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**If you have specific questions or concerns, please consult a lawyer.**

## Former Retail Employees and the Law of Trespass

Daniel A. Nelson

With the end of the employment relationship, a former retail employee no longer has a contractual relationship with the employer store so a ban on entry cannot be enforced as a contract right.

The former employee, should he or she enter the store, is like any other member of the public. Except there is one difference. The store, by having a policy of banning disgraced former employees, has served notice of its intent not to invite the former employee into the store, which makes the former employee little more than a common trespasser.<sup>1</sup>

Visitors may be licensees, invitees, have a contractual right of entry, or have lawful authority to enter. In this case, a former employee is an invitee: a person who is invited into the store, explicitly or implicitly, for some purpose related to the commercial activities taking place inside. Retail stores obviously want the public to enter their property in the hopes of convincing them to purchase goods; they are allowed to shop, browse, purchase items for sale, and even, in some circumstances, to simply walk through the property to go elsewhere.<sup>2</sup>

Yet retail stores, despite having a public aspect, are still private properties. Jurisprudence has long recognised that individuals have a right to enjoy their property; they should only be deprived of the property by due process of law.<sup>3</sup>

Courts have held, as a result, that private landowners have a right to decide who may enter their land and who may not, subject to some exceptions. Landowners may be capricious even; there is no duty to abide by the principles of natural justice and no reasons need be given when the trespasser is asked to leave.<sup>4</sup>

The courts in Canada have refused to mitigate this rule even if the property is open to the public.<sup>5</sup>

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<sup>1</sup> Notice may be given orally or in writing under the *Trespass to Property Act*, R.S.O. 1990, c. T-21, s. 5(1).

<sup>2</sup> *Hudson's Bay Co. v. White*, 1997 CarswellOnt 313 (Ont. Gen. Div.).

<sup>3</sup> *Harrison v. Carswell*, 1975 CarswellMan 58 (S.C.C.) at para. 15.

<sup>4</sup> *Russo v. Ontario Jockey Club Ltd.*, 1987 CarswellOnt 684 (Ont. H.C.) at para. 7.

<sup>5</sup> *Ibid.*, at para. 15. Development is forestalled by the Supreme Court's decision in *Harrison v. Carswell*, *supra*, which indicated that only legislatures may make changes to the law of trespass.

Trespass occurs when a person enters the property of another without lawful justification and without the express permission of the occupier.<sup>6</sup> Intention to trespass is irrelevant.<sup>7</sup> Even if permission is initially granted, that consent can be revoked and, if the person refuses to leave, they become a trespasser.<sup>8</sup>

The case law surrounding trespass makes it clear that retail stores, as employers, may enforce its policy of banning former employees from their stores because the store is entitled to evict anyone from its stores.<sup>9</sup> The former employee enjoys no privileged status and is like any other member of the public.

While not necessary, it would probably be a good idea to send a letter to the former employee making it clear that the store has specifically withdrawn its general invitation to visit its stores from the former employee. The letter should indicate that the former employee is not welcome and that, if the individual attempts to visit the store, the company will have the individual removed, using reasonable force if necessary,<sup>10</sup> and may opt to initiate proceedings under the *Trespass to Property Act*. Proof of sending the letter and receipt should be preserved as evidence against the individual should he or she be prosecuted.

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<sup>6</sup> *Trespass to Property Act*, *supra* note 1 at s. 2.

<sup>7</sup> *Costello v. Calgary (City)*, 1997 CarswellAlta 758 (Alta. C.A.).

<sup>8</sup> *Forster v. Cineplex Odeon Corp.*, 2001 CarswellBC 449 (B.C. S.C.).

<sup>9</sup> Those entering with lawful authority and those with valid and unrevoked contractual rights and licenses excepted. Care must also be taken to avoid claims of false imprisonment.

<sup>10</sup> *Chaytor v. London, New York, and Paris Assn. of Fashion*, 1961 CarswellNfld 3 (Nfld. S.C.). At paragraph 27, the judge indicated that the trespasser, after being asked to leave and then refusing, should be "expelled with the minimum of force necessary."