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Demonstrations and the Law: Patterns of Law's Negative Effects on the Ground and the Practical Implications

ARTICLES

DEMONSTRATIONS AND THE LAW: PATTERNS OF LAW'S NEGATIVE EFFECTS ON THE GROUND AND THE PRACTICAL IMPLICATIONS

BASIL S. ALEXANDER[†]

I. INTRODUCTION

Demonstrations are a recurring and constant feature of Canadian and other societies. Whether it be Kinder Morgan at Burnaby Mountain, APEC in Vancouver, Ipperwash in southwestern Ontario, the Toronto G20, the Arab Spring, "Idle No More", the Occupy movement, or other major demonstrations, they repeatedly play significant roles in expressing dissent and bringing attention to key societal issues with the hope that corresponding change can be achieved.[1] As a result, it is unsurprising that Kent Roach and Craig Forcese have raised a number of concerns regarding Bill C-51's implications for free speech, demonstrations, and

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† BArtsSc(Hon) (McMaster), LLB (Victoria), MPA (Victoria), LLM (Toronto), PhD Candidate (Queen's Law), and member of the Law Society of Upper Canada (2005). This article is a revised version of parts of my LLM thesis, and I thank my supervisor, Kent Roach, and my second reader, Kerry Rittich, for their very helpful feedback during that process. In addition, I appreciated the feedback from presenting the article's ideas at the 20th Annual UBC Interdisciplinary Legal Studies Graduate Student Conference ("Law: Past, Present, and Future"), and I also thank the reviewers and editors of the UBC Law Review for their beneficial remarks.

1 For an overview of key historical demonstrations in the Canadian context, see e.g. Margaret E Beare & Nathalie Des Rosiers, "Introduction" in Margaret E Beare, Nathalie Des Rosiers, & Abigail C Deshman, eds, *Putting the State on Trial: The Policing of Protest during the G20 Summit* (Vancouver: UBC Press, 2015) 3 at 4–12.

related organizations, especially given the noted overbroad definition of speech offences related to terrorism, the resulting potential for "chilling" free speech, and the potential for CSIS's new disruptive powers to affect traditionally legitimate protests and organizations.[2] For those who believe that such concerns are overblown from a practical perspective (e.g., these tools are unlikely to be used in such ways), it is useful to examine some instances of how existing legal tools are already used on the ground with respect to demonstrations to gain a larger understanding of what has happened before and how these new tools may be used given that past experience.

This article will particularly focus on patterns resulting from a pragmatic analysis of how law interacts with demonstrations *while they happen* by focusing mainly on the experiences of Ipperwash, the Toronto G20, the Occupy movement in Canadian cities, and "Idle No More".[3] I will examine the usually negative and unacknowledged larger impacts on

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2 See e.g. Craig Forcese & Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto: Irwin Law, 2015) at 4, 7, 11–12; Kent Roach & Craig Forcese "Bill C-51 Backgrounder #1: The New Advocating or Promoting Terrorism Offence", Legislative Comment on Bill C-51, *An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2015 (first reading 30 January 2015 when comment written, subsequently assented to 18 June 2015 with key concerns remaining) at 20–25, 26, DOI: <10.2139/ssrn.2560006>; Kent Roach & Craig Forcese "Bill C-51 Backgrounder #2: The Canadian Security Intelligence Service's Proposed Power to 'Reduce' Security Threats through Conduct that May Violate the Law and Charter", Legislative Comment on Bill C-51, *An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2015 (first reading 30 January 2015 when comment written, subsequently assented to 18 June 2015 with key concerns remaining) at 16–18, DOI <10.2139/ssrn.2564272>.

3 My interest in this topic originates from and is informed by previous experience with the Ipperwash Inquiry, the proposed Toronto G20 class action, and other past work with Klippensteins, a public interest and social justice law firm in Toronto.

a demonstration as a result of how law is used and applied in courts and by police, particularly in the context of injunctions and criminal law processes. After all, law is "inseparable from the interests, goals, and understandings that deeply shape or comprise social life",[4] so it is important to understand how law is actually used to affect demonstrations. The focus here is accordingly on how the relevant law and corresponding experiences are "constitutive of [the] practical interactions among citizens",[5] and the cited examples illustrate some of the practical impacts, issues, and limitations of law on demonstrations while they are in progress. Despite very different contexts and issues, the discussed judicial decisions and police actions indicate patterns regarding how law and demonstrations interact in practice, which unfortunately reinforce the concerns raised about the potential use of Bill C-51's new additional tools given what is already occurring. Questions thus arise regarding how law can be more sensitive to the effect that it can have on active demonstrations. As well, if historical and complex issues are not being addressed through other avenues, law may need to take steps to be substantively aware of such issues and at least be perceived as not taking sides in a more practical way.

This article begins by reviewing law's negative impact on demonstrations-in-progress in the context of interlocutory and statutory injunctions. Given the prior status quo focus of such injunctions, demonstrators have an uphill battle to practically win such motions. Status quo perspectives thus tend to inform how law approaches key injunction factors, usually to the demonstrators' detriment. As well, using Hohfeldian conceptions, specific "rights" (such as property rights or regulated public property use) usually prevail over more general aspirational "privileges" (such as freedom of expression and freedom of peaceful assembly) when they come into conflict. In addition, although

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[4] Austin Sarat, "Pain, Powerlessness, and the Promises of Interdisciplinary Legal Scholarship: An Idiosyncratic, Autobiographical Account of Conflict and Continuity" (2000) 18:1 Windsor YB Access Just 187 at 201.

[5] Michael W McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994) at 6 [emphasis in original removed].

law can have a potential role in providing guiding norms for future general situations, law does not usually act in a prospective (or *ex ante*) manner for specific future or current situations. It accordingly takes a cautious, limited, and conservative approach for interim decisions that are generally close to the existing legal status quo. The injunction examples thus show how law usually tends to be an instrument used against demonstrations while they occur, instead of protecting them. However, rare circumstances can also arise where demonstrators' interests are more consonant with status quo and societal perspectives so that injunctions can be more helpful.

Law's negative impact on demonstrations is then reinforced by examining how criminal processes can be used to undermine demonstrations in progress. In particular, the police have significant criminal powers available that they can use against demonstrators, and they have discretion regarding when and how such powers are used and what criminal processes are correspondingly initiated. Even if these powers are used inappropriately, the time involved in law's after-the-fact (or *ex post*) processes results in the ability for police to effectively shut down or undermine a demonstration in the heat of the moment with accountability or vindication to only come much later, if at all. Law's criminal processes are thus another tool that can be used effectively against active demonstrators, regardless of whether the circumstances actually warrant it.

The concluding section provides some practical implications and suggestions as a result. For example, law's actual application to demonstrations reinforces Roach's and Forcese's concerns regarding Bill C-51. Furthermore, law's limitations, potential uses by varied actors, and realities should be thoroughly considered and better understood to inform law so that more pragmatic balancing occurs and changes are implemented where needed, such as potentially articulating better some of the specific rights associated with demonstrations and dissent instead of relying more on general and aspirational ideals. The judicial and other governmental branches should also be more willing to acknowledge law's potentially negative impacts on demonstrations and preferably use methods to mitigate such consequences where possible. The judicial branch should accordingly be aware of what other branches and actors

are doing so that more holistic and nuanced solutions are implemented, including trying to practically minimize and avoid raising tensions. Potential non-exhaustive options include: using symbolic language and acknowledgements; providing practical victories to both sides in light of developing evidence and circumstances; and focusing on practically keeping the peace, particularly as part of public interest considerations.

II. THE IMPACT OF INJUNCTIONS ON DEMONSTRATIONS

A. INTRODUCTION

One of the major ways that law can directly impact demonstrations is through interlocutory and statutory injunctions.[6] They can have an effect either prior to a demonstration or during an existing demonstration, which is unlike the general *ex post* nature of most legal proceedings. In theory, they can be used both by and against political demonstrations, given the nature of the formal equitable test. However, the practical reality is that such injunctions are weighted against demonstrators given when they typically arise, the focus of such injunctions on a previous status quo, and the issues involved. For example, property and other specific rights tend to prevail over more amorphous concerns involving freedom of expression and freedom of peaceful assembly (e.g., expressing dissent about the current status quo as a group) when they clash in formal proceedings. Given their nature, injunctions are typically used against, rather than by, demonstrators. Status quo issues and characterizations typically not favourable to demonstrators are also usually given weight, thus illustrating the law's negative practical impact.

This section examines a series of protest decisions illustrating the underlying issues in interlocutory and statutory injunctions—tools that

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[6] For clarity, the focus here is on injunctions related to political demonstrations, rather than picketing in an employment context. However, some of the principles and discussions may be transferable, especially since "[l]essons have been learned" from labour injunctions: *Greenpeace Canada v MacMillan Bloedel Ltd*, 118 DLR (4th) 1 at para 28, [1994] 10 WWR 705 (BCCA) [*Greenpeace*], aff'd [1996] 2 SCR 1048, 137 DLR (4th) 633 (on other issues).

usually result in demonstrators facing uphill battles and being unsuccessful in formal legal proceedings, except in rare circumstances. In addition to the various inherent procedural challenges that demonstrators must deal with as part of any injunction motion,[7] this doctrine and decisions often reflects and reinforces status quo tendencies and preferences. It becomes apparent that where specific (and recognized) Hohfeldian rights that impose obligations on others (such as property rights and regulating public spaces) are in conflict with more general and usually aspirational Hohfeldian privileges that do not have similar obligations on others (such as the freedoms of expression and peaceful assembly) in the context of demonstrations and injunctions, such rights tend to prevail.[8] The analysis indicates that demonstrators are rarely able to succeed in injunction motions, especially if they are unable to successfully characterize their issues as involving specific rights that have obligations on others. This result has potential conceptual implications for freedom of expression and freedom of peaceful assembly in Canadian law, especially since status quo and societal considerations usually have a more influential role when balancing the conflicting different interests.

The section accordingly begins by examining the formal doctrinal tests for interlocutory and statutory injunctions, and it then proceeds to analyze a series of injunction cases that involved Indigenous issues, the

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7 See e.g. Professor Garry D Watson & Michael McGowan, *Ontario Civil Practice: 2016* (Toronto: Carswell, 2015) at PC-14 to PC-17.

8 For the purposes of this article, I use Wesley Hohfeld's more precise definitions to characterize and understand these interacting legal conceptions. In particular, "rights" have correlative "duties" on others that they must follow (e.g., an obligation related to the "right"), and "privileges" have a correlative "no-right" instead (e.g., others cannot prevent or interfere with someone exercising a "privilege", which is typically how freedoms are conceived at a high level): see Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23:1 Yale LJ 16 at 30ff, 32ff; see also *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 336–37, 18 DLR (4th) 321; *Haig v Canada*, [1993] 2 SCR 995 at 1034–35, 105 DLR (4th) 577 [*Haig*]. This distinction helps better understand the differences between the two conceptions as well as why the legal system treats them differently.

Occupy movement in Canadian cities, and the Toronto G20 to illustrate some of the issues.

B. THE GENERAL INJUNCTION TESTS/DOCTRINES

Given that the purpose of interlocutory injunctions is to usually return to a prior status quo, in light of a party doing an action or activity that raises issues for another party while a related proceeding is pending,[9] demonstrators typically face an uphill battle with the relevant test, especially since their perspectives will generally not be considered until late in the test, as part of public interest considerations. The well-known three-part equitable test for interlocutory injunctions is found in the Supreme Court of Canada's (SCC) seminal cases of *Manitoba (AG) v Metropolitan Stores Ltd* and *RJR-MacDonald Inc v Canada (AG)*.[10] Although these decisions specifically involved the *Canadian Charter of Rights and Freedoms*,[11] the Court made clear that this test ought to be applied for interlocutory injunctions and stays in both private law and *Charter* cases,[12] and both private law and *Charter* issues are often involved in protest cases.[13] The test for statutory injunctions will also be

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9 See e.g. Garry D Watson & Derek McKay, *Holmstead and Watson: Ontario Civil Practice* (Toronto: Carswell, 2016) (loose-leaf revision 2016 – Release 3) vol 5 at 40-12. As the relevant considerations for a time-limited interlocutory injunction (or an interim injunction) are the same as those for a general interlocutory injunction (i.e., one that continues until the case is finally determined), I use both terms interchangeably in this article, depending on what was applied for and granted.

10 [1987] 1 SCR 110 at 127–29, 38 DLR (4th) 321 [*Metropolitan Stores*]; [1994] 1 SCR 311 at 334, 111 DLR (4th) 385 [*RJR-MacDonald*]. Both decisions also rely on the reasoning in *American Cyanamid Co v Ethicon Ltd*, [1975] UKHL 1, [1975] AC 396.

11 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

12 *Metropolitan Stores*, *supra* note 10 at 127; *RJR-MacDonald*, *supra* note 10 at 334, 347.

13 The examples in Section II.C are more in the private context, whereas the examples in Section II.D and II.E directly engage the state and corresponding *Charter* considerations.

briefly reviewed, although statutory injunctions have much more limited considerations and potential application compared to interlocutory injunctions. Regardless, before any case is heard, the nature of the injunction tests reinforces a limited and conservative approach to the courts' role and power, largely due to the interim nature of the relief and a focus on the previous status quo. Consequently, a dissent or change that challenges the legal status quo usually cannot be practically supported by the court in injunction decisions.

At the first stage of assessing whether an interlocutory injunction should be granted, an applicant must demonstrate that there is a "serious question to be tried".[14] It is a "preliminary and tentative assessment of the case"[15] involving a low threshold to ensure that the case is not frivolous or vexatious. A motions court accordingly usually only does a preliminary investigation of a case's merits (although exceptions do apply in certain circumstances).[16] The key focus at this stage is on the perspective and rights of the person or entity seeking the injunction, which are usually not the demonstrators. As a general rule, most cases proceed to consider the second and third stages,[17] particularly since public interest considerations are taken into account at the third stage.[18]

At the second stage, the interlocutory injunction's applicant needs to show "irreparable harm" if the relief is not granted.[19] The key here is the nature of the harm, rather than the harm's magnitude.[20] In *Metropolitan Stores*, the Court noted that "[it] is harm not susceptible or difficult to

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14 *RJR-MacDonald*, *supra* note 10 at 337, 348. See generally *ibid* at 335–40.

15 *Metropolitan Stores*, *supra* note 10 at 127.

16 *RJR-MacDonald*, *supra* note 10 at 335, 337, 348. Exceptions include if the interlocutory injunction would "in effect amount to a final determination of the action" or if the issue "can be determined as a pure question of law": *ibid.*

17 *Ibid* at 348.

18 See *Metropolitan Stores*, *supra* note 10 at 128.

19 *RJR-MacDonald*, *supra* note 10 at 348. See generally *ibid* at 340–42.

20 *Ibid* at 341, 348.

be compensated in damages."[21] The Court reinforced this view in *RJR-MacDonald* by explaining that "[i]t is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."[22] Compensation for damages by itself is, therefore, usually not sufficient to meet this part of the test. Instead, other unquantifiable harms usually must be shown, such as being "put out of business by the court's decision", having "irrevocable damage to [one's] business reputation", or having "permanent loss of natural resources",[23] which could be all involved in a demonstration depending on its type, size, location, duration, and other factors. An inability to collect compensation may also be sufficient, which will be disproportionately against demonstrators since they are typically not in a position to pay the often significant damages claimed. The focus is also formally on the harm to the applicant, rather than the opposing party or the public interest at this stage.[24]

The third part of the test involves considering the "balance of convenience", which is also known as the "balance of inconvenience".[25] The goal is to determine "which of the two parties will suffer the greater harm" from granting or refusing the injunction,[26] so this is the key place where the demonstrators' perspective will be analyzed (often for the first explicit time). The Court in *RJR-MacDonald* noted that the factors will be numerous and vary from case-to-case.[27] For example, the harms to the parties will be considered, as well as any applicable public interest

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21 *Metropolitan Stores, supra* note 10 at 128–29.

22 *RJR-MacDonald, supra* note 10 at 341.

23 *Ibid.*

24 See *RJR-MacDonald, supra* note 10 at 341. Irreparable harm to the respondent or public interest is to be considered as part of the next stage: see *ibid.*

25 *Metropolitan Stores, supra* note 10 at 129; *RJR-MacDonald, supra* note 10 at 348–49. See generally *Metropolitan Stores, supra* note 10 at 129–146; *RJR-MacDonald, supra* note 10 at 342–47.

26 *Metropolitan Stores, supra* note 10 at 129.

27 *RJR-MacDonald, supra* note 10 at 342.

factors.[28] The concept of "public interest" is intended to be wide here as any party can advance such issues, as the SCC noted that the public interest "includes both the concerns of society generally and the particular interests of identifiable groups".[29] Given the nature of this stage of the test, the SCC noted that "many interlocutory proceedings will be determined at this stage,"[30] which is what happens in practice.

While public interest considerations are supposed to have a particularly important role in the balance of convenience stage, it is usually done from a conservative perspective relative to the existing legal status quo, which is often what demonstrators have issues with. For example, in the context of *Charter* claims, the Court in *Metropolitan Stores* noted that it is often difficult to determine the merits at an interlocutory stage, as opposed to after trial (although there may be rare exceptional cases that involve only simple questions of law).[31] In addition, there are various consequences for granting a stay in constitutional cases,[32] such as a law being completely suspended on a temporary basis or an exemption being given to the particular litigant involved.[33] However, depending on the nature of an exemption case, it may be difficult to refuse "the same remedy to other litigants . . . in essentially the same situation", which could effectively amount to a suspension.[34] The Court also noted that the law in question has been "enacted by democratically elected legislatures and are generally passed for the common good".[35] The Court thus becomes concerned as to "whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and

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28 *Ibid* at 344, 348–49. For example, public interest factors may be determined by the nature of the applicants and the issues of the case: see *ibid.*

29 *Ibid* at 344.

30 *Ibid* at 342.

31 *Metropolitan Stores, supra* note 10 at 130–33.

32 See generally *Metropolitan Stores, supra* note 10 at 133–46.

33 See *Metropolitan Stores, supra* note 10 at 134–35.

34 *Ibid* at 146.

35 *Ibid* at 135.

advantages of impugned legislation, the invalidity of which is merely uncertain".[36] It will thus not be surprising that "the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons."[37] Even in suspension cases, a court may limit the scope of the relief "so that the general public interest in the continued application of the law is not affected."[38] Such perspectives usually stand in contrast to those of the demonstrators, rather than reinforcing them.

The role of statutory authorities is also relevant to the public interest considerations, but this is again problematic for demonstrators as they are often acting against the authority's actions or orders. For instance, where applicable, it is presumed that for the purposes of the balance of convenience stage, statutory authorities do not have an interest distinct from the public interest,[39] and "no interlocutory injunction or stay should issue to restrain that authority from performing its duties to the public unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry."[40] As well, in the case of an authority "charged with the duty of promoting or protecting the public interest", irreparable harm will nearly always be found by showing that the "impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."[41] Courts should accordingly presume, in most cases, that irreparable harm would occur from restraining such action, rather than determining whether actual harm would result.[42] As a result, in related constitutional litigation,

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36 *Ibid.*

37 *Ibid* at 147. See also *RJR-MacDonald, supra* note 10 at 346.

38 *RJR-MacDonald, supra* note 10 at 347. The Court noted an example of where an organization was ordered "to pay an amount equivalent to the [impugned] tax into court pending the disposition of the main action": *ibid.*

39 See *Metropolitan Stores, supra* note 10 at 135–36.

40 *Metropolitan Stores, supra* note 10 at 149.

41 *RJR-MacDonald, supra* note 10 at 346.

42 See *RJR-MacDonald, supra* note 10.

interlocutory injunctions generally "ought not to be granted unless the public interest is taken into consideration in the balance of convenience and weighted together with the interest of private litigants."[43] When they are involved in demonstrations, statutory authorities and their perspectives thus have an advantageous position when considering what is in the public interest.

Out of the above three stages, it will not be surprising that the public interest considerations in the balance of convenience stage pose the greatest obstacles for demonstrators in interlocutory injunction cases. If the state is not involved (i.e., the *Charter* is not engaged), it will be difficult for broad public interest considerations (beyond decision enforcement) to be given serious weight, as the case will usually be viewed as primarily a dispute between the private parties formally involved in the case. In contrast, for cases that involve the state, demonstrators are often against a governmental or other state authority (e.g., a municipality) that is automatically presumed to be acting in or supporting the public interest,[44] before the case has even begun. It usually is assumed that restraining such authorities from carrying out their roles and duties constitutes irreparable harm to the public interest.[45] There are also concerns about whether a suspension or an exemption from the law or the authorities' activities will deprive the rest of the public from the benefit of the law or the authority's actions.

As a result, related general societal perceptions and assumptions (e.g., protecting private property and using public property in regulated ways) are more likely to dominate over the demonstrators' minority perceptions when the public interest is considered as part of the balance of convenience.[46] For example, despite freedom of expression and

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[43] *Metropolitan Stores*, *supra* note 10 at 146.

[44] See e.g. *ibid* at 136.

[45] See e.g. *RJR-MacDonald*, *supra* note 10 at 346.

[46] For example, McLachlin J (as she then was) noted in the context of freedom of expression that "it has not historically conferred a right to use another's private property as a forum of expression. A proprietor has had the right to determine who uses his or her property and for what purpose. Moreover, the *Charter* does not

freedom of peaceful assembly being anti-majoritarian freedoms directly protected by the *Charter* and thus a key part of Canadian society,[47] the protection of other societal interests (e.g., as embodied by specific rights, legal instruments, and other state action) will be given noteworthy weight in the balancing process, even if such interests are not explicitly covered by *Charter* protection.[48] Such realities reinforce "the extent to which [corresponding] middle-class consumer values predominate under the Charter"[49] as well as elsewhere, which demonstrators may have difficulties overcoming if their protest does not fit within such views. Depending on the context and nature of the demonstration, such societal perceptions and assumptions may also result in more of a law enforcement focus and approach to restore what society perceives as the status quo, rather than resolving the demonstration in other ways.[50]

The above three-part equitable test generally applies in most situations involving interlocutory injunctions in the contexts of demonstrations. However, sometimes an injunction is explicitly authorized by statute where different considerations will apply,[51] which is understandable as the basis of such injunctions is law rather than equity. In particular, the court's discretion is more fettered and the above

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extend to private actions": *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 228, 77 DLR (4th) 385. It is thus not surprising that Kent Roach & David Schneiderman note that "[e]ven if economic liberalism is not expressly promoted by [the *Charter*], it remains difficult to avoid the protection of economic interests, even if indirectly": "Freedom of Expression in Canada" (2013) 61 SCLR (2d) 429 at 441.

47 *Supra* note 11, paras 2(b)–(c).

48 For example, while the *Canadian Bill of Rights* has an explicit provision regarding an individual's right to enjoy property, there is no equivalent provision under the *Charter*: see *Canadian Bill of Rights*, SC 1960, c 44, para 1(a).

49 Roach & Schneiderman, *supra* note 46 at 452.

50 For example, a city bylaw may not be followed by the demonstrators, and there may be calls for the bylaw to be enforced. The corresponding legal question would thus be enforcement of the bylaw, which has the effect of enforcing the legal status quo with the goal of returning to the practical status quo before the demonstration began.

51 See e.g. *Canada v Ipsco Recycling Inc*, 2003 FC 1518 at para 51, [2004] 2 FCR 530.

equitable factors have a more limited application: there is no need to show irreparable harm or that damages would be inadequate, and other enforcement remedies do not need to be pursued.[52] As a result, it can be easier to obtain such an injunction (compared to the tests for obtaining an interlocutory injunction), but only if a relevant statute provides explicit authorization for such an injunctive remedy (e.g., a statute regarding municipal governance and powers).[53] Demonstrators thus have even fewer options under such statutory injunctions as the injunction is more of an enforcement mechanism for certain statutory rights, which means the related injunctions will consider even fewer protest considerations and perspectives in such situations.

This legal context sets the stage for examining how injunctions shape and affect demonstrations on the ground, which demonstrators will usually have difficulty with given the conservative nature and limited considerations of the test. As will be seen in the examples below, demonstrators usually do not fare very well under the cited injunction jurisprudence, and parties opposing the demonstrators are usually able to use protest-related injunctions more to their benefit rather than the reverse. The "rule of law" is often used to justify such decisions, but the lopsided ratio of the wins raises concerns about whether a limited version of the "rule of law" is being used in this context (e.g., one that favours status quo societal perspectives). Instead, broader versions of the "rule of law" and public interest that are more focused on ensuring societal peace may be better able to address the dissent's issues in symbolic or other ways. While courts may not be the best institutions for demonstrators to achieve their desired aims in an idealized democratic state, the reality is that other options for demonstrators to achieve their goals may be limited depending on the context and actual opportunities practically available. Courts may thus need to be more sensitive to the

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[52] See *ibid.* Despite these differences, the court still retains discretion over whether injunctive relief should be granted, and it remains more difficult to obtain a mandatory injunction. Dawson J drew these principles from various authorities, which are omitted here: see *ibid.*

[53] See e.g. *Municipal Government Act*, RSA 2000, c M-26, s 554.

negative consequences that their injunction decisions can have on demonstrators as well as on the protestors' realistic ability to raise related issues as part of the general political process, especially given the law's unnuanced and conservative nature in such situations.

C. THE SUCCESSFUL AND REGULAR USE OF INJUNCTIONS AGAINST INDIGENOUS DEMONSTRATORS

As mentioned before, the norm is that interlocutory injunctions are usually brought against demonstrators, rather than in support of their activities. This section examines a series of injunction cases in the context of Indigenous protests to further illustrate the issues that demonstrators regularly face. As well, the analysis shows how courts tend to protect and reinforce specific Hohfeldian rights rather than general Hohfeldian privileges when they conflict in demonstration contexts. These cases also illustrate the limited public interest considerations and weighing that occurs when the dispute is characterized as involving primarily private interests and not legally engaging the state, even though the demonstration may be against the state more generally. This result buttresses law's unnuanced and conservative nature since the legal status quo and related societal perspectives and perceptions are privileged and reinforced by how the test is applied, which in turn provides broader guiding norms of what courts consider as acceptable that are weighted against demonstrators.

The main series of cases in this section focuses on the Indigenous blockades of rail lines in the context of the "Idle No More" movement in December 2012 and January 2013.[54] As a result of "Idle No More", certain rail lines of the Canadian National Railway were blockaded to draw attention to historical and underlying long-term Indigenous issues as well as Chief Theresa Spence's related hunger strike in Ottawa.[55]

The first decision was a result of the Canadian National Railway (CNR or CN) moving for an *ex parte* injunction on an emergency basis

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[54] See e.g. Dayna Nadine Scott, "Commentary: The Forces That Conspire to Keep Us 'Idle'" (2013) 28:3 CJLS 425 at 425, 427.

[55] See e.g. Scott, *supra* note 54 at 425.

on 21 December 2012, after the courts had closed.[56] While the Indigenous demonstrators did not have any issue with CN directly, the blockade occurred on their "Spur Line" near Sarnia that ran through the relevant Indigenous reserve to apply pressure on the federal government regarding its recent passing of Bill C-45.[57] For context, Bill C-45 was the federal government's second omnibus budget bill that included various changes to the *Indian Act*, the *Navigation Protection Act*, and the *Environmental Assessment Act*, and it became a catalyst for the "Idle No More" movement.[58] This particular protest thus consisted of members of the local Indigenous community supporting the broader movement.[59]

However, the focus of the evidence in support of the *ex parte* injunction request included the "significant economic damage to CN", the effect on a "significant number of CN customers in the 'Chemical Valley'", and the "significant impact on CN's employees",[60] which all have significant public interest overtones from a status quo perspective privileging business. Justice Brown (as he then was) applied the standard injunction test, and ultimately granted an interim injunction.[61] First, a serious issue to be tried was found as the demonstrators were "trespassing on CN's Spur Line and . . . blocking rail traffic."[62] The Court then found that the "widespread economic harm to industries in an area constitutes

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56 *CNR v Chief Chris Plain*, 2012 ONSC 7348 at paras 1–2, [2012] OJ No 6272 (QL) [*Plain 1*]. "*Ex parte*" means that the injunction was sought without notice to the opposing side.

57 *Plain 1*, *supra* note 56 at para 7(c).

58 *Jobs and Growth Act, 2012*, SC 2012, c 31. See also "9 Questions About Idle No More", *CBC News* (5 January 2013), online: <www.cbc.ca>; Scott, *supra* note 54 at 425.

59 *Plain 1*, *supra* note 56 at paras 8, 18.

60 *Ibid* at paras 10–14.

61 *Ibid* at paras 16ff and 25–26. For interlocutory injunctions brought without notice, the injunction may only be granted initially for a maximum of 10 days. See *Rules of Civil Procedure*, RRO 1990, Reg 194, r 40.02(1).

62 *Plain 1*, *supra* note 56 at para 21.

harm of an irreparable nature."[63] Finally, with respect to the balance of convenience, the Court noted that CN's "operations will be significantly disrupted and third parties will suffer economic harm", unless an injunction was granted.[64] The Court also noted that the demonstrators were not complaining against CN (i.e., the property owner), but they were instead focused on the federal government (i.e., the state was not part of the case, which was brought by CN, and the dispute was not about CN specifically).[65] The following excerpt provides important insight into the Court's corresponding thinking and perspective (which was without an opportunity to even hear from the other side yet):

> Persons are free to engage in political protest of that public nature, but the law does not permit them to do so by engaging in civil disobedience through trespassing on the private property of others, such as CN. Given the alternative locations for expressive conduct open to the protestors, and the economic disruption their expressive activity most probably will have on other industries, the political nature of the message expressed by the protestors carries little weight in the balance of convenience analysis in the particular circumstances of this case.[66]

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63 *Ibid* at para 22.

64 *Ibid* at para 23.

65 *Ibid*. However, Scott notes the following, *supra* note 54 at 428:

> We would be remiss to forget the centrality of the railway in the history of Canadian colonialism and the fact that those tracks belonged to a Crown corporation in the not-too-distant past, before they became the 'private property' of CN Rail that the court now seeks to protect against trespass. The movement of toxins across the reserve is also enmeshed in debates about the proposed network of pipelines for the transport of tar sands crude across the country, a system in which Sarnia is a key node.
>
> These things are caught up together, but the courts appear to expect activists to distinguish between the role of the federal government and that of the private corporations that benefit from their legislative agenda when determining who to target.

66 *Plain 1*, *supra* note 56 at para 23 [emphasis added]. Such an approach is also consistent with the SCC's general approach to freedom of expression where content is always protected, but the method or location may not be, such as on private property: see *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at paras 57, 60, 62, [2005] 3 SCR 141 [*Montréal*]).

These comments reflect a particular conception of what protests are considered acceptable in Canadian society, which is reflective of and consistent with assumptions that prioritize private property rights over conveying dissent through effective civil disobedience methods that affect private space. For example, a focus on *lawful* expression is present by the judge's reference to trespassing on private property.[67] This view has the effect of categorically devaluing the protester's actions in a way legitimated by the court process and, thus, limits the sort of balancing that can be done through the balance of convenience. In this case, that also happened without even an opportunity to hear from the demonstrators. In addition, the comments result in characterizing the demonstrators' expression at issue as more general, especially since there are other ways it could occur (albeit with less impact and thus likely drawing less attention). On the other hand, the key overriding right in this case was related to CN's property rights, which imposed obligations on others to respect CN's exclusive access to, use of, and control of the property in accordance with general societal expectations. Little weight was also given to the state or society's actual or historic roles in laying the foundations for the demonstration,[68] and the lack legally of state engagement formally limited *Charter* arguments and considerations.[69] In the result, CN's specific Hohfeldian rights trumped and limited the

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[67] However, Roach & Schneiderman note that "[t]he idea that 'expressive conduct by unlawful means' is not protected under section 2(b) is clearly erroneous, given the Supreme Court's broad interpretation of freedom of expression as only excluding violence and threats of violence. The suggestion that unlawful conduct can never be protected as freedom of expression ignores the fundamental distinction in a democracy between peaceful civil disobedience and violent protest": *supra* note 46 at 509. While Roach & Schneiderman are likely correct, it is questionable whether such expression would be saved under the subsequent section 1 or balance of convenience analyses, which would likely depend on the nature and impact of the civil disobedience as well as the guiding societal norm that the court wishes to communicate.

[68] See e.g. Scott comment at *supra* note 65 regarding the railway's historic role.

[69] As noted by the SCC, "[p]rivate property . . . will fall outside the protected sphere of s. 2(b) absent state-imposed limits on expression, since state action is necessary to implicate the *Canadian Charter*": *Montréal*, *supra* note 66 at para 62.

demonstrators' more general goal of expression (in a legal sense), in accordance with underlying presumptions and perceptions.

These perspectives are reinforced by the judge's treatment of the potential consideration of Indigenous issues as part of the demonstrations. In *Henco Industries Ltd v Haudenosaunee Six Nations Confederacy Council*, the Court of Appeal for Ontario noted that:

> *[T]he rule of law has many dimensions* . . . . *includ[ing]* respect for minority rights, *reconciliation of Aboriginal and non-Aboriginal interests through negotiations*, fair procedural safeguards for those subject to criminal proceedings, respect for Crown and police discretion, respect for the separation of executive, legislative and judicial branches of government and respect for Crown property rights.[70]

On first glance, this excerpt would appear to provide guidance and caution for judges when adjudicating injunctions involving Indigenous issues, even in private property situations. However, Justice Brown stated that these considerations did not apply, as the demonstration "does not involve a claim to aboriginal title or aboriginal rights in connection with the property".[71] In other words, the judge was looking for a claim involving a Hohfeldian right for which there may be potential obligations (such as aboriginal title and rights if they applied), and he does not find one in this case. Instead, the judge characterized the demonstration as "more in the nature of an expression of opposition by one group of Canadian citizens to legislation which they oppose",[72] which is more general with very limited obligations on others (if any).

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[70] 82 OR (3d) 721 at paras 141–42, 277 DLR (4th) 274 [*Henco*] [emphasis added]. See also *Greenpeace*, *supra* note 6 at para 28 (some of the general considerations that arise for demonstrations and private property).

[71] *Plain 1*, *supra* note 56 at para 24. Roach & Schneiderman note the following, *supra* note 46 at 507:

> It is questionable whether the Ontario Court of Appeal judgments can be so easily distinguished, especially because the protesters were not represented in the proceedings and the nature of their protest appeared to have been gleaned by Brown J. from the media. The protests were multi-faceted and involved concerns about treaty, land and constitutional rights that also were the focus of the Ontario Court of Appeal's earlier decisions."

[72] *Plain 1*, *supra* note 56 at para 24.

From a tactical point of view, the CNR plaintiff was now in a very strong legal position relative to the demonstrators due to the *ex parte* decision legitimating its status quo rights. Although the Court noted that the "duty of an *ex parte* moving party [is to] make full and frank disclosure of all material facts, including putting before the court the arguments the responding party would likely make, to the extent known by the moving party",[73] such a burden was likely met here given that the Court was mainly interested in specific Hohfeldian rights, which are usually more difficult for demonstrators to have. All the Court needs to know for more general notions of expression and peaceful assembly is whether it is occurring, what is the impact, and are other alternatives available, especially if private rights are involved (rather than those of the state or public spaces).[74] The injunction also significantly reduced any potential legal uncertainty or issues that demonstrators could have used to their advantage during the court process since the injunction was already granted against them with detailed reasons. The defendant demonstrators would thus have an uphill battle to change this reinforcing of the previous status quo, particularly if they do not have specific Hohfeldian rights to potentially counter those of the opposing party.

The follow-up case to continue the injunction further reinforces these tactical advantages, status quo assumptions and perceptions, and the trumping of specific Hohfeldian rights over the Hohfeldian privileges of general expression and peaceful assembly.[75] Justice Brown again noted the broad nature of the demonstrators' concerns (i.e., disapproval of Bill C-45, support for Chief Spence's hunger strike, environmental issues, and other issues involving the federal

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[73] *Plain 1*, *supra* note 56 at para 17. See also *Rules of Civil Procedure*, *supra* note 61, r 39.01(6).

[74] For a more detailed discussion of private versus public spaces for expression, as well as the applicable considerations for determining if state property is public for such purposes, see *Montréal*, *supra* note 66, at paras 62, 72–80.

[75] See *CNR v Chief Chris Plain*, 2012 ONSC 7356, 114 OR (3d) 27 [*Plain 2*].

government),[76] but the judge again focused on the fact that the demonstrators were not seeking to advance any claim with respect to the property.[77] Instead, their actions were characterized as a "simple political protest directed at others—the federal government—and not at CN. . . . [T]he demonstrators simply have chosen a location which they evidently believe will exert political pressure . . . and CN and its customers are caught in the middle."[78] The Court also continued to "not regard the aboriginal identity of the protestors or their message as immunizing them from the standard balance of convenience analysis on a continuation motion."[79]

While such a construction ignores the widespread historic and long-standing Indigenous issues that underlie the protest, this view is again consonant with the judge looking mainly for specific Hohfeldian rights with obligations that are consistent with traditional approaches and assumptions, which the judge did not find. Instead, Brown J continued to believe that only more general Hohfeldian privileges are applicable and that ready expression alternatives exist that would not impact the specific rights. Such a viewpoint also helps to explain the Court's frustration with the police using their discretion regarding how and when to practically enforce the injunction.[80] In other words, from the Court's perspective, any rights conflict has been determined by the Court as it believes best and in accordance with the law, and the prevailing rights are now to be simply enforced, especially since the Court's coercive power through the police should practically support what the Court determines to be acceptable.[81] However, the police are

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76 *Ibid* at paras 17–19.

77 *Ibid* at para 26.

78 *Plain 2, supra* note 75.

79 *Ibid* at para 31.

80 See *ibid* at paras 32–43.

81 In contrast, Roach & Schneiderman note that, *supra* note 46 at 508 [footnotes omitted]:

concerned about broader practical issues on the ground that largely reflect the concerns raised in *Henco* and that will likely be present on an ongoing basis in future Indigenous demonstrations that have historical issues with the status quo.[82]

This situation is only one example of how Indigenous demonstrators are often on the receiving end of injunctions. For example, another Indigenous rail blockade occurred in 2013 with respect to a CN rail line between Toronto and Montréal in support of "Idle No More".[83] Justice Brown again granted an interim injunction on an *ex parte* basis for similar reasoning to the Sarnia decisions, which reinforces the fact that the Court was again looking for specific rights consistent with generally accepted societal expectations. This perspective is reinforced by the judge's comment that "[w]hile expressive conduct by *lawful* means enjoys strong protection . . . expressive conduct by *unlawful* means does not."[84] The result is a continued construction of what is considered acceptable dissent in a way that privileges and reinforces particular methods and perspectives. The judge's continued frustration and lack of understanding regarding the police's tactics regarding injunction enforcement similarly builds upon the frustration mentioned in the Sarnia case.[85] Once more, this frustration likely reflects a focus on specific Hohfeldian rights legitimated by the Court as the prevailing rights, and a

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> Brown J.'s approach runs a serious risk of undermining the legitimate role of police and prosecutorial discretion in enforcing injunctions and attempting to reconcile the competing constitutional values at issue, including those of freedom of expression. Moreover, it avoids clear warnings by the Ontario Court of Appeal about the importance of police and prosecutorial discretion in enforcing injunctions against Aboriginal protests. These warnings should not be limited to cases where claims of Aboriginal title were made, but are relevant to a wider range of contexts including those involving all forms of non-violent protest protected by section 2(b) of the Charter. . . . Justice Brown's approach seems to view injunctions against Aboriginal protest simply as a matter of law enforcement and not one involving competing rights, including freedom of expression.

82 See e.g. Scott, *supra* note 54 at 426.

83 See *Canadian National Railway Company v John Doe*, 2013 ONSC 115 at para 1, 114 OR (3d) 126 [*Doe*].

84 *Ibid* at para 11 [emphasis added].

85 *Ibid* at paras 15–26.

failure to understand why the police are now not helping reinforce what the judge decided (i.e., compliance with and respect for CN's overriding right).

However, these recent manifestations should not be taken as a new development in the field of Indigenous law or general protests. For example, an *ex parte* injunction was sought to end the protest in Ipperwash Provincial Park back in 1995.[86] Although the context literally changed overnight due to the death of "Dudley" George, the injunction was still granted (although it was never enforced).[87] The basis of this injunction was largely the fact that Ontario had title to the park (i.e., with the corresponding specific Hohfeldian right to exclude others from, control access to, and use the park) versus the perception that the demonstrators were just attempting to make a broader point (i.e., a more general Hohfeldian privilege of expression). Although separated by over 17 years and distinguished by the direct involvement of a state party, this tactic and approach bears a striking resemblance to the approach used by CN in its injunction cases. Although the Ipperwash injunction case was slightly different, as the demonstrators could have had a defence of "colour of right" in theory given their bona fide beliefs regarding their rights to the land, this defence was not before the Court at the time of the injunction, and it only came fully to light in the subsequent inquiry.[88] As well, in the case of the environmental protest regarding Kinder Morgan at Burnaby Mountain, the Court granted a with notice injunction, despite the protest, to allow for field tests authorized by tribunal order,[89] but no more than that after the evidence indicated that

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[86] See Ontario, *Report of the Ipperwash Inquiry: Investigation and Findings*, vol 1 (Toronto: Ministry of the Attorney General, 2007) at 308–11, 346–47 [*Ipperwash Inquiry Report: Findings*].

[87] See *Ipperwash Inquiry Report: Findings*, *supra* note 86 at 599–605.

[88] See e.g. *ibid* at 93. See also *Trespass to Property Act*, RSO 1990, c T.21, s 2(2).

[89] *Trans Mountain Pipeline ULC v Gold*, 2014 BCSC 2133 at paras 10–11, 19–21, 25–27, 122–23, 92 CELR (3d) 258 [*Trans Mountain I*].

the tests were effectively complete.[90] In other words, the specific Hohfeldian right again prevailed, although that situation's key difference was the exhaustion of the relevant right at a particular point.

The approach and tactic of using injunctions against Indigenous and other protestors is thus not a recent development, but one that is based in the history of civil litigation and the perceived limited role of the court to maintain the legal status quo in the interim. In particular, specific Hohfeldian rights that are consistent with societal expectations and perspectives tend to prevail over the more general Hohfeldian privileges of expression and peaceful assembly in the context of demonstrations, especially when other alternatives are perceived to be available. Given both the legitimating role of court decisions and the coercive force available once a decision is made, one can see how courts and demonstrators can clash, particularly when the courts' decisions reinforce a status quo that does not necessarily account for the demonstrators' underlying issues with both the status quo and, potentially, with keeping the peace overall.

D. The Successful Use of Court Proceedings Against the Occupy Movement

This tactic of using injunction proceedings against demonstrators is not limited to Indigenous and environmental contexts. It has also been used with success against the Occupy movements in Calgary and Vancouver.[91] As well, although a formal injunction was not used with respect to Occupy Toronto, similar underlying reasoning was used to justify the constitutionality of the relevant trespass notices at issue.[92] In all of these

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[90] *Trans Mountain Pipeline ULC v Gold*, 2014 BCSC 2403 at paras 9–10, [2014] BCJ 3119 (QL) [*Trans Mountain 2*].

[91] See e.g. Calgary (City) v Bullock (Occupy Calgary), 2011 ABQB 764, [2012] 7 WWR 283 [Occupy Calgary]; Vancouver (City) v O'Flynn-Magee, 2011 BCSC 1647, 342 DLR (4th)190 [Occupy Vancouver 1]; In the Matter of Access to the Courts of Justice, 2011 BCSC 1815, [2011] BCJ No 2593 (QL) [Occupy Vancouver 2].

[92] See *Batty v City of Toronto*, 2011 ONSC 6862, 108 OR (3d) 571 [*Occupy Toronto*]. This case was also decided by Justice Brown.

cases, the demonstrators were largely unsuccessful, and the relevant bylaws, statutes, and notices were found to be constitutional.[93] This series of cases reinforces the difficulties that demonstrators face in the court system with respect to overcoming injunctions and trespass notices, especially when they are consistent with societal norms, even when the *Charter* is engaged due to state involvement (i.e., municipalities in these cases). This lack of success also reinforces the courts' apparent focus and priority for specific Hohfeldian rights compared to more general goals, such as the Hohfeldian privileges of expression and peaceful assembly.

These cases all have very similar bases and storylines. As part of the Occupy movement, tent cities were set up in certain parts of city-owned parks in Toronto, Calgary, and Vancouver.[94] Eventually, after some time, the respective city sought to enforce various bylaws that would have the effect of ending the 24-hour nature of the occupation at the specific locations.[95] Such occupations were also not compatible with societal expectations of how parks are to be used.[96] In Toronto, this decision was ultimately enforced by the issuance of a trespass notice under Ontario's *Trespass to Property Act*.[97] In Calgary and Vancouver, enforcement was instead through an application for a statutory injunction under the relevant municipal act.[98] In most of the cases, the constitutionality of the relevant notices, bylaws, or statutes was also examined as part of the litigation. In the Calgary and Toronto cases, the Courts upheld

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93 *Occupy Calgary*, *supra* note 91 at para 52; *Occupy Vancouver 1*, *supra* note 91 at paras 72–73; *Occupy Vancouver 2*, *supra* note 91 at paras 1, 27, 30; *Occupy Toronto*, *supra* note 92 at para 128.

94 *Occupy Calgary*, *supra* note 91 at para 3; *Occupy Toronto*, *supra* note 92 at para 3; *Occupy Vancouver 1*, *supra* note 91 at para 4.

95 *Occupy Calgary*, *supra* note 91 at paras 4–6; *Occupy Toronto*, *supra* note 92 at paras 4–5; *Occupy Vancouver 1*, *supra* note 91 at paras 5–15.

96 See e.g. *Occupy Toronto*, *supra* note 92 at paras 15, 25–26, 40–42, 91.

97 *Ibid* at paras 4–5.

98 *Occupy Calgary*, *supra* note 91 at para 1; *Occupy Vancouver 1*, *supra* note 91 at paras 2, 3, 8.

constitutionality under section 1 of the *Charter*, and, in the Vancouver case, the Court did not seriously question constitutionality.[99]

The unanimity and consistency among these decisions reinforce the importance of having specific Hohfeldian rights with corresponding obligations on others to be successful. In all of the cases, the occupiers again were characterized as just generally expressing themselves in the respective parks. The contrasting specific Hohfeldian rights instead rested with the respective municipalities as the landowners and managers of the parks, and corresponding obligations to comply applied to all third parties who wished to use the park (including the demonstrators). In all of these decisions, these specific rights ended up taking priority over the general Hohfeldian privileges, such as the freedoms for demonstrators to express themselves peacefully, especially when they are shown to not be acting in accordance with their obligations arising from the municipality's Hohfeldian rights (e.g., following bylaw requirements). While one expects that balancing different societal interests will result in certain expression limits being upheld,[100] such balancing becomes easier where only one side has clear Hohfeldian

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[99] *Occupy Calgary*, *supra* note 91 at paras 31–46; *Occupy Toronto*, *supra* note 92 at paras 10–15, 62–124; *Occupy Vancouver 1*, *supra* note 91 at paras 41–42, 54, 63–67, 70–71.

[100] See e.g. *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at paras 5 & 117, [2002] 1 SCR 156 [*RWDSU*] (under common law: secondary picketing involving tortious or criminal conduct, such as intimidation or public nuisance at management employees' homes); *Montréal*, *supra* note 66 (under section 1 of the *Charter*: bylaw prohibiting noise produced by sound equipment that could be heard in street); *R v Spratt*, 2008 BCCA 340, 298 DLR (4th) 317 (under section 1 of the *Charter*: "access zones" for abortion clinics); *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19 (under section 1 of *Charter*: rules/directive limiting media filming, photographs, and interviews to predetermined locations in courthouses); *Camp Jardin (Gan) d'Israël c La Minerve (Municipalité de)*, 2013 QCCA 1699, [2013] RJQ 1645, leave to appeal to SCC refused, 2014 CanLII 11026 (under section 1 of *Charter*: bylaw prohibiting use of outside speakers and megaphones); *R v Pawlowski*, 2014 ABCA 135, [2014] 7 WWR 241 (under section 1 of *Charter*: bylaw prohibiting operation of amplification system in a park except with a permit).

rights, especially if the court perceives that the other side has available alternatives that are more compatible with those rights.[101] As well, given the municipalities' governmental nature and the reasons discussed above in Section II.C, the municipalities are also entitled to deference when it comes to public interest considerations in such cases, which means that a lot of the legal construction of what constitutes the public interest for the test is already done without the demonstrators' perspective. The above string of decisions reinforces how difficult it is for occupations to be successful in courts given the nature of the applicable legal analyses and the focus on specific Hohfeldian rights that are compatible with societal expectations and assumptions.

E. THE RARE CIRCUMSTANCE WHEN DEMONSTRATORS CAN SUCCESSFULLY USE INJUNCTIONS—FINDING A SPECIFIC RIGHT

While demonstrators are usually in the position of responding to rather than bringing interlocutory injunctions, there can be rare opportunities where demonstrators can use injunctions to their advantage when they are able to find a specific Hohfeldian right that is compatible with broader societal expectations that a court can reinforce. A notable example was the case that the Canadian Civil Liberties Association (CCLA) and Canadian Labour Congress (CLC) brought against the Toronto Police Service (Toronto Police) and the Ontario Provincial Police (OPP) regarding the police forces' potential use of long-range acoustic devices (LRADs) or "sound cannons" during the Toronto G20

[101] For example, the 24-hour nature and extended duration of the Occupy demonstrations were problematic for balancing by the court given the locations, rights, and lengthy time involved as well as perceived potential alternatives. However, resulting questions regarding the continued practical effectiveness of the demonstration include: How integral is the form of such a demonstration to its message? If highly integral, is there another location where such a demonstration could occur? *Occupy Vancouver 2* indicates that may be difficult, given the submission of counsel for the Attorney General of British Columbia that it was time to end the "roving protest": *supra* note 91 at paras 23–24. And how realistically viable are other perceived alternatives?

Summit.[102] This case illustrates the circumstances that need to be present in order for demonstrators to be successful, as well as the practical complications associated with demonstrators trying to fight for or against injunctions.

1. THE DETAILS OF THE CCLA LRAD CASE

The two police services had obtained LRADs in close proximity to the Toronto G20 Summit.[103] The police's intention was to use them during the Summit "to help ensure public safety and health".[104] LRADs have two key abilities: a "Voice" function, which is used to communicate with crowds, and an "Alert" function, which can be used to get a crowd's attention and disperse crowds.[105] Depending on their volume setting and use, the LRADs also have the potential to permanently damage hearing.[106] The CCLA and CLC thus had serious concerns about the potential use of the LRADs as a "weapon" that had not been approved in accordance with the requirements of Ontario's *Police Services Act*, as well as about the potential chilling effect of the LRADs on the constitutionally protected "expressive and associational freedoms".[107] The applicants accordingly initiated the related application and sought an interlocutory injunction regarding the general use of the LRADs, as well as their specific use during the Toronto G20.[108]

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[102] *Canadian Civil Liberties Association v Toronto Police Service*, 2010 ONSC 3525, 224 CRR (2d) 244 [*CCLA*]. Other personal applicants were formally named, but they were affiliated with the CCLA. See *ibid* at para 7.

[103] *CCLA*, *supra* note 102 at at para 1.

[104] *Ibid* at para 48.

[105] See *ibid* at para 1. For an example of the LRAD's alert function, see glassbeadian, "Long Range Acoustic Device (LRAD) G20 Pittsburgh" (26 September 2009), online: YouTube <www.youtube.com/watch?v=QSMyY3_dmrM>.

[106] See *CCLA*, *supra* note 102 at para 34.

[107] *CCLA*, *supra* note 102 at para 72.

[108] *Ibid* at para 3.

However, this application and motion had to be brought on a highly expedited basis given how the issue developed, which illustrates the procedural and process difficulties often associated with protest-related injunctions in light of the materials and steps that must be completed. Although the Toronto G20 Summit was scheduled for 27–28 June 2010, the CCLA first became aware of the LRAD issue only on 21 May 2010,[109] which left very little time to address it before the Summit started. There was some intervening correspondence, and the application (which included the request for an interlocutory injunction regarding the LRADs) was formally initiated on 9 June 2010.[110] All of the intervening steps for the interlocutory injunction motion were dealt with on a "very compressed" basis,[111] which is highly commendable given the procedural steps normally required.[112] The injunction motion was ultimately heard before Justice Brown on 23 June 2010, and the decision was rendered shortly thereafter on 25 June 2010 (i.e., two days before the start of the Summit).[113]

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[109] *Ibid* at paras 2, 9, 78.

[110] *Ibid* at paras 3, 79–80.

[111] *CCLA*, *supra* note 102 at para 143.

[112] Such steps normally include the exchange of affidavits, cross-examinations on affidavits, and the exchange of facta. For this motion, expert evidence also needed to be provided. See e.g. *ibid* at paras 27, 33–34, 37. See also Watson & McGowan, *supra* note 7 at PC-14 to PC-17.

[113] *CCLA*, *supra* note 102. The short and urgent timeframe associated with this motion is atypical compared to analogous civil litigation motions, although urgency and short timelines can arise more often in interlocutory injunction motions given their nature. As well, given the number of demonstration cases that Justice Brown decided, it is unclear how these judicial assignments occurred, especially given the large number of judges in Toronto. For example, was he considered the internal expert on such matters? Was he the one available, able, interested in, or willing to take on such matters given their time-sensitive, public, and other natures? Was he assigned to a list or role (e.g., Commercial List, assignment court (or equivalent), etc.) where such matters were more likely to come up or that was better able to handle such matters? Given that the initial "Idle No More" *ex parte* injunctions were granted outside normal court hours (see *Plain 1*, *supra* note 56 at para 2; *Doe*, *supra* note 83 at para 1), how did the corresponding process to obtain a judge practically work? Answers to

Although the case was formally analyzed using the standard injunction test,[114] the case ultimately turned on two issues: First, was the potential chilling effect of the LRADs a violation of relevant *Charter* freedoms that could not be saved under section 1? Second, were the police forces' LRAD operating procedures sufficient to avoid harm to demonstrators and protestors that would constitute a deprivation of the security of the person under section 7 of the *Charter*? These questions reflect the limited specific inquiries that could be done in an *ex ante* injunction hearing with an expedited time frame and evidence focused on future activities.

With respect to the first issue, the Court found there was no serious question for trial with respect to whether the LRADs would have a chilling effect.[115] In other words, the question did not even pass the low threshold associated with the *first* part of the test. A key part of the Court's analysis was the focus regarding the impact on organizing *lawful* demonstrations and marches during the Summit.[116] Justice Brown cited SCC jurisprudence noting that "[v]iolent expression is not protected by the *Charter*" for various reasons.[117] The Court found that there was "*no evidentiary basis* to support a causal link between the use of LRADs and any demonstrable 'chilling effect' on the potential number of demonstrators at the applicants' activities this weekend."[118] This finding illustrates the problems courts can have with evidence for dealing with *ex ante* issues. For example, the Court found the evidence to be "highly speculative, anecdotal hearsay, and lacking in substance", which did "not enable any reasonable prognostication about how many people may or

these and related questions would provide insight into the realities of internal court processes and what impact that might have on such cases.

[114] *CCLA*, *supra* note 102 at paras 81ff.

[115] *Ibid* at para 113.

[116] *Ibid.*

[117] *Ibid* at para 107, citing *Montréal*, *supra* note 69, at paras 60, 72.

[118] *Ibid* at para 113 [emphasis added].

may not attend the applicants' planned demonstration and march."[119] Further, "other causes might exist for any perceived difficulty in organizing the hoped-for turnout".[120] These comments and findings reinforce an approach where the only substantive information that the decision maker gives weight to is directly causal information that the parties put before the decision maker, which can be difficult for *ex ante* concerns. The problem though is that, instead of inquiring for or obtaining more information, the court may still make key inferences and draw conclusions in the absence of or by giving little weight to such evidence, which may not reflect reality given the limitations of the process.

Roach & Schneiderman make various criticisms of this part of Justice Brown's judgment,[121] which illustrate some of the Court's inherent perceptions at the time of the decision. They note that some of his comments "suggest a confidence verging on complacency about the respect for the freedom to protest in Canada", and that "confidence can hardly be sustained after what happened at the G20 protests."[122] According to Roach & Schneiderman, Justice Brown's findings regarding the evidence also "[suggest] an acceptance of the massive show of state force planned and executed at the protest and a willingness to curtail the expression of the vast majority of peaceful protestors because of the unlawful actions of a small minority of protestors."[123]

However, out of fairness to Justice Brown, the nature of our court system limited him to consider only the information before him prior to the start of the Summit. It is unclear whether such systemic issues would have been fully brought up or discussed given that the focus of the motion was ultimately on the LRADs rather than the overall deployment of state force during the G20 (although in retrospect that

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[119] *CCLA*, *supra* note 102 at para 113.

[120] *Ibid.*

[121] Roach & Schneiderman, *supra* note 46 at 504–05.

[122] *Ibid.*

[123] *Ibid* at 504.

could have been arguably important context where normative *ex ante* guidance would have been helpful). Such a focus is the parties' prerogative, since they exercise considerable control in framing the factual and legal issues in our adversarial and "conflict-solving" system.[124] As well, such a detailed inquiry would be an *ex ante* instead of *ex post* examination of the police's proposed tactics, which is something that Canadian civil litigation typically does not do in depth and is usually reluctant to do for future situations. It is also questionable how much a Canadian court would be willing to examine and comment on the police's preparation and potential actions before a well-known upcoming public event. In particular, given the current nature of our system, it would be unclear what broader dispute or role the court would have at that point (i.e., nothing would have happened yet). Even if such a proceeding occurred, the police would have an obvious incentive to participate as minimally as possible to maximize the amount of discretion they would retain regarding how their policing duties would be carried out.

However, with respect to the second issue in the *CCLA* case, the Court found there was a serious issue to be tried as to whether the LRADs were "weapons" within the meaning of the *Police Services Act* and the associated regulation.[125] Further, there was irreparable harm due to the probability of personal injury to demonstrators as well as "irreparable harm to the public interest in the sense of avoiding or undermining an established statutory regime".[126] Finally, the balance of convenience ultimately turned on whether the sound levels associated with the Voice and Alert functions of the LRAD could cause harm (in the form of permanent hearing loss) given each police force's protocols regarding LRAD use.[127] No injunction was granted regarding the Voice

[124] See e.g. Mirjan R Damaška, *The Facets of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven, Conn: Yale University Press, 1986) at 111–16.

[125] *CCLA*, *supra* note 102 at paras 103–04.

[126] *Ibid* at paras 117–18.

[127] *Ibid* at paras 93, 135–38.

functions, given that non-harmful sound levels would occur given the protocols and the Court's view that "[t]he need for clear and effective communications by the police to demonstrators is very important".[128] On the other hand, the Alert function of the Toronto Police's LRAD was enjoined, as there was "a very real likelihood that demonstrators may suffer damage to their hearing" given the Toronto Police's LRAD operating procedures.[129] In contrast, the OPP was not similarly restrained since the same likelihood was not present because the OPP adopted "more conservative crowd separation distances, as well as lower maximum volume limits at shorter distances".[130]

The decision also had a relevant epilogue as result of the Court including two conditions as part of its decision. First, the injunction against the Toronto Police was to be lifted if the Toronto Police adopted the OPP's limitations from the OPP's LRAD operating procedures.[131] The Toronto Police subsequently made those changes the same day, and the injunction was accordingly ended.[132] The LRAD was thus fully available for use by the Toronto Police during the Toronto G20 Summit, albeit with stricter limitations, which illustrates the potential benefit of an *ex ante* hearing, when possible. Second, the applicants were expected to take the application "quickly to a final hearing" no later than 30 October 2010.[133] In the end, the application was settled instead,[134] and the Ontario government reviewed the use of LRADs by the

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128 *CCLA*, *supra* note 102 at para 135.

129 *Ibid* at paras 97, 136–38.

130 *Ibid.*

131 *Ibid* at para 142.

132 See *Canadian Civil Liberties Association v Toronto Police Service*, 2010 ONSC 3698 at paras 2, 5–6, 2010 CarswellOnt 4585.

133 *CCLA*, *supra* note 102 at para 141.

134 Abby Deshman, Director, Public Safety Program, CCLA (Lecture/Discussion in Law and Social Change: A Practical Perspective/Approach, delivered at Osgoode Hall Law School, York University, 27 February 2014) [unpublished].

police.[135] The relevant regulation under the *Police Services Act* was also amended to make clear that LRADs may only be used for communicating, and that LRADs are not "weapons" when used only for communication purposes.[136]

2. FURTHER ANALYSIS OF THE CCLA LRAD CASE

Although not well known, this Toronto G20 injunction motion was thus largely successful from a demonstrator perspective given the final outcome. Although the LRADs were not restrained generally, limitations were ultimately put in place both temporarily and permanently to protect demonstrators. However, even this rare case illustrates several of the difficulties associated with demonstrators successfully using injunctions to protect themselves.

Procedural and timing issues are immediately apparent. The CCLA only found out about the LRADs' potential use about five weeks before the Summit. This short period left an extremely limited amount of time for an application to be initiated, for the required steps for a complicated motion to be strategized and completed (including detailed affidavits and cross-examinations), and for the court to hear the contested motion as well as render a decision. The CCLA, CLC, and their counsel are to be commended for what they were able to accomplish in such a short period, particularly since such motions typically require much more time. The outcome could have been very different if the initial information had come to light later or if the CCLA and CLC did not have access to counsel who were able to assist in the compressed timeline.

There were also additional doctrinal issues that make the obtaining of such injunctions difficult, which reflect the conservative nature and cautiousness of a court given the interim nature of any order. For example, the judge quoted from Justice Sharpe's "leading text on

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[135] Ontario, Ministry of Community Safety and Correctional Services: Public Safety Division, *Review of Police Use of Long-Range Acoustic Devices* (Toronto: MCSCS, 2011).

[136] *Equipment and Use of Force*, RRO 1990, Reg 926, s 16, as amended by O Reg 36/13.

injunctions",[137] which reinforced that "interlocutory injunctions will be difficult to obtain in constitutional litigation".[138] The Court's decision also included an illustrative discussion regarding the additional legal hurdles that must be overcome in order for prospective relief to be granted prior to actual harm being suffered (e.g., in the case of potential *Charter* violations, "a very real likelihood that an individual's *Charter* rights will be prejudiced").[139] In addition to the technical requirements of the injunction test, these realistic difficulties need to be considered whenever demonstrators are thinking about using an injunction to protect themselves before harm occurs.

In addition, questions arise regarding what kind of legal arguments are likely to be persuasive in court to obtain a beneficial injunction. In the *CCLA* case, arguments about the "chilling effect" on relevant freedoms were largely dismissed as being speculative, anecdotal, and without substance.[140] On the other hand, arguments about preventing actual harm were largely accepted with great practical results.[141] Since both arguments are based off of different parts of the *Charter*, one could be forgiven for assuming that both arguments would have been equally effective. Setting aside Roach & Schneiderman's criticism of Justice Brown's general approach to freedom of expression in a protest context,[142] these different results reinforce the need to base claims on

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137 *CCLA*, *supra* note 102 at para 84.

138 Robert J Sharpe, *Injunctions and Specific Performance* (Aurora: Canada Law Book, 2009) at para 3.1330, cited in *CCLA*, *supra* note 102 at para 84. Justice Sharpe also noted that there are "three situations where interlocutory relief may receive favourable consideration" (i.e., pure questions of law; urgent and transient circumstances so that there will never be an adjudication on the merits; and exemption cases that apply to a limited number of individuals without any significant public harm suffered) (*ibid*), but these are rather limited circumstances that will probably be rarely applicable in the context of demonstrations. See Section II.C above for a more detailed discussion.

139 *CCLA*, *supra* note 102 at paras 86–89.

140 *Ibid* at para 113.

141 *Ibid* at paras 117–19.

142 Roach & Schneiderman, *supra* note 46 at 504–05.

specific Hohfeldian rights that are consistent with societal obligations, instead of general Hohfeldian privileges that are more aspirational.

In particular, the argument regarding *Charter* freedoms (i.e., the Hohfeldian privileges relevant here) was ultimately very general given its nature, especially since it would be difficult to provide direct causal evidence that the LRADs would have a corresponding "chilling effect". Such a result is understandable given that the potential effect was in the future, the limited time to prepare related evidence, the court's adversarial nature, and the fact that the LRAD was presumably not going to be used on lawful demonstrations. To the extent that freedom of expression and freedom of peaceful assembly was invoked, it would also need to be balanced with other competing interests in a section 1 analysis, and there are competing visions about how that assessment should turn out.[143] Such an outcome is consistent as well with the fact that, in Canada, the police or the state generally do not have positive obligations with the freedoms in question (e.g., to *facilitate* expression, peaceful assembly, or association),[144] which is not surprising given the apparently limited evidence on this issue, as well as the liberal ideas that underlie such freedoms. The argument was thus based more on the general propositions and aspirations underlying the freedoms, rather than any detailed requirements on the state, and, as Justice Oliver Wendell Holmes noted, "[g]eneral propositions do not decide concrete cases."[145]

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[143] For example, in the context of large-scale demonstrations, there will be competing viewpoints of what is an appropriate balance between security, public order, and legal status quo considerations versus the demonstrators' interests of expressing dissent as well as such dissent's form and duration.

[144] See e.g. Roach & Schneiderman, *supra* note 46 at 475; *Haig*, *supra* note 8 at 1034–42; *Native Women's Assn of Canada v Canada*, [1994] 3 SCR 627 at 651–57, 119 DLR (4th) 224; *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 at paras 26–33, 176 DLR (4th) 513; *Baier v Alberta*, 2007 SCC 31 at paras 20–30, 35, [2007] 2 SCR 673 [*Baier*]. But see *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at paras 42–66, [2015] 1 SCR 3 [*Mounted Police*] (uses a "purposive approach" to freedom of association).

[145] *Lochner v New York*, 198 US 45 at 76, 25 S Ct 539 (1906).

On the other hand, the argument regarding harm to demonstrators involved a specific and clear expectation or right, especially in a Hohfeldian sense. The right in that case was that the state does not deprive an individual's security of the person (except in accordance with the principles of fundamental justice),[146] including causing harm, and the state has a corresponding obligation to avoid that. From a doctrinal perspective, section 1 and related balancing has also been largely read out in a practical sense for section 7 jurisprudence,[147] which gives this right a preferred status in *Charter* litigation when it comes to potentially limiting the right. The issue was thus more specific and involving direct obligations on the state (i.e., the impact on demonstrators' hearing as well as the availability of data regarding acceptable limits), and it accordingly fitted better with the nature of relief that a Canadian civil court would be willing to grant in light of its inherent preferences, its view of its role in society, and societal preferences expressed through the constitution, statutes, and regulations. The Court accordingly acted to

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[146] *Charter*, *supra* note 11, s 7.

[147] See e.g. *R v DB*, 2008 SCC 25, [2008] 2 SCR 3 ("violations of s. 7 are seldom salvageable by s. 1" at para 89), citing *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 518, 531, 24 DLR (4th) 536; *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283 ("rare for a violation of the fundamental principles of justice to be justifiable under s. 1" at para 133 [citation omitted]); *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 ("[t]he rights protected by s. 7 . . . are basic to our conception of a free and democratic society, and hence are not easily overridden by competing societal interests. It follows that violations of the principles of fundamental justice . . . are difficult to justify under s. 1" at para 66 [citation omitted]); *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 124–129 & 161, [2013] 3 SCR 1101 ("s. 7 analysis . . . is concerned with the narrower question [relative to s. 1] of whether the impugned law infringes individual rights" at para 125)("appellant Attorneys General have not seriously argued that the laws, if found to infringe s. 7, can be justified under s. 1" at para 161). See also Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf revision 2013 supplement) vol 2 at 38-46, 47-4. Hogg notes that "for the most part, the [Supreme Court of Canada] has routinely moved on to the issue of s. 1 justification before finding a breach of s. 7, and some judges (although never a majority) have held that a particular breach of s. 7 was justified under s. 1": *ibid* at 47-4. See also *ibid* at 38-46.

protect a specific Hohfeldian right that was consistent with societal expectations, even though the Court was unwilling or unable to protect the more general Hohfeldian privileges and their aspirational goals, despite their explicit constitutional protection.

F. CONCLUSION—INJUNCTIONS

This section examined a series of nine cases in the Toronto G20, Indigenous, and Occupy contexts to show how demonstrators have generally been unsuccessful with respect to injunction motions. Most times, injunctions are brought successfully against demonstrators, and the *CCLA* case is an example of the rare situation where an injunction motion's result was even partially in favour of demonstrator interests in a concrete sense. In addition to the issues, roles, and perceptions that demonstrators must overcome given the law and the nature of Canadian courts, this section also offers an additional explanation of why demonstrators have had limited success with respect to injunctions: put simply, courts prioritize specific Hohfeldian rights over more general privileges (i.e., relevant freedoms) in the context of demonstrations, which is what the highlighted unsuccessful demonstrator arguments were based on. Such a prioritization is also consistent with and reinforces societal expectations and assumptions. It is an open question as to how analogous prioritization occurs in other contexts, and further detailed analyses would be required to explore that issue.[148] This explanation also provides a potential basis by which demonstrators could be more successful in injunction hearings, as illustrated by the *CCLA* case: if the issues can instead be framed as involving more specific Hohfeldian rights consistent with societal expectations, demonstrators may be more successful in such litigation. It may also be time to more clearly specify what specific Hohfeldian rights are included as part of freedom of expression and freedom of peaceful assembly with respect to

[148] For example, different areas or jurisdictions will likely have different priorities depending on their context, but such analyses are outside the scope of this article given its limited focus on demonstrations in Canada.

demonstrations,[149] which may make it more difficult to prioritize these ideas over others during future injunction hearings. However, one must be careful that any such specification is not treated as an exhaustive and inflexible list, particularly given the incremental and continuously changing nature of both law and society.

Such an explanation is not intended to be exhaustive of the issues that demonstrators will need to overcome in order to be successful in such motions or related litigation. For example, such motions are often brought in condensed timelines, so demonstrators will need access to counsel and resources to be able to respond appropriately within those timelines. As well, demonstrators will face an even greater uphill battle if an injunction has been already granted *ex parte* against them. Demonstrators will also need to overcome the difficulties inherent in the current focuses, perceptions, and roles of Canadian civil courts. For example, Justice Brown's "Idle No More" decisions largely conceived of the particular disputes as single incidents of trespass, and he did not devote much attention to the long-standing grievances that the protesters might have. Finally, one of the underlying lenses for all of these demonstrations is ultimately whether the demonstration is considered peaceful and lawful; by their nature, courts are focused on upholding the law, which means that a court will more easily recognize certain kinds of demonstrations that more easily fit within societal conceptions and expectations regarding the Canadian legal system and society. As a result, despite the *Charter*, the traditional recognition of "the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law"[150] likely continues today as an underlying and implicit feature of the Canadian legal system and society, at least in the context of demonstrations. It may

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[149] See e.g. *Mounted Police, supra* note 144 at paras 66–67 (freedom of association protects certain specific activities or "rights"). For situations that engage the *Charter*, any resulting positive rights would likely need to meet the requirements of *Baier*, as well as survive a section 1 analysis: *supra* note 144 at paras 30, 35; see generally *R v Oakes*, [1986] 1 SCR 103 at 135ff, 26 DLR (4th) 200.

[150] *Harrison v Carswell*, [1976] 2 SCR 200 at 219, 62 DLR (3d) 68.

thus be time for injunctions involving demonstrations to better consider the underlying causes of the demonstrations and keeping the peace as part of public interest considerations,[151] especially if the demonstrations involve issues with the status quo that the legal system may be perpetuating

III. CRIMINAL PROCESSES AND THEIR NEGATIVE EFFECTS ON DEMONSTRATIONS

A. INTRODUCTION

While the previous section examined law's general negative effects on demonstrations-in-progress in the context of injunctions, law's negative effects also manifest in how the police's criminal powers are applied to demonstrations. In particular, police forces have significant powers that can be used to immediately affect demonstrations, particularly through their arrest powers and the related criminal processes. However, accountability for improper actions only comes much later through *ex post* reviews, after the demonstration has already felt the practical effects. As a result, these issues further illustrate how law on the ground cannot usually be relied upon to protect demonstrations as they are occurring. This section accordingly provides a high-level illustrative overview of how some of these criminal powers interacted with protestors during Ipperwash and the Toronto G20, with a particular emphasis on the potential and actual immediate effect of these powers compared to the *ex post* accountability that is available through the criminal process or elsewhere. These issues are particularly concerning given the increasing use of a militarized approach as part of a dual model for protest policing.[152]

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[151] This issue is discussed in more detail below on a preliminary basis as part of the article's conclusion in Section IV.

[152] See e.g. Lesley Wood, "Reorganizing Repressing: Policing Protest, 1995–2012" in Beare, Des Rosiers, & Deshman, *supra* note 1, 44 at 44, 46. The other part of the dual model is to continue negotiating with protest organizers and to "facilitate their events by minimizing resources and confrontation": *ibid* at 46. As there is less relative

B. CRIMINAL PROCESSES—THE LEGAL CONTEXT AND POWERS

When dealing with demonstrations, police forces have various criminal powers that are available to them. The most important one is the police's power to arrest a demonstrator, which is also arguably the power that can have the greatest impact on a demonstration. An understanding of the key ways an arrest can manifest is important to understanding what tools are available for police to potentially use against demonstrators, especially since pre-emptive individual and mass arrests are part of a militarized approach to protest policing.[153]

In theory, "reasonable and probable grounds" are needed for a warrantless arrest to occur,[154] and the test is a combined subjective–objective test (i.e., "a reasonable person placed in the position of the officer").[155] This standard does not mean, however, that arresting officers are "required to establish a *prima facie* case for conviction before making the arrest."[156] It is also lower than a pure objective standard (i.e., any reasonable person anywhere), but it is higher than purely subjective discretion since reasonableness is required in the particular circumstances. The result is a standard that is somewhat deferential to an officer's perceptions of a demonstration and the context, which can be difficult to overcome in the heat of the moment or after-the-fact (e.g., it will often depend on what contrasting evidence is available). Regardless, reasonable and probable grounds must be considered in the context of the particular powers to which they are applicable.

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concern with this aspect of the dual model given its nature, the focus here is on the implications of the militarized approach and its corresponding use of relevant criminal processes.

153 See *ibid* at 44, 46, 50.

154 While the criminal law jurisprudence often shortens "reasonable and probable grounds" to "reasonable grounds", the full "reasonable and probable" requirements need to be met, regardless of the term used. See e.g. *R v Storrey*, [1990] 1 SCR 241 at 250–51, 53 CCC (3d) 316 [*Storrey*]; *R v Latimer*, [1997] 1 SCR 217 at para 26, 142 DLR (4th) 577; *R v Grotheim*, 2001 SKCA 116 at para 30, [2002] 2 WWR 49.

155 *Storrey*, *supra* note 154 at 250–51.

156 *Ibid* at 251.

In the context of demonstrations, warrantless arrests requiring reasonable and probable grounds are usually done pursuant to three main statutory violations or justifications. First, in disputes involving property rights, a *Trespass to Property Act* or equivalent is often available to protect the exclusive possession of private property.[157] However, the legislation's enforcement power is not limited to purely private property, as it was used by the City of Toronto to regain control of a city park in *Occupy Toronto*.[158] Regardless, such legislation reinforces and protects traditional perspectives regarding property, which may not necessarily be consistent with the demonstrators' dissenting views.[159]

Second, warrantless arrests can occur for alleged offences under the *Criminal Code*, which will result in the laying of corresponding charges as part of the process.[160] The incident at Ipperwash provides practical insight into how the police can use such charges and offences against demonstrators to provide a basis for arrest, as well as to set or inflate perceptions of an incident. In addition, if arrests are carried out, they have the collateral effect of ending or undermining the demonstration by removing demonstrators. For example, a relatively minor incident occurred near Ipperwash Provincial Park where one person out of a group of four protesters was involved in an argument and threw a rock at

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[157] See e.g. *supra* note 88 (see particularly ss 2, 9, 10). Other jurisdictions have similar acts that have similar intents and effects; see e.g. *Trespass Act*, RSBC 1996, c 462; *Trespass to Premises Act*, RSA 2000, c T-7. Brown J also noted in *Doe* that similar provisions in the *Railway Safety Act* could have been potentially used to arrest Indigenous protestors who were blockading the railway lines: *Supra* note 83 at para 22; see also *Railway Safety Act*, RSC 1985, c 42 (4th Supp), ss 26.1, 41(1)).

[158] *Supra* note 92 at para 4.

[159] For example, one of the issues that the Occupy movement draws attention to is the disproportionate distribution of wealth under the current system (e.g., the 1% vs. the 99%), which can be reflected in disproportionate property ownership or control with the corresponding exclusion rights. Indigenous peoples also often have different conceptions and values for land and land use that are not compatible with how lands are typically used and managed in Canadian society.

[160] See e.g. *Criminal Code*, RSC 1985, c C-46, ss 494–95 [*Criminal Code*].

a car from an adjacent sandy parking lot and road.[161] Shortly thereafter, the Assistant Incident Commander, Acting Detective Staff Sergeant Mark Wright, listed the possible resulting offences for this minor incident during a recorded telephone conversation with the Incident Commander, Inspector John Carson:

> You got them for *weapon dangerous*, you got them for fucking *mischief* to the road, you got them for *unlawful assembly*.[162]

This example illustrates the significance of police discretion in these situations since the police decide whether and when arrests should be made, which will then result in the removal of demonstrators from the protest if it occurs. The police likewise also provide the key information for charges, and depending on their jurisdiction, can decide which charges are laid, which in turn defines the issues that must be dealt with through the criminal process.[163] While the *Criminal Code* includes

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[161] *Ipperwash Inquiry Report: Findings*, *supra* note 86 (Written Submissions of the Estate of Dudley George and Members of Dudley George's Family at 102–03).

[162] *Ipperwash Inquiry Report: Findings*, *supra* note 86 at 180, 413–14 [emphasis added]. Although subsequent reports of this incident had inflated details, Sergeant Wright was in the nearby area, and he was informed almost immediately by radio of the incident. For more information regarding the context of this particular incident, how it was inflated, and its resulting potential role in the later culminating incident, see e.g. *Ipperwash Inquiry Report: Findings*, *supra* note 86 (Written Submissions of the Estate of Dudley George and Members of Dudley George's Family at 101–04, 111–12, 118–19, 123).

[163] While prosecution pre-charge screening occurs in British Columbia, Québec, and New Brunswick, this is not required elsewhere, unless an offence specifically requires it under a statute. Even if police do not make the actual charge decisions, they still play an influential role by providing the underlying basis for charge decisions, and police can choose to consult with prosecutors if they wish. See e.g. "2.7 Relationship Between Crown Counsel and Investigative Agencies" in Public Prosecution Service of Canada, *Public Prosecution Service of Canada: Deskbook* (Ottawa: PPSC, 2014), online: <www.ppsc-sppc.gc.ca>; British Columbia, Criminal Justice Branch, "Charge Assessment Guidelines" & "Legal Advice to the Police" in *Crown Counsel Policy Manual* (Victoria, BC: CJB, 2009 & 2005), online: <www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service>; Ontario, Ministry of the Attorney General, "Police: Relationship with Crown Counsel" in *Crown*

provisions and considerations for interim release by the police or a court as part of the process,[164] restrictive conditions are often imposed if interim release is granted. For example, related conditions can be used in such a way to prevent demonstrators from attending protests or participating in other key activities (e.g., meetings).[165] This outcome illustrates Jackie Esmonde's point that "the criminal law is a powerful tool" if "the state wishes to curb the power of a particularly effective social movement".[166] As a result, the process's effects and lack of protections for protests are important, since the police have considerable powers that can end a protest immediately in a practical sense, as well as provide a "chilling effect" on demonstration activities depending on how release and other powers are exercised.[167]

Policy Manual: Access & Structure (Toronto: MAG, 2005) at 1, online: <www.attorneygeneral.jus.gov.on.ca>; Office of the Director of Public Prosecutions, "Relationship between Crown Attorneys and the Police" in *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador* (St John's, NL: ODPP, 2010), online: <www.justice.gov.nl.ca>; Alberta, Ministry of Justice and Solicitor General, "Decision to Prosecute" in *Crown Prosecutors' Manual* (Edmonton, AB: MJSG, 2008), online: <justice.alberta.ca>.

164 See e.g. *Criminal Code*, *supra* note 160, ss 497–99, 503, 515.

165 See e.g. Jackie Esmonde, "Bail, Global Justice, and the Limits of Dissent" (2003) 41:2/3 Osgoode Hall LJ 323 (QL) at paras 6–7, 48ff. While the article was focused on bail conditions by a court, the points apply by analogy to interim release conditions set by police.

166 *Ibid* at para 28. See also Jackie Esmonde, "The Policing of Dissent: The Use of Breach of Peace Arrests at Political Demonstrations" (2002) 1:2 JL & Equality 246 (QL) at para 67 [Esmonde, "Policing of Dissent"]

167 Esmonde also notes the following, "Policing of Dissent", *ibid* at para 66 [footnotes omitted]:

> Virtually all political demonstrations or strikes involve some element of illegality, even if all this means is that demonstrators have taken over part of a street or are obstructing a sidewalk. A large range of offences could be applied to almost any protest, including trespass laws, unlawful assembly, causing a disturbance, and mischief. In practice, this means that the police have a broad discretion to decide when a demonstration has crossed the boundary between lawful and unlawful protest. When this discretion is applied arbitrarily and inconsistently, . . . it is impossible for protesters to know when their actions will attract legal consequences. It also grants the police the flexibility to decide whether a particular demonstration, or even

These offences and the resulting characterization also make the incident seem far worse than it actually was. For example, "weapon dangerous" refers to possession of a weapon for a dangerous purpose,[168] and a "weapon" is defined broadly under the *Criminal Code* to cover anything that could be used to threaten, intimidate, or cause death or injury (i.e., a rock could be included in the right circumstances), even though here only one rock was thrown at a car as it was leaving.[169] In addition, "mischief" in this context deals with damage or interference to property rights, even though the damage in this instance was only about $400.[170] Finally, "unlawful assembly" involves three or more people with common purpose who will disturb the peace "tumultuously",[171] even though the group size here was only four and only one person was involved in throwing the rock (i.e., it was unlikely the group was "tumultuous"). Regardless, these characterizations structure and impact immediate public and other impressions if used as the basis for a warrantless arrest to make the incident sound far worse than it actually was, which can then undermine public support and affect perceptions of the protests. The police then use this basis as an authority to arrest, and any vindication will take a fair amount time before it occurs (if at all) given the time required for criminal processes and other potential accountability processes to play out.[172]

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whether a particular movement, will be characterized as criminal or as peaceful and law-abiding.

168 *Criminal Code*, *supra* note 160, s 88(1).

169 *Ibid*, s 2 (*sub verbo* "weapon") [emphasis added].

170 *Ibid*, s 430(1); *Ipperwash Inquiry Report: Findings*, *supra* note 86 (Written Submissions of the Estate of Dudley George and Members of Dudley George's Family at 103). Inspector Ron Fox also characterized criminal mischief during a recorded phone call with Inspector Carson as "[w]hen it's read in the newspaper it sounds like stuff our kids get involved in", which Inspector Carson agreed with. See *Ipperwash Inquiry Report: Findings*, *supra* note 86 (Transcript of 12 July 2005, Examination-in-Chief of Inspector Ron Fox at 87).

171 *Criminal Code*, *supra* note 160, s 63(1).

172 For example, according to dispute pyramids, relatively few justiciable problems actually reach the stage of litigation and subsequent appeals: see e.g. Herbert Kritzer,

Third, warrantless arrests can occur, but no offences end up being actually charged. Although one possible reason is that the police or prosecutor decides not to lay or approve charges,[173] another distinct possibility for large demonstrations like the Toronto G20 is that demonstrators are arrested for "breach of the peace", which is essentially a temporary arrest power without a prosecutable offence.[174] The potential practical end result is that demonstrators can be detained and removed to undermine or end a protest, and then released later usually with little to no review since judicial processes are typically not engaged unless formal charges occur.

This power is supposed to be used in accordance with the *Criminal Code* and the guidance provided by the common law. For example, the Court of Appeal for Ontario has stated that it involves "an action or actions which result in *actual or threatened harm* to someone".[175] As well, "[t]he mere possibility of some unspecified breach at some unknown point in time will not suffice" and that "[t]he apprehended breach must be imminent and the risk that the breach will occur must be

"Claiming Behavior as Legal Mobilization" in Peter Cane & Herbert Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010) 260 at 263–64. There is no reason why an analogous phenomenon would not apply to other relevant accountability or vindication mechanisms.

[173] If the police are required to do prosecution pre-charge screening, prosecutors can then play a direct role in not laying or approving charges; otherwise, prosecutors will not participate and have no impact on the pre-charge process, unless the police choose to involve them. For more information, see *supra* note 163.

[174] *Criminal Code*, *supra* note 160, ss 30–31. For more information about the CCLA's experience with breach of the peace during the Toronto G20, see Abby Deshman & Nathalie Des Rosiers, "Anatomy of a Breach of the Peace: The CCLA and the G20 Summit" in Beare, Des Rosiers, & Deshman, *supra* note 1, 84; National Union of Public and General Employees & Canadian Civil Liberties Association, *Breach of the Peace: A Citizen's Inquiry Into Policing and Governance at the Toronto G20 Summit* (Ottawa & Toronto: NUPGE & CCLA, 2011); Canadian Civil Liberties Association, *A Breach of the Peace: A Preliminary Report of the Observations During the 2010 G20 Summit* (Toronto: CCLA, 2010).

[175] *Brown v Durham Regional Police Force* (1998), 43 OR (3d) 223 at 248, 167 DLR (4th) 672 [emphasis added, footnote omitted].

substantial."[176] Such arrests are also not "meant as a mechanism whereby the police can control and monitor on an ongoing basis the comings and goings of those they regard as dangerous and prone to criminal activity."[177] In other words, it is not intended to be used to control or stifle a legitimate demonstration or dissent, and this guidance was developed largely before the spread of the militarized approach as part of a dual model to protest policing.[178]

However, experience stands in contrast to this ideal, and such experience illustrates the practical consequences and effects of pre-emptive mass arrests as part of a militarized approach to demonstrations. For example, for the Toronto G20, there were widespread arrests of over 1,100 individuals,[179] largely by using the breach of peace power in a preventative way.[180] This result was the largest number of protest-related arrests in Canadian history,[181] and the bona fides of most of these arrests were highly questionable, given that 779 people were released without charge and a further 204 people had their charges stayed by the Crown, withdrawn, or dismissed.[182] In addition, when convicting Superintendent Mark Fenton in a discipline hearing regarding two of his mass arrest decisions, the adjudicator specifically ruled that "[t]his decision to order mass arrest demonstrated a lack of understanding of the right to public protest"[183] and that "[h]is use of

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176 *Ibid* at 249.

177 *Ibid.*

178 See Wood, *supra* note 152 at 44, 46.

179 See Canadian Civil Liberties Association, "G20 Accountability . . . by the numbers . . . " (December 2012), online: <ccla.org> [CCLA, "G20 Accountability"].

180 See e.g. House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 40th Parl, 3rd Sess, No 38 (3 November 2010) at (1550)ff, (1720)ff, & (1730)ff (testimony of Chief William Blair, Toronto Police Service, that most arrests were to prevent or for apprehended breach of peace).

181 See Beare & Des Rosiers, *supra* note 1 at 6. See generally *ibid* at 6–12.

182 CCLA, "G20 Accountability", *supra* note 179.

183 Ann Hui, "Police Official Guilty of G20 Charges", *The Globe and Mail* (26 August 2015) A5 (QL).

power was not rationally connected to the purported risk to be managed."[184] It is thus not surprising that then Ontario Ombudsman André Marin used strong language to publicly criticize the police's actions during the Toronto G20,[185] or that Justice Nordheimer (on behalf of a unanimous Divisional Court panel) expressed serious concerns if the related class action's central allegations about police conduct were proven.[186] However, as beneficial as such comments may be after-the-fact, they do not and cannot comprehensively deal with the potential issues associated with a militarized approach now being part of a dual model to demonstration policing, and these and other reviews could have no impact while the incidents were occurring on the ground. Conversely, comprehensive analyses with more effective immediate impact is likely difficult given the nature and typically limited focus of such *ex post* reviews.

C. Conclusion—Criminal Processes

For all three forms of warrantless arrest, it becomes apparent that the major practical problem is that courts and other review mechanisms only

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184 Wendy Gillis, "'This is Not a Police State': Senior Cop Who Ordered Mass Arrests at G20 Found Guilty at Police Tribunal", *Toronto Star* (26 August 2015) A1 (QL).

185 Robert Benzie & Rob Ferguson, "G20 law was 'Massive' Breach of Rights, Marin Says" *Toronto Star* (8 December 2010) A1 (QL) ("For the citizens of Toronto, the days up to and including the (June 26–27) weekend of the G20 will live in infamy as a time period where martial law set in in the city of Toronto, leading to the most massive compromise of civil liberties in Canadian history. And we can never let that happen again").

186 *Sherry Good v Toronto Police Services Board*, 2014 ONSC 4583 at para 95, 121 OR (3d) 413 [*Good*] aff'd 2016 ONCA 250, 130 OR (3d) 241 [*Good ONCA*], leave to appeal to SCC requested, 37050 (6 June 2016):

> If the appellant's central allegation is proven, the conduct of the police violated a basic tenet of how police in a free and democratic society are expected to conduct themselves. Their actions, if proven, constitute an egregious breach of the individual liberty interests of ordinary citizens. On this view of the respondent's conduct, it is not hyperbole to see it as being akin to one of the hallmarks of a police state, where the suppression of speech, that is uncomfortable for those in positions of power, is made a prime objective of those whose job it is to police the public.

review the arrests after-the-fact when an applicable criminal or other process is engaged. In other words, there is no outside review before the arrest, and the potential for court and other review mechanisms to protect demonstrations before or while they are happening is practically non-existent given the mechanisms' nature.[187] The result is that no practical remedy may be immediately available for the demonstration as a whole, particularly if the demonstration is undermined or stopped as a result of the arrests. This concern is particularly troubling given the rise of a militarized approach that uses "activities to incapacitate protester activity" as part of a dual model to protest policing.[188]

In theory, one of the roles of an *ex post* review is to remedy the situation. However, the appropriate remedy in a criminal case is excluding evidence or entering a stay of proceedings pursuant to section 24 of the *Charter* as well as the common law,[189] which is focused on the individual accused rather than the affected collective protest or other broader systemic issues (such as the implications of a militarized approach to protest policing and how police decisions are made regarding when to use that approach). Other *ex post* reviews also usually have limited jurisdictions and powers,[190] and there is also a question of

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[187] In theory, injunctions can be made to prohibit arrests or other actions against demonstrators, but such injunctions are practically feasible only in rare circumstances: see e.g. *Occupy Toronto*, *supra* note 92 at para 7 (a temporary order prohibiting enforcement of the trespass notices was in place pending the hearing of the main proceeding).

[188] Wood, *supra* note 152 at 46.

[189] *Supra* note 11, s 24; see also e.g. *R v Grant*, 2009 SCC 32 at paras 59, 67–128, 150, [2009] 2 SCR 353 (re: exclusion of evidence under the *Charter*); *R v Regan*, 2002 SCC 12 at paras 53–57, [2002] 1 SCR 297 (re: stay of proceedings under the *Charter*).

[190] For example, police reviews are usually limited to reviewing just the relevant police force, and the scope and powers for reviews pursuant to a statutory authority (e.g., Ombuds, independent police reviews, etc.) are limited by the relevant statutes: see e.g. *Ombudsman Act*, RSO 1990, c O.6, s 14(1) [*Ombudsman Act*]; *Police Services Act*, RSO 1990, c P.15, ss 57, 58, 97 [*Police Services Act*]. Such reviews can also often result in only non-binding recommendations: see e.g. *Good ONCA*, *supra* note 186 at para 87.

how many people are actually willing to use and follow through with such mechanisms or just "lump it" instead, given the costs, time, and other difficulties involved.[191] In addition, while criminal and other *ex post* reviews may be beneficial by providing a sense of symbolic accountability, the reality is that they come after-the-fact, when the damage is long done to the protest. For example, for the Toronto G20, the Divisional Court certification decision and Superintendent Fenton's disciplinary conviction occurred in 2015 (i.e., about 5 years after the events), the Court of Appeal rendered its certification decision in 2016, and a further leave to appeal to the SCC is pending at the time of finalizing this article.[192] Assuming certification is upheld and barring a settlement, a trial of the common issues will still need to occur, and the trial's result may again involve further appeals. While in theory such decisions are symbolic and helpful for the future, judicial and other review systems did not and could not protect demonstrators while the police's actions were occurring on the ground in June 2010. Furthermore, there is a question about how effective and useful such guidance will be in the future, given the past raising of concerns regarding breach of the peace powers in the context of globalization protests, the spread of a militarized approach as part of a dual model to protest policing, and the concerns that Roach & Forcese have expressed about Bill C-51.[193] In other words, without appropriate support, the guidance may have limited to no effect on the ground when most needed, and the issues and concerns will continue to grow over time rather than be reduced.

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[191] See e.g. Kritzer, *supra* note 172 at 263–64; Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9:1 Law & Soc'y Rev 95 at 124ff; McCann, *supra* note 5 at 306. See also *Good ONCA*, *supra* note 186 ("only 16 members of the class have brought individual claims, and 15 of those have been 'resolved'. It remains apparent that most of the affected individuals are unwilling to devote the time and expense necessary to seek individual relief" at para 86).

[192] *Good*, *supra* note 186.

[193] See e.g. Esmonde, "Policing of Dissent", *supra* note 166 at paras 5 & 40ff; Wood, *supra* note 152 at 44; Roach & Forcese materials cited above at note 2.

One other key point is that an *ex post* review and possible remedies can only occur if a relevant process is actually engaged. For example, in the criminal context, the demonstrator must actually be facing charges. If the individual is instead arrested and released without charge (such as in "breach of peace" situations), there is no formal review by the criminal justice system where potential symbolic or actual remedies may happen, which further limits the potential benefit of criminal reviews (including corresponding updates to the common law) since they occur rarely.[194] To illustrate using the Toronto G20, there are only two reported judicial analyses in criminal courts of the breach of peace arrests (which were found to be inappropriate in both cases) despite the large number of arrests, and these reviews only occurred because other criminal charges were laid against those individuals.[195] While other potential independent review mechanisms may exist,[196] such reviews can similarly only occur if there is appropriate statutory authorization and, if required, a willingness for demonstrators to initiate and follow through with appropriate complaints.

It is thus clear that there are issues about law's negative consequences on demonstrations in the criminal context as well, particularly since any reviews are after-the-fact and may require significant time. By then, it is too late, as the goal of the militarized approach to "incapacitate protester activity" will have long been accomplished.[197] These particular situations

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[194] See e.g. Esmonde, "Policing of Dissent", *supra* note 166 at para 18.

[195] See *R v Puddy*, 2011 ONCJ 399, 241 CRR (2d) 113; *R v Botten* (2012), 271 CRR (2d) 323, 98 CR (6th) 328 (Ont Ct J).

[196] In the case of the Toronto G20, see e.g. the Office of the Independent Police Review Director (*Police Services Act*, *supra* note 190, ss 57–58), the Ombudsman (*Ombudsman Act*, *supra* note 190, s 14), and their respective reports (Office of the Independent Police Review Director, *Policing the Right to Protest: G20 Systemic Review Report* (Toronto: Office of the Independent Police Review Director, 2012) at xi, online: <www.oiprd.on.ca>; Ombudsman Ontario, *Caught in the Act: Investigation Into the Ministry of Community Safety and Correctional Services' Conduct in Relation to Ontario Regulation 233/10 under the Public Works Protection Act* (Toronto: Ombudsman Ontario, 2010), online: <www.ombudsman.on.ca>).

[197] Wood, *supra* note 152 at 46.

are also often viewed through criminal and individual lenses given the review mechanisms' nature. In addition, when a policing incident occurs involving a demonstration, a far greater number of protestors usually need to deal with the criminal process compared to police officers,[198] which illustrates the disproportionate effect of the criminal system on demonstrators. With respect to other potential independent reviews, the scope of the jurisdictions and powers will be dependent on relevant statutory authorizations as well as, if required, demonstrators being willing to initiate appropriate complaints and see them through to completion, which may not occur. Regardless, all such reviews are *ex post* given their nature and can only occur well after the key events, which limits their practical effect, especially at the time and given their often non-binding nature. An open question is thus what potential solutions would be appropriate to put demonstrators back to where they were before the particular protest was undermined or shut down. Alternatively, there may be other *ex ante* solutions that may reduce or prevent problematic incidents from occurring, especially if a militarized approach to policing demonstrations will be continuing.[199]

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[198] For example, with respect to the culminating incident at Ipperwash, only one officer was ultimately criminally charged (i.e., Kenneth Deane, who killed "Dudley" George) compared to five Indigenous protestors: see *Ipperwash Inquiry Report: Findings*, *supra* note 86 at 624–29. With respect to the Toronto G20, only two officers were charged despite the large variety of incidents that occurred: see Special Investigations Unit, News Release, "Toronto Police Service Officer Charged" (21 December 2010) online: Special Investigations Unit <www.siu.on.ca/en/news_template.php?nrid=802>; Special Investigations Unit, News Release, "Toronto Police Service Officer Charged" (10 June 2011), online:<www.siu.on.ca>. These numbers stand in contrast to over 1,100 individuals who were arrested during the Toronto G20. See CCLA, "G20 Accountability", *supra* note 179; see also Rachel Mendleson & Jayme Poisson, " 'About the Police, For the Police and Controlled by the Police'", *Toronto Star* (29 June 2015) A1 (QL) (summarizes Toronto G20 police accountability before Fenton ruling).

[199] As noted by the English proverb, "an Ounce of Prevention is worth a Pound of Cure": Benjamin Franklin, "Protection of Towns from Fires", *Pennsylvania Gazette* 2:12 (4 February 1735).

IV. CONCLUSION—PRACTICAL IMPLICATIONS AND SUGGESTIONS

Law thus tends to not be an instrument that protects demonstrations while they are actually occurring, at least when one looks at the impact of injunctions and criminal processes on Ipperwash, Occupy, "Idle No More", and the Toronto G20 as discussed above. It is instead a tool typically used against demonstrators due to various reasons. For example, as a result of the interim nature of the related relief and evidence that can be put forward, the law has a cautious and conservative approach in this area, and tends not to act in a prospective manner or for current situations. As well, societal perspectives tend to inform and frame how key issues are approached, particularly with respect to determining the current legal status quo and reinforcing that status quo where possible. In addition, after-the-fact reviews cannot protect rights in the heat of the moment due to the nature of and time required for such processes to play out, especially with the spread of a militarized approach to protest policing and its tactics to incapacitate in the short term. The result is that inappropriate uses of legal powers cannot be corrected and victims are not vindicated until much later, if at all. It is thus not surprising that law is often used to end demonstrations or undermine them with great effect.

This reality reinforces the concerns raised by Roach & Forcese regarding Bill C-51 and its potential impact on free speech, demonstrations, and related organizations.[200] Put simply, given that injunctions and criminal processes already do not usually protect demonstrations and are instead used successfully against them in sometimes questionable ways, it is concerning what additional impact the new legal tools, authorizations, and powers will have on potentially undermining demonstrations and dissent. These new tools also unfortunately reinforce the trend of an increasing role for tactics that incapacitate demonstrations as part of a militarized approach to protest policing, rather than engaging in discussions and negotiations. At minimum, vigilance is warranted, and the actual need, benefit, and

[200] See materials referenced above at note 2.

oversight of such tools should be revisited critically. Research about how these new tools are now being actually being employed with respect to demonstrations would also be useful. For example, while comprehensive research will likely be difficult to conduct given the secrecy and lack of reporting associated with many of these new tools, specific case studies regarding their application and resulting impacts that become known through information releases or demonstration observations may be helpful.[201]

Law's limitations, potential uses by varied actors, and realities should thus be thoroughly considered and better understood to inform law so that more pragmatic balancing and changes can occur. In effect, we should be more willing to acknowledge and understand the social constructive role of law, what underpins it, and how that can and should be changed. Michael McCann notes that, "[l]egal norms and rights rarely persist uncontested, but are subject to constant battles over official enforcement, extension to different relational contexts, and substantive reformulations by variously situated citizens."[202] By better understanding the current uses of and tendencies in Canadian law with respect to demonstrations, they can be harnessed when well suited. Where not complementary, work should be done to change and reformulate them in other creative and more compatible ways, whether that is inside or outside the formal legal system. For example, given the court's apparent preference for specific Hohfeldian rights over more general Hohfeldian

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[201] For example, using the Toronto G20 as an example where further information about the extensive intelligence is now known (e.g., covert surveillance, cyber surveillance, overt surveillance, police video cameras, and social media), we now know that it did not perform well "at least in achieving its stated purposes of prevention and securitization": Kate Milberry & Andrew Clement, "Policing as Spectacle and the Politics of Surveillance at the Toronto G20 in Beare, Des Rosiers, & Deshman, *supra* note 1, 127 at 142–43. See generally *ibid* at 131–38.

[202] McCann, *supra* note 6 at 304. Jeanne M Woods also notes that "[a]ll legal rights are social constructs, the product of social struggle—particular demands made on organized society in particular historical times and places": Jeanne M Woods, "Emerging Paradigms of Protection for 'Second-Generation' Human Rights" in Clare Dalton, ed, *Progressive Lawyering, Globalization and Markets: Rethinking Ideology and Strategy* (Buffalo, NY: William S Hein & Co, 2007) 267 at 291.

privileges, it would be useful to better articulate some of the specific rights associated with demonstrations and dissent instead of relying more on general and aspirational ideals,[203] and the SCC's "purposive approach" to freedom of association provides a potentially useful starting point and analogy.[204] Such a development would have implications for cases relying on the *Charter* as well as cases involving the common law, especially given the fundamental nature of peaceful assembly (like expression) as well as the role of the *Charter* with respect to the common law.[205]

The judicial and other governmental branches should also be more willing to acknowledge law's potentially negative impacts on demonstrations and preferably use methods to mitigate such consequences where possible. The judicial branch should also be aware of what the other branches are and are not doing and take that into account when determining what approaches may be best from a more holistic and nuanced perspective, including trying to practically minimize and avoid raising tensions. A few examples follow to illustrate how such an approach can be helpful in different ways.

For example, despite ruling against the demonstrators in the end, Wittmann CJ of the Alberta Court of Queen's Bench provided positive symbolic language in the *Occupy Calgary* case that acknowledged what the demonstrators were trying to accomplish, their role in society, and

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[203] See also Nathalie Des Rosiers, "Conclusion: The Future of Protests in Canada" in Beare, Des Rosiers, & Deshman, *supra* note 1, 319 at 320, 322–23. For example, freedom of peaceful assembly is currently analyzed as part of freedom of expression analyses, rather than on its own with its own implications: see e.g. *Smiley v Ottawa (City)*, 2012 ONCJ 479 at para 41, 100 MPLR (4th) 306; Halsbury's Laws of Canada (online), *Constitutional Law (Charter of Rights)*, "Freedom of Assembly" (VI.3) at HCHR-42 "Freedom of assembly", "Protest activity", "Restrictions on protest activity and s. 2(c) analysis" (2014 Reissue)). Accordingly, it may now be time to revisit that approach.

[204] See generally *Mounted Police*, *supra* note 144 at paras 30ff (e.g., freedom of association "stands as an independent right with independent content" at para 49; freedom of association protects certain specific activities or "rights" at paras 66–67).

[205] See *RWDSU*, *supra* note 100 at paras 18–22 (expression's fundamental character and role of *Charter* for common law).

the positive actions by both the demonstrators and the city.[206] It thus played a positive, reinforcing, and symbolic role that included continued general guidance for how these issues should be carried out, despite the formal legal ruling in favour of the city.[207]

As well, over two decisions regarding the Kinder Morgan protest at Burnaby Mountain, Cullen CJ was able to give both sides practical victories in light of the developing evidence and circumstances. In the first decision, the Court granted an injunction to Trans Mountain Pipeline to conduct the field tests authorized and required by the relevant tribunal,[208] but the Court explicitly acknowledged (and thus softened) the potential impact of its actions on the demonstration.[209] On the other hand, the demonstrators secured practical victories in the second decision on three fronts, due to changes in the context. First, the company's request to extend the injunction was not granted because the work had been effectively completed (as shown by the pipeline company's own evidence).[210] Since delay was no longer a concern, there was no longer a basis for the originally found irreparable harm, and the

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[206] *Occupy Calgary*, *supra* note 91 at para 51:

> Many of the values and rights we cherish today have been the subject of debate and fierce protest in years past. Society does not easily change for the better, and it is often necessary for individuals with strong views to take extraordinary steps to make their voices heard. The Occupy Calgary group has been, if not entirely organized, certainly passionate and peaceful. The City of Calgary has also exercised restraint in the manner in which it has dealt with the group, up to and including the way in which it acted in the conduct of this proceeding and the remedy sought. I hope that in the days that follow the granting of this application, both sides continue to act in a measured, conscientious and peaceful manner.

[207] The SCC arguably played a similar role in *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

[208] *Trans Mountain 1*, *supra* note 89 at paras 10–11, 19–21, 25, 123.

[209] *Ibid* at para 115 ("[t]he courts must be careful not to act in ways that dissuade concerned and engaged citizens from expressing their opposition to activities which they view as destructive of the social or political good": *ibid*). Regardless, the Court was likely swayed to grant the injunction at that time given the aggressive actions of the demonstrators, as well as the irreparable harm due to costs and losses resulting from the delayed access: see e.g. *ibid* at paras 81–103, 113–14, 117.

[210] *Trans Mountain 2*, *supra* note 90 at paras 2, 4, 7–10.

extension was not granted.[211] Second, the Court was unwilling to add a clause to the formal order that explicitly prevented people from crossing a police tape line around the key areas, as that would change the nature of the injunction and the police already had the authority they needed to enforce the injunction.[212] In other words, the Court was not prepared to interfere with the police's discretion regarding enforcement on the ground, and the Court arguably did not want to get drawn into detailed operational issues (e.g., the Court keeps its decision at a high level and leaves to the police how to apply the order in specific circumstances). Finally, in response to the company's request to correct a misdescription of the key locations in the formal order, undertakings and promises to appear for related contempt proceedings due to arrests were vacated (with the consent of the pipeline company) because the descriptions were wrong.[213] The pipeline company thus likely overreached by trying to have the Court continue to bolster its position after the field tests were completed, and the Court was understandably cautious given the well-known nature of this protest in the area. Rather than the Court agreeing to these amendments and potentially aggravating the situation, the Court exercised restraint by relying on contextual changes to practically diffuse the situation instead. These two decisions thus illustrate how a court can be more aware of law's potential negative consequences on the ground with respect to demonstrations and mitigate it in a broader societal sense when possible.

One of the underlying themes in the above-cited situations is the focus on practically keeping the peace. Although the formal legal doctrine of injunctions and criminal processes does not explicitly consider this goal as a factor, the potential inclusion of such an approach as part of the public interest considerations offers a possible way to ensure that such broader issues are considered instead of the current narrow considerations that contribute to law's negative effects on demonstrations. For example, in order to better understand how to keep

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[211] *Ibid* at para 10.

[212] *Ibid* at paras 2–3.

[213] *Trans Mountain 2*, *supra* note 90 at paras 2, 13–23.

the peace, law would need to be more aware of and sensitive to societal changes and issues that may be at the root of dissent. For instance, one of the Occupy movement's fundamental concerns is societal wealth distribution (e.g., the disproportionate amount received by the top 1% compared to the remaining 99%). Indigenous movements are also usually rooted in historic wrongs that have not been corrected. However, relying on such points do not tend to be persuasive, and they are usually given little weight in legal processes given their usual focus and nature. On the other hand, explicitly considering historical and peace issues would at least allow for relevant evidence on such issues to be considered so that more nuanced approaches can be developed by the courts. Relevant considerations could also include what actions are being done or are not done by others to address the substantive basis of the issues so that the court can use a more careful approach to defuse situations and potentially facilitate moving towards resolution.

How would such an approach manifest? Even though its focus was on Indigenous protests, the *Report of the Ipperwash Inquiry* provides a useful initial basis for an approach on how to avoid violence that would be applicable in most demonstration situations. Justice Linden particularly noted that the focus of policing should be to reduce the potential for violence, and analogous considerations could also apply to courts as part of public interest considerations. In particular, he commented that:

> Professor Clairmont and Inspector Potts concluded that *the potential for violence is reduced if police strive* to build a network of mutual support or interdependence between police and protesters in order *to promote trusting relationships that encourage and facilitate peaceful negotiations.* At the same time, police should *strive to effectively "institutionalize" conflict* in order to reduce the risk of violence and also *contribute to a legacy of relationships of trust and mutual support* between police and protesters.

> *I heard overwhelming support of this approach*—in our research papers, consultations, submissions from parties, and from witnesses who commented on this subject in the evidentiary hearings.[214]

Justice Linden also noted that a number of elements should be included in policing best practices to reduce violence, which are again applicable by analogy to protests more generally.[215] Courts may also be able to use such best practices when they need to interact with and potentially affect a demonstration in a significant way, especially since the above approach and the related guiding principles consider many perspectives. This initial framework can thus provide a nuanced balance of how to approach and deal with demonstrations in a wide range of

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[214] *Report of the Ipperwash Inquiry: Policy Analysis*, vol 2 (Toronto: Ministry of the Attorney General, 2007) at 189 [*Ipperwash Inquiry Report: Policy*] [emphasis added]. See generally Ipperwash Inquiry, "Public Order Policing in Canada: An Analysis of Operations in Recent High Stakes Events" by Willem de Lint (Toronto: Ministry of the Attorney General, 2004); Ipperwash Inquiry, "For the Nonce: Policing and Aboriginal Occupations and Protests" by Don Clairmont & Jim Potts (Toronto: Ministry of the Attorney General, 2006).

[215] Such best practices include, *Ipperwash Inquiry Report: Policy*, *supra* note 214 at 189:

- Understanding and respecting the history, traditions, culture, and claims of Aboriginal protestors
- Listening, communicating, and negotiating honestly
- Trying to develop a network of mutual support linking occupiers with the police and anyone else who may be affected by the dispute
- Being patient, and emphasizing communication at every turn
- Remaining neutral as to the substance of the dispute
- Building trusting relationships with protestors, First Nation communities, and others involved in an occupation and protest
- Committing to minimizing the use of force, and to escalating the use of force only to prevent harm to persons or serious property damage
- Involving First Nation police officers/ police service
- Maintaining public order

With respect to the last point regarding "[m]aintaining public order", Justice Linden noted that "[t]he police must also develop tactics designed to keep public order, but not to eliminate blockades [i.e., protests]—except where there has been physical harm to persons or significant property destruction": *ibid.*

contexts and from different perspectives, unlike the narrower public interest considerations that are currently used.

An important distinction to keep in mind for all demonstrations is that *peaceful* is not the same as *lawful*, which sometimes unfortunately get collapsed together in judicial decisions.[216] This collapsing gives the impression that they are the same and that only lawful demonstrations are acceptable in our system. However, demonstrations often involve some form of illegality, so how the police exercise their discretion in such situations is key,[217] particularly if the demonstration is peaceful overall. Justice Linden understood this issue, and he noted that a corresponding key best practice to avoid violence "is the strategic exercise of police discretion", which "may involve whether, when, or how enforcement action is taken to address alleged breaches of the law."[218] Appropriate training, best practices, and other support that uses relevant sociological and criminological research would be helpful for when police have to deal with such situations on the ground.

It is thus not surprising that the police may sometimes wish to delay or get a court order to build perceived legitimacy before enforcement.[219] Such an approach would also use the court as a mechanism to

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[216] See e.g. *Plain 1*, *supra* note 56 at para 23; *Doe*, *supra* note 83 at para 11; Roach & Schneiderman, *supra* note 46 at 505.

[217] See e.g. Esmonde quote at note 167 above.

[218] *Ipperwash Inquiry Report: Policy*, *supra* note 214 at 190. Justice Linden notes that "[p]olice discretion must always be exercised within the law. It must also be exercised in a principled, consistent manner and with a view to larger, long-term police and societal objectives": *ibid* at 191. He makes clear that the "police must be certain to pursue protestors or others alleged to have committed serious offences": *ibid*. However, he also notes the underlying rationale behind police discretion given the practical issues they face: "[p]olice discretion allows police services to balance the often competing demands placed upon them, and to decide, in appropriate circumstances, that it is wiser to delay the enforcement of a particular law or the laying of charges against specific person in the larger interest of public safety or public order": *ibid* at 191.

[219] See e.g. *Plain 2*, *supra* note 75 at paras 20, 22, & 32; *Doe*, *supra* note 83 at paras 15 & 19–20 (examples of police using their discretion to delay enforcement in the context of the "Idle No More" demonstration cases).

"institutionalize" the conflict given some of the systemic or historical issues that may be at play, so this reality provides another reason why courts need to be aware of and willing to consider broader issues in the context of demonstrations than is traditionally done. In such situations, it would also be useful for a court to keep in mind what other actors are doing when devising potential solutions (e.g., if a militarized approach continues to be a part of a dual model to protest policing, the courts may need to take a more active and stronger role in providing key guidance, especially closer to when such tactics are being used).

These proposed options are not meant to be comprehensive nor exhaustive for potential opportunities and methods to reduce law's current practical negative effects on demonstrations. For example, the CCLA's post-litigation success regarding the allowable use of LRADs stands as a useful example of what can be accomplished in the right circumstances.[220] In the *Henco* situation, the Government of Ontario came up with the creative solution of purchasing the private land involved in the Indigenous dispute and then allowing the demonstrators to remain there while the parties worked towards a longer-term solution.[221] As well, the integration of independent legal counsel to advise police during protests could help ensure that the police are being held accountable and acting appropriately on an ongoing and immediate basis instead of relying on after-the-fact reviews when the impact on demonstrations is already done.[222] These and other examples are all ways

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[220] See above at the end of Section II.E.1.

[221] *Supra* note 70 at paras 5, 43–45, 49–50, 138–39. Although the focus of that protest involved a long-standing Indigenous land dispute and claim (see *ibid* at paras 14–19), analogous or other creative solutions should still be possible in appropriate protest settings.

[222] Similar to intelligence, such advice could be integrated into the Incident Command structure of large-scale protests to help avoid problems before they occur. Such an approach may also help build trust and avoid violence, which is one of the fundamental issues that the police need to practically deal with in such situations. See also Wood, *supra* note 152 (overview of how protest policing has generally changed to utilizing a dual strategy of negotiating with some and a militarized response with others).

to achieve a more nuanced approach to law's processes and impact, so that law is more aware of how it contributes to systemic conflict and how that can be mitigated. However, much work and opportunity remains on that front.