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Consumer Boycotts in the 'New Economy':

How Should the Common Law Respond?

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Abstract

In the "New Economy", state regulation of corporations is in decline and there is little prospect of effective international control. Corporations are increasingly free vis à vis the state to set their own standards in fields as diverse as working conditions, environmental discharge and relations with aboriginal communities. At the same time, the power of organized labour to control corporate behaviour appears on the wane. The decline of the state and organized labour has left consumer pressure -backed by boycotts- as one of the few checks on corporate power. This thesis examines the boycott phenomenon and the common law reaction to this form of popular protest. Although drawing heavily on political, historical and sociological insights, ultimately the author proposes a common law response that does not deny the autonomous and apolitical nature of private law reasoning.

Avant-Propos

À l'ère du nouvel ordre économique mondial, les États se désengagent de la réglementation des entreprises qui échappent ainsi au contrôle étatique et international. Les entreprises sont de plus en plus libres vis-à-vis des autorités publiques de fixer leurs propres normes de conduite dans des domaines aussi variés que les conditions de travail, les normes environnementales ou des relations avec les communautés autochtones. En outre, la capacité des organisations syndicales d'intervenir pour contrôler le comportement des entreprises semble également en declin. Dans ce contexte de désengagement des pouvoirs publics et des syndicats, la pression exercée par les consommateurs, notamment par le biais du boycott, apparaît comme l'un des derniers moyens de contrôle des entreprises.

La presente thèse examine le phénomène du boycott et la réaction de la *common law* à cette forme de protestation populaire. Bien qu'il s'inspire de considérations politiques, historiques et sociologiques, l'auteur propose une approche de *common law* qui ne contradit pas la nature apolitique et autonome de la logique de droit privé.

Acknowledgments

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Finally, I thank my family for their encouragement. This thesis is dedicated to my father who showed me (at an early age) the power of direct consumer action.

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Chapter I. Introduction

In the summer of 1880, Captain Charles Cunningham Boycott, a land agent of County Mayo, Ireland, sent his tenants to cut oats. However, instead of the tenants' regular wage of 62 and 37 cents a day for men and women respectively, he offered only 32 and 24 cents. The tenants refused to work at that wage and the members of the Boycott family, along with their servants, attempted to harvest the crops themselves. The family gave up after a few hours. The tenants were eventually persuaded to return to work after pleas from Mrs. Boycott but, on rent day, they were served with eviction papers. The angered field workers held a meeting and secured pledges from all those present to cease dealings with the Boycott family. The action spread to the point where no one in the area would work for the family members, sell to them or even speak with them. Three days after the meeting was held, an American journalist coined the term "boycott" to describe the tool of economic and social ostracism available to the Irish peasantry:[1]

> The great reform, as you can see, can be achieved without shedding a drop of blood, without violence, without breaking any law -English, human or divine. But if a man does take a farm from which a poor tenant has been evicted, I conjure you to do him no bodily harm...Act toward him as the Queen of England to you....She would not regard you nor your wife nor your children as her equals. Now imitate the Queen of England, and don't speak to a landgrabber nor a landgrabber's wife nor to a landgrabber's children....If a landgrabber comes to town and wants to sell anything, don't do him any bodily harm...If you see a landgrabber going to a shop to buy bread, or clothing, or even whiskey, go to the shopkeeper at once, don't threaten him...Just say to him that under British law he has the undoubted right to sell his goods to anyone, but there is no British law to compel you to buy another penny's worth from

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[1] H.W. Laidler, *Boycotts and the Labor Struggle* (New York: John Lane Co., 1913) at 25-26, citing James Redpath. Despite the origins of the term itself, boycotts existed well before 1880. One notably early use of the consumer boycott was by the townspeople of Canterbury, England, against the monks of Christ's Church, which involved an agreement not to "buy, sell or exchange drinks or victuals with the monastery": N.C. Smith, *Morality and the Market: Consumer Pressure for Corporate Accountability* (London: Routledge, 1990) at 201.

him, and that you will never do it as long as you live.

If a boycott is defined as simply a withdrawal of economic cooperation, then at least three types of boycotts can be seen in this Irish example: a workers' boycott (a refusal to work for the Boycott family), a suppliers' boycott (a refusal to sell to "landgrabbers") and a consumers' boycott (a refusal to patronize suppliers selling to "landgrabbers").[2] Although there is overlap between these three types, the focus of this thesis is on the consumer boycott.[3]

It is submitted that consumer pressure -backed by consumer boycotts- plays a significant role in regulating corporate behaviour. This has never been more true than in the era of what has been called the "New Economy".[4] In the New Economy paradigm, state regulation of corporations is in decline and there is little prospect of effective state or international control. Corporations are increasingly free vis à vis the state to set their own standards in fields as diverse as working conditions, environmental discharge and relations with aboriginal communities. At the same time, the power of organized labour to control corporate behaviour appears on the wane. The decline of state and labour regulation has left consumer pressure as one of the few checks on corporate power.

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[2] The broad classification of a boycott as a "withdrawal of cooperation" is from G. Sharp, *The Politics of Nonviolent Action* (Boston: Porter Sargent, 1973).

[3] I find two definitions of "consumer boycott" useful. It may be defined simply as a "concerted refusal to deal with a product or with a business, coupled with efforts to induce third parties to likewise withhold their patronage": C.B. Boyd, "Countless Free-Standing Trees: Non-Labor Boycotts After *NAACP v. Claiborne Hardware Co.*" (1983) 71 Kentucky L.J. 899 at 899-900. It may be defined more purposively as "the organized exercising of consumer sovereignty by abstaining from purchase of an offering in order to exert influence on a matter of concern to the customer and over the institution making the offering.": Smith, *supra*, note 1 at 140.

[4] See H.W. Arthurs, "'Mechanical Arts and Merchandise': Canadian Public Administration in the New Economy" (1997) 42 McGill L.J. 29.

This thesis examines the boycott phenomenon and the judicial reaction to this form of popular protest. Chapter Two sketches the place of boycotts in North American history. This sketch provides the factual basis from which I draw subsequent analysis. Chapters Three and Four propose justifications for boycotts, notably the idea that boycotts can provide a democratic check on corporate power. The most frequently used argument against the legitimacy of boycotts is that they cause too much economic disruption. Chapter Five tackles this argument by examining the numerous practical and non-state law norms which contain the damage boycotts cause. Chapter Six examines the judicial response to consumer boycotts. Almost invariably, Canadian courts have found boycotting activity tortious (usually by reference to the economic interference torts). Chapter Seven examines the related (sociologically, historically and jurisprudentially) phenomenon of political strikes. After exploring the place of political strikes in Canadian society, I contrast the approach of labour boards to these strikes with the judicial response to boycotting. The boards typically recognize the political nature of the protest at stake, take a legal pluralist perspective and, in the end, fashion a more nuanced remedy than courts tend to in the boycotting context.

Constitutional issues -stated or unstated- are at the heart of the judicial response and are specifically addressed in Chapter Eight. The constitutionalization of tort and the "Charter values" approach (currently in vogue in Canada) are rejected as solutions, primarily for their disruptive effect on private law principles (non-instrumentally conceived). Chapter Nine suggests that the common law is capable of producing appropriate results in boycotting cases without reference to the Charter. This result can be achieved by reference to the mechanism of a *privilege* (already present in the law of defamation). A privilege suspends the normal operation of tort principles, to permit a democratic or public interest perspective, without gutting the private law of internal consistency. This chapter

takes issues of common law formalism seriously and aims to be more than the seemingly inevitable law reform "tack on" to scholarship in the "law and...." stream of legal writing (law and economics, law and politics, law and sociology etc.). Indeed, one of the underlying theoretical concerns of this thesis is how the common law can be reconciled with democratic concerns and a legal pluralist perspective, while maintaining the integrity of common law reasoning.

Chapter II. A Historical Sketch

A. Boycotting in the U.S.

Boycotts have a historic and significant place in U.S. history. There are at least four noteworthy phases of boycotting: i) anti-British boycotts of the revolutionary period; ii) pro-labour boycotts of the late nineteenth and early twentieth centuries; iii) the post-war civil rights boycotts; and, iv) the corporate accountability movement of the last thirty years.

As early as 1764, some Boston merchants tried to counteract the economic effects of the *Sugar Act* by reducing luxury imports from England, in particular mourning clothes and the gloves traditionally given out at funerals.[5] These early efforts were systematized in nonconsumption and nonimportation pacts which figured prominently in colonial resistance to the *Stamp Act* of 1765, the *Townshend Acts* of 1767, and the *Tea Act* of 1773. Massachusetts towns responded to the "Coercive Acts" with a "solemn league and covenant" to end trade over the summer of 1774, and the boycotting movement culminated with the decision of the first Continental Congress to establish an "Association" to end consumption and importation that fall. Political historians have seen the boycotts as motivated by a desire to put pressure on English merchants dependent on the colonial trade, "and so induce agitation within the Mother Country for colonial redress."[6] Others have supplemented this view. Using an intellectual history approach, Edmund Morgan argues that the

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[5] The classic work on the subject is A.M. Schlesinger, Sr., *The Colonial Merchants and the American Revolution*, 1763-1776 (1918; reprint ed., New York, 1968).

[6] P. Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765-1776* (New York: Alfred A. Knopf, 1972) at 75.

"pressure on parliament" explanation is too narrow and that the boycotts were not merely political.[7] Examining the language used to encourage the boycotts, Morgan was struck by the inwardness of the appeals. Advocates argued that Americans had become too dependent on luxury goods (not English luxury goods necessarily) at the expense of American values such as self-denial and industry. In addition to the political goal, the boycotts "were also a positive end in themselves, a way of reaffirming and rehabilitating the virtues of the Puritan Ethic."[8] Similarly social historians add to the political explanation, arguing that the revolution was social in nature from the beginning and that social change was not simply a consequence of the political revolution.[9] B.C. Smith, for example, suggests that the "trade boycotts reshaped relations among neighbours, among different social classes, and between genders."[10] The boycott agreements (which penetrated to rural areas), the observation and surveillance of neighbours to ensure compliance, and the social ostracism and punishment of boycott breakers served to effect social change. She concludes:[11]

> However common and plausible it may be to identify the patriot movement with the position and resolves of assemblies and conventions or with the pamphlets and

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[7] E.S. Morgan, "The Puritan Ethic and the American Revolution", in E.S. Morgan, ed., *The Challenge of the American Revolution* (New York: Norton, 1976) 88.

[8] *Ibid.*, at 96.

[9] B.C. Smith, "Social Visions of the American Resistance Movement" in R. Hoffman and P.J. Albert, eds., *The Transforming Hand of Revolution: Reconsidering the American Revolution as a Social Movement* (Charlottesville: University Press of Virginia, 1996) 27 at 28.

[10] *Ibid.*, at 30. For example, she writes, at 40-41: "Women had the power to break the provisions of the Association. As a result, the success of nonimportation and nonconsumption required female participation to an unprecedented degree. By the same token, free men who did not fulfill the voting requirements and who could not therefore either serve on committees or elect committeemen also had to be included in some ways."

[11] *Ibid.*, at 28.

> newspapers that dissected British colonial policies, it is vital to remember that most Americans who became engaged in the resistance movement became engaged in one or another nonimportation, nonconsumption pact. Becoming a patriot no doubt meant adopting certain views regarding political representation and the nature of the empire, but in pragmatic and immediate terms it meant enlisting in a boycott of trade.

The U.S. civil rights movement provides another strong example of the ways in which social and political movements effect change through boycotts. Blacks in the southern U.S. had boycotted street-car services in the first decade of the twentieth-century to demand equal seating,[12] but the boycotts of the late 1950s and 1960s are more widely known. The boycott of the Montgomery bus service in 1955 -sparked by Rosa Park's refusal to obey the driver's directive that she move further to the "black" section of the bus- is the most celebrated.[13] Participation of blacks in the boycott was high and an alternative transportation system was established to move the boycotters around the city. Black self-reliance during the boycott took on a near-spiritual air:[14]

> For those who seek in the American past glimpses of communities in which self-determination constituted a liberating passion rather than a distasteful chore, black Montgomery in 1955-1956 is a fine example. That community was probably never more free than during the boycott. So high was the level of engagement, so deep was the urge to reform, "so profoundly had the spirit become a part of people's lives that sometimes they even preferred to walk when a ride was available. The act of walking, for many, had become of symbolic importance."

Although in the end it was sucessful litigation -and not economic pressure- which ended segregation

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[12] See "The Boycott Movement Against Jim Crow Streetcars in the South, 1900-1906", in A. Meier & E. Rudwick, *Along the Color Line: Explorations in the Black Experience* (Urbana: University of Illinois Press, 1976) at 267.

[13] See R. Kennedy, "Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott" (1989) 98 Yale L.J. 999.

[14] *Ibid.*, quoting in part from M.L. King, *Stride Toward Freedom: The Montgomery Story* (New York: Harper, 1958) at 77-78.

on Montgomery busses, the boycott had a profound effect on the civil rights movement.[15] Randall Kennedy sums up its importance:[16]

> The boycott made black Montgomerians aware of themselves as a community with obligations and capacities to which they and others had previously been blind. On the eve of the boycott, few would have imagined the latent abilities that resided within that community. The protest elicited and clarified those abilities. On the eve of the boycott, few black Montgomerians would have considered themselves as persons with important political duties. The protest inculcated and enlarged their sense of responsibility. Moreover, by publicizing their willingness and ability to mobilize united opposition to Jim Crow Practices, the protesters in Montgomery contributed a therapeutic dose of inspiration to dissidents everywhere.

The Montgomery bus boycott, and the other boycotts of the early civil rights movement, tended to be directed at governments or state enterprises. Even when private businesses were the direct targets of boycotts, the ultimate targets were often municipal governments (activists hoped that targeted local merchants would put pressure on governments to repeal segregation laws).

Boycotts continued to be a weapon of those seeking racial justice in the U.S during the 1970's and 1980's but the target of the boycotts changed. During those years the Rev. Jesse Jackson, as the head of a civil rights organization named "Operation PUSH", attempted to wield the growing economic power of blacks through the boycott weapon.[17] Operation PUSH called for the boycott of a number of well-known corporations including Coca-Cola, Anheuser-Busch, Phillip Morris, Ford Motor, Burger King and Nike to protest what it saw as unfair hiring or distribution practices. The

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[15] See Kennedy, *ibid.*, and R.J. Glennon, "The Role of the Law in the Civil Rights Movement - The Montgomery Bus Boycott, 1955-1957" (1991) 9 Law & Hist. Rev. 59.

[16] Kennedy, *ibid.*, at 1066.

[17] See S.A. Holmes, "Boycotts Rarely Affect the Bottom Line: Their Biggest Impact May Be as Rallying Points for Organizers", *The New York Times* (15 November 1996) C2.

move away from political goals (in the sense of electoral politics), and the targeting of corporations rather than the state, is indicative of the gradual shift in emphasis in the corporate accountability/consumer rights movement of the last thirty years. In the early years of the movement (popularized in the late 1960's and early 1970's by activists such as Ralph Nader) the focus was often on the potential for government regulation of corporations.[18] As suggested in the Operation PUSH example, however, American activists increasingly focussed their attention directly on corporations and away from the lobbying of state officials. Boycotting was one of the means of applying *direct* pressure. This pressure for corporate accountability has not been limited to the civil rights movement, with actions for corporate accountability occurring in areas such as international human rights, the environment, labour and community interests. As a major theme of this thesis, these corporate accountability boycotts are dealt with in subsequent chapters.

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[18] R. Nader, ed., *The Consumer and Corporate Accountability* (New York: Harcourt Brace Jovanovich, 1973).

B. Boycotting in Canada

While the boycotting tradition in the U.S. is undoubtedly stronger than in Canada, boycotts are also a traditional protest tool here.[19] In fact, the parallels between the boycotting movement of the revolutionary period in the American colonies and strategies pursued by Patriot leaders in Lower Canada are striking. Despite revolutionary rhetoric in the months leading up to the Rebellion of 1837, the Patriots made few practical military preparations.[20] Other means of protest, including a boycott of British goods, were pursued.[21] Several months prior to the violence of November 1837, Louis Joseph Papineau delivered a speech where he made direct reference to the American experience: "Let us examine what the Americans did, under similar circumstances. Ten years before they took up arms, they adopted the course which we are now about to recommend to you. They abstained from taxed articles...".[22] And, as in the American experience, supporters were encouraged to turn from imported articles to "homespun textiles and other 'domestic manufactures'".[23] Lower level boycotts in Canada have also been described by social historians. In one Acadian village:[24]

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[19] Few Canadian historical texts make any reference to boycotting. Indeed, one would imagine at first glance that boycotts are not a traditional form of protest in Canada. This paucity of secondary materials may be related to the more general fact that social history and the histories of popular resistance and extra-state normativity are stories that have not -until recently- been particularly well told in Canada. One may also speculate that a protest mythology does not figure prominently in our national psyche. Regardless of the reason why the story has not been well told, a deeper look does reveal a number of instances of boycotting as sites of popular protest.

[20] A. Greer, *The Patriots and the People: The Rebellion of 1837 in Rural Lower Canada* (Toronto: University of Toronto, 1993) at 146.

[21] *Ibid.*, at 144-147

[22] *Vindicator*, 6 June 1837, cited in Greer, *ibid.*, at 146.

[23] Greer, *ibid.*, at 144.

[24] L. Léger, *Les Sanctions Populaires en Acadie* (Montréal: Leméac, 1978).

> Un marchand du haut du comté servait la population depuis de nombreuses années quand, un bon jour, son frére se mit en tête d'ouvrir un magasin dans le même patelin. Une si petite localité ne pouvait faire vivre deux marchands, tout le monde s'en rendait bien compte. Aussi trouvait-on cette décision de la plus grande indécence. L'informatrice se rappelle très bien que ses parents avaient jugé bon de boycotter le nouveau propriétaire même si son magasin les aurait mieux accomodés. Quelques autres familles eurent recours à cette sanction, penalisant ainsi une conduite que la loi ne pouvait atteindre.

If the Canadian historical literature on boycotts is sparse, there is no shortage of reported boycotts in recent years. For example, 1996 saw a number of instances of boycotts or threatened boycotts including the following: a coalition of about 80 groups including the Canadian Teachers Federation threatened advertisers on violent television shows;[25] Quebec anglophone groups boycotted sixteen Canada-wide retail chains for not posting English signs;[26] and certain groups in Toronto boycotted the Harveys hamburger chain to protest its parent corporation's (Cara) financial support of Ontario's Progressive Conservative party.[27] In addition, 1996 saw a number of boycotts directed at foreign jurisdictions or at multinationals with activities in other countries. These include a boycott of vacations to Florida by a coalition of churches, charities and students in order to protest the extraterritorial reach of the U.S. Helms-Burton bill;[28] boycotts of corporations doing business in

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[25] R. Matas, "Boycott may hit violence on TV advertisers of unduly graphic programs get warning from public coalition", *The Globe and Mail* (31 Otober 1996) A2. A similar boycott has been threatened against advertisers who plan to buy air-time on Canadian radio stations carrying the controversial *Howard Stern Show*: "Howard Stern doesn't faze CBC's This Morning" *The Globe and Mail* (28 August 1997) A9.

[26] C.P., "Quebec Anglophone groups to boycott stores", *The Globe and Mail* (22 July 1996) A4.

[27] J. Rusk and J. Lewington, "Donations to Conservatives bring boycotts of businesses", *The Globe and Mail* (13 January 1996) A12.

[28] C.P., "Florida - vacation boycott to start", *The Globe and Mail* (1 August 1996) A4.

Burma to protest human rights abuses there;[29] and, boycotts of French wine to protest French nuclear testing in the South Pacific.[30]

C. *Consumers and Workers*

The collective bargaining process -with its state and non-state norms- is undoubtedly distinct from the typical consumer-vendor purchase and sale transaction. At the same time, however, boycotts and strikes (particularly politically motivated boycotts and strikes) are related and can sensibly be treated together for sociological, historical and jurisprudential reasons. From a sociological perspective, both involve social movements which manifest themselves in a contentious and collective challenge to established authorities or elites.[31] There are other social movements which engage in challenge through means such as violence, lobbying, negotiation or refusal to accept certain religious or personal mores (dress, public deportment). But what makes boycotts and political strikes contentious, and thus distinct from other challenges, is the intentional, but peaceful, infliction of economic harm.[32] Also contentious is the political *motive* of the protest combined with

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[29] P. Knox, "Boycott threats pay off, Consumers spark Burmese pullouts", *The Globe and Mail* (12 July 1996) A12.

[30] "Wine industry hit", *The Globe and Mail* (28 February 1996) B2. Of course the most high-profile activity of this sort in recent years was the international consumer boycott of South African goods to protest that country's apartheid regime. These boycotts, along with calls for disinvestment, were often put in place prior to official trade sanctions: see N.C. Smith, *supra*, note 1 at 234-241.

[31] Sidney Tarrow, *Power in Movement* (Cambridge: Cambridge University Press, 1994) at 2. I am grateful to Prof. Suzanne Staggenborg of the Sociology Department, McGill University, for pointing me to some of the sociological literature on social movements and collective action.

[32] Or at least the withdrawal of cooperation.

means outside of traditional politics (running for office, supporting political parties etc.).

From a historical perspective, boycotts and strikes are the "flip sides" of each other, having been used as alternative weapons (often by the same people) for the same end. This is highlighted in cases of consumer boycotts in support of labour struggles. In particular, the consumer boycott tactic played an important role in the recognition of trade union status in the late nineteenth and early twentieth centuries. Early on, boycotts became the natural counterpart to the labour struggle. One of the early American writers on the use of boycotts put it simply: "The strike aims to gain better conditions for labor by depriving the 'unfair' employer of the labor power necessary to produce goods; the boycott, on the other hand, seeks these same ends by depriving the employer of the market for those goods which labor has created."[33] Once union recognition is granted, and the union has the ability to control the supply of labour, the consumer boycott appears to be less used. But, in the initial drive for recognition, consumer pressure is one of the few tactics available to working people and their supporters, leading one early writer to call it -perhaps with some exaggeration- "the most effective weapon of unionism".[34] The direct relationship between the consumer boycott and labour is nowhere more plain than in the massive California grape boycott of 1965-1970.[35] After years of bitter and unsuccessful attempts for union recognition, the United Farm Workers Organizing Committee (UFWOC), led by Cesar Chavez, called for a consumer boycott of California grapes.

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[33] Laidler, *supra*, note 1 at 7. The "union label"campaign was the companion form of expressing consumer preference. Products were marked with indications that they were union-made and "fair" lists were also published indicating preferred sources of goods: N.C. Smith, *supra*, note 1 at 149.

[34] As cited in Smith, *ibid.*

[35] Although as Smith correctly points out, *ibid.*, at 250, the case was not only a labour issue: "It also involved minority rights, poverty, pesticide misuse and civil rights".

The boycott was organized through committees in the major North American markets comprised of a broad coalition of social activists, consumer and religious groups and union members. Consumers were receptive to the calls for a boycott and sympathetic, more generally, to the plight of the farm workers. Businesses selling the grapes were picketed and customers were asked not to purchase them.[36] Some unions attempted to aid the consumer boycott by declaring the grapes "hot" and refusing to handle them. In a press release, the Secretary-General of the B.C. Federation of Labour conceptualized the union's assistance for the boycott in these terms:[37]

> The grape boycott has been gaining wide support with more and more shoppers refusing to buy grapes. An indication of this is the decision this week by the giant Dominion Stores chain to stop handling California grapes in any of their stores in Canada. The Federation is making its announcement in order that other super-markets can avoid being overstocked as the boycott grows. We will do so by declining to handle, in trucks, warehouses or stores, California or Arizona grapes. Members of our affiliated unions have decided to contribute in this way to the growing success of the campaign to support the effort of the grape workers to obtain 20th century wages and working conditions.

If the consumer boycott was "consumers aiding workers," then the political strike by B.C. workers may be characterized as "workers aiding consumers aiding workers". The sales of California grapes eventually plumetted and the growers were forced to capitulate in important respects.[38]

The success of the California grape boycott has encouraged a number of Labour-Community

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[36] See, for example, *Darrigo Grape Juice Ltd.v. Masterson* (1971), 21 D.L.R. (3d) 660 (Ont. H.C.J.).

[37] Cited in *Slade & Stewart Ltd. v. Haynes* (1969), 5 D.L.R. (3d) 736 (B.C.S.C.).

[38] For a recent Canadian example of this sort of boycott see J. McCarten, "Angry Alberta workers promote Safeway boycott" *Globe and Mail* (22 April 1997) A7. In April 1997, the union representing workers at the Safeway grocery stores in Alberta called for a consumer boycott of the chain in order to pressure the company to end the protracted dispute over part-time workers and wages.

Boycotts (LCBs), organized by coalitions of unionists and community leaders in response to corporate threats to their common interests.[39] Threatened plant shutdowns are the clearest example of this sort of corporate threat. In this scenario, community leaders vow to boycott the products of the company if the plant is closed; in essence, the community says "we'll buy your products, but not if you stop making them here". LCBs of this sort have met with some success, including the prevention of a threatened shut-down at a GM plant in California.[40]

D. Racist boycotts

It would be misleading to suggest that boycotts and political strikes are vessels which inevitably carry democratic, social democratic or liberal ideals. Political actions of this sort can "suppress political dissent as well as express it".[41] In the U.S., the refusal of some southern merchants to sell to blacks who registered for the vote stands out as an example.[42] Similarly, racist or anti-immigrant boycotts have a place in Canadian history. Three boycotts, varied in terms of time and place, are illustrative.

In the 1840s, Protestant Orangemen in New Brunswick organized boycotts against incoming

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[39] See J.G. Pope, "Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution" (1991) 69 Texas L.R. 889.

[40] *Ibid.*

[41] P.G. Mahoney, "A Market Power Test for Non-Commercial Boycotts" (1984) 93 Yale L.J. 543 at 533.

[42] *Ibid.*

Catholic immigrants:[43]

> In an attempt to combat the debilitating effects of immigrant competition, such as the general lowering of wage scales, Orangemen sounded the call for economic segregation. They suggested that Protestant merchants and employers should hire and do business only with co-religionists. By ostracizing Roman Catholic labourers, Orangemen hoped to persuade entrenched immigrants to leave and to discourage incoming Catholics from settling in the community.

In British Columbia of the late nineteenth and early twentieth century, the Chinese community was targeted for boycotts by members of the local white population.[44] These boycotts had a narrow political motivation (to encourage the government to restrict Asian immigration and curtail the ability of Asians to compete for employment) as well as a broader sociological foundation (popular resistance to an outside "threat"). Similarly, although Quebec's "L'achat chez nous" movement of the 1930s -which involved, in part, a boycott of Jewish businesses- was promoted by nationalist organizations, newspapers and endorsed by premiers Godbout and Duplessis, it also contained elements of popular and spontaneous political, economic and sociological motivation.[45] As suggested in the latter example, these boycotts (as well as in some cases accompanying social violence) were in large measure tolerated by the authorities and the courts. Given prevailing social attitudes, human rights regimes, and anti-hate speech legislation, boycotts of this sort are rarely seen in Canada on an organized scale, although one might speculate that loose neighbourhood boycotts of this sort continue to occur.

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[43] S.W. See, "The Orange Order and Social Violence in Mid-Nineteenth Century Saint John" (1983) 13 Acadiensis 68 at 81.

[44] See W.P. Ward, *White Canada Forever: Popular Attitudes and Public Policy Toward Orientals in British Columbia* (Montreal: McGill-Queen's University Press, 1990) at 44-45.

[45] J. Langlais, and D. Rome, *Jews and French Quebecers* (Waterloo: Wilfred Laurier Univ. Press, 1991) at 99.

Chapter III. Justifications for Boycotts

There are at least six reasons why consumer boycotts are justifiable: i) boycotting is *in fact* a traditional and frequent tool of popular protest; ii) boycotting is a tool of social change (particularly for politically marginalized groups); iii) the expression inherent in boycotting contributes to democratic debate; iv) boycotting can be a non-violent catharsis for social frustration; v) boycotting can be an ethically and even religiously required activity for some; and, vi) consumer pressure backed by boycotts (or threatened ones) can be a significant democratic check on corporate actions. I address the first five justifications in this chapter and explore the sixth in the following chapter.

Some of the proposed justifications (but, significantly, not all) are amenable to an expressly constitutional rhetoric. For example, an argument could be made that the *right* to freedom of expression demands a *right* to boycott. I deliberately refrain from making those arguments here, since (and this is explored in Chapter Eight) a constitutional discourse is of little assistance in the private law sphere. The justifications I cite, rather, are based on political theory, and conceptions of public and individual interests. The link between these justifictions and legal doctrine, which ultimately makes this a work *in* law (and not only "law and" politics, history or sociology), is examined in Chapter Nine.

i) Boycotting as a traditional tool of popular protest

Tradition and custom are sources of legitimacy in various and disparate strands of law such as international,[46] negligence,[47] constitutional[48] and aboriginal law[49]. Of course, even widespread practice can be evaluated and found to be wanting or reprehensible, but custom remains at least one source of morality and law, the rejection of which may have costs.[50] We have seen in Chapter Two that boycotts are - and have been for centuries - customary tools of popular protest in the United States and Canada. On this basis, they are due (at least *prima facie*) some degree of legitimacy.

ii) Boycotting as a tool of social change

Chapter Two described a number of instances where boycotts were used to change existing social relations. In particular, boycotts have been one of the primary tools of protest among marginalized groups. As one author put it in a provocative article, "'A Nation of Thieves': Securing Black People's Right to Shop and to Sell in White America": "[p]eople who lack political power but

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[46] A. D'Amato, *The Concept of Custom in International Law* (Ithaca, N.Y.: Cornell University Press, 1971).

[47] R.A. Epstein, "The Path to the T.J. Hooper: The Theory and History of Custom in the Law of Tort" (1992) 21 J. Legal Studies 1.

[48] D.A. Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University, 1991).

[49] J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623.

[50] *Ibid.*, at 629.

possess economic power employ boycotts."[51]

iii) The expression inherent in boycotting contributes to democratic debate

Boycotts are not simply weapons that organizers direct at their immediate corporate targets.[52] Organizers use boycotts as both rallying points and information disseminating mechanisms for their causes. In some cases, boycotts are used to mobilize broad social movements. Undoubtedly, boycotts (or more precisely boycott organizers) are incapable of creating social movements by themselves. As Sydney Tarrow observes in sociological terms:[53]

> By mobilizing consensus, movement entrepreneurs play an important role in stimulating...consensus. But leaders can only create a social movement when there are more deep-rooted feelings of solidarity or identity.

However, when boycotts are prohibited, the expressions of "feelings and solidarity" are unheard and unheeded. In arguing for the protection of insurgent speech, John Rawls borrows from Kalven, the example of rebels, who do not simply yell "Rebel!, Rebel!", but give reasons for the rebellion.[54] In

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[51] R. Austin, "'A Nation of Thieves': Securing Black People's Right to Shop and to Sell in White America" (1994) Utah L.R. 147 at 155.

[52] Organizers of boycotts have come to recognize that they are often ineffective in significantly harming short-term "bottom lines" of large corporations. And, although not forced through direct and immediate economic pressure to change policies, corporations will often accede to demands in the face of a threatened boycott to avoid bad publicity, loss of corporate prestige and reputation and accompanying long-term harm. See, for example, the Heineken pullout from Burma: P. Knox, "Boycott threats to pay off" *The Globe and Mail* (12 July 1996) A12.

[53] Tarrow, *supra*, note 31 at 5.

[54] J. Rawls, *Political Liberalism* (New York: Columbia, 1993) at 346, citing H. Kalven, *A Worthy Tradition* (New York: Harper & Row, 1988).

the same way boycott organizers do not simply call for a boycott and pressure others into joining - they give reasons. Just as permitting the advocacy of rebellion ("subversive advocacy") allows political leaders to respond and forestall violence, so boycotting provides a signal to which political and corporate leaders can respond.

With expression generally, the societal interest in a democracy is considered (perhaps with exceptions such as hate speech) to be found in the widest dissemination of ideas. Without this free flow of information, it is argued, citizens cannot make informed choices and the truth-advancing function of communication is curtailed. If there is merit to these arguments, then they also offer a justification for boycotting given the expressive nature of this activity.

iv) Boycotting as non-violent catharsis

To draw on Rawls again, "[f]ree political speech is not only required if citizens are to exercise their moral powers....but free speech together with the just political procedure specified by the constitution provides an alternative to revolution and the use of force which can be so destructive to the basic liberties."[55] Similarly, boycotting may provide an alternative to violent consumer protest. Thus the peaceful "housewife" boycotts of the 1960s[56] can be contrasted with the often violent riots led by eighteenth-century women for essentially the same reasons.[57] More concretely, Pauline Maier has suggested that in certain instances in U.S. revolutionary history, boycotts were

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[55] *Ibid.*, at 344.

[56] See D. Sanford, "Gamesmanship in the Supermarkets" in D. Sanford, ed., *Hot War on the Consumer* (New York: Pitman, 1969) at 21-25.

[57] See E.P. Thompson, *Customs in Common* (New York: The New Press, 1993), chap. 4.

"substituted for colonial violence" and the United States Supreme Court has recognized the same with respect to the civil rights movement.[58] In sum, this form of protest is a cathartic non-violent means of expressing political or social discontent.[59]

v) Ethical and religious dimensions

Less instrumental than the justifications offered above, ethical and religious imperatives are also sometimes at issue. Recall, for example, Edmund Morgan's proposition that the boycott of British goods gained momentum not only for narrow political goals but for the personal values of strength and self-denial which it encouraged. At times, the moral calculus may even involve a religious obligation to boycott. After stories of abusive labour practices in sourcing factories for the Gap clothing chain came to light, two Rabbis from a New York congregation wrote to the chief executive of the company:[60]

> Before we publicly announce to our congregation that shopping at the Gap and the Banana Republic is a violation of Jewish ethical laws, we would like to hear from

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[58] See Maier, *supra*, note 6 at 74. And see the decision of the U.S.S.C. in *Claiborne*, *infra*, note 182. Although this thesis deals primarily with the North American context, it is worth noting that boycotting is securely placed worldwide as a *strategy* of non-violent direct action (NVDA). On this point see Gene Sharp's classic work, *The Politics of Non-Violent Action*, *supra*, note 2, and see P. Ackerman and C. Kruegler, *Strategic Nonviolent Conflict* (Westport: Praeger, 1994). Boycotting is also securely placed in the *philosophy* of NVDA: see J. Bondurant, *The Conquest of Violence: The Gandhian Philosophy of Conflict* (Berkeley: University of California Press, 1965).

[59] The cathartic effect of boycotts may be analogized to the role of strikes in a labour context. On the ability of strikes to relieve tension, see for example, J. Webber, "The Malaise of Compulsory Conciliation: Strike Prevention during World War II" in B.D. Palmer, ed., *The Character of Class Struggle: Essays in Canadian Working-Class History, 1850-1985* (Toronto: McClelland and Stewart, 1986) at 159.

[60] B. Herbert, "A Sweatshop Victory" *The New York Times* (22 December 1995) A39.

you if there are any plans to immediately correct those violations.

This next chapter explores the sixth justification, namely, that boycotting can provide a check on corporate behaviour in the New Economy.

Chapter IV. The Democratic Check in the New Economy

> The sales of large multinational corporations rival the gross national products of some countries. General Motors, for instance, has corporate sales larger than the gross national product of Switzerland. General Electric has sales that place it ahead of the gross national products of such countries as the United Arab Emirates and Israel. Considering the size of such corporations, it is understandable that they are difficult to control. Only a few international quasi-governmental agencies even attempt to do so. In most instances, however, they are powerless because they cannot enforce their resolutions. National governments are also somewhat powerless because of the sheer size of the multinational corporations. Surprisingly, the actors that are often most successful in controlling multinational corporations are social activist organizations.[61]

A. From state law to direct action

As noted earlier, the consumerist movement of the late 1960's and early 1970's, epitomized in the consumer-citizen Ralph Nader, focussed on the state. On subjects as diverse as auto insurance, baby formula, and grocery chain lotteries, Nader and his companions demanded state research into corporate actions, legislation to protect consumers and increased penalties for offenders.[62] Not surprisingly, legal scholars also focussed on legislation and the role of lawyers in protecting consumers. In an article entitled "The Future of Canadian Consumerism", J.S. Ziegel wrote:[63]

> Lawyers on both sides of the border have played leading roles in the post-war consumer movement. This is as it should be because the law is still the most important source of norms in our economy.

But, he argued, lawyers were not doing enough. Somewhat naively, he proposed two solutions to

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[61] J. Gerber, "From Bottles to Bombs: The Role of Success and Occupying a Unique Niche in Organizational Transformation" (1991) 24 *Sociological Focus* 225 at 225.

[62] See Nader, *supra*, note 18.

[63] J.S. Ziegel, "The Future of Canadian Consumerism" (1973) 51 Can. Bar. Rev. 191 at 204.

the challenges faced by the consumer movement: i) consumer law had to be made a respectable branch of law in the law schools and in the profession; and, ii) corporate lawyers should avoid drafting contracts which excluded consumer protection legislation.[64] In a similar vein, Michael Trebilcock argued that the consumer movement needed political power (in the traditional sense) in order to secure pro-consumer legislation.[65]

A number of scholars have criticized what are ultimately positivist views such as those expressed by Ziegel and Trebilcock. They argue that state law is frequently powerless to redress social or political grievances "on the ground" and, even when well intentioned, state law may make things worse.[66] Social activists, who are perhaps also realizing that the state is not able to effect social change in a way once thought, increasingly turn their attention from public policy and officials to private companies.[67]

The idea that the collective use of consumer pressure -through boycotts when necessary- can effect social change is explored in this chapter. Specifically, I suggest that consumer pressure has some ability to regulate corporate activity and that boycotts are an integral tool of this regulation.[68]

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[64] *Ibid.*, at 204-205.

[65] M.J. Trebilcock, "Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose?" (1975) 13 Osgoode Hall L.J. 619 at 620.

[66] For example, one author argues that anti-discrimination laws may have contributed to the further victimization of the people the laws were intended to protect: K. Bumiller, *The Civil Rights Society* (Baltimore: John Hopkins University Press, 1988). And see: B. de Sousa Santos, "Law: A Map of Misreading" (1987) 14 J. Law and Society 279.

[67] Holmes, *supra*, note 17.

[68] I am not suggesting that the decline of state regulation is the only -or even the main- reason why social activists are turning to boycotts and other forms of consumer action. There are other reasons, including a lack of access to state power.

B. The New Economy Paradigm

In addition to recognizing the limited capacity of state norms to alter patterns of behaviour, it is also crucial to recognize that the state norms that do exist may be receding. The retreat is increasingly noticed by scholars, notably Harry Arthurs, who writes that while in the past sixty years "we thought that we could count on a strong public administration", that is no longer the case in the New Economy.[69] Since this paper deals with the role of boycotting in the context of the New Economy, a brief review of this concept is useful. For Arthurs, the New Economy is marked by three intersecting trends.[70] First, there have been dramatic changes in technology resulting in changes in the social organization of work. Second, there has been a liberalization of Western economies, accompanied by increasing globalization. Finally, there have been shifts in the boundaries between state and civil society. This latter category is shaped by the first two trends but also by long-term changes in political ideology, cultural changes and institutional changes. According to Arthurs, each of these currents in the New Economy has had a profound effect on Canadian public administration.

Changes in technology, especially in the field of communications, "have rendered governments virtually incapable of controlling commercial and cultural activities traditionally within the state's natural sphere of influence."[71] Liberalization of trade, globalization and regional economic integration have forced states to abandon some of the traditional regulatory regimes of the post-war period. By the same token, states have become vulnerable to foreign governments and

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[69] Arthurs, *supra*, note 4 at 31. See also P. Spiro, "New Global Potentates: Nongovernmental Organizations and the Unregulated Marketplace" (1996) 18 Cardozo L. Rev. 957; and, J.O. McGinnis, "The Decline of the Western Nation State and the Rise of the Regime of International Federalism", (1996) 18 Cardozo L. Rev. 903. *Contra.*, see M.R. Fowler and J.M. Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (University Park, Pa.: Pennsylvania State University, 1995) and M.L. Movsesian, "The Persistent Nation State and the Foreign Sovereign Immunities Act" (1996) 18 Cardozo L. Rev. 108.

[70] Arthurs, *ibid.*, at 32.

[71] *Ibid.*, at 35.

investors. With respect to the shifting boundaries between state and civil society, Arthurs points to a new ideological norm. The very idea of interventionist government has been successfully attacked and anti-state rhetoric has become commonplace even among those who wish to govern. Indeed, the "fundamental reason for anti-government governments holding power is that they wish to abandon its use".[72] This ideological shift is not seen only among parties of the traditional right; "governments of whatever provenance are committed to reducing public spending, the size of the public service and the state's regulatory presence."[73] With cutbacks and the downsizing of the civil service, the field of state activity (including the capacity to research), has also shrunk. Further, what remains of the civil service has not been immune to the ideological and institutional changes. The world view and self-conception of a committed and professional public service has been successfully attacked and leadership in the public service has passed from those who believe in the state to those who do not.

In the New Economy paradigm, the state is increasingly unable or unwilling to regulate corporations at the same time as corporate power is growing. The power of large multi-national corporations is in many respects unchecked and the presence of international treaties means that even if the state did wish to check corporate behaviour, it may be bound not to do so.

In his examples, Arthurs deals primarily with the growing impotence of Canadian governments to regulate corporate behaviour. If his conclusions are accurate for a G7 country with a still large and sophisticated bureaucracy, they are doubly so for developing states. In addition to the reasons Arthurs provides for an unwillingness or inability to regulate, the following observations apply to developing states. First, the economies of these countries are often highly dependent on foreign investment (often by only a few corporations). Second, they are mired in external debt, aid-dependent and obliged to accept the liberalization schemes of the IMF and World Bank. Third, the

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[72] *Ibid.*, at 41.

[73] *Ibid.*, at 50.

bureaucracies are underfunded and relatively unsophisticated. And finally, in the post-cold war era, there is only one model for development and only one superpower which can be looked to for support. In the mid-1970s, when the non-aligned movement was strong on the international scene, the "Group of 77" introduced a code of conduct for transnational corporations. Even though the language and scope of the code was limited and the code was never formally adopted, it did represent an attempt to check corporate behaviour. But as one observer puts it, "[s]ince the time this code was drafted....third world confrontation has largely given way to integration into a liberalized global economy. For most of the developing world, multinational corporations are now prized investors, not malfeasors."[74]

C) Boycotting as a Human Rights' Check

One question remains which Arthurs addresses only cursorily and which I address in this section: besides unions (which he sees as increasingly weak in the New Economy[75]) are there non-governmental forces which can regulate corporate behaviour?[76] I suggest that consumer pressure -backed by boycotts- can be an important force in policing corporate behaviour.

A recent report commissioned by the International Centre for Human Rights and Democratic

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[74] L. Compa and T. Hinchcliffe-Darricarrère, "Enforcing International Labor Rights Through Corporate Codes of Conduct" (1995) 33 Columbia J. of Transnational Law 663 at 670.

[75] In addition to the rise of corporate power vis à vis the state, Arthurs notes that corporate power is growing vis à vis labour and the post-war labour law scheme: H.W. Arthurs, "Labour Law Without the State" (1996) 46 U.T.L.J. 1.

[76] H.W. Arthurs and R. Kreklewich, "Law, Legal Institutions, and the Legal Profession in the New Economy" (1996) 34 Osgoode Hall L.J. 1 at 22: "[There is] historical evidence that relatively powerless communities - E.P. Thompson's commoners and plebian crowds, for example, or local merchants in rural Quebec, or the peasants of Chiapas- may retain some vestigial capacity to generate their own norms, some limited capacity to modify, deflect, even occasionally defeat, the law of the state or of powerful corporate interests." [footnotes omitted].

Development (ICHRDD) suggests that a majority of Canada's largest corporations have codes of conduct for their operations and that roughly half of the corporations operating internationally have adopted codes of conduct for dealing with human rights.[77] There are at least two reasons why corporations might adopt these codes independent of external pressure. First, human rights may be good for business.[78] Repression leads to strikes, instability and corruption which negatively impact on business ventures. Furthermore, having adult, educated and well-paid workers and safe working conditions can lead to enhanced productivity. Secondly, there are obvious ethical reasons why shareholders or the "controlling minds" of the corporation might wish to set out guidelines for employees and suppliers on what is acceptable behaviour.

Although long-term self-interest or altruism may persuade some companies to make voluntarily self-regulation a workable scheme, voluntary codes are typically adopted only in "response to real or perceived threats".[79] Often this threat is of consumer action.[80] Similarly, the codes that are adopted may actually be monitored and enforced only under the further threat of consumer pressure.

There have been successes in persuading companies to adopt these codes of practice. For example, following an initial refusal of Starbucks' president to meet with representatives of a coalition called the U.S.-Guatemala Labor Education Project, the group launched a public

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[77] C. Forcese, *Commerce With Conscience? Human Rights and Business Codes of Conduct* (Montreal: International Centre for Human Rights and Democratic Development, 1997).

[78] This argument has been made by D. Cassel, "Corporate Initiatives: A Second Human Rights Revolution" (1996) 19 Fordham Int'l. L.J. 1963.

[79] Forcese, *supra*, note 77 at 12.

[80] Sometimes, codes are used to insulate corporations from liability for the individual acts of employees. Another threat is that of potential government regulation. The move towards corporate self-regulation has been endorsed by the current U.S. administration, in what has been seen as an attempt to deflect criticism of its failure to consider human rights concerns during its renewal of China's MFN status: *Ibid.*, at 11.

communication campaign.[81] The campaign involved informational pickets at Starbucks' stores and letter writing, demanding that the company adopt a code of conduct for workers' rights on supplier plantations. At this point, the coalition was careful not to announce a boycott. Eventually -and faced with the prospect of a boycott- Starbucks relented and agreed to develop a code of conduct for agricultural workers. Similar pressure on the Gap clothing chain encouraged the company to sign an accord with the National Labor Committee (NLC) which would involve independent monitoring of the Gap's sourcing factories.[82]

The existence of voluntary codes is certainly not a panacea and, in many instances, the codes are simply a sham. For example, the ICHRDD survey reveals that only 14% of companies have codes of conduct which cover all the core labour rights as identified by the OECD.[83] An equal number have codes with an independent compliance mechanism. Given this latter statistic, it is perhaps not surprising that there may be marked discrepancies between codes (even very sophisticated ones) and actual corporate practice. The ICHRDD report cites several examples: in June 1997 Canadian hard liquor producers in the U.S. "abandoned their half-century promise not to broadcast advertisements for their products"; that same month, "Canadian cigarette manufacturers changed their code of conduct to permit advertising closer to schools after they were cited by anti-tobacco advocates for several violations of the original code banning such practices"; and, Montreal-based Cambior, "a company that reports having environmental standards in its code of conduct, was implicated in a massive tailings spill in Guyana in 1995."[84] In light of these examples, it is easy for sceptics to point out that "corporations treat codes as public relations measures rather than obligatory

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[81] See Compa, *supra*, note 74 at 683-684.

[82] Herbert, *supra*, note 60.

[83] Forcese, *supra*, note 77 at 40.

[84] *Ibid.*, at 16-17, 42.

covenants".[85]

At the same time, some observers have been critical of the direction which consumer pressure has taken and of the way in which companies "bow down" to inappropriate consumer demands by adopting certain code provisions and practices. For example, *The Economist* has remarked that consumer pressure may do more harm than good.[86] Citing reports that under pressure from American retail chains, the textile industry in Bangladesh fired thirty thousand children (who often found more dangerous occupations such as prostitution) the editors wrote:[87]

> If consumers in rich countries really want to help the world's working children, rather than merely assuage their own consciences, there are many ways in which they can do so-by pushing for debt forgiveness in the poorest countries, or by opposing protectionist trade rules that prevent the poor from exporting their goods. In these ways they might help to stamp out the practice of child labour, rather than simply turning their noses up at it.

Others have suggested that the leaders of NGOs which claim to act on behalf of consumers are becoming very powerful without real accountability: "Armed with the leverage of large memberships, and knowing that those members are likely to be a docile herd, NGO leaders have emerged as a class of modern day, non-territorial potentates, a position rather like that commanded by medieval bishops."[88]

Despite these criticisms, the codes induced by consumer pressure may at least afford some protection in the absence of effective national or international regulation. This *ad hoc* and piecemeal approach is perhaps not the preferred mode of regulation, but, in short, it is better than nothing. This is especially true in developing states. If these states are unable to check corporate behaviour,

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[85] *Ibid.*, at 12.

[86] "Consciences and Consequences" *The Economist* (3 June 1995)13; "Ethical Shopping: Human Rights" *The Economist* (3 June 1995) 58.

[87] "Consciences and Consequences", *ibid.*, at 14.

[88] Spiro, *supra*, note 69 at 963.

developed states cannot or will not apply their laws extra-territorially, international organizations are doing little, and labour organizations there are weak, consumer action becomes one of the only available checks. One observer has even analogized consumer power in this context to "supranational law" because of its extra-territorial effect; a manufacturer cannot avoid ethical or human rights standards by relocating production to states with weaker human rights or labour standards because consumer pressure follows. In this scenario he argues -hyperbolically perhaps- "domestic laws become essentially irrelevant".[89]

[89] *Ibid.*, at 962.

Chapter V. Practicality and Polyjurality

The previous two chapters explored justifications for boycotts. This chapter tackles the most common argument *against* boycotts, namely: boycotts cause too much economic and social disruption. It cannot be denied that boycotts cause damage (or, more precisely, successful ones do). And, while we value expression, there is presumably some point where the pain or disruption the expression causes is simply "not worth it". The line can be drawn in different places and on different subjects such as violence or hate speech. At the same time, concerns about the extent of damage boycotts cause appear unduly alarmist, since practical impediments and extra-legal normative orders serve to contain the damage. The checks on the disruption caused by boycotts are examined in this chapter.[90]

MichaelTrebilcock identifies three challenges to consumerism becoming a political force.[91] Although Trebilcock's view of "political" means lobbying for legislative change, the challenges he identifies equally apply to direct challenges to corporate behaviour. First, there is a diffusion of consumer interest; an individual's interest in one product is typically so small that registering his or her dissatisfaction will not be worth the effort. Second, there is a fragmentation of consumer interest; consumers have different consumption patterns, different material goals and different ideologies. Third , there is the "free rider" problem; an inactive consumer will receive the benefits which other consumers secure.

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[90] This chapter (along with Chapter VII) draws on the legal pluralist perspective. There is broad academic debate within the school(s) of legal pluralism. I have no intention of entering that debate. I simply draw on the most basic insight of legal pluralism, namely, that "more than one legal order" can be present in a particular "social field", [J. Griffiths, "What is Legal Pluralism?" (1986) 24 J. Legal Pluralism 1 at 1]. More specifically, I use the term as shorthand to indicate that formal state law is not the only place to look for norms in the contexts of consumer boycotts and political strikes.

[91] Trebilcock, *supra*, note 65.

In addition to these general challenges to consumerism which Trebilcock identifies, there are a number of boycott-specific challenges. First, boycott targets are often divisions of large multinational corporations which are not easily susceptible to pressure on one division in one country.[92] Accordingly, a multinational corporation is unlikely to be brought to its knees even by a massively successful boycott in one locale. Second, boycott organizers have limited persuasion/coercion tools available to them. Given that consumer boycotts often do not involve picket lines, they are weaker than other forms of protest such as industrial action. Even when picket lines are established, they will rarely carry the same strength as a picket line at a place of work. The consumer who crosses a boycott picket line may have "shame" yelled after him or her but there typically is not longer-term social ostracism or other forms of popular punishment. Third, consumer loyalty may trump the ethical qualms of the potential boycott participant. This consumer loyalty is bred, at least in part, through massive advertising expenditures. For example, the refusal of many young blacks to honour the recent boycott of Nike shoes (despite their sympathy with the equity objectives of the boycotts) has been attributed to the fact that "buying and wearing articles of clothing represent[s] a strong expression of consumer values (values associated with the media images of such celebrated corporate spokespersons as superstar athlete Michael Jordan)."[93] Finally, the target corporation usually possesses greater resources than the organizers.[94] Thus while the group calling for a boycott typically does so by obtaining media attention, targets can effectively respond

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[92] Although it should be noted that a number of pressure groups and their boycotts have become multi-national in recent years.

[93] M. Friedman, "Grassroots Groups Confront the Corporation: Contemporary Strategies in Historical Perspective" (1996) 52 J. of Social Issues 153 at 160-161.

[94] This is particularly true for "single-issue" coalitions and organizations that promote boycotts. Sociologists have found that these "single-issue" groups are often institutionally weak and short lived. On this latter point see M.N. Zald and R. Ash, "Social Movement Organizations: Growth, Decay and Change" (1966) 44 *Social Forces* 327.

in a "media war".[95] Corporate public relations departments have become quite sophisticated in their responses. Often the corporation will paint the boycott organizers as a group of radicals representing no one beyond themselves.[96] Similarly, in cases where the challenged corporate activity is not illegal, companies may paint themselves as trapped "in the middle" of a dispute between the boycotters and the government.[97] In fact, boycott threats are not dealt with on an *ad hoc* basis. Strategies for dealing with boycotts are published in business journals and managers have been encouraged with, for example, the following tip:[98]

> *DON'T panic and swallow unnecessary economic consequences.*
> Don't assume that *any* price is worth paying to avoid a boycott. It is essential for managers to assess the situation with a clear-eyed, rational, economic approach. How likely is a boycott? How strong and well organized are the boycott organizers? How effective is a boycott likely to be? How vulnerable is the company regarding its customers and other product lines, its trade relations, and its competition?

Companies have also become proactive in preventing boycotts by engaging in long-term "public education" campaigns about their practices. Mobil corporation, for example, has purchased full-page advertisements in *The Economist* to make the case for its business activities in developing

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[95] The disproportion in resources available for media wars is mitigated somewhat by the use of direct communication with potential boycott supporters through the internet (see for example, http://freeburma.org) and the distribution of videos (see E.L. Smith, "Lessons From History" (1996) 26(8) Black Enterprise 16). Direct contact points of organizers (addresses, phone numbers or internet addresses) are sometimes provided in the alternative press (see for example, C. Wilson, "Gag me with a suit" *[Montreal] Hour* (11 September, 1997) 7). These methods of direct communication tend to be "hit and miss".

[96] See D.A. Johnson, "Confronting Corporate Power: The Nestle Boycott" in T. Wheelwright, ed., *Consumers, Transnational Corporations and Development* (Sydney: Transnational Corporations Research Project, 1986).

[97] T. Claridge, "Boycott Hurting Paper Firm", *The Globe and Mail* (27 April 1995) A7.

[98] D.K. Davidson, "Ten Tips for Boycott Targets" (1995) 38(2) Business Horizons 77 at 79. While most of the "tips" suggested in the article are purely from a "public relations" perspective, it is important to note that one of the suggestions in the article is that managers should not "neglect the social or political dimension of the issue".

countries.[99]

Given these factors it is not surprising that many boycotts garner little public support and never really "get off the ground". In at least one case, the call for a boycott had the opposite effect than what the organizers intended. A boycott by fundamentalist Christian churches of a Vancouver Toyota dealership, in protest against the car manufacturer's advertising in a gay community newspaper, brought mainstream criticism of the churches and an increased number of sales inquiries for the dealership.[100]

Further, the measure of success of a particular boycott is not the amount of economic harm imposed on a target. Except in rare cases, consumers withold their patronage but not necessarily forever. The "promise of re-entry" is held out, "for it is understood that the member-customer will return to the fold in case certain conditions which have led to the boycott are remedied."[101] A boycott victory is an accord -explicit or implicit- with a target which sees a boycott lifted in exchange for a change in the target's behaviour. The boycotters do not seek the bankruptcy of a company. Indeed, a bankruptcy might well be harmful to the consumer. As Albert Hirschman puts it:[102]

> Boycott is often a weapon of customers who do not have, at least at the time of the boycott, an alternative source of supply for the goods or services they are ordinarily buying from the boycotted firm or organization, but who can temporarily do without them. It is thus a temporary exit without corresponding entry elsewhere and is costly to both sides, much like a strike.

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[99] See Appendix "A": Mobil Corporation, "Staying the course vs. cut and run" [Advertisement], *The Economist* (19 October, 1996). Notice that Mobil's internet address is also provided in the advertisement.

[100] R. Howard, "Boycott effort against advertiser in gay paper fails", *The Globe and Mail* (16 June 1995) N8.

[101] A.O. Hirschman, *Exit, Voice, and Loyalty* (Cambridge: Harvard University Press, 1970) at 86.

[102] *Ibid.*

Often the result of a corporate boycott is not a win-lose situation for the company or the organizers. Accords may be reached involving changes in corporate policy or practice and a lifting of the boycott. In the case of Operation PUSH, boycott threats alone often prompted the proposed target companies to reach agreements with Mr. Jackson with respect to such matters as the hiring of minorities and the purchasing of more material from black suppliers.[103] Further, the Nestle boycott is well-documented and provides a striking example of the way boycott issues are typically settled without resort to court action.[104] In 1977 a coalition of activist groups calling themselves the Infant Formula Action Coalition (INFACT) was formed to change the marketing practices of infant formula manufacturers in the developing world. The manufacturers were using dubious marketing practices such as sending saleswomen to hospitals for promotional purposes (the women would often wear white to give themselves a nurse-like appearance). These products were considered by the coalition to be both expensive and dangerous since, among other things, poor families were tempted to economize by diluting the formula. In 1977 the coalition announced a boycott of the products of Nestle, the industry leader. The coalition grew in size and changed from being a loose coalition of activist groups to an organization with substantial financial resources. It was supported by numerous national organizations including churches. However, it was not until 1984 -seven years after the boycott began- that Nestle complied with INFACT's final demands and a settlement was reached which saw the boycott lifted.

The purpose of this chapter is not to say that boycotts are not powerful weapons (they can be, as shown below and in previous chapters) but simply that there are numerous extra-legal checks on their power.

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[103] Holmes, *supra*, note 17. Others have remarked that the prospect of decreased sales and negative publicity from the mere *threat* of a boycott has afforded pressure groups with "substantial leverage...before they go public with their efforts": Spiro, *supra*, note 69 at 960.

[104] J. Gerber, "From Bottles to Bombs: The Role of Success and Occupying a Unique Niche in Organizational Transformation" (1991) 24 *Sociological Focus* 225.

Chapter VI. The Judicial Response

A. SLAPPs

Boycotts, demonstrations, petitions and other forms of collective protest often trigger corporate counter-offensives. The media weapons used to counter collective action have already been mentioned, but target corporations sometimes will also use the courts to stifle dissent.[105] Using a model developed by Penelope Canan and George Pring, many of these lawsuits can be described as Strategic Lawsuits Against Public Participation (SLAPPs).[106] This sort of action "claims injury from *citizen contact with a government, official, agency, or the electorate on a substantive issue of public significance.*"[107] SLAPPs involve tort claims (the economic interference and defamation torts figure prominently) against citizens or groups that have brought alleged corporate malfeasance to public attention. This tactic is used to retaliate against those who have opposed the claim filer's activities and to stifle further dissent. The targets are frequently environmental or community groups which have opposed builders' development plans. The decision to bring a SLAPP is usually a tactical move and part of a larger strategy where "winning the lawsuit doesn't matter".[108] The mere commencement of the action brings automatic gains to the SLAPP launcher: the target is forced to find a lawyer, file a statement of defence and engage in the procedural skirmishes which occur in civil litigation. By channeling the dispute into the judicial forum, the dispute takes on the trappings

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[105] Still, it should be pointed out, many corporations choose to avoid lawsuits for fear of appearing the bully, as well as for the possibility of adverse findings in a judicial determination.

[106] See P. Canan and G.W. Pring, "Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches" (1988) 22 Law. and Soc. Rev. 385.

[107] *Ibid.*, at 386.

[108] See C. Tollefson, "Strategic Lawsuits Against Public Participation: Developing a Canadian Response" (1994) 73 Can. Bar Rev. 200 at 206.

of a private dispute between two parties and the nature of the conflict is transferred from the public sphere to the private one. As Canan and Pring put it:[109]

> Lawsuit aims did not correspond to the original public controversy (e.g., zoning or civil rights), but recharacterized the controversy in language that effectively assured court acceptance (e.g., libel or interference with economic advantage). In other words, the filers successfully enlisted judicial power against activities protected by the petition clause by rephrasing a facet of the public-political dialectic in private-legal terms.

By privatizing the public grievance, the grievance is contained.[110]

SLAPPs have been described as lawsuits ultimately with little or no legal merit which the courts eventually dismiss. This may be truer in the U.S. (where there is a specific First Amendment right to petition government) than in Canada. However, one of the few academics to study the issue in Canada appears to extend the conclusion to this country. Chris Tollefson has written that SLAPPs are "almost invariably dismissed or otherwise resolved in favour of the target of the suit."[111] He points to a 1992 action filed by MacMillan Bloedel Limited ("MacBlo") against British Columbia's Galiano Island's conservancy group as well as the Island's municipal council and three individual trustees of the council.[112] The suit alleged that the conservancy group had conspired through unlawful means to manipulate the planning process to oppose MacBlo's land use plans on the island. However, the company never particularized its allegations, "nor did it provide any evidence that the Conservancy had done anything other than engage in traditional lobbying activities such as publicizing the issue, convening public meetings and circulating petitions."[113] Eventually, after a

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[109] Canan and Pring, *supra*, note 106 at 389.

[110] *Ibid.*, at 386.

[111] Tollefson, *supra*, note 108 at 204.

[112] *Ibid.*, at 219, referring to *MacMillan Bloedel v. The Galiano Island Trust Committee*, Vancouver A920930 (B.C.S.C.).

[113] *Ibid.*, at 219.

year of procedural wrangling, the company consented to a judicial dismissal of its claims against the conservancy and the individual trustees. In ordering the dismissal, the judge specifically referred to the SLAPP phenomenon and granted leave to the conservancy to continue discoveries of MacBlo's Chairman "with a view to establishing grounds for an award of special costs against the company for abuse of process."[114]

It would be a mistake to think, however, that the judicial dismissal of SLAPPs is ultimately a foregone conclusion - simply a matter of waiting out the procedural roadblocks and slow pace of the judicial process. Indeed, current private law doctrine justifies court action against those who organize boycotts. In the rest of this chapter I canvass the judicial response.

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[114] *Ibid.*, at 220.

B. SLAPPs that work twice: Daishowa v. Friends of the Lubicon[115]

The recent case of *Daishowa v. Friends of the Lubicon* involves a politically motivated boycott and is explored here in some detail. Chris Tollefson examined the case before a judicial determination was made and branded it a SLAPP.[116] Subsequent to that article being published, however, a judicial determination has been made which was favourable to the SLAPP filer. If this case is any indication, some SLAPPs will achieve success not only through filing but in the substantive decisions of courts.

i. The Application

Daishowa v. Friends of the Lubicon arose in the context of an aboriginal land claim dispute over a 10,000 sq. km area in Alberta.[117] The Lubicon are a band of roughly 500 Cree Indians living in the community of Little Buffalo. No treaty exists purporting to extinguish their aboriginal title over the lands claimed. The defendant Friends of the Lubicon (the Friends) is a volunteer organization whose aims are to increase public awareness of the Lubicon land claim and to encourage a land claim settlement with the federal government. The methods used by the Friends include speeches, rallies, education, lobbying and boycotts.

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[115] The following decisions deal with Daishowa's request for interim injunctive relief: (1996), 29 C.C.L.T. 76 (Ont. Div. Ct.), revs'g, [1995] O.J. No. 1536 (Gen. Div.). Motion for leave to appeal to the Ontario Court of Appeal was dismissed, [1996] O.J. No 1442 (C.A.). Application for leave to appeal to the Supreme Court of Canada was dismissed, [1996] S.C.C.A. No. 528. The trial began on September 2, 1997 before MacPherson J. of the Ontario Court (General Division). As of the time of writing the trial had not concluded.

[116] C. Tollefson, "Strategic Lawsuits and Environmental Politics: *Daishowa v. Friends of the Lubicon*" (1996) 31 J. Can. Studies 119. Certainly supporters of the Friends have branded the case a SLAPP [see the cartoon distributed in Montreal on an untitled pamphlet in October, 1997 by Amitié Lubicons-Quebéc: appendix 'B']. Although media coverage of the case has been sparse, there has been occasional recognition of the SLAPP-like nature of the action [see for example, M. Valpy, "Protesting for the Lubicon" *The Globe & Mail* (30 September 1997) A23].

[117] The background facts of the case are fully summarized in the Divisional Court's decision, *supra,* note 115 at 81-82.

Daishowa, a large Japan-based corporation, operates paper and sawmill operations and manufactures paper products including paper bags. Following the announcement by a Daishowa subsidiary that it intended to carry on logging operations on land claimed by the Lubicon, the Friends moved to pressure Daishowa through its customers. The Friends would contact Daishowa's customers, provide background information and demand that the customers stop using the corporation's products. They also demanded that the customers not buy products from Daishowa in the future. Those customers who refused to comply with the Friend's demands were then boycotted. The boycott -backed up by picketing and threats of picketing- was quite successful and a number of Daishowa's customers canceled orders or refused to renew orders.

Daishowa sought an interlocutory injunction to restrain the Friends from boycotting and picketing the corporation's customers. Daishowa also claimed damages for misrepresentation, defamation, injurious falsehood, intimidation, wrongful interference with economic relations and inducing breach of contract. Kitely J. found that none of the torts had been made out except for misrepresentation. She found inacurate the Friends' claims that Daishowa had entered into an agreement not to log on the disputed lands and that Daishowa's subsequent refusal to make a commitment not to log was an act of genocide. However, aside from some conditions imposed on the Friends to prevent further misrepresentation, Kitely J. dismissed the application. She found that Daishowa had failed to establish the economic torts, primarily because it did not demonstrate that the Friends intended to harm its economic interests. She accepted the Friends' claim that their intention was to encourage Daishowa to make a clear and public commitment to refrain from logging on, or buying timber logged on, lands claimed by the Lubicon. Finally, she found that secondary picketing was not unlawful *per se* and, since no tort had been made out, was not unlawful in the case at hand. After finding that irreparable harm would be caused to Daishowa, she went on to consider the balance of convenience. With significance placed on public values and interests, she found that

the balance of convenience favoured the Friends:[118]

> (i) the Charter rights of freedom of expression, freedom of conscience and freedom of association manifested in the actions of the Friends must be given consideration, along with the competing interests of Daishowa to profit;
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> (ii) the public interest in protecting the claims of the aboriginal peoples is important;
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> (iii) the use of a boycott to communicate a public message is an effective tool in accomplishing political and social objectives;
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> (iv) while inconvenienced, and in some cases irritated and subjectively intimidated, none of the customers was unable to meet packaging needs at similar cost;
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> (v) there was no cross-motion to restrain logging;
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> (vi) having undertaken a self-imposed moratorium for four winters, and with a trial as early as January, 1996, Daishowa would miss one more logging season which would be far less inconvenient than harvesting thousands of trees which may ultimately be found to be the property of the Lubicon.

ii. The Appeal

Daishowa appealed on the basis that Kitely J. erred in not finding secondary picketing unlawful in a non-labour context and in holding that the company had not made out a *prima facie* case respecting the economic torts. For the majority of the Divisional Court, Corbett J. found that while peaceful picketing is not illegal *per se*, it may become unlawful if used in the commission of another independent tort. She then turned to the four "economic interference" torts alleged by the plaintiff to have been committed. She considered four torts under this rubric: i) intentional interference with contractual relations or economic interests; ii) illegal conspiracy to injure; iii) intimidation; and, iv) inducing breach of contract.[119]

The test for intentional interference with economic relations requires the plaintiff to

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[118] As quoted in the Divisional Court's decision, *ibid.*, at 85.

[119] The court accurately states the conventional tests for the economic interference torts (which are set out here). The *legitimacy* of these torts is scrutinized in Chapter IX.

demonstrate:[120]

1) intention to injure the plaintiff;
2) interference with another's method of gaining his or her living or business by *illegal means*;
3) economic loss caused thereby.

With respect to the tort of conspiracy to injure, the plaintiff must prove:[121]

1) an agreement by two or more persons;
2) (a) the agreement must be to do an unlawful act or to effect an unlawful purpose; or
(b) the agreement must be to do a lawful act by unlawful means; and
3) the plaintiff must suffer damages.

For this tort, the real or predominant purpose of the agreement must be to inflict harm on the plaintiff. With respect to 2(a), to determine if the agreement was to effect an unlawful purpose, the governing principles are:

i) there must be a combination of two or more persons wilfully to injure a person in his or her trade;
ii) if the real purpose of the combination is not to injure another, but to serve the legitimate interests of those who so combine, the act is not tortious, even if damage results.

For the tort of intimidation, the plaintiff is required to prove:[122]

1) coercion of another to do or refrain from doing an act;
2) the use of a threat as a means of compulsion;
3) the threat must be to use unlawful means;
4) the person threatened must comply with the demand;
5) intention to injure the person threatened; and
6) the person threatened must suffer damage.

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[120] *Supra*, note 115 at 93.

[121] *Ibid.*, at 93-94.

[122] *Ibid.*, at 94.

With respect to inducing breach of contract, the plaintiff must show:[123]

1) the defendant's knowledge of the contract and its terms;
2) the intention to procure a breach of the contract;
3) conduct by which the defendant directly persuades or induces a third party to break a contract with the plaintiff;
4) there must be a breach of contract; and
5) the plaintiff must suffer damage.

Two prongs of these tests are not self-evident. The first is the issue of "illegal means" (relevant to the intentional interference, conspiracy and intimidation torts). This refers to anything illegal under statute or common law.[124] In this case, the illegal means alleged by Daishowa and accepted by the court were the misrepresentations regarding the alleged commitment not to log and the use of the word "genocide". The second issue (relevant to all of the economic torts) is the question of intention. On the subject of the Friends' intention, Corbett J. had little difficulty finding that the intent of the picketing was to induce Daishowa's customers to cease doing business with the company. In doing so, she held that "the ultimate moral goal cannot justify an otherwise illegal act in the absence of some duty to interfere."[125]

The majority of the Divisional Court also disagreed with Kitely J. on the Charter issues. Again for the majority, Corbett J. found that the "litigation herein is strictly private litigation" and that the Friends had not proven that the common law was inconsistent with Charter values.[126] In the end result, the court overturned Kitely J.'s decision and enjoined the Friends from further picketing

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[123] *Ibid.*, at 93.

[124] *I.B.T., Local 213 v. Therien*, [1960] S.C.R. 265 at 280.

[125] *Supra*, note 115 at 100.

[126] *Ibid.*, at 101.

or threats of picketing.

In dissent, O'Leary J. found that secondary picketing was not illegal *per se* and that the picketing which occurred had been peaceful and not unlawful. O'Leary J. took a view of the Friends' intention similar to that of Kitely J's: "Here it is clear that the predominant purpose of the defendants is to help the Lubicon though they hoped to accomplish that purpose by causing economic injury to Daishowa."[127] He would have upheld (with some amendments) the original order.

At first glance, the majority decision of the Divisional Court in *Daishowa* makes a distinction between labour and non-labour cases, since it holds that secondary picketing is not unlawful in a non-labour context unless it is part of the commission of an independent tort. However, this reasoning is ultimately circuitous. It is difficult to conceive of secondary picketing which does not interfere with contractual relations in some way, or which does not have as its immediate intention (as opposed to ultimate intention or motive) the causing of economic harm. As pointed out by one observer in the labour context:[128]

> [One] argument holds that in order to uphold the "rule of law" and therefore the public "interest", picketing must be conducted in accordance with the prevailing laws of the land. It follows that if picketing involves the commission of a nominate tort - directly inducing breach of contract, direct interference with contractual relations, indirect procurement of breach of contract, intentional injury by unlawful means or conspiracy to injure by unlawful means - the tort liability must prevail and picketing be prohibited.
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> .....
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> Given that the state of the industrial torts is such that it is virtually impossible to envisage any picket line not involving one or more of them (except, perhaps where

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[127] *Ibid.*, at 111.

[128] G. England, "Some Thoughts on Secondary Picketing" in G. England, ed., *Essays in Collective Bargaining and Industrial Democracy* (Toronto: CCH, 1983) at 72-73.

> the line is ignored and fails in its purpose), the rule of law argument becomes a convenient shield....

Thus, although the Divisional Court did not find secondary picketing to be illegal *per se*, such protests will almost always be illegal in fact.

iii. Not new law

In effect, the *Daishowa* court simply continued down the road established in pre-Charter cases in both the consumer and labour contexts. Two "grape" examples make this clear. In *Darrigo's Grape Juice Ltd. v. Masterson,* roughly sixty persons picketed a grape store (a well-known landmark for Toronto, especially Italian, wine-makers).[129] The protesters -not employees of the grape juice seller- carried placards in English and Italian calling on customers to boycott Darrigo's grapes because the company had bought them from one of the California growers targeted by the UFW. Mr. Justice Keith of the Ontario High Court declared that the picketing was illegal for "sound social reasons" and that to find otherwise "is simply to import into our Province the social and economic battles of other people, the end of which one could not possibly forsee."[130] In *Slade & Stewart v. R.W.D.S.U, Local 580* the British Columbia Supreme Court decided that the B.C. Federation of Labour's appeal to its members to refuse to handle California grapes constituted an unlawful inducement of breach of contract.[131] The labour organization declared the grapes "hot" and called upon members of its affiliated locals to refuse to handle those goods. Like the consumer

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[129] *Darrigo's Grape Juice Ltd. v. Masterson,* [1971] 3 O.R. 772 (H.C.J.).

[130] *Ibid.*, at 773-774.

[131] (1969) 5 D.L.R. (3d) 736 (B.C.S.C.).

boycott in *Darrigo's*, the Federation was responding to the UFW campaign. After noting that the "cause of the workers in the California grape industry may well be a worthy one", Macdonald J. said:[132]

> It is open to supporters of that cause to lay the facts before people everywhere and urge them not to buy these grapes. But the actions taken here deprive the plaintiff Slade & Stewart and its employees of any choice as to participating in the boycott of the grapes. The situation therefore does not provide justification.

Both of the "grape cases" were inspired by *Hersees of Woodstock v. Goldstein*, an earlier labour case long considered the leading Canadian case on point.[133] In that case, the Ontario Court of Appeal found the union's secondary picketing of a retailer to be unlawful (the retailer was supplied goods by the employer manufacturer):[134]

> Even assuming that the picketing carried on by the respondents was lawful in the sense that it was merely peaceful picketing for the purpose of communicating information, I think it should be restrained. Appellant has a right lawfully to engage in its business of retailing merchandise to the public....[T]he right, if there be such a right, of the respondents to engage in secondary picketing of appellant's premises must give way to appellant's right to trade; the former, assuming it to be a legal right, is exercised for the benefit of a particular class only while the latter is a right far more fundamental and of greater importance, in my view, as one which in its exercise affects and is for the benefit of the community at large.

The coming into effect of the Charter has had little effect on boycott doctrine. In *R.W.D.S.U. v. Dolphin Delivery Ltd.*, the British Columbia courts had determined that a union's "secondary

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[132] *Ibid.*

[133] [1963] 2 O.R. 81 (C.A.).

[134] *Ibid.*, at 86. Interestingly, the picketers' placards also made reference to the community's interests. After claiming that the retailer carried clothing made by non-union labour, it read "Protect your standard of living. Look for the Amalgamated Union label when you buy men's and boy's apparel" [at 83].

picketing" of a company constituted the tort of inducing breach of conduct and they enjoined the picketing.[135] On appeal to the Supreme Court of Canada the union argued that the injunction contravened the Charter-guaranteed freedom of expression. McIntyre J. for the Court dismissed the appeal, finding that the Charter did not apply to court orders based on the common law and issued in the resolution of a dispute between private parties.[136] The case was a disappointment to organized labour and was widely criticized by commentators,[137] but the Supreme Court has not retreated from the principle set down there.[138] Doctrinally there is no question that the Charter does not *apply* (in the strict sense) to lawsuits which arise between private parties over boycott activities; we are left to the devices of the common law perhaps with reference to the Charter. Chapter 8 returns to the constitutional question, where it is argued that the constitutional approach of American jurisprudence is an inappropriate model. I will suggest that the common law *is* capable of dealing with important political and ethical interests in a just manner, although clearly it sometimes fails to do so.

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[135] [1986] 2 S.C.R. 573.

[136] More precisely, this ratio is arrived at only by reconciling *Dolphin Delivery* with subsequent pronouncements of the Court: see P.W. Hogg, *Constitutional Law of Canada*, 4th student ed. (Toronto: Carswell, 1996) at 656.

[137] See for example, B. Etherington, "Case Comment: *RWDSU v. Dolphin Delivery*" (1987) 66 Can. Bar. Rev. 818.

[138] See *Dagenais v. CBC* [1994] 3 S.C.R. 835 and the discussion, *infra*, of *Hill v. Church of Scientology* (1995), 126 D.L.R. 129 (S.C.C.).

Chapter VII. The Approach of Labour Boards

In Chapter Two, I indicated that politically motivated boycotts and strikes are historically and sociologically related phenomena. This chapter sketches the place of political strikes in Canada and points to some of the non-state norms which structure them. I then turn to the labour boards' treatment of political strikes and contrast it with the response of courts to consumer boycotts. Unlike the judicial approach, the labour boards tend to take a legal pluralist insight into account and recognize some of the larger social issues at stake in fashioning appropriate remedies.

A. Political Strikes

Political strikes and labour boycotts have received more attention from historians in Canada than consumer boycotts. Three relevant principles can be distilled from the following examples of political strikes. First, the strikes occur in the context of a larger social movement and in opposition to state (in)action. Second, political strikes are relatively rare in Canada. Finally, when they do occur they have tended to be short-lived and symbolic. The Winnipeg General Strike of 1919 is a notable exception to that final principle.

i) The general strike as the political strike

The Winnipeg General Strike of 1919 grew out of two "ordinary" and unrelated strikes involving the building-trades union and metal-trades workers at three metal shops.[139] However, the

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[139] N. Penner, *Winnipeg 1919* (Toronto: James Lewis & Samuel, 1973) at ix.

principal issue in both strikes -which began one day apart- was similar. In light of the employers' refusal to deal with the Building Trades and Metal Trades Councils, the issue "became quite clearly the right of the workers to bargain collectively through union structures of their own choice."[140] Shortly after the strikes began, the Winnipeg Trades and Labour Council polled the membership of its affiliated unions on the prospect of participating in a general sympathy strike. By an overwhelming majority, the workers voted for a strike and a strike was called which paralyzed the city's industry and government services. Massive demonstrations were held by workers and their supporters and a sort of shadow municipal government allowed essential services to continue "by authority of the Strike Committee". However, after eight weeks of struggle (met with physical and legal coercion on the part of the state and employers), the strike was called off with few concessions from employers and numerous defeats for workers. The strike has been well documented and need not be expanded upon further here.[141] It is worth noting however, that while most of the strikers were not revolutionaries (and most probably were not seeking fundamental changes in the existing political structure), the strike developed a political essence.[142] As David Bercuson points out:[143]

> The Winnipeg General Strike was not a revolution and was never planned to be one. It did, however, raise basic questions concerning the nature and composition of "constituted authority" as well as what qualifies as a *bona fide* challenge to that

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[140] *Ibid.*

[141] See D.C. Masters, *The Winnipeg General Strike* (Toronto, 1950) and D.J. Bercuson, *Confrontation at Winnipeg* (Montreal: McGill-Queen's University Press, 1974).

[142] At the same time the strike was not simply about the issue of collective bargaining; 1919 was the culmination of class conflict in Winnipeg "one battle in a long campaign to achieve that measure of power necessary to sit and be recognized as equals with employers and government.": Bercuson, *ibid.*, at 189.

[143] *Ibid.*, at 180.

> authority. There can be no doubt that the strikers intended to enhance their own position at the expense of the normal political and economic power of capital. In using as blunt an instrument as a general strike, however, they also ran the risk of challenging the *de facto* power of at least one level of government. General strikes are intended to bring the normal functions and activities of society to a standstill and they therefore transfer to workers part of the option of what will continue to operate and what will not - this is inevitable if anarchy is to be avoided. To this degree the existing order is undermined, whether by accident or design and whether on a purely local level or a more national one. The rapid increase of labour's power in Winnipeg was a shock to the cozy arrangements and alliances that had existed for at least four decades. The threat to the status quo was compounded by the belief in some quarters that the workers were embarked on a campaign to supplant the municipal and even the provincial and national governments. The charge was not true but reflected the union's rapid rise to new positions of power. Thus, the political implications of a general strike were far more widespread and potentially serious than those of more industrial disputes, a fact the workers failed to realize.

There has not been another general strike in Canada of the same magnitude. Indeed, as the following examples suggest, there is little taste for another such strike.

ii. Days of Protest and Action

Political strikes, according to Bryan Palmer, occur when "the state takes measures that trade unions view as destructive to the social order and/or the existence of trade unions themselves."[144] Certainly the focus on the state as the object of political strikes is evident in the 1976 Day of Protest. In 1974 the inflation rate in Canada approached 13%. The following year, Pierre Trudeau (who had earlier stated his opposition to wage and price controls) established an Anti-Inflation Board which limited workers' wage increases. Organized labour objected loudly but found few allies on the national or provincial stage (even the three Western NDP premiers supported the anti-inflation

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[144] Cited in *General Motors of Canada Ltd. and C.A.W.* (1996), 31 C.L.R.B.R. (2d) (Ont.) 161 at 182-183.

controls). As Palmer puts it, "labour was left to its own devices" and, on October 14, 1976, a "Day of Protest" organized by the CLC was launched with nearly one million workers leaving their jobs.[145]

Recently, unpopular government action was again met with "Days of Protest" in Ontario. This involved rotating one day strikes in the province's cities. The work-stoppages were to be combined with demonstrations organized by unions, coalitions of social activists and others objecting to the Progressive Conservative government's agenda. The largest work stoppage and demonstration occurred in Toronto on October 25, 1996 which involved three hundred sites targeted for picketing and shutting down the operation of the Toronto Transit Commission.[146] As with the 1976 action, the protest was sparked -at least in part- by government changing "the rules of the labour game". In particular, unions were angered by the government's Bill 7. The Bill was a revision to the *Labour Relations Act* which repealed a number of provisions that had been introduced in 1992 by Bob Rae's NDP government (key among them was the ban on strike replacement workers). They were also angered by other aspects of the Tory "Common Sense Revolution" and the speed (and accompanying lack of consultation) with which the government was proceeding with its agenda. The days of action were directed at the state and were not intended to directly influence the collective bargaining agreements or other employment relations between the unions and

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[145] B.D. Palmer, *Working-Class Experience* (Toronto: Butterworth, 1983) at 291. Government-imposed wage controls also prompted a strike during an earlier period, poignantly demonstrating the political nature of certain industrial actions: L.S. MacDowell, "The 1943 Steel Strike Against Wartime Wage Controls" (1982) 10 *Labour/LeTravail* 65.

[146] M. Campbell, "'Quite a party' puts brake on Toronto" *The Globe and Mail* (26 October 1996) A1.

management.[147] Palmer is undoubtedly correct in his assertion that it is state action (or presumably inaction) which prompts political strikes. At the same time, however, the state is influenced by citizens and groups and in the eyes of many of the unionists, overly influenced by corporations at the expense of workers. Accordingly, one of the targets of the strikes in Ontario were corporations *qua* state lobbyists - not only the state itself. For example, on October 2, 1995 Buzz Hargrove, the National Union President of the CAW, indicated that if employers did not sign letters directed to Premier Harris opposing Bill 7 there would be an "all-out frontal assault in the workplace."[148] Mr. Hargrove also made public statements, such as the following at a Union meeting in St. Catherines:[149]

> I'm saying to the corporation [GM] you have a choice...Just join with Mike Harris and say take away our rights and believe me we're going to change harmony for anarchy in the workplace...normal demonstrations won't work for the union this time...the one weapon we have and which we have never used as a collective is our power in the workplace.

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[147] For example, in a brief to the Ontario Labour Relations Board, the CAW declared: "The encouragement offered by the President of the CAW-Canada National Union and the Union to workers outside the CAW to express their opposition to the policies of the current Tory Government by joining together in a common day of protest in London, Ontario, on December 11, 1995 was not designed or motivated to persuade or compel General Motors of Canada Limited to change terms of employment at its facility in London, Ontario." The union's declaration is reproduced in *General Motors, supra,* note 144 at 177.

[148] *Ibid.*, citing the "Employer's statement of facts" at 168-169.

[149] *Ibid.*, at 169.

iii) The State as Employer

On March 28, 1972 Quebec labour's "Common Front" mobilized civil servants, hospital and social service workers, teachers, workers at Hydro-Québec and the Liquor Board in a general strike.[150] And, despite government-obtained injunctions ordering a return to work for 12,000 Hydro-Québec workers and 14,000 hospital workers, the strike continued. For having advised their members to ignore the injunctions, the presidents of Quebec's three central labour organizations, as well as other union leaders, were handed jail terms. The imprisonment of the labour leaders led to further illegal strikes (in both the public and private sectors) demanding their release. In early 1975, the Common Front was reformed for a new round of negotiations with the government. A series of 24-hour walkouts were met with back-to-work legislation and injunctions. There was widespread disobedience to the law and more than 7,000 charges were laid against workers (the charges were later dropped by the PQ government which came to power in 1976).

British Columbia witnessed a similar clash of unions with the state as employer in the summer and fall of 1983. The July 7, 1983 "Black Thursday" budget, introduced by Bill Bennett's newly elected Social Credit government, contained a package of legislation which has been described as "awesome in its direct attack on the areas of labour and social rights and welfare-related services."[151] Key among the new legislation was Bill 2, which removed government employees' rights to negotiate non-wage issues, and Bill 3, which allowed the province to fire employees at will

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[150]Confédération des syndicats nationaux and Centrale de l'enseignement du Québec, *The History of the Labour Movement in Quebec*, trans. A. Bennett (Montreal: Black Rose, 1987) at 235-238.

[151] B.D. Palmer, "The Rise and Fall of British Columbia's Solidarity" in Palmer, *supra*, note 59 at 182.

at the expiration of contracts. Bills 5 and 27 respectively sought to repeal much of the tenant and human rights protection schemes. Unionists and social activists joined to form "Operation Solidarity" in opposition to the budget and to the government. A number of highly attended demonstrations were held and the level of militancy was high. Both government workers and teachers participated in strikes against the budget, but the general strike threatened by public and private sector unions never materialized.

iv. Hot, Black and Green

A third type of political strike by workers has already been mentioned in the discussion of the California grape boycott in Chapter Two. It involves a refusal to handle goods or work on projects which are tainted by labour, environmental, political or social concerns. A good example is the "green ban", which appeared in 1971 when the New South Wales branch of the Builders Labourers Federation agreed to boycott a construction site in Sydney. The bushland in question had been zoned residential despite widespread community opposition and residents of the area were protesting the building of luxury condominiums.[152] The movement was opposed by the government of New South Wales, by employers, by the mass media and even others in the labour movement and eventually the union was decertified. Over the course of four years, however, the green bans were at least successful "in slowing a construction boom which in little more than a decade had almost completely transformed the face of Sydney" including the near obliteration on the city's peripheral

[152] M.A. Haskell, "Green Bans: Worker Control and the Urban Environment" (1977) 16 Indus. Rel. 205.

green belts and the destruction of numerous historical sites.[153] One observer of the green ban movement has described the relationship between the workers and the community groups which demanded the ban "an unlikely collaboration between community groups struggling drastic neighbourhood changes and traditionally job oriented trade unionists...".[154] Given the parallels and direct links between consumer boycotts and strikes which have been described in Chapter Two, the collaboration does not seem unlikely. In fact, the precursor to the Australian green ban was the "black ban" there, which often involved workers boycotting certain employers or certain goods in order to improve wages or working conditions but sometimes involved "purely" political goals (a refusal by longshoreman to handle arms bound for South Vietnam, for example).

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[153] *Ibid.*, at 206.

[154] *Ibid.*, at 205.

B) The Legal Pluralist Perspective

> The 'web of rules' governing the complex and dynamic relationship we call employment include strands of state law, to be sure, but also explicit contracts and implicit understandings, custom and usage, patterned behaviour, cultural assumptions, power relations, and technological imperatives.[155]

The "web of rules" is not only present for "run of the mill" industrial disputes; it also extends to political strikes. Political strikes also involve new "rules". The infrequency of these strikes may be attributed, in part, to the fact that they are illegal during the course of a contract, but that is not a sufficient explanation. Indeed, in Ontario's recent days of action, some labour leaders declared their willingness to ignore injunctions even before the injunctions were granted.[156] Furthermore, injunctions such as the one obtained by the TTC (which was to permit access to the workplace to employees) were often ignored.[157]

What then keeps political strikes from occurring more frequently? Certainly one factor is simply that workers do not relish the idea of losing a day's pay or of facing discipline without contractual gain in return. Secondly, following any strike the parties must work together again; accordingly, both sides have an interest in limiting a dispute which is not directly between them. Thirdly, unions themselves do not represent one coherent block of political beliefs and, both between and within unions, there are varying political currents. For example, other unions, as well as employers and the state, actively opposed the Green Bans of the Builders' Labourers' Federation

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[155] H.W. Arthurs, "Labour Law Without the State" (1996), 46 U.T.L.J. 1.

[156] T. Corcoran, "Labour's Days of Lawlessness", *The Globe and Mail* (22 October 1996) B2.

[157] *Supra*, note 146.

(BLF) in New South Wales.[158] Fourthly, public opinion restrains politically motivated industrial action. Political strikes such as the recent days of action in Ontario depend for their success or failure, in large measure, on public opinion. The media -which at least to a significant extent shapes public opinion- did not embrace the protesters. In fact, the media was largely -often vitriolically- opposed to the political strike. One *Globe and Mail* editorial described the days of action "as an attempt to hijack democracy",[159] and another columnist wrote:[160]

> Who are these union bosses - these heads of organizations that collect $1-billion a year in dues from workers, often against the will of members, tax free? Whom do they represent, even though their organizations, which control $3-billion worth of assets behind tax-free veils, which are unmonitored by any agency? Even statistics on labour groups are non-existent. But their leaders are free to undermine fundamental principles of democracy. Will anybody stop them?

Often the media will play on divisions within the union movement by, as seen above, portraying union leadership as anti-democratic in not respecting the more moderate wishes of their membership. Union organizers recognize the difficulty in gaining public support for a strike which will paralyze services. Accordingly, they take pains to point out that they are engaging in such activity only as a last resort. For example, in proposing a common front to oppose Bill 136 in Ontario (which labour believed would suspend the right to strike among government employees), labour leader Syd Ryan remarked that "it's very important that we are seen to be out there saying to Mike Harris that we

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[158] Haskell, *supra*, note 152 at 211.

[159] "Democracy, union style", *The Globe and Mail* (23 October 1996) A18.

[160] Corcoran, *supra*, note 156. Even the more sympathetic *Toronto Star* portrayed "ordinary Torontonians" as "caught in the middle": Editorial, "Let's keep the protests peaceful", *Toronto Star* (24 October 1996) A28.

don't want to get in a strike position."[161]

The evidence overwhelmingly points to political strikes being used as a last resort. For example, Bryan Palmer has documented the resolute determination of union leadership to avoid an unlimited general strike during B.C.'s Solidarity movement in 1983. In place of an unlimited general strike that many in the Solidarity coalition urged, labour leaders offered "a timetable for 'escalating public sector job action' against the government's massive attacks on the post-war labour scheme and on the social welfare state."[162] And, according to Palmer, despite the rhetoric of a massive general strike (with the rhetoric itself sometimes muted), labour leadership had every intention of avoiding one. In the end, if Palmer is correct, the union leadership "sold-out" its coalition partners -and possibly even its own membership- in order to gain some concessions from the government with respect to the labour legislation and to avoid a general strike.

Whether or not Palmer's interpretation of the B.C. Solidarity movement is correct, the leaders of the labour movement were certainly prudent. The failure of a general strike can be devastating, as David Bercuson has demonstrated with respect to the events of 1919:[163]

> The Winnipeg general strike was one of the most complete withdrawals of labour power ever to occur in North America and dealt a mighty blow at one of trade unionism's strongest bastions. The strike, from the labour viewpoint, was a complete failure in the short run and no amount of post-strike rhetoric could cover up this fact.

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[161] See, for example, R. Mackie, "Labour targets Ontario bill", *The Globe and Mail* (8 July 1997) A1.

[162] Palmer, *supra*, note 145 at 192.

[163] Bercuson, *supra*, note 141 at 176.

The political strikes that have materialized since 1919 tend to be short-lived and symbolic.[164] For example, the Ontario Days of Action rotated between cities and lasted only one day at each location. The reticence with which unions engage in political strikes is reflected in union activity up to and during the strikes which have been called. Typically unions have attempted to insulate employers from excessive harm. For example, during the 1976 and 1996 "Days of Action" strikes, a number of unions and union locals forewarned management of the possibility of a strike at their workplaces.[165] Others have offered that employees could be made available to perform essential or emergency services.[166]

The reaction of employers to the one-day strikes in Ontario is also telling. For the most part, employers -tacitly or directly- recognized that the political strikes were not typical industrial actions and they generally accepted (admittedly unhappily) one day losses in production. Some companies, such as aircraft giant De Havilland, "accommodated" the strikers by shutting down production on that day (even though it also insisted on its legal right not to be the target of an illegal strike).[167] In fact, most employers did not pursue the available legal remedies to prevent the strikes. This latter

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[164] In addition to the strategic prudence of workers in avoiding political strikes (as suggested above), internal ethical concerns are also at play. Workers may be restrained by a realization that the normal democratic process (and indeed the rule of law) is being ignored.

[165] See *Livent Inc.* (1996), 33 C.L.R.B.R. (2d) 93 (Ont.).

[166] See: *Domglass Ltd. and United Glass & Ceramic Workers* (1976), 2 C.L.R.B.R. 394 (Ont.) (union to provide emergency and start-up crews to protect sensitive equipment and facilitate start-up immediately following the protest day); *B.C. Hydro and Power Authority* (1976), 2 C.L.R.B.R. 410 (B.C.) (union providing emergency hydro services); and, *General Motors, supra*, note 144 (union permitting stationary engineers who work in the "power house" to cross picket lines).

[167] *De Havilland Inc.*, [1996] O.L.R.B.R. 938.

point is reflected in some of the labour board decisions on point. In dealing with General Motor's application for legal relief from the "Days of Action" strike which occurred at its London plant, the Board Chair wrote:[168]

> [I] do not think that I can ignore the fact that there now have been protest strikes in London, Hamilton and Kitchener, involving thousands of employees and dozens of employers, yet this is the only unlawful strike application that any employer has pursued. This is a little surprising given the number of employees and workplaces involved, and the fact that employers are not normally loath to litigate questions of this kind...
> [T]he fact that most employers did not seek legal intervention suggests that the employer community has not regarded these protests as typical wildcat strikes, or local employer-employee confrontations, or even legal events for that matter.

Obviously the Board in this case recognized the extraordinary nature of the events. In fact, this recognition has found expression in a number of labour board decisions.

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[168] *General Motors, supra*, note 144 at 230.

C. Labour Board Treatment of Political Strikes

Recognizing the unique nature of political strikes, boards tend to take a cautious and nuanced approach. This is evident in the boards' approaches to the 1976 and 1996 days of action. Faced with an application from B.C. Hydro for a *quia timet* injunction to prevent work-stoppages on the 1976 "National Day of Protest", the B.C. Labour Board remarked:[169]

> That major work stoppage was a unique event in recent Canadian history. No one knows whether it will be repeated in the foreseeable future. At this stage, surely the wisest course is *not* to distort the general law of strikes under the Code to deal with what may turn out to be a once-and-for-all event. If, on the other hand, "political strikes" were to become habit-forming, then unquestionably Canadian legislatures, including the B.C. legislature, would find it necessary to deal with the problems presented by this kind of trade union action....[W]e believe that the Legislature would recognize that it is not essentially a matter of collective bargaining law which is the concern of the Labour Code. The Code deals with the entire range of labour/management disputes and establishes this Board, broadly representative of both labour and management, as the tribunal to administer that body of law. By contrast, political work stoppages involve disputes between unions and a government. Neither the resources of the Code nor this Board have much, if anything, to contribute to the resolution of those problems....

The definition of a "strike" under the B.C. *Labour Code* at that time had a purposive element; the collective refusal to work must have been "for the purpose of compelling [the] employer to agree to terms or conditions of employment...."[170] The Board found that the Hydro unions were not seeking to compel Hydro to do anything and that the work stoppages had a "*political* rather than a *collective bargaining* purpose".[171] Similarly, the Board found that the political strikes in the Solidarity cases

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[169] *B.C. Hydro, supra,* note 166, at 418-419.

[170] *Labour Code,* S.B.C. 1975, c. 33, s. 1.

[171] *B.C. Hydro, supra,* note 166 at 413.

of the 1980s were not strikes within the meaning of the labour legislation.[172] Following the Operation Solidarity cases, the province's Social Credit government amended the Labour Code to remove the element of purpose.[173] The amendment to the B.C. statute has led the authors of *Labour Law and Industrial Relations in Canada* to conclude that "purpose is no longer significant in any Canadian jurisdiction for determining whether collective action constitutes a strike."[174] This statement is accurate in terms of the *definition* of a strike. However, purpose remains an important issue for the labour boards with respect to remedy. Faced with work stoppages arising out of the 1976 protest, the Ontario Labour Board in *Domglass* also recognized the extraordinary nature of the protest:[175]

> The threatened work stoppages...are not the product of a normal collective bargaining dispute. Although affecting the employer in a very direct manner, these work stoppages had not been called for the purpose of obtaining employment concessions from the applicant but, rather, for the purpose of protesting a federal statute, the Anti-Inflation Act.

The Ontario labour legislation, unlike B.C.'s at the time, did not have a "purpose" requirement; a strike was a strike, the Board found, and the political motivation of the strikers did not change its unlawful nature. Still, the extraordinariness of the situation led the Board to take a delicate tack in the remedy it provided the company. The Board issued a declaration rather than a direction. This

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[172] See *Metro Transit Operating Co. v. Indep. Can. Transit Union, Loc.3* (1983), 83 C.L.L.C. 16,054 and *Health Lab. Rel. Assn. v. Hosp. Employees' Union Loc-180* (1983), 3 C.L.R.B.R. (N.S.) 390.

[173] *Labour Code Amendment Act*, S.B.C. 1984, c.24, s.1..

[174] H.W. Arthurs, D.D. Carter, J. Fudge, H.J. Glasbeek and G. Trudeau, *LabourLaw and Industrial Relations in Canada* (Deventer, Neth.: Kluwer, 1993).

[175] *Domglass, supra,* note 166.

meant that the strike could go on even though the workers would have to face legal consequences after the strike (in fact, even where legally available such disciplinary action rarely occurs). Twenty years later in the "Days of Action" scenario, the Ontario Labour Board fashioned similar solutions. In responding to an application from General Motors following a one day walk-out at the London plant, the Board found the strike to be clearly unlawful.[176] Following the lead in *Domglass*, however, the Board declined to use a remedial hammer given the constitutional issues at stake. Recognizing the private ordering that usually occurs in these situations, the Board simply made a declaration:[177]

> A declaration confirms the legal parameters of the problem, but leaves the parties free at this stage to seek their own voluntary solution within the law - as some trade unionists and employers seem to have done already.

In essence, the boards have demonstrated some willingness to adopt a legal-pluralist perspective in fashioning remedies for political cases, in a way which courts have not in the boycott context.

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[176] *General Motors, supra*, note 144.

[177] *Ibid.*, at 231. The Board in *T.T.C. v. Wilson* (1996), 33 C.L.R.B.R. (2d) 102 (Ont.) similarly recognized the unusual nature of the situation and in granting time-place restrictions on picketing it endeavoured to restrict the freedom of expression value at stake as little as possible.

D. Labour Board Treatment of Consumer Boycotts

It is also worth noting that labour boards have tended to offer more protection to worker-organized consumer boycotts than their judicial counterparts have to consumer-organized boycotts.[178] In *K Mart Canada Ltd. v. U.F.C.W.*, for example, the British Columbia Labour Relations Board found certain boycotting activities to be protected by the Charter right to freedom of expression.[179] The retailer's workers, on lawful strike at one store, had handed out leaflets and buttons at other stores in the region asking customers not to shop at K Mart. Taking direct aim at the *Hersees* case, the majority of the B.C. Board distinguished between picketing and consumer boycotts and held that "leafletting at the site of a secondary employer who is handling 'struck goods' or who is 'functionally integrated' with the primary employer involved in the labour dispute" was protected activity.[180] However, the Board did not justify its decision solely by applying the Charter to the labour legislation in question. The Board attempted to draw a parallel with consumer boycotts in

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[178] This point should not be exaggerated. For example in *Gauvin v. Epiciers Unis Metro-Richelieu*, [1996] A.Q. no. 887 (Que. S.C.) the court overturned a decision of the Labour Board which had upheld the suspension of workers who had participated in a consumer boycott of their employer. The boycott was intended to protest against the firing of 250 employees. See generally: P. Verge and G. Murray, *Le droit des syndicats* (Sainte-Foy: Les Presses de l'Université Laval, 1991) at 259-264 and see P. Verge and A. Barré, "L'appel à la solidarité des consommateurs lors un conflit de travail" (1986) 17 R.G.D. 283.

[179] (1994), 24 C.L.R.B.R. (2d) 1 (B.C.L.R.B.). The case history is somewhat complicated. The Labour Relations Board (LRB) was sitting as a review panel, examining a previous decision of the Industrial Relations Council (IRC). The decisions of the IRC and the LRB were ultimately upheld by the courts, although the courts did not adopt the LRB's reasoning on Charter and other issues: (1995), 14 B.C.L.R. (3d) 162 (S.C.), aff'd (1997), 149 D.L.R. (4th) 1 (B.C.C.A.).

[180] *Ibid.*, at 70. In doing so, the Board adopted the criticisms of the *Hersees* decision by Harry Arthurs ["Case Comment" (1963) 41 Can. Bar. Rev. 573] and others.

the non-labour context[181] :

> '[A]ttending' at a specific location to prosecute a consumer boycott has been a traditional right enjoyed by many non-labour groups including political, social, religious and economic interest groups. Such methods were employed by civil rights groups to address human rights and civil liberties; by many different groups of citizens (especially new Canadians) to address the contravention of human rights in various countries around the world, including consumer and economic boycotts; by individuals generally, and women in particular, in regard to discrimination and violence; by religious groups to proselytize and defend religious beliefs; and by many citizens to protest war and nuclear arms. It is clear, therefore, that in some circumstances, what has been a fundamental freedom for many Canadian citizens has been made unlawful for trade unions and their members.

From the perspective of the previous chapter, it is evident that the Board erred in assuming that consumers generally have the freedom to boycott.

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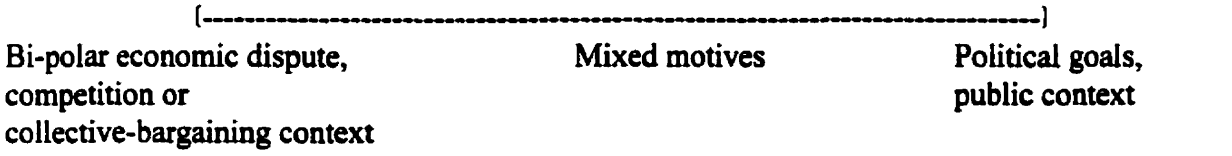
[181] *Ibid.*, at 53.

Chapter VIII. The Constitutional Option

A. The U.S. Experience: an unworkable dichotomy

In contrast to the Canadian experience, American courts have afforded constitutional protection from tort claims for *political* action. Furthermore, this protection has not come through a subtle approach to remedy (as in the case of Canadian labour boards), but through doctrine. The American approach has proven to be a difficult one, largely due to confusion over what is "political". The term is a nebulous one and has proven to be an unworkable calculus for deciding what collective action warrants constitutional protection. I argue that the constitutional approach is itself ultimately flawed and should not be imported into Canadian jurisprudence.

The U.S. courts' approach can be fashioned along a spectrum. At one end are boycotts or strikes motivated by business competitors or unions for the sole purpose of material gain. At the other end of the spectrum are boycotts motivated purely by political or social justice concerns. In the middle are mixed motive boycotts which could be categorized as economically or politically oriented. The spectrum of *motivation* can be set out as follows:



While Canadian courts have refused protection at both ends of the spectrum, American courts have tended to protect boycotts on the political end.

The decision of the United States Supreme Court in *NAACP v. Claiborne Hardware Co.* is the leading case on the right to boycott for political reasons.[182] In 1966 black citizens of Claiborne County, Mississippi presented local officials with a list of demands for racial equality and integration. When the complainants did not receive a satisfactory response, several hundred blacks at a local NAACP meeting voted to boycott the county's white merchants. Like the Friends' boycott, this was a "secondary" boycott: black citizens were boycotting private businesses because of government (in)action. The court at first instance found, among other grounds of liability, that the protesters had committed economic interference torts and that the boycott was therefore unlawful.[183] In addition to awarding damages, a permanent injunction against "store watching" was issued. The state appeal court upheld the decision, but the U.S. Supreme Court reversed, rejecting the private law approach taken by the lower courts on constitutional grounds. For the Court, Stevens J. said:[184]

> Through the exercise of...First Amendment rights, petitioners sought to bring about political, social and economic change. Through speech, assembly, and petition - rather than through riot or revolution- petitioners sought to change a social order that had consistently treated them as second-class citizens.

The result reached by the United States Supreme Court is compelling from at least three perspectives: jurisprudential, political and factual. Jurisprudentially, the decision accords with constitutionally enshrined rights and values (freedom of speech, of association and of the right to petition). As some scholars have put it, the boycott was a means of petitioning government and

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[182] (1982), 458 U.S. 886.

[183] The other grounds involved the applicability of anti-trust law to the boycotting activities.

[184] *Claiborne, supra,* note 182 at 911-912.

influencing social decision making. Professor Michael Harper, for example, has analogized boycotting in such cases to "electoral voting."[185] Motivated by an attempt to influence social and political decision making, boycotts should be recognized as "a constitutionally protected political act by which individuals can influence their society."[186] In his view, "[r]egistration of the intensity of beliefs in the economic marketpace is no less legitimate than registration of the intensity of beliefs in the political marketpace."[187]

The *Claiborne* decision is also compelling from a political theory perspective, since it recognizes that banning peaceful forms of social protest such as boycotting would be a dangerous invitation to use other means.[188] Recall from Chapter Three that the non-violent and cathartic nature of consumer boycotts is the source of a justification.

Finally, the decision is factually compelling. We must bear in mind that the *Claiborne* decision was written in 1982. Looking back on the successful civil rights movement, and with the prospect of a large damage award against the NAACP, the result reached by the Court seems to be the only "politically" acceptable one. On this score, one writer suggests that "it was the important objective of racial equality that probably persuaded the Court that protecting the boycott was more important than protecting the merchants".[189]

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[185] M.C. Harper, "The Consumer's Emerging Right to Boycott: *NAACP v. Claiborne Hardware* and its Implications For American Labour Law", (1984) 93 Yale L.J. 409.

[186] *Ibid.*, at 422.

[187] *Ibid.*, at 423.

[188] *Supra*, note 182.

[189] G.C. Covington, "Constitutional Law - The First Amendment and Protest Boycotts: *NAACP v. Claiborne Hardware*" (1984) 62 N. Carolina L.R. 399 at 407.

Despite the positive aspects of the *Claiborne* decision, the case did not establish a clear field of protected activity. While some *political* actions have been protected under *Claiborne* doctrine,[190] the political divide has not been an easy one and courts have often retreated from the full ramifications of the decision. These subsequent interpretations of *Claiborne* have caused Professor Harper's "voting analogy" to lose its descriptive power. In fact, a more appropriate analogy might be "an occassional referendum based on limited suffrage", rather than full voting rights. This is clearest when labour associations have employed boycotts with mixed motives (even outside of the collective bargaining framework).

The decision in *FTC v. Superior Court Trial Lawyers Association* is instructive.[191] In that case, a group of lawyers who regularly represented indigent clients in District of Columbia criminal cases agreed amongst themselves to stop providing such representation until local authorities increased the lawyers' compensation.[192] The boycott was successful and the District of Columbia was forced to raise the lawyers' tariff. However, after the lawyers had returned to work, the Federal

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[190] In *Missouri v. National Organization for Women (NOW)* 620 F.2d 1301, *cert. denied*, 449 U.S. 842 (1980) the court upheld the right of NOW to engage in a boycott of convention sites in states which refused to ratify the Equal Rights Amendment (ERA). The Eighth Circuit Court held that since NOW's motives were political, and not for profit or competition, the activity was protected by the First Amendment.

[191] (1990) 493 US 411.

[192] The facts of the case are reminiscent of actions by Canadian legal aid lawyers, and doctors billing under medicare plans, to withhold services in the face of tariff cuts. See, for example, L. Moore, "Lawyers poised for legal-aid strike" *The [Montreal] Gazette* (14 November, 1996) A10. It is difficult to separate questions of the professionals' pay rates from broader public interest questions. For example, it has been suggested that legal aid cuts have contributed to racism in the justice system: *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System - A Community Summary* (Queen's Printer for Ontario, 1995) at 50.

Trade Commission found that the boycott had breached anti-trust laws. While acknowledging that the boycott was a "classic restraint of trade", the Court of Appeal found the boycott to be constitutionally protected and revoked the Trade Commission's decision. The court noted that the boycott was intended to get a political message out to the public and therefore contained an element of expression warranting First Amendment protection. The United States Supreme Court reversed the Court of Appeal's decision, finding that the boycott was more economic than political since the boycotters were "seek[ing] special advantage for themselves".[193] In a partial dissent, Brennan J., saw a political element in the boycott and suggested that the majority approach may have ignored "the possibility that the boycott achieved its goal through a politically driven increase in demand for improved quality of representation, rather than by a cartel-like restriction in supply."[194] For the majority of the United States Supreme Court, the lawyers' boycott was about price-fixing rather than about politics. The Court of Appeal and the dissenting Justices on the Supreme Court saw the boycott as at least possibly being political expression and deserving constitutional protection as such. Both sides of this case used the term "political" to refer to vastly different matters.

If *FTC v. Superior Court Trial Lawyers Association* caused the court some difficulty, cases within the collective bargaining context have been more easily disposed of (even when the boycott or strike is motivated purely by political reasons). In *International Longshoremen's Ass'n v. Allied International Inc.*, the Court found that a secondary boycott by longshoremen of a ship carrying cargo to the Soviet Union (protesting the Soviet invasion of Afghanistan) was prohibited by federal

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[193] *FTC, supra*, note 191 at 431-432.

[194] *Ibid.*, at 442.

labour relations legislation and therefore unlawful.[195] In essence, this decision follows a long line of American jurisprudence beginning with the 1911 decision in *Gompers v. Buck Stove and Range Co.*[196] In that case, labour leader Samuel Gompers and other officials of the American Federation of Labor (AFL) had been held in contempt for violating an injunction which prohibited them from publicizing a boycott of the Buck Stove and Range Company. The defendants had been asked by striking workers of the company to put their employer on the AFL's "We Don't Patronize" list. Gompers agreed and a national boycott was put in place. Although the Supreme Court reversed the original convictions on procedural grounds, it approved the use of the injunction in these circumstances, thus "constit[uting] a stinging precedent for organized labour".[197] The Court reasoned that the AFL, with its "multitudes of members" could make an individual "helpless" in the face of a threatened boycott.[198] Publicizing such a boycott would therefore have a coercive effect on individuals and would discourage them from exercising their constitutional rights. Although the case has been subjected to considerable criticism, it has never been overruled and it is well established that state or federal governments may regulate peaceful labour boycotts in order to protect society from economic disruption.

A number of observers have commented on the ambiguity created by the politics-or-not-politics dichotomy. And, at least one, Gary Minda, has described the case law as confusing and

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[195] (1982) 456 U.S. 212.

[196] 221 U.S. 418 (1911).

[197] G. Minda, "The Law and Metaphor of Boycott" (1993) 41 Buffalo L.R. 807 at 821.

[198] *Gompers, supra*, note 196, at 438.

incapable of synthesis or reconciliation:[199]

> [T]he Supreme Court has been unable to articulate a consistent rationale or theory for distinguishing between forms of protected and unprotected political expression. The problem is not that the Court has failed to recognize constitutional issues, for the Court has struggled hard to resolve conflicts between the First Amendment and federal regulation under labor and anti-trust legislation in various contexts. Rather, the problem is that the Court has failed to recognize that its own case law has embraced vastly different cognitive conceptions about the right of groups to petition government for political and economic objectives.

Minda insists that judicial decision making in this area is better understood as a conflict over metaphors framed by the parties or the judges (for example, is a boycott a "disease" which infects "the body of interstate commerce"[200] or is it "solidarity" and "soapbox oratory"?[201]). He writes:[202]

> [T]he indeterminacy of boycott doctrine can best be understood as a system of symbolic representations capable of generating different idealized cognitive models and socially constructed understandings about real world events based on an embodied experience of the body. In the metaphoric world of boycott doctrine, law and metaphor are inseperably related to imagined understandings about experience.

Other writers have tried to synthesize boycott doctrine and to advocate for an expansion or contraction of the sphere of protected activity. For example, Seth Kupferberg argues convincingly

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[199] Minda, *supra*, note 197 at 903.

[200] *Ibid.*, at 899.

[201] *Ibid.*, at 927.

[202] *Ibid.*, at 930. A useful Canadian analogy can be drawn here. In *Reconcilable Differences* (Toronto: Carswell, 1980), Paul Weiler suggested that a picket line "operates as a signal telling workers not to cross. Certainly in British Columbia the response is automatic, almost Pavlovian". This metaphor of a "Pavlovian" reaction -as misleading as it may be- was picked up by the B.C. Court of Appeal in *Dolphin Delivery* and informed its treatment of secondary picketing (the court viewed most union picketing as "conduct" rather than "speech" on account of the automatic response of workers). On this point, see J. Webber, "A Comment on *B.C. Teachers Federation v. A.G.B.C.* (1988), 23 C.P.C. (2d) 245 at 256-257.

that "a strike's blend of advocacy and economic pressure, individual rights and political submergence in a group is analogous to that of a civil rights boycott".[203] The democratic rights inherent in collective labour action bring them close to the collective action in the *Claiborne* example.[204] He also argues that the political spectrum fashioned by the courts invites ambiguity:[205]

> [W]hat about strikes demonstrating sympathy with other workers, demanding a day-care program or equal opportunity for different races, or objecting to a steel-mill's plan to close down and buy another company? Any line between workers' interests as employees and their interests as citizens is hard to draw.

He argues persuasively that a strict dichotomy between labour and political action invites anti-democratic decisions and that "to expect people to be responsible citizens, but not during working hours, is to repeat an ancient and inadequate response to a political work stoppage."[206]

A historical perspective provides strong support for Kupferburg's argument that a sharp labour-politics dichotomy is not a sensible one. For example, the interplay between collective bargaining and political activity (in the sense of attempting to influence legislation) has been well documented in the case of the United Auto Workers (UAW).[207] In the first major post-war dispute between the UAW and General Motors, the UAW demanded a 30% wage increase with no price

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[203] S. Kupferberg, "Political Strikes, Labour Law, and Democratic Rights" (1985) 71 Va. L.R. 685 at 689.

[204] This point is reinforced if his argument that U.S. labour legislation is not simply intended to secure industrial peace, but is also a "democratic charter", is accepted: *ibid.*, at 688.

[205] *Ibid.*, at 694.

[206] *Ibid.*, at 752.

[207] M.T. Stanley, "The Amalgamation of Collective Bargaining and Political Activity by the UAW" (1956) 10 Indus. & Lab. Rel. Rev. 40.

increase (since wage and price controls by government permitted only those wage increases which did not involve price increases). The union attempted to demonstrate the company's ability to pay and both sides attempted to sway public and government opinion on this issue and the possible effects of the wage dispute on general inflation. Needless to say, the line between labour and politics is further blurred in the context of state-as-employer as the Common Fronts of the 1970s in Quebec make clear.

B. The Canadian Approach

In the U.S., the common law is considered state action ("the state 'acts' when its courts create and enforce common law rules")[208] and subject to the *Bill of Rights*. Canadian courts, on the other hand, have refused to apply the Charter to the common law or to court orders in the context of private disputes.[209] Accordingly, the economic interference torts which are used to find consumer boycotts unlawful are not subject to Charter scrutiny.

The reluctance of courts to avoid the constitutionalization of torts is not misplaced. Patrick Glenn's contrast of the Canadian and U.S. positions is instructive.[210] The U.S. view, that orders of state judges represent a form of state action subject to the Bill of Rights and that the private law is capable of constitutionalization may be sensible in that country's judicial tradition. In the U.S., "judges have been accepted as making law through a process of *stare decisis*; the notion of a common law of each state was largely accepted in the formative stages of U.S. law; [and] judicial authority is hence divided along the lines of federal and state legislative authority."[211] This approach "is also supported by the electoral character of judicial office in many states".[212] By contrast, these factors are not present in Canada:[213]

> *Stare decisis* has not prevailed over a wider range of Commonwealth sources; the

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[208] L.H. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1988) at 1711.

[209] See the discussion of *Dolphin, supra*, note 135.

[210] H.P. Glenn, "The Common Law in Canada" (1995) 74 Can. Bar Rev. 261.

[211] *Ibid.*, at 280.

[212] *Ibid.*

[213] *Ibid.*, at 281.

> common law has never been divided up and allocated out; the judiciary has thus remained a unitary one associated with both provincial and Federal governments...As independent, non-elected adjudicators in pursuit of the common law, Canadian judges are not the type of political danger against which the Charter was meant to provide protection. They are the sources of the protection.

Thus the decision in *Dolphin Delivery* "avoids what might be seen as the peculiar consequence of holding a judiciary responsible to itself" whereas "in the United States context...it means a great deal to say that state judiciaries are responsible to the Federal judiciary and its interpretation of the *Bill of Rights*".[214] Glenn essentially argues that the approach of the Court in *Dolphin* is more sensitive to Canadian federalism:[215]

> Private law relations subject to the common law are free from what has been referred to as the "nationalizing process"of the Charter. They are subject to an undivided common law, but both in the past and in the present the common law which has been applied in Canada has been tolerant of diversity, as has the entire common law tradition through most of its history. The common law will clearly evolve in a way which is broadly consistent with the *Charter*, but lock-step provincial uniformity is not required. The general solution also permits some measure of tolerance of the particularity of Québec law. In its codified form it appears obviously legislative in character and therefore to represent state action, subject to the Charter. Since the *Civil Code* is the common law of the province, however, applicable to private legal relations by means of judges [who are] members of the same multiple, unitary court structure applicable everywhere in Canada, it is not clear that Québec law alone should be [the] object of a constitutionalizing process.

There are other reasons to avoid the constitutionalization of tort. The length and expense of trials would increase as parties attempt to fill the heavy evidentiary burdens inherent in Charter cases

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[214] *Ibid.*

[215] *Ibid.*

and additional procedural burdens are placed on them.[216] In addition, if Charter activity to date is an accurate indicator, there will be increased demands for intervenor status and this status will often be granted in light of the relaxed requirement of a direct *lis* between parties in these cases.[217] The addition of intervenors, of course, further increases the length and expense of proceedings. For many litigants (including the targets of SLAPPs who often have limited resources) these additional burdens are not negligible.

Finally, it should be pointed out that the U.S. experience in constitutionalizing torts has been somewhat disastrous. Writing shortly after the *Sullivan* decision,[218] Harry Kalven recounted a conversation with the First Amendment theorist Alexander Meiklejohn who said that the case "was an occasion for dancing in the streets."[219] There were many reasons to celebrate: the decision may have saved the *New York Times* from financial ruin through a massive damage award; the decision reined in a State Court clearly unsympathetic to the Civil Rights movement;[220] and, it was a bold

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[216] In Ontario, for example, parties are required to give notice to the Attorneys General of Canada and Ontario when the constitutional validity of a common law rule is in question. The Attorneys General may also become parties to the proceeding, further increasing the time and expense of cases: *The Courts of Justice Act*, R.S.O. 1990, Chap. C.43, s.109.

[217] See generally, P.R. Muldoon, *Law of Intervention* (Toronto: Canada Law Book, 1989).

[218] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1963).

[219] H. Kalven, "The New York Times Case: A Note on the Central Meaning of the First Amendment" (1964) S. Ct. Rev. 191 at 221.

[220] The case arose from an advertisement in the New York Times by supporters of the civil rights movement, decrying a "wave of terror" set upon non-violent protesters by Montgomery, Alabama police. The plaintiff Sullivan was the Commissioner of Montgomery's police force. The jury awarded $500,000 in damages and other cases were awaiting trial. This "precedent of the Alabama courts threatened the survival of a national press engaged in political reporting and commentary.": P.N. Leval, "The No-Money, No-Fault Libel Suit: Keeping *Sullivan* in its Proper Place" (1988) 101 Harv. L.R. 1287 at 1289.

move toward the protection of freedom of speech. However, as one observer has put it, "a generation has now passed and the dancing has stopped."[221] Numerous scholars and judges (including one justice who participated in the *Sullivan* decision) have strongly criticized the decision.[222] One author has even suggested that in its present form the libel law "is not worth saving":[223]

> The remnants of American libel law provide little protection for reputation. The actual malice rule of *New York Times v. Sullivan* does not adequately protect the press, so courts have imposed many other constitutional limitations on the libel action. Cumulatively, these make the remedy largely illusory. Many victims of defamation cannot meet the actual malice requirement and many who can are thwarted by other constitutional obstacles.
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> Nonetheless, libel law continues to exact a price from speech. The constitutional protections are designed to, and often do, encourage the media to defame. Outraged juries frequently return six- or seven-figure verdicts. Although such verdicts are usually reversed on appeal, defamation victims continue to sue. While the likelihood of success is minuscule, the amount at issue is usually large, so the media defend vigorously. Because many of the constitutional protections do not lend themselves to preliminary disposition, even the least meritorious cases require extensive discovery on both sides. Those actions that go to trial often produce plaintiffs' judgments that are eventually reversed on constitutional grounds. Libel law, as modified over the past twenty years, produces expensive litigation and occasional large judgments, and therefore continues to chill speech.

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[221] R. Epstein, "Was *New York Times v. Sullivan* Wrong?" (1986) U. of Chicago L. Rev. 782 at 783.

[222] White J., with Burger C.J. concurring, stated that he had "become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation": *Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749 at 767.

[223] D. Anderson, " Is Libel Law Worth Reforming?" (1991) 140 U. Pa. L. Rev. 487 at 488. See also: R. Epstein, *supra*, note 221 and P.N. Leval, *supra*, note 220. Law reform commissions in other Commonwealth jurisdictions have argued against the American approach; see the *Report of the Committee on Defamation* (United Kingdom, March 1975) at 169 and see New South Wales Law Reform Commission, *Discussion Paper* (August, 1993) at 184.

This disappointment with the constitutionalization of libel law may be contrasted with the pre-*Sullivan* "quiet satisfaction" with the common law tort.[224] The Alabama state courts' application of the defamation law may have been unsound but the common law itself was essentially sound.[225] Finally, it should be pointed out, the difficult American experience with the relationship between constitutional and tort principles is not limited to defamation.[226]

Although the Supreme Court of Canada has rejected the U.S. constitutionalization option, it has not altogether rejected an appeal to constitutional standards. The result is somewhat of a muddle. The Court has held that while the Charter does not *apply* to the common law, the law must be developed in accordance with "Charter values":[227]

> The Charter represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the Charter.

The use of the word "incremental" is significant in the above cited passage. In fact, the Charter gives courts no *new* obligation to change the common law; it is simply a "manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values."[228] Indeed Cory J. repeats the standard mantra of common law judges when they do not wish to alter what is, after all, judge-made law: "Far-reaching changes

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[224] Epstein, *supra*, note 221 at 789.

[225] *Ibid.*, at 790.

[226] On dissatisfaction in the privacy law field, see D. Zimmerman, "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" (1983) 88 Cornell L.R. 291.

[227] *Hill v. Church of Scientology*, *supra*, note 138 at 156.

[228] *Ibid.*, at 156.

to the common law must be left to the legislature."[229]

The incremental nature of change to the common law is further underscored by additional limiting language from the Court on the use of Charter values. For example, private litigants cannot claim a Charter "right". This is not merely a question of semantics since the discourse of rights is also implicitly removed from advocacy in such cases. Furthermore, section one analysis is considered inappropriate; rather, a flexible "balancing" of principles is to take place.[230] Thus while we have reference to the Charter as an important source of interpretation of the common law, the "crucible" of the Charter (s. 1 is both the source of rights and the limiting mechanism) is removed from that source.[231] In essence, the dismembered Charter acts as little more than a list of important values to be looked at together with other important goals in society, but without the use of the legal tests and principles which have been developed in over fifteen years of s. 1 jurisprudence. Unfortunately, the dismemberment is not a clean one. In *Hill v. Church of Scientology*, Cory J. was able to "balance" the Charter value in free expression with the Charter value of a good reputation. The latter value, of course, is not in the Charter. In effect, Cory J. read in a Charter value:[232]

> Although it is not specifically mentioned in the Charter, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.

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[229] *Ibid.*, at 157.

[230] *Ibid.*

[231] E.P. Mendes uses the "crucible" metaphor in "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1" in G.A. Beaudoin and E.P. Mendes, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1996).

[232] *Hill, supra*, note 138 at 163.

Since *Hill*, the Charter values approach has become somewhat of a "growth industry" in tort.[233] To take a recent example, John Craig uses Charter values to ground his argument for the recognition of a common law tort of invasion of privacy.[234] In doing so, he relies heavily on the Supreme Court of Canada's decision in *R. v. Dyment*.[235] Following a car accident, the defendant in *Dyment* was treated in hospital for his injuries. Without consent, the treating doctor took a blood sample from the defendant which he later gave to police; the sample was used to secure a conviction of the defendant on charges of impaired driving. The case before the court did not arise from a civil suit between doctor and patient and the Court was not asked to award damages against the doctor. Rather, the case involved criminal law and dealt with the issue of whether, in accepting the blood sample, the police made an improper seizure in contravention of s. 8 of the Charter, the evidence from which should be excluded. The Court did criticize the doctor's actions directly, but the case was ultimately about state action. At no point in his article does Craig explore the possibility that the Court's reasoning in *Dyment* may not be applicable to actions involving two private parties. Instead, the author makes the following bold statement:[236]

> In light of [the Court's pronouncement in *Dyment*] one would think that the scales have been tipped in favour of the recognition of a general privacy tort. The principle that the common law should be developed in light of Charter values seems to dictate this result. Although the tort's status will not be resolved definitively until

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[233] See, for example, J.D.R. Craig, "Invasion of Privacy and Charter Values: The Common Law Tort Awakens" (1997) 42 McGill L.J. 355; and D.W. Boivin, "Accommodating Freedom of Expression and Reputation in the Common Law of Defamation" (1997) 22 Queen's L.J. 229.

[234] Craig, *ibid.*

[235] [1988] 2 S.C.R. 417.

[236] Craig, *supra*, note 233 at 371-372.

> considered by the Supreme Court, it is difficult to imagine that it would be rejected by the same Court that has characterized privacy as "essential" to the well-being of the individual, and as profoundly significant for the social order.

There are at least five difficulties with the quasi-constitutional Charter values approach.[237] First, to invite common law courts to develop Charter jurisprudence in the absence of standard constitutional litigation (the presentation of social scientific evidence, for example) is to invite decisions which may inappropriately impact on "normal" Charter jurisprudence. Second, with the Charter emerging as a "reverential 'sacred text'" in our public discourse, the societal value which has Charter connotations will usually trump the one that does not.[238] Taking their cue from the Supreme Court of Canada in *Hill* (the reading in of reputation as a Charter value), lower court judges will feel pressured to ground the common law in a Charter value. When this cannot be done, the contest of values will be easily resolved. Third, a perceived need to ground values in the Charter may slowly limit the scope of the liberty interests already protected by the common law, since, in some instances, the common law goes farther than the constitutional minimum.[239] Fourth, the Charter values approach invites the use of Charter jurisprudence -with its focus on the state- in ways which

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[237] Despite the doctrinal muddle created by the Charter values approach, the danger of the approach should not be exaggerated since, in cases involving private parties (such as the Divisional Court's decision in *Daishowa*), the approach has often had little effect.

[238] The phrase is from R.A. Macdonald, "Legal Bilingualism" (1997) 42 McGill L.J. 119 at 137, where he explores the "scriptural status" some legislative texts (such as the U.S. Constitution) are given.

[239] This latter point was recently made by the Australian High Court, which noted that the common law's protection of speech (through the defamation defence of qualified privilege) may go beyond what was constitutionally required. There appears to be constitutional protection for discussion of Australian political matters, but not of matters concerning foreign countries. The common law privilege is more expansive: *Lange v. Australian Broadcasting Corporation* (1997), 71 A.L.J.R. 818 at 833.

may be inappropriate for a dispute between private parties. Finally, the Charter values approach threatens to gut the common law (non-instrumentally conceived) of its internal consistency and self-referential nature.

Fortunately, the constitutionalization or quasi-constitutionalization of torts such as defamation and economic interference are not the only ways to take into account and balance expression and other societal values.[240] In the next chapter, I explore the privilege concept in the common law and argue that it can provide an appropriate solution.

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[240] I do not argue that Charter values must always be *irrelevant* to the private law. They may be relevant when the private law concept at stake is tenuously related to corrective justice principles. I insist only that private law values need not be *grounded* in the Charter values approach. For example, while Charter values may be relevant to awards of punitive damages, general principles of fairness articulated prior to the Charter remain crucial to the debate: C.P.M. Waters, "Multiple Punishment: The Effect Of A Prior Criminal Conviction On An Award of Punitive Damages" (1996) 18 Adv. Q. 34.

Chapter IX. Political Privilege

A good deal of this thesis has focused on the historical and sociological basis of boycotting. In this chapter I move to "law reform." However, as indicated in the introduction, this section is intended to be more than an addendum to the preceding chapters. A central concern of this thesis is how a sociological and political conception of a phenomenon can be reconciled with a non-instrumental conception of the private law. I suggest in this chapter that the private law *is* independently capable of protecting certain political boycotts. Change need not come through constitutionalizing tort or instrumentally manipulating and twisting tort principles and doctrine until a politically acceptable result is reached. The private law mechanism of privilege, already present in defamation law, can be used to resolve clashes between political concerns and the private law. The privilege operates to suspend the usual principles of tort law (non-instrumentally conceived) without changing the principles themselves. In other words, a privilege operates *in spite of* fundamental tort principles, while not denying their internal coherency.

A) Weinrib and the Province of the Private Law

The approach I take is premised on a non-instrumental and non-political conception of the private law. If tort is *about* making political decisions, then there is no need for the mechanism of a privilege to suspend the normal workings of tort; a socially and politically acceptable solution can be arrived at as a matter of course. As a starting point for my analysis, I examine Ernest Weinrib's overall conception of the private law.

Synthesizing Aristotelian notions of corrective justice, formalism and Kantian right, Weinrib attempts to show that the private law is a coherent and internally intelligible scheme.[241] In so doing, he dismisses the functionalists' attacks on the private law by identifying four erroneous assumptions: a) that the private law is not an autonomous discipline; b) that law and politics are inextricably mixed; c) that the private law's assumptions cannot be taken seriously in their own right; and d) that there is no distinction between private and public law.[242] While I find Weinrib's arguments largely persuasive, it is difficult to accept that what passes as private law is *only* about corrective justice. A neat, arithmetic form of justice is often not reflected in practice. This is clearly illustrated in the law of defamation. Before turning to the defamation example, it is worth noting that Weinrib claims that his approach applies to all of private law even though he fashions his argument chiefly from the common law of accidents:[243]

Because the negligent defendant's culpability seems morally detached from the

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[241] E. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995).

[242] *Ibid.*, at 6-7.

[243] *Ibid.*, at 20.

> fortuity of injury, liability for negligence poses a particularly severe challenge to the stringent notion of coherence that I shall be developing. If formalism illuminates negligence law, it presumably illuminates less problematic bases of liability as well. At any rate, the prevalent academic assumption that crucial doctrines of negligence law - the standard of care and proximate cause, for instance - are explicable only in functionalist terms should dispel the suspicion that I have chosen to defend the internal approach on the legal terrain that contemporary scholars would initially regard as most favorable to it.

And, while he deals briefly with unjust enrichment, contracts and nuisance, he does not attempt to extend his analysis to other torts.[244] I suggest, however, that other torts, such as libel and slander, may provide harder cases and his failure to grapple with this is a gap in his account of the private law.

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[244] Even within accident law Weinrib faces difficulty. His reasoning on the questions of *respondeat superior*, private nuisance, liability for abnormally dangerous things and damage caused while preserving one's property can only be described as tortured in his refusal to concede that a public interest dimension informs doctrine in these areas.

B. The Defamation Analogy

While there is certainly a conceptual place for the protection of reputation under corrective justice,[245] it is extremely difficult to see defamation law as simply a formalistic working out of corrective justice. If that is in fact the case, courts have been roundly deceptive (or self-deceived) about their own reasoning. Corrective justice cannot account for the richness and texture of defamation law with its intricate balance between the protection of reputation and the public interest. At least three defences in the common law of defamation rely on a conception of the public interest: absolute privilege, qualified privilege and fair comment.

One of the leading English text-writers introduces the absolute privilege defence as follows: "There are certain occasions on which public policy and convenience require that a man should be free from responsibility for the publication of defamatory words."[246] These occasions include statements made in the course of judicial proceedings and statements made in the course of parliamentary proceedings, even if maliciously made.[247] The origins of the rule are explicit in the decisions:[248]

> This rule of law...is founded on public policy, which requires that a judge, in dealing with a matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence...shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel.

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[245] Aristotle, for example, saw defamatory remarks as capable of rectification: *Nichomachean Ethics*, trans. T. Irwin, (Indianapolis: Hackett Publishing Co., 1985) at 122.

[246] J.C.C. Gatley, *Libel and Slander* (London: Sweet & Maxwell, 1974) at 160.

[247] The concept of malice in defamation law encompasses both publishing out of spite or ill will, as well as publishing something known to be false or with reckless disregard to the truth.

[248] *Kennedy v. Hilliard* (1859) 10 Ir. C.L.R. at 209.

If a Member of Parliament (MP) slanders another MP or a private citizen in the House of Commons, that act is in principle rectifiable. But corrective justice is not permitted to run its course. The slander in this case is taken out of the reach of corrective justice so that MPs may speak freely on matters of state. Part of the reason for this is that slanderous remarks in these contexts can be curtailed through other means; for example, the speaker of the House of Commons may expel a member for unparliamentary language and a judge may cite litigants or counsel in contempt. Again, corrective justice is conceptually unconcerned with other normative frameworks such as the rules of Parliament or courts. An absolute privilege is also granted to high officials of state acting in the scope of their duties. This privilege is granted so that officers will not be restrained in acting vigorously for the public good. In granting this privilege courts do not deny that a plaintiff has been wronged or that a reputation has been unfairly sullied. They are, however, unwilling to grant judgment to wronged plaintiffs in these cases. As one American decision puts it: "it is better to leave unredressed some defamations by officers acting out of malice or excess zeal, than to subject the conscientious to the constant dread of retaliation."[249]

An objection may be raised to my using the absolute privilege defence as an example where public interest (and not corrective justice) accounts for a well-developed doctrine. Perhaps, since courts, parliaments and high officials are state actors, the parameters of the proper scope for the "private" law is by definition exceeded. Further, the judicial and Parliamentary privileges could simply be seen as instances of those institutions protecting their own processes (through the offices of judge and speaker) and as such, the absolute privilege is a special case. However, this objection

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[249] *Expeditious Unlimited Aquatic Enterprises Inc. v. Smithsonian Institution*, 566 F. 2d 289 at 294 (D.C. Cir., 1977).

cannot be sustained in the example of the qualified privilege defence, where state organs and state-based institutional interests are not necessarily involved.

Otherwise defamatory remarks are protected by a qualified privilege if made on "an occasion where the person who makes a communication has an interest or duty -legal, social or moral- to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it."[250] If such a duty exists, then (in the absence of malice) an action for defamation cannot succeed. A statutory legal duty would include the duty of a lawyer to report another lawyer who is incompetent or dishonest to an appropriate tribunal for investigation.[251] Similarly, a contractual legal duty might require an employer to report to a union on why a union member was not hired.[252] Such legal duties require people to act in a certain way and, accordingly, no liability is triggered by these acts. Significantly, the requisite duty is not limited to a legal duty but can also include social or moral obligations. Indeed, if the duty was only legal, public policy reasons would not necessarily be involved. A legal duty to report could simply be doctrinally synthesized, by a formalist, with the legal duty not to defame. But social or moral obligations inherently involve conceptions of the "good life". Thus a private association is interested in receiving information relating to the character of a prospective member[253] and an engaged woman

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[250] *Adam v. Ward*, [1917] A.C. 309 at 334 (H.L.).

[251] *Weber v. Cueto*, 568 N.E. 2d 513 (1991). Chapter 15 of the Canadian Bar Association's *Code of Professional Conduct* (Ottawa, 1988), the provisions of which are reflected in the rules of professional conduct for most provincial law societies, specifies that a lawyer must report when "there is a reasonable likelihood that someone will suffer serious damage as a consequence of an apparent breach [of the rules]".

[252] *Hanley v. Pisces Productions Inc.*, [1981] 1 W.W.R. 369 (B.C.S.C.).

[253] *Halmrast v. Chisholm*, [1924] 1 W.W.R. 140 (Alta. S.C.).

has an interest in hearing from a son-in-law about the character of her fiancé.[254] These conceptions of the good life arise from "background culture".[255] Some of the most important elements of the background culture are distilled into "public policy". This public policy is often a reflection of prevalent societal values; a consensus of sorts as to what is societally acceptable or reasonable. The consensus is derived from a normative framework which may vary between time and place - it is certainly not immutable. Corrective justice cannot name these elements of public policy and, accordingly, cannot inform the definition of social or moral obligations.

Finally, the common law allows for the defence of fair comment: "If a defendant can prove that the words complained of, although capable of a defamatory meaning, are a fair and *bona fide* comment on a matter of public interest, the action fails."[256] The public interest served by the fair comment defence is broader than the public interest served by the absolute and qualified privileges. Here the public interest is related to conceptions of freedom of expression and democratic life. For example, comments or criticisms of candidates for elected office allow the electorate to make informed scrutiny, and are therefore considered to be in the public interest.[257] Public interest matters within the scope of the fair comment defence also extend beyond the institutions and figures of parliamentary democracy. Participants in sports, artists and entertainers, among others, will also be

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[254] *Adams v. Coleridge* (1884), 1 T.L.R. 84 (Q.B.D.).

[255] The phrase is Rawls', *supra*, note 54, at 14.

[256] *Boland v. Globe & Mail Ltd.*, [1961] O.R. 712 at 737 (C.A.).

[257] *Vander Zalm v. Times Publishers* (1980), 18 B.C.L.R. 210 (C.A.).

open to scrutiny and fair comment.[258] Interestingly, the common law did not always recognize such a defence. Writing in 1868 one judge noted:[259]

> The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, *though injustice may often be done*, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? [emphasis added]

The above passage recognizes the need for the fair comment defence *in spite of* the fact that injustices will occur; again the law of defamation specifically prevents corrective justice from taking its course. In corrective justice, the fact that a plaintiff is a "public person" is irrelevant (all parties being, juridically speaking, equal) . If judicial reasoning is to be accepted at face value - and Weinrib himself makes an argument for taking reasons for decision seriously -[260] the public interest guides the ultimate legal result in at least these three defences of the common law of defamation. Corrective justice as outlined by Weinrib is insufficient to explain the existence of the fair comment defence.

One final point needs to be made with respect to the defamation example. In the absence of malice or spite, a defamatory remark can be considered a form of negligence - a spoken or written

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[258] See R.E. Brown, *The Law of Defamation in Canada* (Toronto: Carswell, 1994), chap. 15.5(2).

[259] *Wason v. Walter* (1868), L.R. 4 Q.B. 73 at 93-94.

[260] Weinrib, *supra*, note 241 at 12. Admittedly, as Weinrib points out at 13, it does not follow that courts do not make mistakes.

accident in a sense, since (to borrow Weinrib's phrase) the "moral culpability is detached". If this is the case, then Weinrib's argument that the common law has an internal coherency in "accident law" without reference to the public welfare should also apply in these cases. I suggest that in these spoken or written accident cases, it does not. But despite the fact that political values sometimes do -and ought to- enter private law reasoning, Weinrib's assertion that corrective justice is a conceptually ascertainable and autonomous subject is not challenged here.

The advantage of the privilege concept in defamation is that it does not gut the private law of internal consistency. For Weinrib, considerations of welfare cannot be the normative structure on which the private law is based. By using a privilege to prevent a corrective justice result from happening, the normative structure of right and correlative duty can be acknowledged and even affirmed while a welfare-oriented result can be reached. The legitimacy of private law reasoning is conceded even though its result is not put into force by the institutional mechanisms of the law. Although a welfare- oriented result stems from a public interest privilege, the normative structure of the private law does not become public welfare. Further, by using a privilege, legal fictions or metaphors need not be used to achieve a public interest-driven result. Legal doctrine and precepts need not become "proxies for extrinsic goals or as an alien vocabulary that requires translation into the discourse of another discipline".[261] Rather, reasons for decision can be taken at face value: in essence corrective justice finds the defendant liable but judgment is not entered for the plaintiff.

Before moving to the application of the privilege concept to the law of consumer boycotts, it should be noted that the concept raises some concerns similar to those raised by the common law notion of excuses. George Fletcher, for example, has argued for a two-stage analysis of tort

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[261] *Ibid.*, at 146-147.

actions.[262] This involves a determination of right followed by a determination of excuses. The plaintiff goes first and proves his or her case using corrective justice principles. In the second stage of analysis, however, a defendant can be excused on what are essentially compassionate grounds. This sort of "conceptually sequenced argument" is used by Bruce Chapman and Michael Trebilcock as an example of how tort is capable of taking into account plural considerations while still maintaining an essentially bilateral form of equality between plaintiff and defendant.[263] As Chapman and Trebilcock point out, the grounds on which a defendant could be excused are not unrelated to the plaintiff: "In Fletcher's account of excuses...the organizing idea for excuses is compassion, that is, that any reasonable person similarly situated would have acted as the defendant did. Presumably this includes the plaintiff."[264] This view of excuses should be distinguished from what I propose here. On my reading of the privileges available in defamation law, the privileges are unrelated to the plaintiff as a "reasonable person similarly situated". At times, the privilege question may be unabashadly severed from the bilateral relationship between plaintiff and defendant.[265] For

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[262] G. Fletcher, "Fairness and Utility in Tort Theory" (1972) 85 Harv. L.R. 537.

[263] B. Chapman and M.J. Trebilcock, "Pluralism in Tort and Accident Law: Towards a Reasonable Accommodation" [unpublished, the paper was presented by B. Chapman to the Faculty of Law, McGill University, 10 October 1997].

[264] *Ibid.* This position is in contrast to Weinrib who sees defendant-specificity as inherent in the concept of excuses [see Weinrib, *supra*, note 241 at 53-55]. Although Chapman and Trebilcock use Fletcher's treatment of excuses for the purpose of showing a "conceptually sequenced argument" in tort (and not for the purpose of elucidating on the topic of excuses generally), it is nonetheless curious that Chapman has previously argued that excuses have no conceptual place in tort: "A Theory of Criminal Law Excuses" (1988) 1 C.J.L.J. 75.

[265] Sometimes, as will be explored in the following sections, the plaintiff's conduct will be relevant to the privilege question, but not in the sense of equality that Chapman and Trebilcock see in Fletcher's account.

example, the law of defamation recognizes the *status* of a judge and permits the judge to say certain things that others simply cannot say. The question is not posed: if the plaintiff were a judge would it have been reasonable of him or her to say those things?[266]

My proposal should also be distinguished from the work of Richard Epstein who invites utilitarian balancing into his equation.[267] Like Fletcher, Epstein suggests a sequenced analysis (determine corrective justice and then determine utilitarian concerns) but, in the end, Epstein would allow utilitarian concerns to inform the tests for liability. In the nuisance context, for example, he suggests that not only have utilitarian considerations "worked to remove from the legal system some physical invasions that are in principle actionable under the nuisance principles of corrective justice", but that "the same utilitarian constraints support the creation of nuisance-like actions even in the complete absence of a physical invasion."[268] In the scheme proposed here, utilitarian concerns are unrelated to the tests for determining liability. To borrow a metaphor from contract law, the privilege can only be used as a shield and not a sword. It can be used to prevent an ultimate finding by the court of liability but it cannot create a ground of liability. The common law will not hold someone liable for nonfeasance (a failure to positively act) but only for malfeasance (a violation of

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[266] In this sense, my reading of the privilege concept is closer to what Fletcher terms a justification (which focuses in a utilitarian manner on costs and benefits) rather than an excuse (which focuses on "the degree of the actor's choice in engaging" in a course of conduct). *Supra*, note 262 at 558.

[267] See for example, R.A. Epstein, "Nuisance Law: Corrective Justice and Its Utilitarian Constraints" (1979) 8 J. Legal Studies 49.

[268] *Ibid.*, at 94.

another's integrity).[269] The political privilege to which I refer cannot turn nonfeasance into malfeasance; to do so would be to interfere with the common law's reasoning and not simply the ultimate judgment of the court. With these considerations in mind, we can now turn to the application of the privilege concept to the common law of consumer boycotts.

C. *Boycott law reconsidered*

The law of boycotts provides an excellent example of the intersection of the political and the private law and the potential scope for a political privilege. Primarily through the economic interference torts courts have found boycotting activities to be unlawful, regardless of the motive of boycotters. The privilege concept will be applied to these torts (in the context of consumer boycotts) to determine whether that provides an appropriate private law response. Before turning to the application of the privilege to the torts, it is worth considering briefly if the torts are in themselves legitimate under private law principles.

The economic torts are generally seen in instrumentalist terms and serious criticisms have been levelled against them. The most severe criticism is that the law developed in the context of the rise of trade unionism as an essentially instrumental tool of judges seeking to control organized

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[269] To take an extreme example, the common law does not recognize a duty of easy rescue. On this example, and the nonfeasance-malfeasance distinction generally, see Weinrib, *supra*, note 241 at 153-154.

labour.[270] John Orth, for example, shows how courts at first complemented anti-union legislation and then, as legislation grew more tolerant of union activities in the second half of the nineteenth-century and early twentieth century, attempted to frustrate the legislation.[271] Following legislation preventing criminal prosecutions for common law conspiracy,[272] courts simply reacted by developing the tort of conspiracy.[273] Similar patterns can be seen with the other economic torts. Not surprisingly, Orth concludes, labour began "to see the common law as inherently hostile to its organizational aspirations and to use its parliamentiary power to avoid as much as possible the law and the legal profession".[274] For Innis Christie, the common law courts' antipathy towards labour (as expressed through the economic interference torts) is not limited to the nineteenth-century:[275]

> [I]n each of these recent cases where a court might be considered to have made an attempt to assess and balance the conflicting interests in a trade dispute it has in fact

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[270] I.M. Christie, *The Liability of Strikers in the Law of Tort* (Kingston: Queen's Industrial Relations Centre, 1967).

[271] J.V. Orth, *Combination and Conspiracy* (Oxford: Clarendon Press, 1991).

[272] *Conspiracy and Protection of Property Act*, 38 & 39 Vict., c. 86 (1875).

[273] *Quinn v. Leathem* [1901] A.C. 495 (H.L.). See Orth, *supra*, note 271 at 148 and see Chapter 3 in Christie, *supra*, note 269.

[274] Orth, *ibid.*, at 155.

[275] Christie, *supra*, note 270 at 192. Others have viewed the economic torts through an instrumentalist lens and found them justified. In the tort law as "ombudsman" stream of writing, A.N. Klar ["Annotation to *Mintuck v. Valley River Band*" (1977) 2 C.C.L.T. 2] suggests the following: "One of the most significant developments in the law of torts over the past few years has been the growing importance of the "economic torts". The spate of recent cases which have as their basis one or the other of these torts is proving what tort lawyers have always known and argued. Tort law has enormous potential to act as an important and effective tool in the hands of the private citizen to remedy abuse and injustice no matter how large or important the perpetrator of the injustice is."

> seemed concerned only with the interests of the employer. The trade union aims have been castigated rather than assessed, and the public interest ignored.

Undoubtedly, a historical view and a functionalist evaluation of the torts' worth assist in a full understanding of the issues.[276] But it is also possible to see these torts as flowing from less-instrumental principles. Take the tort of inducing a breach of contract for instance. In this example there is a promisor, a promisee and a third party inducer. A contract exists between the first two parties "which has transformed the promisor's choice to perform the promised act into an external object that juridically belongs to the promisee."[277] By inducing a breach of this contract, the third party is inducing away from the promisee what belongs to him or her. Third parties who know of the existence of the contract have a duty not to interfere with the performance of that promise. They have a duty not to meddle in an autonomous juridical relationship which has been created. When the third party *causes* a breach of the contract (or rather is a contributing cause since the promisor is presumably an autonomous actor), then the third party is normatively linked with the plaintiff. The promisee and promissor are linked in a bipolar relationship of right and correlative duty and damage from the inducement is rectifiable

Other non-instrumental bases for the existence of the tort of inducing breach of contract can be constructed. For example, Charles Fried's conception of contract looks to the morality of

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[276] It should be noted that Orth's view is not simply instrumentalist. For example, his explanation *supra*, note 271 at 147 of the tort of inducing breach of contract takes into acount developing conceptions of contract in nineteenth-century terms: "Once contract was equated with property, interference with it became a tort".

[277] Weinrib, *supra*, note 241 at 139. And see P. Benson, "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory," (1989) 10 Cardozo L.R. 1077.

promise making:[278]

> There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it.

It could be argued that a third party's attempts to cause a breach of the moral obligation is itself immoral and deserving of sanction.[279]

The torts of interference with economic interests, conspiracy and intimidation do not rest on a breach of contract and are justifiable on different grounds from the tort of inducing breach of contract. These three torts are parasitic in the sense that they operate only when *illegal means* are used. The illegality is defined outside of the tort itself. However, presuming that the underlying illegality is founded on proper legal principles, it is reasonable to recognize the economic context in which the actions take place and to protect the interest people have in pursuing a trade or earning a living. *Gersham v. Manitoba Vegetable Producers' Marketing Board* is a good example of an appropriate use of the tort of interference with economic interests.[280] In that case, the defendant Marketing Board "blacklisted" the plaintiff farmer by threatening that anyone who employed the plaintiff "in a responsible capacity" would no longer receive credit from the Board. The Board was apparently taking its revenge for some constitutional litigation the plaintiff had previously engaged in respecting the Board's jurisdiction. As a result of the Board's actions, the plaintiff's employer fired him. The Board in effect induced a breach of contract. But there was more at stake in this case

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[278] C. Fried, *Contract as Promise* (Cambridge: Harvard Univ. Press, 1981) at 17, although Weinrib [*ibid.*, at 52] and Benson [*ibid.*, at 1116] consider his position instrumentalist.

[279] *Ibid.*, at 14.

[280] [1976] 4 W.W.R. 406 (Man. C.A.).

which the tort of inducing breach of contract could not cover. There were only seven or eight fruit and vegetable wholesalers in the area and they constituted "a closely-knit group, each member knowing everything about his competitors."[281] The court found that the action of the defendant not only induced a contractual breach by the plaintiff's employer, "but went further and succeeded in ostracizing the plaintiff from a business in which he grew up from childhood with his father."[282] In short, the Board had interfered with the plaintiff's ability to earn a living. The court held the Board's actions to be an abuse of power, wholly incompatable with its statutory mandate and therefore illegal. This illegality formed the basis for the court's finding that the Board had committed the torts of interference with economic interests and intimidation.

With the legitimacy of the torts at least a reasonable proposition, we can return to the issue of a privilege which would suspend the operation of those torts. Significantly, the judge at first instance in *Daishowa* did not rely on a privilege to arrive at the end result. Rather, she attempted to redefine the common law test to accord with her version of a politically acceptable solution. The result was a poorly reasoned doctrinal analysis. By holding that the ultimate moral purpose of the Friends was relevant to the intention component of the tests for the economic interference torts, she found contrary to a long line of authority and indeed, contrary to a common sense understanding of intention. She attempted to replace intention with motive. While motive is an important element in an ethical calculus, it cannot provide a baseline of liability for actions in the world. To introduce motive into the liability calculus is to allow the defendant to impose his or her internal standards on other people. Such a subjective notion of fault is not only contrary to the objectivity of corrective

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[281] *Ibid.*, at 408.

[282] *Ibid.*, at 409.

justice, it is unworkable.[283] Even in criminal law, where the subjective standard is crucial to the concept of *mens rea*, motive and intent are distinguished. As Glanville Williams puts it:[284]

> If we say that a man shot and killed his aunt with the motive of benefiting under her will, the immediate intent, which makes the act murder, is the intention or desire to kill, while the ulterior intent or motive, *which forms no part of the definition of the crime of murder*, is the intention or desire to benefit under the will. [emphasis added]

Using the privilege concept, the court in *Daishowa* could have applied the common-law tests and found that the defendants had breached a duty and caused harm, while at the same time finding that a political privilege acted to shield the defendants from liability in the end result. Motive is irrelevant to corrective justice. It can, however, become relevant with respect to the privilege mechanism which is removed from corrective justice reasoning.

A public interest or more broadly defined political justification for economic interference has been explored but poorly developed in Anglo-American jurisprudence.[285] However, there are strong, albeit early, judicial precedents for such a privilege. In the 1923 case of *Brimelow v. Casson*, the court found that a moral duty to interfere *justified* the otherwise actionable interference.[286] The defendants were representatives of theatrical associations who induced the manager of a theatre to

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[283] See *Vaughan v. Menlove*, (1837) 132 E.R. 490 (Comm. Pl.) and Weinrib's discussion of this case and the subjective standard generally: *supra*, note 241, at 178-183.

[284] G. Williams, *Textbook of Criminal Law*, 2nd ed. (Stevens & Sons, 1983) at 75.

[285] See G.H.L. Fridman, *The Law of Torts in Canada*, vol. 2 (Toronto: Carswell, 1990) at 302-306; J.D. Heydon, "The Defence of Justification in Cases of Intentionally Caused Economic Loss" (1970), 20 U. of T. L.J. 139; P. Burns, "Tort Injury to Economic Interests: Some Facets of the Legal Response" (1980), 58 Can. Bar Rev. 103 at 147-148; and *Posluns v. Toronto Stock Exchange and Gardner* (1964), 46 D.L.R. (2d) 210 (Ont. H.C.).

[286] [1923] All ER Rep 40.

break a contract with the plaintiff's touring company. The defendants' reason for inducing the breach was that the "chorus girls" hired by the plaintiff were not being paid a "living wage" and were forced to resort to prostitution to supplement their meagre income. Russel J. did not doubt that an interference with contractual rights had taken place which would normally be actionable. However, the question of justification remained:[287]

> In these circumstances, have the defendants justification for those acts? That they would have the sympathy and support of decent men and women I can have no doubt. But have they justification in law for those acts....These defendants, as it seems to me, owed a duty to their calling and to its members (and I am tempted to add to the public) to take all necessary peaceful steps to terminate the payment of this insufficient wage...."The good sense" of this tribunal leads me to decide that in the circumstances of the present case justification did exist.

The judge in that case did not come about his "good sense" in a vacuum; some of the criteria had been suggested in an earlier case still:[288]

> 'The good sense of the tribunal which had to decide would have to analyze the circumstances and discover on which side of the line the case fell.' I will only add that, in analysing or considering the circumstances, I think that regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and, I think, also to the object of the person in procuring the breach.

"Good sense", of course, is more than the whim of the judge sitting on the case. Based on the suggested heads of inquiry, a careful and judicious balancing can take place. There will by necessity be some vagueness in the enquiry in order to maintain flexibility. To some extent, the criteria can only be filled in by conceptions arising from "background culture" which, although articulated and

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[287] *Ibid.*, at 47.

[288] *Glamorgan Coal v. South Wales Miners' Federation* [1903] 2 K.B. 545 at 573, per Romer L.J., citing in part *Mogul Steamship v. McGregor, Gow & Co.* [1892] A.C. 25 per Bowen L.J. This approach met with some approval in *Posluns v. T.S.E. and Gardiner, supra*, note 285.

weighed carefully, will vary with time and place.[289] Asking the justification question is not conceptually tidy. It does not relate the plaintiff to the defendant in a bilateral and equal relationship. Nor can the endeavour cloak itself in the rhetorical trappings of objectivity which constitutional jurisprudence takes on. However, the approach is transparent, intellectually honest and avoids stripping established tests of meaning.[290]

D. A privilege for consumer boycotts?

I do not attempt to propose tests for when a privilege should be successfully invoked in consumer boycott cases.[291] Indeed, it is the nature of common law privileges that they are fact and context specific. The more modest goal here is to propose some considerations upon which an appropriately tailored and nuanced privilege can be developed in the context of consumer boycotts.

It is helpful to bear in mind the reasons why consumer boycotts warrant protection: i) boycotting is *in fact* a traditional and frequent tool of popular protest; ii) boycotting can be a tool of social change (in particular for politically marginalized groups); iii) boycotting can be a non-violent catharsis for social frustration; iv) the expression inherent in boycotting contributes to democratic debate; v) boycotting can be an ethically and even religiously required activity for some people; and,

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[289] See *supra*, note 255.

[290] Obviously, there is a need to ensure that judges are selected who are capable of reflecting background culture when the issue of privilege arises.

[291] As suggested earlier, no sharp sociological or historical distinction can be drawn between consumer and labour boycotts. However, labour boycotts are primarily dealt with under labour law schemes (and not the common law), a full analysis of which is beyond the scope of this thesis.

vi) consumer pressure backed by boycotts (or threatened ones) can be a significant democratic check on corporate actions. What is more, one of the reasons traditionally cited for denying boycotts - namely, massive social disruption- can be seen as unduly alarmist. The labour boards' treatment of political strikes is instructive in how an appropriate remedy can be fashioned which recognizes the legal (strictly speaking) issues at stake but also takes into account the political nature of the protest and the existence of extra-legal norms.

The first step of analysis is to determine whether the boycott in question is sufficiently related to the justifications. One threshold question in determining whether a privilege should apply to a consumer boycott is to ascertain whether the expression in question is politically (or ethically) motivated.[292] This will be a low threshold question if "political" is defined broadly enough to avoid the tangle U.S. courts have found themselves in by dichotomizing "political" with "self-interest" and "economic". The preliminary question would generally prevent one business from organizing a consumer boycott of another.[293] It would also deny protection for boycotts motivated only by malice.

The relationship of the consumer to the immediate boycott target, and in turn to the ultimate boycott target, is also relevant. Boycott organizers do not act under a privilege when they target a

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[292] Undoubtedly boycotts involve expression. Given the fact that they are by definition *concerted* refusals to patronize, communication with and persuasion of others is inherent. Often the communication will be in the form of picketing, which has been recognized by the Supreme Court of Canada as involving freedom of expression issues: *Dolphin Delivery, supra,* note 135 at 588, per McIntyre. Although Beetz J. took a contrary position, at 604 (the picketing which was enjoined "would not have been a form of expression"), this seems indefensible.

[293] I say generally because situations can be imagined where competitive actions could also be considered political (a group of workers fired for "whistle-blowing" on a company's environmental practices and who have opened a competing business).

business or individual unconnected, or only tenuously connected, with the ultimate target. Most of the justifications for the privilege would simply not apply and the interests of the wrongfully targeted merchants would be needlessly harmed. However, sharp lines between targets and non-targets should be cautiously drawn for two reasons. First, to have any effect at all, consumer boycotts are often necessarily indirect. Consumers do not buy their paper bags direct from manufacturers such as Daishowa; they purchase them through the medium of retail businesses. In that example, citizens could not wield their power to spend to ensure corporate accountability without a boycott of retailers who purchased Daishowa products. In effect, the Divisional Court's decision insulated Daishowa from consumer protest. Second, the purchasing behaviour of retailers is not ethically neutral. The retailers of Daishowa's products are in themselves ultimate targets, in the sense that they may be targeted for unethical purchase behaviour, completely aside from the pressure that they can put on Daishowa.[294]

The final question to be considered is under what circumstances the privilege can be defeated. Even when a privilege is available in principle, a defendant's conduct may move the court to deny immunity.[295] In the defamation context, an occasion of privilege may be defeated if, among other reasons, the information communicated is not "reasonably appropriate in the context" of the occasion on which the privilege is available.[296] In *Hill*, the Supreme Court of Canada found that the

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[294] Similar reasoning can be applied to a reverse facts situation. The Gap's sourcing factories cannot complain that they are merely "neutrals" in a battle between the Gap and its customers over factory conditions.

[295] This discretion is similar to that available to a court under equity's "clean hands" doctrine.

[296] *Hill, supra*, note 138 at 171.

lawyer for the Church of Scientology was acting under a qualified privilege when he read out court-filed documents but that the privilege was defeated by his conduct in exercising the privilege:[297]

> The press conference [at which the documents were read] was held on the steps of Osgoode Hall in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct that were yet to be tested in a court of law. His comments were made in a language that portrayed Hill in the worst possible light. This was neither necessary nor appropriate in the existing circumstances.

Under what circumstances should a privilege to boycott be defeated? The purpose of a consumer boycott is to persuade others not to purchase from the target. Anything that goes beyond that may exceed the privilege. The privilege would allow picket lines at a store entrance to convince others not to shop there. It would not permit protesters to target shop workers from reporting to work or delivery persons from taking goods in or out of the stores.[298] Similarly, the privilege to boycott may be defeated if a completely impenetrable picket line is formed, or if violence, threats of violence or an intolerable level of intimidation are used by the boycotters. Certainly picket lines can involve "unpleasant social pressure" (without that pressure they may be wholly ineffective)[299] but the privilege to boycott cannot be a privilege for unlimited public disorder.[300]

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[297] *Ibid.*, at 174.

[298] Those activities may well be justifiable but not under a privilege to boycott.

[299] A.A. Borovoy, *When Freedoms Collide* (Toronto: Lester & Orpen Dennys, 1988) at 25.

[300] The question of defeating privilege exists to regulate means but not deny the legitimacy of the activity itself, in the same way that rules of the road, or rules of a debate, do not deny the legitimacy of driving or debating.

Chapter 10. Conclusion

This thesis has not presented constitutional arguments for a right to boycott. In fact, I have suggested that the constitutional and "Charter values" approaches to tort are flawed.

The common law is capable of taking into account justifications for otherwise tortious conduct. These justifications include a public welfare and legal pluralist perspective. Furthermore, through the use of a flexible and tailored common law privilege, reliance on these justifications would not interfere with non-instrumental conceptions of the private law. By using a privilege to import non-private law reasoning into the private law, the law is not gutted of internal consistency. It has been a fundamental proposition of this thesis that it is possible to speak about corrective justice and societal interests at the same time. A final word then, with respect to our society's interest in consumer boycotts. Undoubtedly, Arthurs' conception of the New Economy is impressionistic and contains exaggerations. Indeed, there is an unmistakable "straw-man" feel to his paradigm. Nonetheless, it is not difficult to accept the basic proposition that government regulation of corporations is declining and that the power of multi-national corporations is increasing. The fact that boycotting is capable of acting as a democratic check (together with the other justifications) is sufficiently compelling to demand the protection of a common law privilege for actions that may in principle be tortious.

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Appendix 'A'

From time to time, Mobil expresses a point of view on issues of public concern. Here is our perspective on one such issue.

Staying the course vs. cut and run

Doing business in countries where political and civil reforms are at stake has become a lightning rod for many concerned citizens. It is an issue that responsible corporations operating in the global community must deal with.

Mobil, for one, operates in many such countries. In this and a subsequent message, we would like to offer some of the reasons—along with our experiences—we choose to stay the course, not to cut and run. While some may not agree with our decisions, we believe our rationale deserves consideration.

Like other public companies, Mobil is in business to make a profit for its shareholders. That's why we pursue opportunities where our skills and knowledge can help nations achieve their development goals. A major factor in the decision to stay or go in a nation where trouble is brewing is the effect on the long-term return to our shareholders. This does not mean we are indifferent to other stakeholder interests, nor are we indifferent to social issues. We would not have thrived and succeeded for 130 years if that were the case. Mobil's goal is to create a win-win experience for our partners—the host country and our shareholders.

As an energy company, we go where the hydrocarbons are buried. Occasionally this takes us to some difficult areas. We help nations develop their natural resources, and these efforts contribute to their economic growth. If we do our job well, we contribute to the local, national and world economies, while paying dividends to our owners and improving the value of their holdings. But, when trouble occurs, some people would have us abandon or put at risk our assets—and perhaps our people—in hopes of forcing change.

The goals that others hope to achieve—be it democratic reform or respect for human rights—are not in question. Where we disagree is *how* a corporation helps this process. Withdrawal or open confrontation usually is not the best way. Staying and operating responsibly, to our mind, is the best way to nurture the process.

Mobil does not have—and should not have—the power to topple governments or impose policies. We do not shy from trying to protect our people from local political reactions to sanctions or confrontations. And we do express our views when we meet with high-level officials. Perhaps even more importantly, we lead by example.

That is why we are concerned when responsible groups advance single-interest tests that would limit or curtail our ability to operate in certain countries or urge that we publicly oppose a country's established leadership.

Mobil, along with other responsible global companies, is a positive force for change in many developing countries. We contribute to economic development, provide employment and create local businesses. In developing other nations' energy resources, we transfer our technological know-how, operate ethically and carry out activities in an environmentally responsible manner. Oftentimes, our work force serves as a talent pool for a nation's future leaders. Mobil's affiliate companies and our employees address serious social needs in communities where we operate. But in the end, we are still guests in these nations.

Our presence provides greater long-term benefits for the people of those beleaguered nations than would be gained, short-term, by leaving them—forsaking our shareholder assets and our dedicated employees.

Next: Staying the course benefits others.

Mobil

http://www.mobil.com

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Appendix 'B'

SAVIEZ-VOUS QU'EN ONTARIO UNE MULTINATIONALE POURSUIT UN GROUPE COMMUNAUTAIRE POUR 11 MILLIONS $ EN DOMMAGE ET INTÉRÊTS À CAUSE D'UN BOYCOTT?

SAVIEZ-VOUS QUE LE PROCÈS SE DÉROULE EN CE MOMENT ET QU'UNE INJONCTION INTERDIT LE BOYCOTT DEPUIS JANVIER 1996?

SAVIEZ-VOUS QUE LA CHARTE CANADIENNE DES DROITS ET DES LIBERTÉS NE S'APPLIQUE PAS DANS CETTE CAUSE ET QUE LE DROIT DE LA COMPAGNIE DE COMMERCER LIBREMENT SURPASSE LE DROIT DES ACCUSÉS À LA LIBERTÉ D'EXPRESSION?

DAISHOWA VS. LES AMIS DES LUBICONS

PARTICIPEZ À UNE JOURNÉE D'ATELIERS AVEC LES ACCUSÉS, MEMBRES DES AMIS DES LUBICONS DE TORONTO

SAMEDI, LE 18 OCTOBRE DE 10H00 À 17H00
420 ST-PAUL EST, LOCAL 224, MONTRÉAL
(MÉTRO CHAMPS-DE-MARS)
CAFÉ, FRUITS, MUFFINS SERVIS DÈS 9H30

APPORTEZ VOTRE DÎNER, CONTRIBUTION VOLONTAIRE.
TRADUCTION CONSÉCUTIVE DISPONIBLE.

Évenement organisé par la campagne Amitié Lubicons-Québec. Pour de plus amples renseignements sur le déroulement de la journée ou pour confirmer votre présence, composez le 844-0484.

Amitié Lubicons-Quebéc [untitled pamphlet distributed in Montreal in October, 1997].