristine force by a shopping centre owner in respect of areas of the shopping centre which have been opened by him to public use, and necessarily so because of the commercial character of the enterprise based on tenancies by operators of a variety of businesses. To say in such circumstances that the shopping centre owner may, at his whim, order any member of the public out of the shopping centre on penalty or liability for trespass if he refuses to leave does not make sense if there is no proper reason in that member's conduct or activity to justify the order to leave.

Trespass in its civil law sense, and in its penal sense too, connotes unjustified invasion of another's possession. Where a dwelling house is concerned, the privacy associated with that kind of land-holding makes any unjustified or unprivileged entry a trespass, technically so even if no damage occurs. A court however would be likely to award only nominal damages for mere unprivileged entry upon another's private premises where no injury occurs, and it is probable that the plaintiff would be ordered to pay costs for seeking empty vindication. If the trespasser refuses to leave when ordered, he could be forcibly removed but, more likely, the police would be called and the issue would be resolved at that point, or a basis for an action or for a penal charge would arise. In short, apart from privileged entry, a matter to which I will return in these reasons, there is a significant element of protection of privacy in resort to trespass to exclude or remove persons from private dwellings.

The considerations which underlie the protection of private residences cannot apply to the same degree to a shopping centre in respect of its parking areas, roads and sidewalks. Those amenities are closer in character to public roads and sidewalks than to a private dwelling. All that can be urged from a theoretical point of view to assimilate them to private dwellings is to urge that if property is privately owned, no matter the use to which it is put, trespass is as appropriate in the one case as in the other and it does not matter that possession, the invasion of which is basic to trespass, is recognizable in the one case but not in the other. There is here, on this assimilation, a legal injury albeit no actual injury. This is a use of theory which does not square with economic or social fact under the circumstances of the present case.

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?

If it was necessary to categorize the legal situation which, in my view, arises upon the opening of a shopping centre, with public areas of the kind I have mentioned (at least where the opening is not accompanied by an announced limitation on the classes of public entrants), I would say that the members of the public are privileged visitors whose privilege is revocable only upon misbehaviour (and I need not spell out here what this embraces) or by reason of unlawful activity. Such a view reconciles both the interests of the shopping centre owner and of the members of the public, doing violence to neither and recognizing the mutual or reciprocal commercial interests of shopping centre owners, business tenants and members of the public upon which the shopping centre is based.

The respondent picketer in the present case is entitled to the privilege of entry and to remain in the public areas to carry on as she did (without obstruction of the sidewalk or incommoding of others) as being not only a member of the public but being as well, in relation to her peaceful picketing, an employee involved in a labour dispute with a tenant of the shopping centre, and hence having an interest, sanctioned by the law, in pursuing legitimate claims against her employer through the peaceful picketing in furtherance of a lawful strike.

The civil law doctrine of abusive exercise of rights provides, in my opinion, an apt analogue for the present case. I do not press it as having precise application, but insofar as it embraces a balancing of rights, a consideration of the relativity of rights involving advertence to social purpose as well as to personal advantage, it is the peaceful picketer who has cause for complaint against interference with her rather than the shopping centre owner having a legally cognizable complaint: see, generally, Gutteridge, "Abuse of Rights" (1933-35), 5 Camb. L.J. 22; Castel, *The Civil Law System of the Province of Quebec* (1962), pp. 409 ff. The shopping centre owner has no overriding or even co-equal interest to serve in intervening in the labour dispute and, if anything, is acting as surrogate of the struck tenant in a situation where the latter has not and probably could not claim redress or relief.

It seems to me that the present case involves a search for an appropriate legal framework for new social facts which show up the inaptness of an old doctrine developed upon a completely different social foundation. The history of trespass indicates that its introduction as a private means of redress was directed to breaches of the peace or to acts likely to provoke such breaches. Its subsequent enlargement beyond these concerns does not mean that it must be taken as incapable of further adaptation but must be applied on what I can only characterize as a level of abstraction which ignores the facts. Neither logic nor experience (to borrow from Holmes' opening sentence in his classic *The Common Law*) supports such a conclusion.

Recognition of the need for balancing the interests of the shopping centre owner with competing

interests of members of the public when in or on the public areas of the shopping centre engaged courts in the United States a little earlier than it did the courts in this country. Making every allowance for any constitutional basis upon which courts there grappled with this problem, their analyses are helpful because they arise out of the same economic and social setting in which the problem arises here. Thus, there is emphasis on unrestricted access to shopping centres from public streets and on the fact that access by the public is the very reason for the existence of shopping centres; there is the comparison drawn between the public markets of long ago and the shopping centre as a modern market place; there is the appreciation that in the light of the interests involved there can be no solution to their reconciliation by positing a flat all or nothing approach. The cases in the United States, and I cite a few of them here without further elaboration, appear to me to reject the appellant's proposition that (as his counsel put it) "the issue is trespass, not picketing" because that, in my opinion, involves a predetermination without regard to the issues of fact: see *Schwartz-Torrance Investment Corp'n. v. Bakery and Confectionary Workers' Union, Local 31* (1964), 394 P. 2d 921, 85 S. Ct. 888; *Amalgamated Clothing Workers of Amer. v. Wonderland Shopping Centre Inc.* (1963), 122 N.W. 2d 785; *Amalgamated Food Employees' Union, Local 590 v. Logan Valley Plaza Inc.* (1968), 391 U.S. 308; *Lloyd Corp'n. Ltd. v. Tanner* (1972), 407 U.S. 551, 92 S. Ct. 2219.

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A more appropriate approach, to which I adverted earlier, is to recognize a continuing privilege in using the areas of the shopping centre provided for public passage subject to limitations arising out of the nature of the activity thereon and to the object pursued thereby, and subject as well to a limitation against material damage. There is analogy in existing conceptions of privilege as an answer to intentional torts, such as trespass. The principle is expressed in Prosser on Torts, 4th ed. (1971), at p. 98, as follows:

'Privilege' is the modern term applied to those considerations which avoid liability where it might otherwise follow. In its broader sense, it is applied to any immunity which prevents the existence of a tort; but in its more common usage, it signifies that the defendant has acted to further an interest of such social importance that it is entitled to protection, even at the expense of damage to the plaintiff. He 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.

The question of 'privilege' arises almost exclusively in connection with intentional torts. Much the same considerations have weight in negligence cases, in determining whether the defendant's conduct is reasonable under the circumstances. Negligence, however, is a matter of risk and prob-

ability of harm; and where the likelihood of injury to the plaintiff is relatively slight, the defendant will necessarily be allowed greater latitude than where the harm is intended, or substantially certain to follow.

As the defendant's interest gains weight in the scale of social values, his privilege becomes greater. It may be absolute, in the sense that there is immunity from all liability, regardless of the motive or purpose for which he acts. The acts of judicial officers, done under authority of law, for example, are absolutely privileged, even though malicious or corrupt. It may be conditioned upon a proper motive and reasonable behavior, as in the case of the privilege of self-defense. It may be limited, in the sense that the defendant may not be restrained in advance from acting, and is not liable for any mere technical tort, but is still liable for any substantial damage that he may cause. The sliding scale by which the law balances the interests of the parties to accomplish a social purpose is nowhere better illustrated than in the field of privilege.

See also Bohlen, "Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality" (1926), 39 Harvard L.R. 307, where it is said at pp. 319-20:

The liability for a harmless invasion of either an interest of personality or property is either punitive or compensatory. In so far as it is punitive, there is no reason why, if the good likely to result from an act is greater than the harm it is intended to cause, the actor should be punished either criminally by fine or imprisonment, or by damages, whether labelled punitive or not, imposed in a civil action. And clearly there is no more reason for imposing either punishment because the harm intended and done is a harmless invasion of a dignitary interest of personality rather than a harmless invasion of a similar interest of property.

Illustrations were given during the course of argument of situations which might put the respondent's activity in a different light relative to the place of picketing and to the object of picketing and which, correlatively, might provide some redeeming interest of the shopping centre owner in exercising control over the public areas. The character of a shopping centre, such as the one involved here, is one thing, and the nature and place of activities carried on there are something else. I would agree that it does not follow that because unrestricted access is given to members of the public to certain areas of the shopping centre during business hours, those areas are available at all times during those hours and in all circumstances to any kind of peaceful activity by members of the public, regardless of the interest being prompted by that activity and regardless of the numbers of members of the public who are involved. The Court will draw lines here as it does in other branches of the law as may be appropriate in the light of the legal principle and particular facts. In the present case it is the respondent who has been injured rather than the shopping centre owner.

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I would dismiss the appeal.

Earlier, I noted that the four arguments types we've used so far are not exhaustive — there are no doubt other types we could identify and use to classify common law reasoning. Or perhaps there is a different set of argument types altogether that better describes the patterns that interest us. The point is that such patterns exist and, as we spend more and more time learning and using common law arguments, we come to understand (or intuit) that what counts as a legitimate or “valid” legal argument must fit into one or another well-recognized categories.

Which must mean that sometimes an argument will not fit into a well-recognized category, and therefore might be seen as “invalid” or illegitimate in the context of common law reasoning. Such arguments fall outside the normal vocabulary of the common law.

Of course, identifying an argument as “invalid” according to the expected patterns of the common law does not necessarily mean it is a *bad* argument—nor does it mean that the common law *shouldn't* recognize the argument as legitimate. Can you think of an example of when calling something an “invalid legal argument” could be problematic?

Vocabulary

Denial of Premise

Symmetrical Opposition

Counter-Theory

Mediation

Members of the public have fundamental rights that require access to public spaces.