

## Capitalist Law for Capitalists

### A lawyer's notes on the eviction from St. James Park

The City of Toronto went to court to ask a judge to order the occupiers of St. James Park to remove their tents and other structures that enabled them to maintain a highly visible and much-publicized presence in the park for 24 hours every day. The City did not ask that the occupiers be ordered out of the park forever or at all times.



Rather, the City said, it wanted to ensure that there were to be no people using the park during the hours of 12:01 a.m. and 5:30 a.m. No structures to sleep in, no sleepovers in the park for the occupiers; that is all that the City wanted. In principle, the City said, it respected the occupiers' right to use the park. The City had no beef with their ideas, their ideals and their communication of them. The City's concern was the public good. It had no ulterior motives. This was the case presented to the court.

*That is how politics are legalized: under the guise of settling a dispute that is about the very foundations of the status quo protected by the law, the law forces the participants to fight as if there were no fundamental conflicts in issue. Rather, the debate is transliterated into a struggle about finding a principled compromise between parties who merely have a different take on agreed-upon values. (Glasbeek & Mandel; Mandel).*

This piece sets out to show how the trick was done this time. It needed to be done.

The Occupy Movement, initially treated by the pundits and opinion leaders as mildly amusing, trivial, performance art, simply would not go away. It was not like a spirited march through the streets, with slogans and banners, that fades from the political news the moment it (and the inevitable debate about police behaviour at the rally) has had its day in the media. The occupiers had staying power and were successfully spurring the public to ask rather embarrassing questions about the lack of fairness, about the lack of justice, indeed about the very tenets of the system under which we live. Dangerously—to the dominant class, at least—was the manifestly increasing awareness of many people that, what they had thought to be their peculiar personal disaffection with life, was more widely shared than they had known. The germs of a solidarity of anti-establishment interests appeared to be sowed by the occupiers.

No one doubted, then, that what really bothered the City's politicians and the dominant class was not the alleged dirt and squalor of the St. James encampment, but rather the steadfastness of, and the growing support for, the social/political movement that calls itself the Occupation. The occupiers (in more than 1500 cities at one point) were beginning to

present serious political problems to the dominant class that profits from the lack of challenge to the status quo. It had to find a way (a) to stop the occupiers from doing what they were doing and (b) to do so without appearing to repress the voices that were getting such a good hearing. In Toronto, law, specifically judicially-applied law, was deemed to provide the potentially effective answer.

Respect for judges as non-partisans has been carefully cultivated over the ages and the law they administer is presented to the public by political parties of all stripes, via films, television, the media, plays, books, religious leaders, civics classes and so on, as based on principles that we all share. In this milieu, the elites could be pretty confident that, if a judge ended the pesky occupation, it would not be perceived as a political stilling of free thought, assembly, association or speech. Most likely, it would be seen to be the result of a rational balancing of competing interests. After all, even citizens with shared values, as Canadian citizens are presumed to be, are bound to have disputes that need resolution. Rules based on the shared value system, neutrally applied by an apolitical adjudicator, are the accepted, and acceptable, means to settle such differences. No sensible person could, or would be expected, to object to a decision yielded by a non-partisan judicial process giving life to the consensually agreed-upon principles reflected in law.

It worked out as planned. The judge presiding over the City of Toronto's application for an order to terminate the occupation of the park found that there were competing interests at work and that, on balance, the right thing to do would be to order the occupiers to give up some of their rights to use the park to act politically. They should be asked to tear down their tents and restrict themselves to acceptable daylight activities. The reasoning used by Justice Brown was, in legal terms, unexceptional. They reveal a lot about (i), the structural elements of law and (ii), the artificial, manipulable methodology of legal decision-making that pervades our system. Specifically, the court had to downgrade the importance of the interests of the occupiers and to exaggerate the value of the interests of those opposed to the Occupation without seeming to do so. This, in turn, required the application of legal principles to a setting for which they were not designed and a strained reading of the factual situation to make sure that they would yield the desired result. These kinds of tactics—the emphasis on some facts, on some aspects of law rather than others, without acknowledging that the choices made signify the rejection of choices that might have been made if a different result had been desired—are not unusual in the judicial sphere and are often referred-to as clever lawyering.

The clever lawyering was needed (by the elites) because the mere fact that the litigation had been initiated could not help but cause people to think about the underlying political concern of the elites, namely that the occupiers were having some success. There was a message getting out that, contrary to conventional wisdom, Canada is a class divided and conflicted polity rather than one based on consensus. A veil designed to hide the reality of class relations and, thereby, to safeguard the elites who benefit from the status quo, was being torn away. As it is a court's role to maintain the status quo, not to give ammunition to those who dispute it, the aim of the legal reasoning deployed, therefore, was to end the effectiveness of the occupiers' alarming message by ending the Occupation. The legal reasoning used was clever lawyering because it allowed the supposedly impartial court to pretend that it was merely dealing with a run of the mill dispute about the proper use of a public park, nothing that required taking a stance on profound political issues.

Michael Mandel: “They used to say that if you were able to think of something that was related to another thing without thinking about that other thing, then you had the legal mind.

### Private property ideology infects public administration

Private property is the crucial legal element of any market capitalist society and is protected zealously by the law. Accordingly, it is accompanied by a set of ideological tenets that allow the law to give privileged treatment to private property. The ownership of private property gives the owner the right to exclude anyone else from it and from its use. It is for the owner alone to determine what to do with, and how to, use his/her property. The starting point is that no one else, not even the government, should interfere with this ‘right’. Legitimizing justifications must be advanced by an elected government to permit it to disturb the owner’s dominium over his/her private property. These starting points put **individuals who own private property** in a position to act as **sovereign market capitalists**. This is why those who own property may refuse to share it with anyone, no matter how needy they are.

Why is any of this relevant to the eviction of the occupiers from St. James Park?

The City of Toronto owns St. James Park. It does not run it for profit. It does not operate it to benefit itself as owner. Rather its understood task is to administer it for the public’s benefit because its responsibility is to admit the public, to enhance the public’s access to, and use of, it rather than to limit or to exclude the public from the park. The City’s ownership is not analogous to the ownership of, say, a farmer’s land, a miner’s mine. That kind of exclusive ownership is legally designed to allow the farmer and the miner to rule as sovereigns, to act selfishly, to deny the owned property’s potential benefits to others. The City, as owner, has no such goals, indeed, disavows them. The principles and ideology that safeguard private property so that capitalism, so that the private accumulation of socially produced wealth, may flourish, ought to have been irrelevant, therefore, when the City claimed that some citizens’ actions inhibited it as it sought to exercise its public mandate to manage the park. It is its mandated managerial role that was put in peril, not its ownership.

As a manager, it makes sense for the City to exercise some control over the park’s uses and availability. Such regulation, however, should serve the goals of the City as guardian of the park, rather than exploiter of it as private property. There are City by-laws that regulate the uses to which the public may put parks. Mostly, they are about health and safety of the users and the maintenance of the facilities. If parks are to be used for organized gatherings, special events or picnics for more than 25 people, a permit is needed. Behaviour which contravenes any of these regulations constitutes a punishable offence.

The City offered evidence that the Occupation of St. James Park had led to many contraventions of these by-laws. Its inspectors had so reported, and the Mayor’s Office had received a series of complaints alleging such breaches. The by-laws provide for their enforcement and tailored sanctions have been devised to this end. They were not used by the City. The City sought to enforce its by-laws by invoking the Trespass to Property Act.

It invoked a law that was designed eons ago to protect private property owners, even though it was not trying to protect its interests as an owner, but rather the interests of other people.

The City argued that it had not passed any special law that violated the occupiers' Charter rights, giving the occupiers no claim to have the statutorily justified eviction set aside as unconstitutional. Its argument was that the Trespass to Property (TPA) was not a law enacted to proscribe Charter rights because the TPA, long ago, had been "designed to protect the rights of private property owners". This was but one instance of the tensions that inhere in legal methodology: after all, the City's central point in the case was that it was protecting the public, not its private property rights, yet it was, for one part of its case, vigorously asserting that it was relying on a law designed to protect private ownership rights. It was saying that, as a City, it engaged in governmental action and that, while governmental actions were subject to the Charter, private actors are not and that, for the purposes of the Charter, it was acting under a law aimed at private property ownership and, therefore, immune from a government's obligations to respect the Charter. Plausibility, rather than integrity, is the essence of legal reasoning.

It is salient to emphasise the point: the City argued that it was using its *formal private ownership* status to achieve its objective as a *public-protecting political entity*. But why, then, did that to-be protected public not include the occupiers?

The answer given had two branches. The first was the one most explicitly addressed by the judgment written by Justice Brown. It was that the occupiers were badly behaved members of the public; they had been naughty park users (there had even been whiffs of marijuana!). The second was dealt with in more nuanced tones. It was that the occupiers were not using the park for the purposes intended, although it had to be acknowledged that there were no rules that said the park had to be enjoyed or used for any specific purpose. As we shall see, this presented a dilemma for the court and it resolved the problem by acknowledging that the broad, if unusual use made of the park by the occupiers, was valid and could be enjoyed, *but not fully*.

Let us turn to the first argument, the one that caught most of the headlines and on which Justice Brown spent a lot of effort: the regrettable behaviour of the occupiers. There were three aspects to this line of (what turned out to be a persuasive) argument.

One was that the dense occupation of the park and heavy traffic in the park, plus the inevitable increase in debris and garbage, was doing damage to the grass and made it difficult for the City to do necessary maintenance work, such as emptying water pipes before the cold weather set in. There was undoubtedly a good deal of concern about these kinds of problems amongst the inspectors and those City functionaries responsible for the maintenance of the park. That is, this claim that something needed to be done to keep the park as it should be kept, had merit. But this did not signify, in and of itself, that the occupiers should be evicted. Remedies well short of that—for instance, asking them to move out for, say, three days, or removing a number, but not all, of the occupiers' structures—might have satisfied both the real needs of the City and the desire of the occupiers to make their political statement in their preferred manner. This is why the City

added a distinct set of reasons to make its case that eviction from its property was essential if the public was to be able to use the park as the City said it should be allowed to do.

The crux of this argument was that people found that they could not use the park as they always had. People's enjoyment of the park had been seriously diminished and this was something that the City could not, would not, tolerate. Evidence was adduced that, because the Occupation was so large, it effectively stopped people 'going there for picnics, to throw a ball around, to take children to play, to exercise a dog or to enjoy the peace and quiet of a park'. Individuals gave evidence that the paths were muddy, that they had to abandon their normal route through the park when walking their dog, that their view overlooking the park was no longer enjoyable because now it was spoiled by a large bunch of tents, that smells coming from the occupiers' activities marred their household joys, as did the increased noise with which they had to deal.

In sum the claims were that, not only was the City's goal to manage the park as it deemed proper being foiled, it would be failing to discharge its duty to look after the general public's pleasures if it did not get the order it sought. The City supplied evidence from its staff responsible for the park and added a hefty number of affidavits sworn by disappointed users of the park. This testimony was set out in considerable detail by Justice Brown, indicating how much respect he was giving it. What is intriguing are the things related to this evidence which must have been thought about but that were not explicitly considered to be germane.

Obviously, the complainants were not the only members of the public who had views on the occupiers' use of the park. It has been noted, that the occupations everywhere were finding increasing resonance with the public. One might guess that the complainants that the City relied on were not among those who shared the occupiers' political perspective. Should their opinions and grievances count for as much as they apparently did, given that other members of the public went out of their way to support the occupiers? That there was such overt support for the Occupation was no State secret.

Under the heading "Meet the army behind the protestors" Catherine Porter of The Toronto Star, wrote on November, 4, 2011: "There are the people in St. James Park. They put their numbers at around 500. Then there are the people behind the people in the park. I'd put their numbers in the thousands". She went on to report on the sympathizers who brought potable water, compostable water bottles, coffee, firewood, porta-potties, generators, three Mongolian tents, a 28-foot mobile kitchen (that cost donors \$8,500 a month), straw to dry out the paths and the ground under the tents, books for the library that had been set-up, offers of the use of church kitchens for occupiers to come and cook for their comrades, etc.,. In addition, there was also a never-ending stream of visitors who came to look, to participate in the debates and lectures, to learn.

Not to put too fine a point on it: yes, there were complainants who sincerely felt that the park was being abused and that they were suffering as a consequence; but, yes, it was also widely known that huge numbers of the public approved of this use of the park and thought that it should not only be tolerated, but supported. Why then did the complainants count for so much and those other citizens' views for so little? As the prolix reasoning proffered by

Justice Brown does not address this issue directly (being the other known related thing not to be thought about), his rationale must be inferred.

The tellingly common characteristic of the complainants was that they lived in the area and, therefore, more likely to use it as expected, namely, as a recreational area that supplemented the spiritual enjoyment and material value of their neighbouring *private property*. Not only did their complaints dovetail with the City's non-asserted, but easy-to-spot, political agenda, they also called on that visceral capitalist sense that private property must be treated as generously as possible. Just as indiscriminate bombing causes tolerable (to the bombers) collateral damage, private property ownership brings welcome (to the owners) collateral benefits. The sentimental notion that it is agreeable to have a park near one's home and that is a joy not to be taken away lightly was what was claimed expressly by those who talked about the restrictions on walking the dog, the unpleasantness of the mud, the inhibitions on being able to sit on a bench reading a book, or on one's balcony—in blissful silence—with the pleasing view of the nice smelling greenery.

The unstated, but not hard to sense, argument was that these residents had purchased private property near a park, that they had paid a premium and that this was endangered.

In response to the argument made by the occupiers that there were plenty of other parks in the vicinity that might be enjoyed, Justice Brown was scathing:” Not what one would call a sharing attitude from the Protestors. Where would that leave the McGregor family? Carolyn McGregor...and her husband lived adjacent to the Park with their baby daughter. Do I understand the applicants to be suggesting that the McGregor family should push their baby stroller several blocks up the road to enjoy the serenity of a park? Why can't the McGregors use the Park too?”

This notion of enhancement of property value manifestly appealed to this judge (and likely influences most judges). Private property rights, read widely, should not be undermined without justification and the occupiers should not be seen as having justified their presence sufficiently. To bolster this argument that this inferred rationale persuaded the court in this case, two supporting arguments are offered.

First, the judge made much of the fact that the Occupation was large, that it occupied much of the park. Justice Brown wrote that, in effect “the Protestors have appropriated public land to their exclusive, private use” to attain their ungodly purposes (Justice Brown began his judgment by reminding everyone that that Canada's Charter of Rights and Freedoms acknowledges the “supremacy of God” and that this meant that we should show humility in our dealings with fellow Canadians). The Protestors (as he called them) showed anything but humility. Indeed, he found that they were arrogant in their unwillingness to vacate the park or to abandon their project. He used terms like ‘absolutist, ‘rigid’, to describe them and appeared to accept a suggestion made by a witness that their behaviour was an embodiment of everything they purported to criticise. In short, although he may not have been conscious of this idea, he was holding that the protesting occupiers were acting like occupiers of old, like the Europeans who came to occupy this land and never left. Like them, they were appropriating land that was not theirs to use as if they were private owners

of it. But, unlike the land inhabited by indigenous people when Europeans landed, the inhabitants of contemporary Canada have laws and a police and military system that defend private property. Now that capitalist law reigns, private property can no longer be appropriated by a simple taking. In short, the occupiers were cast as would-be invaders, as radicals, an argument to which I return below.

Second, another factor that influenced the decision was the presentation of a number of complaints by users of the park to the effect that, when trying to use the park as they usually did, they had been confronted by abusive and threatening persons after the Occupation began. It is easy to see how this kind of evidence detracted from the occupiers' claim that they were pursuing lofty social and political objectives that justified the occupation. But, should it have had as much weight as the court appeared to accord it? This kind of behaviour is criminal in nature and could be stopped in the normal way. Indeed, the police gave evidence at the trial that it had increased its presence at the park and environs and had been patrolling 24 hours a day. That is, it is questionable whether such alleged regrettable behaviour by a few people demanded that the City be allowed to clear St. James Park. For one thing, the police testified that a number of arrests had been made, mostly for public drunkenness or minor assaults and one for a sexual assault. It was not, then, manifest that users and neighbours of the park were unprotected in the face of new dangers. More, it was far from clear that the alleged menacing incidents and abuse came from the political occupiers, although there was some evidence that some of it did. Again, note that the police said that it also had made quite a few arrests under the Mental Health Act. As Inspector Meissner's evidence stated: "There appear to be a number of vulnerable people on site, as those with substance abuse and mental health issues, whose welfare is a particular concern to me, given their vulnerability".

This offers a glimpse into another pertinent verity. There was a lot of talk about the fact that parks are for public use, but that public normally does not include people with drug and substance abuse issues, or those whose mental health makes them behave less than conventionally or the homeless desperately looking for somewhere safe to shelter. Parks are for the general public, yes, but a public that will use it as a supplement to the welfare they enjoy as solid citizens. Parks are to be used by them to enrich their approved-of lifestyles. Not all purposes that a park might serve, such as a place for the needy to sleep, to wash themselves, to relieve themselves, for the politically active to meet and plot, are perceived as public-serving purposes.

Here a somewhat tangential point is made. It is that, in this case, the court determined that the inconvenience and loss to some members of the public required a remedy and that the appropriate authority, the City, had done its duty by seeking a remedy on their behalf. But, it is not true, of course, that the City or other government is always so solicitous of the people's right to use public space and to go about their day's activities as they see fit. Indy car races, runs and bike rides for charity, marathons, Santa Claus parades, the Caribana parade, the Gay Pride parade, meetings by foreign leaders, such as the G20, the World Forum, all require denial of access to public thoroughfares, interruptions to normal life and commerce. More, they are frequently accompanied by protests, demonstrations, clashes with the police, drunkenness and excessively exhibitionist conduct. Yet, the various levels of government take a benign approach to these disruptive gatherings. It is true that they are temporary, but they constitute inconveniences to a much greater number of people over a

much greater geographic area than did the St. James Park occupation. More, they are heavily subsidized by various levels of government and, therefore, by the tax-paying public, even if some, often many, members of the public object to the activity. The response is likely to be that this point goes nowhere, that to make this kind of comparison is nothing but a red herring. After all, the elected government is purporting to act for the benefit of the public when it allows and promotes these kinds of disrupting activities. But, what are those benefits, who are the major beneficiaries?

Advertisers, sponsors (including governments supporting 'good causes'), the advertising industry, caterers, hotels and other tourist service businesses, police officers who earn overtime, security firms, all benefit. Through the trickle down theory, all others, including the grumblers and the inconvenienced, are supposed to benefit as well, although this is never proved.

A wise man once said that the trickle down theory was fine in theory and would work if it wasn't for all the sponges at the top.
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In short, when the purpose is the promotion of market capitalism and of entrepreneurs, the public's inconvenience is not only tolerated but actually welcomed by the same authorities that found the Occupation of St. James Park just simply beyond the bounds of acceptability.

There should be no doubt by now: it was not inconvenience to, or even the claimed material losses of, potential St. James Park users that motivated the City and its mainstream supporters, but the motives, the intentions of the Occupation that whipped them into legal action. This was obvious and could not be completely hidden from view by the litigation. It was, however, downplayed by clever lawyering.

#### The dilution of liberal democratic ideals to preserve capitalism

As seen, the court gave way more weight to the claims made by the City about its costs and the interference with normal, desirable, users of the park than either the facts or logic warranted. By contrast, the occupiers claim that the Occupation was a necessary means to exercise liberal political freedoms, was given much less weight than it should have been given. This was not easy, but it was done.

It was not easy because, since the time that our judiciary was given a central role as a protector of political freedoms by the advent of the Charter of Rights and Freedoms, it has become an article of faith for judges to declare that Canada loves and practises liberal freedom and that courts are jealous guardians of this always fragile liberty. They will support citizens exercising their freedoms of conscience and religion, freedom of thought, belief, opinion and expression, freedom of peaceful assembly and freedom of association. To this end, they will be quick to accept that citizens are attempting to enjoy their rights and freedoms and be ready to defend them against encroaching governments. This is what made the task of marginalizing the occupiers' claims a difficult one.

Justice Brown, began with the seemingly required rote recital of Canada's respect for political liberty. He had to then walk the talk. He had to acknowledge that the protestors in the park were attempting to express their social and political views and to communicate them to the rest of the world. He emphatically welcomed the fact that protestors were acting as all Canadians were entitled to conduct themselves. The message was manifest: no court, certainly this court, is biased against any actor. Its only prejudice is that it will maintain the values known to be shared by all. In this setting of tolerance and respect, any conclusion reached after a judicious weighing of competing interests should not be open to be attacked as partisan.

Justice Brown was now in a position to give the City and the elites whose interests it was championing their desired result. He had made it clear that it was not the occupiers' desire to exercise the freedoms and liberties that we all respect and protect that he was about to criticize, but how they went about it. It was their technique, not their motive, that disappointed this non-partisan judge. After all, even Charter freedoms and rights are not absolute in nature. Utilitarian principles demand that even fundamental freedoms and rights found in the Charter be curtailed if their exercise leads to unacceptable consequences. Governments may restrict the operation of Charter rights if their motive is to attain a legitimate governmental objective and the means used are reasonable given (i) the nature of the harm sought to be averted and (ii) the extent of curtailment of the Charter right. The non-partisan, principled judiciary is the ideal institution to do this kind of balancing.

Now the importance of his evident sympathy for the plight of the complainants whose use of the Park had been impaired by the Occupation and, to a lesser degree, the inconveniences and costs incurred by the caretaking City, came into play. It weighed heavily in the scales used to balance park users' rights against those of political protestors. The evident disdain felt by the judge for the selfish and rigid behaviour of the protestors tilted the scales even further against the occupiers. But, had not the same judge pronounced his admiration and respect for the exercises of free speech, belief, opinion, assembly and association, all of which were sought to be exercised by the protestors? Here the court resorted to another legal technique—avoiding facts in plain view.

The court pretended that the eviction notice would not seriously impair the social and political actions and hopes of the occupiers. They would still be able to use some more traditional tactics to communicate their social and political messages. They would still be able to use signage, web postings, demonstrations and marches through City streets and other public spaces. All they would not be able to do is to occupy the park with their tents and other structures. This would meet the objections of the complainants and give the City more opportunity to do its caretaking. And, as the protestors still had some opportunity to exercise their political freedoms and rights, the eviction order could be characterized as a reasonable limit imposed on them.

*This, then, was the trick: the negation of the essence, of the effectiveness, of the strategies deployed by the occupiers, was held not to be a serious denial of their freedoms and rights because those rights and freedoms could be exercised in different ways.*

It made sense, legal sense, that is. It was true, eviction from the Park did not prevent the protestors from believing, speaking, assembling or associating. But, they could not do so as they chose.

The protestors had chosen to occupy because it was a novel means to express novel perspectives. To pretend that this did not matter very much required the court to ignore (i) direct evidence before it and (ii) a lot of socially acknowledged facts, widely disseminated by the mainstream media. If these matters had been given the consideration they merited, it would have been very difficult for Justice Brown to hold that the needs of those who lived adjacent to St.James Park or those of the City outweighed those of the occupiers who had exercised their supposedly cherished Charter freedoms and rights.

In their evidence, the protestors averred that the fact of physical occupation was central to their action. It spoke of resistance to the ordinary forms of allocating rights and privileges; it was a way to provide a live example of how a non-authoritarian society might be run; it was a means to demonstrate that consensus building and direct participation in decision-making was to be preferred to electoral democratic institutions; it was an arresting way by which to alert other people to the fact that inequality and injustice were attributable to a means of governance that did not permit the wishes of the 99% to be reflected in policy-making... In short, the Occupation in Toronto, as elsewhere, was a means of political protest chosen to communicate a set of messages that could not be so easily conveyed by signage, by web-postings and marches, that is, by means that were better suited to agitate around single issue problems thrown-up by the unchallenged regime. Rather, these distinct means of protest were employed to give voice to a wide-sweeping questioning of the very structures that maintain and perpetuate the existing political economic system.

So, here it is: Justice Brown demonstrated that he was able to think of something that was related to another thing without thinking about that other thing; he has the legal mind. This is very different from an ordinary mind, a mind that tries to understand how the situation before it may change its complexion when related facts are taken into account.

By the time that Justice Brown heard the arguments a perceptible shift in attitude towards the Occupation phenomenon had occurred. Initially, it had been treated as a banal, somewhat narcissistic exercise by uninformed young folk. After a few weeks, many well-publicized opinion polls showed that the Occupation's messages, the ones that the opinion leaders said were too vague, too unformed, to be identified, had won over public sentiment. Many people, solid majorities according to some polls, told the pollsters that they approved of the anti-corporate, anti-capitalist message they discerned in the Occupations.

From the *Toronto Star*, 8 November, 2011, that is, before the court case began:

“Occupy Toronto activists are hunkering down...in St. James Park, hoping to press their colourful “war on apathy” through the frigid winter months...however the individual Occupy Canada protests play out...a young generation...has succeeded in energizing debate over the inequities that are eroding our social fabric...In the U.S....the...protests have been hailed as a public service. One poll found that 2 in 3 agree with the activists that wealth should be divided more equally...the message is getting through. Bank of Canada Governor Mark Carney has called the movement “entirely constructive”... thoughtful people are engaged.”

From Robert Paul Wolff, *The Philosopher’s Stone*, <http://robertpaulwolff.blogspot.com>, 26 Nov.2011:

“The OWS Movement has already won. In ten weeks, it is (sic) completely changed the focus of the public conversation in America, from debt reduction and Congressional deadlock to income inequality. That is a simply extraordinary victory, achieved completely without the big money backing that launched and sustained the Tea Party Movement.”

In short, the nature of the protests, in particular, their duration and their stout eschewing of the usual modes of organization and communication, had been effective. The occupiers’ choice of means to tell their story, to urge the need for change, to emphasise the unfairness of wealth and income distribution, turned out to be a good one. Indeed, it was clear to one and all that this was the reason for authorities to terminate occupations all over North America. The presence in the parks was an increasing threat to the status quo. Unless Justice Brown lived in a bubble on another planet when he was not judging, he would have been well aware of it. Yet he chose not to attach too much importance to the impact of the physical occupation of a public space and the alternative forms of politics advocated and practised there, even though they were educating the public as they were intended to do. He chose to pretend that he was being fair to the protestors by allowing them to use tactics that they did not believe would work.

A lower court decision, not very important in legal terms, but instructive in political terms

The judiciary is comprised by a set of State appointed functionaries whose central task is to preserve the State. Usually when judges have to balance interests, it will not be obvious what outcome would serve the State best. In those cases, courts can, and do, exercise their discretion and, on occasions, reach decisions that are welcomed by those who care about the vulnerable and the poor. But, when the issue before the court more clearly calls into question the maintenance of the extant system, the courts will do their duty, even if this means distorting facts and applying laws in unusual ways.

The internalized sense of duty they have is to that of their duty to the Canadian State as a capitalist State. In a capitalist society, you get law that sustains capitalism. Liberal ideas and principles are said to be embodied in that law, thereby giving capitalism an appeal it

otherwise might not have. These ideas and principles are given short shrift when their normal and logical application would undermine the fundamentals of capitalist relations of production. Judges are not always subjectively aware of what drives them to act in this way, but that they are so driven is made clear by the contorted reasoning used to uphold the order to evict the protestors from St. James Park.

The Occupation Movement clearly challenges the basic tenets of capitalism and, therefore, capitalist law, administered by a capitalist State's judiciary, was rightfully expected to lend a hand to the dominant class. The result in this case fought out in a lower court is testament to the fact that the Occupation Movement is seen as having radicalizing potential by the dominant class. Justice Brown delivered the desired result and provided a patina of respectability for this onslaught on a peaceful political protest, on a protest that, on its face, appeared to comply with the goals of a liberal democratic State. When the adverse decision came down, there were self-congratulatory statements by City politicians about the orderly manner in which the occupation had been ended, without injustice to the occupiers. After all, the Rule of Law had been applied to terminate the Occupation; what could be more legitimate than that? The media felicitated the authorities and thanked the occupiers for having brought important matters to the public's attention, urging them to follow up on their 'success' in more traditional political ways.

The law worked as it is meant to do: it helped legitimate repression when that was deemed necessary by the elites. Militants are pushed and urged by hypocritical well-wishers amongst the elites, towards a more traditional form of politics, towards a less effective, less threatening (to the elites) politics. The result in this case fought out in a lower court is testament to the fact that the Occupation Movement is seen as having radicalizing potential by the dominant class. Hopefully the Occupation Movement's continued willingness to question and challenge the status quo will cause it to question and challenge the law that serves their adversaries so well. Developing actions aimed at the delegitimation of capitalism's legal institutions may bring rich rewards. It may remove a brick from the wall built to keep out the 99%.

Harry Glasbeek,  
13 January, 2012.