An Accountability Reality Check: Evaluating Key Review Mechanisms for Policing and Demonstrations

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws

Faculty of Law
University of Toronto

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Abstract
When a major incident occurs between police and demonstrators where there are questionable police and state actions, there are regularly calls for corresponding accountability. This thesis analyzes the realities of potentially using civil litigation and other non-court mechanisms to achieve such accountability, especially regarding how the mechanisms reinforce “conflict-solving” or “policy-implementing” tendencies. Injunctions are also specifically examined as they commonly occur in the context of demonstrations. It is suggested that property “rights” (as defined by Hohfeld) repeatedly trump the demonstrators’ “privilege” of freedom of expression. As a result of the analysis, three solutions are proposed: 1) an independent body who can initiate comprehensive reviews for a major incident when needed; 2) incorporating an independent legal advisor into the planning and incident command structure for major events to help prevent the concerns from arising; and 3) courts conducting inquiry-like hearings that incorporate the best aspects of both “conflict-solving” and “policy-implementing” approaches.
Acknowledgments

It truly “takes a village” for a sizeable thesis and a Master of Laws to come to fruition in a single year, and there are several people I would like to particularly thank:

- Kent Roach, who was an outstanding supervisor. He always provided thoughtful, frank, and thorough advice and feedback throughout the process (as well as generally), which constantly made me think and made both the final product and myself better. His turnaround was also lightning fast, and I learned a lot from him and his example, which I hope to carry forward in my own career.

- Kerry Rittich (who graciously agreed to be the thesis’s second reader) and Jutta Brunnée, who both helped me to better understand different perspectives and theories of the law, which complemented my previous practical experience and showed me potential opportunities for doctoral work. Their frank advice regarding future considerations also proved to be prescient and first-rate.

- All those affiliated with Klippensteins over the years I worked there, including Murray Klippenstein, Rosie Lewis, Vilko Zbogar, Kent Elson, Cory Wanless, and all the exceptional clients I had the privilege of working with (e.g. Maynard “Sam” George and his family, the Co-operative Housing Federation of Canada, etc.). It was there that I had the opportunity to work on both the Ipperwash Inquiry and the proposed class action for the Toronto G20 Summit as well as various other public interest and social justice work. That experience provided the basis and impetus for this thesis and my future work, and I would not be the person I am today without that experience.

- Those who run the Graduate Program Office and make it work (i.e. Associate Deans Jutta Brunnée and Mariana Moto Prado; Assistant Dean Judith McCormick; and Program Coordinators Julia Hall and Whittney Ambeault). They are the ones who answered all of my questions, helped whenever they could, and made my life generally easier when it was time to deal with administrative matters.
• Everyone that I had the privilege of meeting, getting to know, and working with over the past year, both inside and outside the classroom. Those interactions and discussions made the year much more enjoyable, particularly after many years of working in a small firm. I particularly want to acknowledge Dustin Gumpinger, my long-thesis compatriot, and those I regularly worked with and saw this past summer (i.e. Maria José (Majo) Rivas Vera, Ksenia Polonskaya, Michael Moll, and Aylin Yildiz), who all made my work much more effective and bearable.

• Finally, my parents, Mercy and Philip Alexander, who completely supported me when I decided to make a significant career change and pursue my Master of Laws as well as my doctorate (which starts this fall with the Faculty of Law at Queen’s University). In short, I would not be here without them.
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Introduction

Demonstrations are a fundamental part of Canadian and other western democratic systems. They are protected as part of the freedoms guaranteed under the *Canadian Charter of Rights and Freedoms*, and various societal changes have come about due to the debates that result from large-scale demonstrations. Wittman CJCQBA particularly notes that “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.” Demonstrations are also a key part of democracy and the promise of liberalism to allow individual expression and non-violent attempts to persuade others. Non-violent demonstrations are thus an important way for members of society to draw attention to key issues in order to make things better for the future, and they will be an ongoing part of Canadian and western society. For example, anti-globalization and “Idle No More” are current manifestations of movements that are drawing attention to their issues through demonstrations and other means.

However, a demonstration’s interactions with police or other agents of the state are often not ideal. For example, in the indigenous context, there were 24 major indigenous occupations and protests in Canada between 1974 and 2007, with Oka/Kanesatake, Gustafsen Lake, and Ipperwash likely being the most well-known for their interactions with state authorities. In the case of Ipperwash, “Dudley” George was shot and killed by a police officer during the culminating incident. In addition, the interactions between demonstrators and state authorities have been heightened by perceptions of demonstrator violence associated with various international summits and other events since 1999. For example, since the 1999 WTO Summit in Seattle until the Toronto G20 Summit in 2010, there have been over 8,700 arrests at 15 major events, and extensive property damage sometimes occurred at the events. In the case of the

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2 See e.g. *Calgary (City) v Bullock (Occupy Calgary)*, 2011 ABQB 764 at para 51, [2012] 7 WWR 283.
3 Ibid.
6 Ibid. Throughout this thesis, the Toronto G20 Summit will also be referred to as the “Toronto G20” or the “Summit”.

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recent Toronto G20 Summit, over 1,100 people were arrested,\(^7\) but the vast majority of those arrested were released without charge.\(^8\) As a result, a criminal court did not have the opportunity to review or comment on the propriety of the arrests for the numerous people released without charge. Even if a criminal court had such an opportunity, any judicial comments would likely be limited to specific individual cases given the personal focus and nature of the criminal justice system. Any potential systemic issues could only get a mention at most that would ultimately not be binding upon the police.\(^9\) As well, since 9/11, security concerns and intelligence have become much more important for state authorities, particularly for meetings involving world leaders. Such concerns may also be contributing in a general sense to police perceptions and actions, as well as potential overreactions, and there are often competing visions regarding how to balance security and public order concerns with the demonstrators’ interests of expressing dissent.

While there are multiple ways this balance can be struck, the liberal state is nevertheless supposedly neutral with respect to the non-violent expression of ideas and dissent, so the state should arguably facilitate and celebrate non-violent protests. However, recent mass protests in Canada have resulted not only in mass arrests, but also in court-issued injunctions that effectively end the protests, usually due to an interference with related property rights and concepts. Although courts usually consider freedom of expression interests before granting such injunctions, such interests typically take a back seat to the affected property interests, even though such demonstrations will probably result in only a temporary interference relative to the long-term. From a Hohfeldian perspective, it appears that the “rights” of control and access to the property as well as the corresponding “duties” of others to respect those rights usually trump


\(^8\) See e.g. *Good v Toronto (City of) Police Services Board*, 2014 ONSC 4583 at para 91 & Appendix A, [2014] OJ No 3643 (QL) [*Good*] (proposed class action covers 805 individuals who were released without charge, which is not exhaustive of everyone released without charge).

\(^9\) See e.g. *R v Botten* (2012), 98 CR (6th) 328 at paras 56–58 & 69, 271 CRR (2d) 323 (Ont Sup Ct J). Justice Sachs particularly discussed “the organized and deliberate state misconduct at the Esplanade” (*ibid* at para 69), and she noted that: “[t]he police’s response, namely to arrest the entire crowd, cannot be justified and constituted a real abuse of their power” (*ibid* at para 56); “[t]he manner in which the arrests were executed was also inexcusable” (*ibid* at para 58); and that “[a]s a community[,] we must be concerned that this kind of wholesale abuse of fundamental rights does not go unnoticed. If it does, we run the risk of it repeating[,] the more it happens[,] the more the fabric of what makes us a democracy will be torn away” (*ibid* at para 58).
and limit the general “privilege” of expressing one’s self through a non-violent demonstration.\(^\text{10}\) This result particularly occurs if the demonstration occurs on private land that is owned by someone who is not the direct subject of the demonstration’s call for change.

Questions are also often raised about the propriety of some of the state’s actions against demonstrators. For example, Ombudsman André Marin characterized the Toronto G20 as follows:

> 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.\(^\text{11}\)

While some may have issues with the Ombudsman’s tone and approach, it ultimately ensured media coverage for his assessment of the key issues, and the underlying animating concerns were not unique to him. For example, in reversing the dismissal of the certification motion for the proposed Toronto G20 class action, Justice Nordheimer noted on behalf of a unanimous panel of the Divisional Court that:

> 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.\(^\text{12}\)

While such wrongful actions are troublesome, the reality is that it can be difficult to prevent them from occurring in a negative liberal state such as Canada where concepts of individual autonomy, capitalism, and a minimalist form of government and interference are preferred by default. Mirjan Damaška characterizes such states as being “reactive” states whose task “is

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\(^{10}\) See Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale LJ 16 at 30ff and 32ff.

\(^{11}\) Robert Benzie & Rob Ferguson, “G20 law was ‘massive’ breach of rights, Marin says” *Toronto Star* (8 December 2010) A1 (QL) [emphasis added].

\(^{12}\) *Good, supra* note 8 at para 95 [emphasis added].
limited to providing a supporting framework within which its citizens pursue their chosen goals.”\textsuperscript{13} Due to the reactive state’s nature, Damaška notes that the state’s court system is focused on providing a forum to resolve disputes between citizens that they cannot resolve themselves, and this resolution occurs in the form of a confrontational contest before a neutral adjudicator.\textsuperscript{14} By its nature, the court system is thus designed to resolve actual disputes after they occur rather than preventing them from arising. As a result, it is difficult to proactively raise issues in order to deter them from occurring. As well, presumptions often associated with a liberal economic system, such as autonomy and formal equality (which does not reflect the substantive inequalities that are actually present in society), pervade the system.\textsuperscript{15} After an event occurs, these and other issues make it challenging to use the court system to accordingly raise, investigate, and resolve resulting concerns and hopefully prevent them from reoccurring in the future. While various other non-court options may be available to partially compensate for the limitations associated with the court system, these other options are ultimately not ideal for several reasons, including that governments and key decision-makers rarely implement the resulting non-binding recommendations to prevent the concerns from reoccurring.

This thesis accordingly explores how civil court and non-court mechanisms can and cannot be used to raise issues of concern with the goal of substantively reviewing and resolving such issues as well as hopefully preventing them from occurring in the future through change or other consequences. Collectively, these concepts form “accountability” in a broad sense for the purpose of this thesis. The potential effectiveness of civil litigation and non-court mechanisms to achieve such accountability, particularly in the context of demonstrations, is thus the main focus here, and both legal and political considerations in a practical sense are key parts of the examination. Interlocutory injunctions will be also be examined as this aspect of civil litigation has the ability to potentially affect future demonstrations and immediately affect demonstrations in progress, unlike general civil litigation or other non-court mechanisms. However, criminal options will not be explored as the criminal and quasi-criminal law are typically used by police

\textsuperscript{13} Mirjan R Damaška, \textit{The Facets of Justice and State Authority: A Comparative Approach to the Legal Process} (New Haven, CT: Yale University Press, 1986) at 73.

\textsuperscript{14} \textit{Ibid} at 73 \& 79–80.

\textsuperscript{15} See e.g. \textit{ibid} at 104–109.
against demonstrators rather than vice-versa.\textsuperscript{16} There are also relatively limited options available for demonstrators to hold the police accountable through the criminal law compared to the other options discussed here,\textsuperscript{17} especially given the police’s tendency of releasing without charge protesters who have been subject to mass arrests as well as other state actors eventually dropping many of the laid charges.\textsuperscript{18}

My personal interest in this topic is largely the result of several years of experience with Klippensteins, Barristers and Solicitors. During that time, I was part of the legal team for the Estate of “Dudley” George and Members of the George Family at the Ipperwash Inquiry, and much of my time and focus during my early legal career was correspondingly devoted to the Ipperwash Inquiry. More recently, I was also part of the legal team for the proposed class action regarding the Toronto G20 Summit. I have accordingly been involved in reviewing potential state misconduct in two different major demonstration contexts, which provides insight into the related processes and issues. Much of the thesis thus draws upon the experiences of Ipperwash and the Toronto G20, particularly since there are voluminous and detailed reviews now available for those incidents.

Chapter 1 focuses on the realities of using civil litigation for such accountability purposes. It will be shown that civil litigation is closer to a “conflict-solving” type of proceeding on Damaška’s spectrum of types of proceedings.\textsuperscript{19} This result is not surprising given that economic liberalism is consistent with what Damaška calls a “reactive state” whose focus is on resolving disputes that citizens cannot settle themselves.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{16} E.g. trespass to property (\textit{Trespass to Property Act}, RSO 1990, c T.21, s 2(1)); warrantless arrests for breach of the peace (\textit{Criminal Code}, RSC 1985, c C-46, ss 30–31); and charges under the \textit{Criminal Code}, including unlawful assembly (\textit{ibid}, s 63), mischief (\textit{ibid}, s 430), and possession of a weapon for a dangerous purpose (\textit{ibid}, s 88(1)). See also \textit{Report of the Ipperwash Inquiry: Investigation and Findings}, vol 1 (Toronto: Ministry of the Attorney General) at 626–629 [\textit{Ipperwash Report: Findings}] (summary of criminal proceedings against 5 demonstrators).
\item \textsuperscript{17} E.g. private prosecutions, although such prosecutions may be stayed or effectively taken over by the state (see \textit{Criminal Code}, supra note 16, ss 504, 507.1, 579–579.1); Special Investigations Unit investigations into serious injuries and death (see \textit{Police Services Act}, RSO 1990, c P.15, s 113), although such investigations are limited to criminal offences and appropriate criminal thresholds would need to be met. For comparison purposes, only one officer was charged and convicted with respect to Ipperwash, which was the officer who shot and killed “Dudley” George, whereas five demonstrators had to deal with various criminal proceedings (\textit{Ipperwash Report: Findings}, supra note 16 at 626–629).
\item \textsuperscript{18} See e.g. \textit{Good}, supra note 8 at para 91 and Appendix A; \textit{Good v Toronto (City of) Police Services Board}, 2013 ONSC 3026 at para 37, 43 CPC (7th) 225.
\item \textsuperscript{19} See Damaška, supra note 13, ch IV & V.
\item \textsuperscript{20} \textit{Ibid} at 73ff.
\end{itemize}
While civil litigation has certain benefits,\textsuperscript{21} it has various limitations due to its “conflict-solving” nature. For example, it is usually ill-equipped to deal with systemic or long-term issues given its standard focus on individual liability and the corresponding quantum of damage. This reality is unsurprising since one of the consequences of the “conflict-solving” approach is that the goal of maximizing dispute resolution takes a priority over that of “accurate fact-finding”,\textsuperscript{22} which makes it more difficult to create a proper foundation for potential systemic remedies. Various litigation requirements also tend to advantage state defendants instead of demonstrators. While the applicable civil procedure rules seem to treat all litigants alike on the surface, they in practice systematically advantage wealthier and status quo reinforcing litigants, such as the police, other state actors, and corporations who oppose the actions of protesters. As well, the role and availability of resources is another key issue, and the police and other state representatives seem to have limitless resources to litigate preliminary procedural and other issues in a manner that often prevents demonstrators from having their freedom of expression interests considered comprehensively on the substantive merits. Finally, the litigation process tends to examine events after they occur, so they usually cannot prevent the initial event from actually occurring.

The unfortunate reality is that many obstacles must be overcome for this mechanism to be successful, but it may be better than no option at all. Certain changes should also be accordingly implemented to improve the viability of this mechanism from a demonstrator perspective.

Chapter 2 particularly examines interlocutory injunctions to review a particular aspect of the civil litigation process that can be used in theory both by and against demonstrators. This aspect is being singled out because, unlike civil litigation generally, it can potentially affect a demonstration prior to it occurring, or it can have an immediate effect on an existing ongoing demonstration. However, it will become apparent that interlocutory injunctions remain consistent with the general “conflict-solving” approach of civil litigation with all of the corresponding inherent difficulties, and the injunction test’s public interest considerations (which include majoritarian and economically liberal tendencies) can be challenging for demonstrators to overcome.

\textsuperscript{21} Such as the process being public, the decisions being made by an arms-length adjudicator, and the results being binding on the parties.

\textsuperscript{22} Damaška, supra note 13 at 123 [footnote omitted].
In addition, certain legal issues tend to repeatedly arise in the context of protest injunctions, and these repeated issues will examined over a series of cases to further understand some of the legal issues that demonstrators regularly deal with. In particular, unlike the focus of Chapters 1 and 3 on the nature of the forum, a Hohfeldian analysis will be conducted on these repeated legal issues. It will become apparent that whenever demonstrators tend to advance “privilege”-based arguments, such as those based on freedom of expression, demonstrators tend to lose when the court is faced with a conflicting “rights”-based argument of a state actor or a private landowner. As a result, courts tend to prefer “rights” and “duties” over “privileges” when they come into conflict in the context of demonstrations, which reinforces what Kent Roach and David Schneiderman characterize as “Canada’s rather modest free expression tradition”. However, there has been some success when demonstrators are able to advance “rights”-based arguments. It may thus be time for the relevant freedoms to have more and clearer “rights”-based aspects so that courts are at least comparing “rights” and “rights” instead of “rights” and “privileges”. Demonstrators may also need to be selectively opportunistic about what issues they are actually able to successful resolve, defend, or advance through injunctions.

Chapter 3 focuses on the realities of using non-court options as accountability mechanisms instead. It will be shown that these options tend to use a “policy-implementing” approach on Damaška’s spectrum of types of proceedings, which results in related procedures being more interested in achieving “a substantively correct result”. Such an approach thus provides a better foundation to make recommendations to change policy, which is the underlying goal of many of these non-court mechanisms.

It will become apparent that many of the examined non-court mechanisms are able to promote accountability in various ways, but these mechanisms have their issues as well. For example, most of the mechanisms have a limited ability to ensure appropriate responsibility and consequences, particularly since most of them are not binding (i.e. any implemented change is the result of persuasion rather than command). Given their ex post nature, they are also not ideal.

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23 See Hohfeld, supra note 10.
25 See Damaška, supra note 13, ch IV & V.
26 Ibid at 148.
for preventing the initial event from actually occurring. For complex, large-scale situations, there are also problematic issues with respect to the mechanisms’ potential trigger methods as well as jurisdiction fragmentation and limits.

To overcome some of these issues, it will be recommended that an appropriate mechanism ought to be in place that is arms-length from pure political considerations. This mechanism would have the power to initiate or recommend when comprehensive reviews ought to occur for major incidents when needed (although it would not conduct the review itself). This mechanism could also have a role in co-ordinating the various existing non-court mechanisms and providing administrative support as well as following up to ensure that any recommendations and their underlying goals are being accounted for so that the underlying concerns do not reoccur.

Finally, the conclusion will review the key highlights and ideas from the previous chapters. In addition, two more comprehensive options will be put forward to attempt to overcome the various issues discussed in the chapters.

First, it will be argued that a preventative solution would actually be the best option, especially given that most of these mechanisms can only conduct effective reviews after an incident has already occurred. An independent legal advisor with security of tenure and expertise in relevant policing matters should instead be present as part of the planning process for major events as well as part of the incident command structure in order to advise key decision-makers as issues develop. To avoid conflicts of interest, the legal advisor should not be accountable to the police force in question. Instead, the legal advisor should be directly accountable to an appropriate police review body, such as the Ontario Civilian Police Commission or the Independent Police Review Director. Such an approach would also be better given how people respond differently in a psychological sense to accountability before rather than after a bad decision has occurred.

Second, a utopian solution would be that courts would take a hybrid of the “conflict-solving” and “policy-implementing” approaches to actually conduct inquiry-like reviews. The hybrid

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approach would take the best elements of both approaches, and courts would be able to develop and enforce binding outcomes and policy solutions. However, given the current realities of Canadian courts and society (including the current general preference for courts to use a “conflict-solving” approach given Canadian society’s economic liberal tendencies), such a system would be a significant departure from the status quo in many ways. It is accordingly unlikely that such a system would be implemented in the immediate future by Canadian courts, even in just accountability settings. However, such changes could be implemented by legislation or other means. As well, parts of the ideal system may be able to be implemented on an incremental basis, and it may become more feasible over time as Canadian society continues to change and evolve.
Chapter 1 – The Realities of Using Civil Litigation for Accountability

A. Introduction

As part of examining the various non-criminal options available for demonstrators to potentially achieve accountability against the state, this chapter focuses specifically on the realities associated with potentially using binding civil litigation to review and resolve related concerns and hopefully prevent them from reoccurring. One of the things that will become apparent is that this avenue tends to be an *ex post* method, which raises questions about how effective it is for reviewing and resolving any raised concerns as well as preventing them from occurring again (i.e. achieving “accountability” for the purposes of this thesis). While other avenues of potentially achieving such accountability through non-court methods will be the focus of the Chapter 3, it is important to first understand civil litigation’s nature as well as how it may fit as part of an overall system. These and other issues related to civil litigation will be explored in this chapter, and the next chapter will explore the role and impact of interlocutory injunctions, which are a specific tool of civil litigation.

Civil litigation offers certain benefits as an accountability mechanism from a general perspective. For example, civil litigation is usually public, the decisions are made by an arms-length adjudicator, and the results are binding on the parties, which are all ideal contributors to accountability. The plaintiff also has a great deal of control over the process and the issues that will be explored as part of the litigation. For example, plaintiffs are able to commence a lawsuit without the permission of any of the defendants, and plaintiffs are also able to “discover” the defendants and call witnesses. As a result of discovery and other processes, the plaintiff has various abilities to gather key (and otherwise unavailable) information from all of the defendants regarding the case’s key issues and to force a hearing on disputed issues.

However, these positive aspects are limited by the various realities associated with the litigation process given its “conflict-solving” nature, especially in the Canadian context. For example, civil litigation is usually focused on liability and the assigning of a corresponding quantum for damages; it is accordingly ill-equipped to deal with systemic or long-term issues. Appropriate financial resources for the litigation also need to be present in order for any litigation to be
successful.\textsuperscript{1} Deep-pocketed defendants thus have the ability to draw out litigation over the long-term and increase expenses for plaintiffs, which increases the possibility that plaintiffs may be unable to see a case through. The resulting consequence is that defendants can use such tactics strategically to preserve and reinforce rather than change the existing status quo. Advanced funding and adverse costs are also approached in ways that are consistent with capitalist and liberal presumptions of formal equality, which advantages those litigants who are better resourced since the realities of substantive inequality are rarely accounted for. The case must also be litigated within the technical confines of the legal system, including meeting the various requirements for causes of actions, procedures, and the rules of evidence. Settlements, if they occur, also usually have non-disclosure clauses that limit their potential effect to assist with accountability in a public way. All of these factors are consistent with the more “conflict-solving” nature of civil litigation in Canada, and these litigation realities result in the demonstrators’ interests in freedom of expression and dissent often being under-represented practically in the litigation process.

In addition, another key issue is that civil litigation can generally be conducted only after an event and the corresponding harm has already occurred. It is ill-equipped to prevent the initial situation from ever happening (i.e. in accordance with civil litigation’s nature, a conflict must exist before it can be solved by the litigation process), and any resulting litigation could only guide potential future actions in a preventative way if there is corresponding interest by the relevant actors. Given the issues that arise due to civil litigation’s approach, it may also only allow for a partial glimpse of the key issues involved given the mechanisms’ technical requirements and focus on certain issues. As a result, the underlying substantive issues may only be explored in a limited sense or not at all. In short, civil litigation in its current form is not a

\textsuperscript{1} While there are arguments that state liability may have a deterrence effect, such effects will actually be limited depending on the circumstances. For example, Peter Schuck, who argues in favour of such an effect, acknowledges the potential problems of suboptimization (e.g. the appropriate level at which liability will have a deterrence effect, particularly since “public agencies usually cannot retain the fruits of whatever efficiencies they manage to generate”) and enforceability (e.g. budgets may receive additions to compensate for the liability, and there may be other non-budgetary incentives) (see Peter H Schuck, \textit{Suing Government: Citizen Remedies for Official Wrongs} (New Haven, CT: Yale University Press, 1983) at 102–109). In addition, given the fact that state liability has been a feature of the Canadian state for some time, the state has had time to respond and put in place methods to dampen the potential deterrence effect (e.g. insurance, amounts set aside in budgets, etc.). Accordingly, any state liability would likely need to be extremely significant, unexpected, and outside of existing resources to have an actual deterrence effect in the Canadian context.
panacea for holding state actors accountable given the various realities as well as obstacles that must be overcome for litigation to be successful. One must thus be sure that the sought accountability fits within civil litigation’s general “conflict-solving” approach.

This chapter examines some of the issues and realities associated with using civil litigation as an accountability mechanism. It begins by providing initial context by examining the “conflict-solving” nature of civil litigation and the various ways that civil litigation can manifest. It then explores the disconnect between principles of the Rules of Civil Procedure (e.g. to conduct proceedings in the just, most expeditious, and least expensive way on the merits) and lawyers’ duties under the Rules of Professional Conduct (e.g. to zealously advance every possible argument). The issues of costs and resources are explored in order to fully understand the practical difficulties that must be dealt with in order for civil litigation to be successful. The issues associated with various procedural and other requirements of civil litigation in Canada are also examined. The unfortunate reality is that for civil litigation to be remotely successful as an accountability mechanism, many obstacles must be overcome over the long-term life of the litigation. However, this option is sometimes better than no option at all, and it would be worthwhile if some changes are implemented to instead facilitate accountability litigation in certain circumstances, including by sometimes using a different overriding approach rather than the default “conflict-solving” approach.

B. Initial Context of Civil Litigation

Prior to examining some of the detailed issues associated with civil litigation, it is important to first have an initial understanding of the more “conflict-solving” nature of civil litigation as well as the various forums in which civil litigation may be conducted. It is also important to understand the different practical kinds of litigation that a plaintiff can bring. Each of these areas will be discussed in turn.

1. The “Conflict-Solving” Nature of Civil Litigation

Canadian civil litigation is often characterized as being an “adversarial” system compared to the “inquisitorial” system used in continental Europe and elsewhere. However, it often becomes
unclear what this distinction means in practice as well as what are the real differences between the two systems. In fact, Mirjan Damaška notes that when one looks closely at current justice systems, elements that are typically considered part of “adversarial” systems can be found in “inquisitorial” systems and vice-versa. He instead proposes a spectrum between a pure “conflict-solving” type of proceeding and a pure “policy-implementing” type of proceeding, which represent “adversarial” and “inquisitorial” ideas taken to the extreme. As will become apparent as these conceptions are applied below, the Canadian civil litigation system has more of a “conflict-solving” approach overall.

In the “conflict-solving” approach, the legal process is essentially a contest regulated by the judge acting as a neutral and largely passive umpire. Proceedings proceed as “a contest of two adverse parties before a neutral conflict resolver”, and “[j]udgments tend to be justified procedurally—that is, by victory in the forensic contest.” As a result, given the nature of the contest, “[p]rocedural law … acquires its own integrity and independence from substantive law.” There is thus a corresponding potential for discordant results in a case when one compares the procedural perspective to the substantive perspective. The process thus has various procedural mechanisms “to prevent such a dilemma for arising” or to resolve it in a way that is consistent with the idea of a contest. For example, providing equal weapons to ensure procedural parity is seen as a way to balance the advantages that particular litigants have. As well,

If the contest was fair and the decision maker has not compromised his neutrality, the loser has little reason to suspect the legitimacy of his defeat. He has mainly himself to blame for the adverse decision, and even if he rebels, society as a whole maintains its

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3 Ibid at 6 & 98.
4 See ibid, ch IV & V.
5 See generally ibid, ch IV. A more detailed discussion of “policy-implementing” types of proceedings takes place in Chapter 3 as that concept is more applicable there.
6 Ibid at 79–80 & 98.
7 Ibid at 101.
8 Ibid.
9 Ibid at 101–102.
10 Ibid at 102.
11 Ibid at 103. See also ibid at 103–104.
faith in the neutral administration of justice. Disputes thus can be “absorbed” by a legal process carrying the contest idea to its limits.\textsuperscript{12}

As a result, if the procedural objective is fairly obtained, a deviation from the result required under the substantive law may cause less concern.\textsuperscript{13} In other words, how a decision is reached can be as important as what the decision says.\textsuperscript{14}

The “conflict-solving” approach is a manifestation of the legal process in what Damaška characterizes as a “reactive state”.\textsuperscript{15} In such states, the task of the state “is limited to providing a supporting framework within which its citizens pursue their chosen goals. Its instruments must set free spontaneous forces of social self-management.”\textsuperscript{16} Damaška is careful to note that there is “no necessary connection between the reactive posture, capitalism, and individualism”, and he even lists examples where such states existed outside such frameworks.\textsuperscript{17} However, he also notes that the “most important variants … arose in the context of societies organized around capitalist markets”.\textsuperscript{18} The society’s normative context thus determines how rights will be distributed by a reactive state’s legal system. For example, in the Canadian context, liberal, capitalist, and other constitutional considerations should predominate given how Canadian society is supposed to work. Such an approach is also consistent with the fact that private, individual, or group rights are a key feature of a reactive state’s legal culture,\textsuperscript{19} even if those rights vary from reactive state to reactive state. In the Canadian context, the “conflict-solving” approach will thus reinforce rights and concepts that pervade and form the underlying basis of Canadian society, such as liberalism and capitalism.

As will become apparent below, the forums and issues regarding civil litigation have elements that are more consistent with a “conflict-solving” type of proceeding and approach. As a result, various difficulties manifest that must be overcome in order for civil litigation to be effectively used as an accountability mechanism.

\textsuperscript{12} Ibid at 80 [emphasis added].
\textsuperscript{13} Ibid at 102.
\textsuperscript{14} Ibid at 102–103.
\textsuperscript{15} Ibid at 77ff.
\textsuperscript{16} Ibid at 73.
\textsuperscript{17} Ibid at 74.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid at 76–77.
2. The Litigation Forums

As initial background context, there are practically six kinds of civil litigation that can take place in Ontario for broad accountability purposes. Five are under the jurisdiction of the Superior Court of Justice, and the last one is mainly under the jurisdiction of the Human Rights Tribunal of Ontario. As different forms of relief and procedure are associated with each of these forums, they will be each briefly described to explain their differences. However, all of these forums are generally consistent with a “conflict-solving” approach as the parties are largely autonomous and have significant control over the proceedings. Such control includes initiation of a proceeding as well how factual and legal issues are framed. The involved tools and procedures also reinforce the contest nature of the “conflict-solving” approach, albeit to different degrees and with different tools depending on the forum.

The Superior Court of Justice is the superior court of record for Ontario. It accordingly has general inherent jurisdiction as a section 96 court under the Constitution Act, 1867. However, from a practical perspective, not all civil litigation proceeds in the same way before the court.

First, civil litigation may proceed as standard litigation pursuant to the Rules of Civil Procedure. Such litigation will normally proceed as an action, which engages all of the tools and procedures available under the rules. Most forms of relief are generally available in this format given the court’s inherent jurisdiction. The process includes various discovery and other tools for the litigants, and it involves various detailed steps that must be completed in order for an action to be tried. The second related option is that litigation may proceed as a class action if it is certified as a class proceeding. Such litigation proceeds as a regular action with

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20 Ontario is being used as the illustrative jurisdiction for the purposes of this chapter. However, other jurisdictions have analogous arrangements where similar issues ought to arise.
21 Damaška, supra note 2 at 104ff and 109ff.
26 Ibid, rs 14.02 & 14.03.1.
27 See e.g. Professor Garry D Watson & Michael McGowan, Ontario Civil Practice: 2014 (Toronto: Carswell, 2013) at PC-2 to PC-8.
additional procedural steps that overlay the *Rules of Civil Procedure* given the requirements for and other issues associated with class actions.29

Relative to the standard action, the other available options have various differences in their procedures and the relief available. The third option is that litigation may proceed as a simpler application in certain limited circumstances, especially if “it is unlikely that there will be any material facts in dispute”.30 This process is akin to a motion, and it does not have the same extensive procedural steps as an action.31 It also does not typically involve hearing directly from witnesses like a trial as the evidence is usually put forward through paper affidavits and transcripts of cross-examinations.32 Accordingly, the judge hearing the application has discretion to order that an application proceed instead as a trial with respect to all or part of the issues if needed.33

Fourth, if the claimed amount is $100,000 or less, litigation may proceed under simplified procedure.34 While this forum is mandatory if the claim is only for money, real property, or personal property,35 defendants can object to the use of this forum in other situations and force the action to proceed as an ordinary action if the plaintiff includes claims outside of these mandatory areas.36 Unlike an application, this method allows for a trial with witnesses, but it does not have nearly as many procedural steps or requirements as a regular action.37 However, unlike a regular action, the trial is also a summary trial that uses affidavits to reduce the trial time required as well as short time limits by default for the oral examination of witnesses.38

Finally, if the claimed amount is $25,000 or less, litigation may proceed under the jurisdiction of the Small Claims Court.39 Only claims that involve the payment of money or the recovery of

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29 See e.g. *ibid*, ss 11–12, 17–27.
30 *RCP*, supra note 25, rs 14.05 & 14.05(3)(h).
31 See e.g. Watson & McGowan, supra note 27 at PC-8 to PC-10.
32 *Ibid* at PC-9 to PC-10. See also *RCP*, supra note 4, rs 39.01(1), 39.02(1), & 39.03(1)–(2).
33 *RCP*, supra note 4, r 38.10.
34 *Ibid*, r 76.02. See also generally r 76.
35 *Ibid*, r 76.02(1).
36 *Ibid*, r 76.02(5)–(6).
37 See e.g. Watson & McGowan, supra note 27 at PC-23 to PC-25.
38 *RCP*, supra note 25, rs 76.10(7) & 76.12(1). These short default times can be extended by the trial judge (*ibid*, r 76.12(2)).
39 O Reg 439/08, s 1, amending O Reg 626/00, s 1. In Ontario, the Small Claims Court is a branch of the Superior Court of Justice (*Courts of Justice Act*, supra note 23, ss 22–23).
personal property less than $25,000 are allowed. This process usually has minimal procedural steps compared to the other processes as the focus is on the settlement conference and trial. In an effort to reduce costs, paralegals are also allowed to represent litigants instead of lawyers, and adverse cost awards are usually limited to 15% of the amount claimed plus disbursements. All motions and trials are also done in a “summary way”, and the applicable requirements for evidence are more relaxed relative to the mechanisms above.

In addition to the options available through the Superior Court of Justice, one other relevant option is sometimes available if the case involves a violation of human rights. The Human Rights Tribunal of Ontario is an administrative tribunal that has jurisdiction to deal with issues arising under Ontario’s Human Rights Code. However, jurisdiction is limited to only the forms of discrimination listed under Part I of the Human Rights Code. Similar to the Small Claims Court, the requirements for evidence are more relaxed. The Tribunal also has its own rules of procedure to govern litigation before it, and, unlike the court mechanisms above, the Tribunal has the explicit power to order compensation, make restitution, or order a party “to do anything that … the party ought to do to promote compliance with [the Code].” Issues under the Human Rights Code can also be dealt with as part of a civil proceeding before the court as long as the human rights violation is not the sole issue.

Given all of the variations above, it becomes clear that the nature of the relief one is seeking may determine the applicable forum. For example, if the plaintiff is seeking a declaration, that relief cannot be obtained in Small Claims Court. Similarly, a defendant could strategically object to force a plaintiff out of simplified procedure if such a claim were made there. In addition, while a

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40 Ibid, s 23.
41 See e.g. Justice Marvin A Zuker, Ontario Small Claims Court Practice: 2014 (Toronto: Carswell, 2013) at 554 (small claims case flow chart).
43 Ibid, s 29. An exception is provided if “the court considers it necessary in the interests of justice to penalize a party or a party’s representative for unreasonable behaviour in the proceeding” (ibid).
44 Ibid, s 25.
45 Ibid, s 27. See also Ontario, Small Claims Court Rules, r 18.
47 Ibid, s 34.
48 Ibid, s 42; Statutory Powers Procedure Act, RSO 1990, c S.22, s 15.
50 Human Rights Code, supra note 46, ss 45.2–45.3.
51 Ibid, s 46.1.
public trial may be more desirable in certain circumstances to articulate or affirm social norms,\textsuperscript{52} considerations regarding the amount of the claim and costs involved play a key role in the format choice (e.g. only those claims involving large amounts are the most likely to now have standard civil trials). As well, while the Human Rights Tribunal of Ontario is attractive because it has jurisdiction to provide orders beyond just money, one must be able to identify an appropriate form of discrimination in order for the Tribunal to have jurisdiction. Given the different procedural powers and rights associated with the different processes, a litigant needs to determine what forum may be strategically best given the greater context.

The reasons for the differences in the above mechanisms include the costs of litigation versus the amount claimed as well as the issues each mechanism is intended to ultimately resolve. Economic considerations thus drive and underlie many of the issues associated with civil litigation. In fact, the different systems for simplified procedure and Small Claims Court are ultimately built on the assumption that the amount of the dispute is the predominant factor for both procedure and remedies, which accords with a particular view of liberal capitalism. While this focus is appropriate for most litigation, this focus has potential issues for litigation whose intent is accountability in a broader sense, especially if the desired relief is only available through certain mechanisms that require costly additional steps. In the context of demonstrators trying to hold police accountable for their conduct and actions in a meaningful way, the resulting cost and time of litigation may practically prohibit actual accountability depending on the relief being sought as well as devalue the expressive interests of often dissenting demonstrators.

A better solution would be to open up the remedies in the alternative formats so that relief beyond the current limitations could be sought and granted. For example, currently the forum with the most comprehensive remedies has the most procedure (i.e. a Superior Court action), but it does not necessarily need to be so. Legal analysis has to occur in all of the forums for any of the above remedies to be granted anyway, so it is surprising that declarations are not available in all forums. If the concern is that some of the forums may not have the expertise to deal with such remedies or will be unaware of the implications of a potential declaration, such concerns

\textsuperscript{52} Damaška, \textit{supra} note 2 at 62.
can be mitigated by simply ensuring that more appropriate judges are assigned in such cases.\textsuperscript{53} Given scarce court resources, a vetting process may be necessary, or a simple and workable policy and procedure could be developed to easily transfer such cases from Small Claims Court to the main Superior Court of Justice forum while maintaining the limited procedure associated with a Small Claims Court case.

3. The Different Kinds of Plaintiffs That Bring Litigation

The previous section focused on the various forums in which litigation can occur, and this section accordingly focuses on the different kinds of plaintiff that can bring litigation for accountability purposes. There are four kinds of plaintiffs that usually initiate such litigation, and multiple kinds of plaintiffs can be involved in the same case. As different interests need to be considered for each kind of plaintiff, each kind will be discussed in turn. While the first kind below is the one that is most consistent with a “conflict-solving” approach compared to the others, the general “conflict-solving” approach remains paramount overall as the kind of plaintiff is ultimately only one aspect of many in the litigation context.

First, litigation can proceed with a typical plaintiff that initiates a lawsuit. Usually, this person is someone who was negatively affected and is now seeking a remedy on their own personal behalf. This type of litigation is the model that most lawsuits follow. It is arguably the most straightforward as the interests of the actual plaintiff are usually the only ones that need to be considered from a client perspective, and those interests are ultimately paramount and can be determinative. It is also the one that is most consistent with a “conflict-solving” approach.\textsuperscript{54}

Second, litigation can proceed by using a representative to litigate a case on behalf of a group. Historically, such litigation was conducted by using a representation order,\textsuperscript{55} but such litigation is now often conducted instead pursuant to the \textit{Class Proceedings Act, 1982}.\textsuperscript{56} The considerations in such litigation are more complicated as the nature of these cases means that the

\textsuperscript{53} For example, all judges of the Superior Court of Justice are automatically judges of the Small Claims Court (\textit{Courts of Justice Act, supra} note 23, s 22(3)).
\textsuperscript{54} See Damaška, \textit{supra} note 2 at 116–119.
\textsuperscript{55} \textit{RCP, supra} note 25, r 10.
\textsuperscript{56} \textit{Supra} note 28.
litigation will directly bind other parties who may not be before the court. Other parties’ interests need to be explicitly considered as part of the process, which is why court approval of the representative or the proposed litigation is required.\textsuperscript{57} The “conflict-solving” approach is thus reinforced as the court must essentially approve an exception for this kind of plaintiff.

Third, litigation may be conducted instead by an organization or an individual on the basis of public interest, but, as noted by the Supreme Court of Canada, such standing is limited to specific circumstances.\textsuperscript{58} In such situations, there is often no other way to get the issue before the court, which reinforces the preference for and primacy of the standard kind of plaintiff. Such litigation is thus intended to be an exception rather than the norm, which also reinforces the “conflict-solving” approach. Such organizations and individuals often also intervene in other litigation to ensure that other key perspectives are considered by courts. However, such exceptional participation must be approved by the court,\textsuperscript{59} thus again reinforcing the standard “conflict-solving” approach.

Finally, litigation may be brought on a test-case basis. In such circumstances, a nominal plaintiff whose interests have been affected litigates the issues, usually with the support of an organization or others.\textsuperscript{60} However, the decision is ultimately binding only on the actual litigants, not others, and the supporters rather than the nominal plaintiff usually make the key decisions regarding the litigation. The value of such a decision is instead in the precedent that can be used in other situations, such as in future court cases and by influencing future behaviour. Abram Chayes notes that one of the traditional roles of litigation was to clarify the law to guide future action, and this effect continues in public law litigation as “[t]he argument is about whether or how a government policy or program shall be carried out.”\textsuperscript{61} This kind of plaintiff is also more consistent with a “conflict-solving” approach as a standard plaintiff is used, so additional court approvals are not required. Such a case also contributes further to a general “conflict-solving” approach.

\textsuperscript{57} See e.g. \textit{ibid}, s 5(1).


\textsuperscript{59} See e.g. \textit{RCP supra} note 25, rs 13.01–13.03.

\textsuperscript{60} See e.g. Abram Chayes, “Foreword: Public Law Litigation and the Burger Court” (1982) 96 Harv L Rev 4 at 24–25 [Chayes, “Foreword”].

\textsuperscript{61} Abram Chayes, “The Role of the Judge in Public Law Litigation” (1976) 89:7 Harv L Rev 1281 at 1285 & 1294–1295 [Chayes, “Role of the Judge”].
approach by assisting with the overall stability of decisions (i.e. by providing a precedent, other potential similar conflicts will be avoided, thereby helping preclude future litigation).62

Each type of plaintiff has inherent advantages and disadvantages. For example, individuals are usually the ones actually affected by the issues, but organizations often have greater financial resources than individuals to carry out the litigation. In other words, organizations are often better placed to deal with some of the practical inequalities that arise in the “conflict-solving” approach.63 There may also be strategic discovery issues about who the plaintiffs wish to make available for discovery by the defendants, which reinforces the contest nature of Canadian civil litigation. Regardless of the choices made, depending on the nature of the relief sought and the party bringing the case, the litigant may wish to consider what other interests need to be accounted for in order for the litigation to ultimately be successful. For example, if supporters are financially assisting with litigation, they may want some say in how the litigation ought to be conducted. It may also be strategically worthwhile to have supporters intervene as part of the litigation to bring different perspectives and emphasize certain points that assist a party’s case.

The reality is that this variety of plaintiff types is necessary in order to work within the contest nature of the “conflict-solving” approach. Given the amount of procedural requirements that must be met, an obvious question is whether a simpler approach could be used that is not so focused on procedure but instead on making more substantive decisions on the underlying issues at the heart of the dispute. After all, as Chayes notes, “[l]imitations on standing thus translate into limitations on the power of the courts, or at least on the occasion for its exercise,”64 and litigants may have few other options to achieve the sought change.65

Given this general context regarding mechanisms and plaintiffs, a framework has been set regarding how civil litigation can be potentially used as an accountability mechanism. However, a detailed review of various related issues and risks is needed before one can decide whether

62 See Damaška, supra note 2 at 145 (preclusion effect in the context of additional litigation between the same parties, which is applicable by analogy to similar litigation by others).
63 See e.g. ibid at 106–109. See also Section D below.
64 Chayes, “Foreword”, supra note 60 at 9–10.
65 Chayes, “Role of the Judge”, supra note 61 at 1313 & 1315.
civil litigation is a viable accountability option that is available. The remainder of this chapter accordingly focuses on select issues that potential litigants need to be aware of.

C. The Disconnect Between Civil Litigation Principles and Lawyers’ Duties

Given the nature of civil litigation, there are various fundamental assumptions associated with the Rules of Civil Procedure that are not always consistent with the duties that lawyers owe to their clients and others under the Rules of Professional Conduct. It is important to understand this disconnect to understand some of the realities and incentives present in civil litigation. These issues will be explored in this section by examining key aspects of both rules to illustrate the key conflicts involved.

Rule 1.04(1) provides insight into what the Rules of Civil Procedure believe that civil litigation is ultimately attempting to achieve overall:

General Principle
1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.\(^{66}\)

This general principle assumes that all civil litigation has as its goal the resolution of disputed matters in the noted way. It is also largely consistent with the idea that the litigants are acting rationally with respect to a dispute. However, the more “conflict-solving” nature of litigation is reinforced as the “most expeditious” and “least expensive” parts of the principle are procedurally focused. As well, “just” and “on its merits” are hybrids of both procedural and substantive concerns, which further reinforces the “conflict-solving” approach. This interpretation principle also only reflects how the court should approach how to resolve civil disputes; it does not reflect the fact that the individual interests and actions of the litigants may not actually be consistent with these assumptions. For example, it may not be in a party’s interests that litigation be completed expeditiously or in the least expensive manner. Instead, strategies may be employed to lengthen litigation in the most expensive and longest way possible in order to make it more

\(^{66}\) RCP, supra note 25 [emphasis added]
likely that the opposing side will simply decide to no longer pursue the litigation.\textsuperscript{67} Proceedings may thus not be determined necessarily on their merits, but they are simply resolved because a litigant is unable to continue or for other reasons. Such strategies and results further reinforce civil litigation’s “conflict-solving” nature.

The \textit{Rules of Professional Conduct} reinforce a disconnect between civil litigation principles and the lawyers’ duties to a litigant. In particular, Rule 4.01 provides that “a lawyer shall represent the client resolutely and honourably within the limits of the law”.\textsuperscript{68} The commentary to the rule further notes that:

\begin{quote}
The lawyer has a duty to the client to \textit{raise fearlessly every issue, advance every argument, and ask every question}, however distasteful, which the lawyer thinks will help the client’s case and to \textit{endeavour to obtain} for the client the benefit of \textit{every remedy and defence} authorized by law.\textsuperscript{69}
\end{quote}

This commentary and the rule reflects the partisan and adversarial nature of the litigation process.\textsuperscript{70} It is also consistent with a “conflict-solving” approach given civil litigation’s basis as a contest.\textsuperscript{71} Although the effect of this key duty may be mitigated somewhat by other duties under the \textit{Rules of Professional Conduct},\textsuperscript{72} an important underlying disconnect between the \textit{Rules of Civil Procedure} and the \textit{Rules of Professional Conduct} remains, especially given the overarching nature of both principles.

This disconnect is amplified when one considers the proportionality principle now included as part of the \textit{Rules of Civil Procedure}. Rule 1.04(1.1) provides that:

\begin{itemize}
\item \textsuperscript{67} See e.g. James C Morton, Michael J Iacovelli, & Corey D Steinberg, \textit{Procedural Strategies for Litigators}, 2d ed (Markham, ON: LexisNexis, 2007) at 1–2, 35, & 47–48. See also Đamaška, \textit{supra} note 2 at 108–109.
\item \textsuperscript{68} The Law Society of Upper Canada, \textit{Rules of Professional Conduct} (Toronto: Law Society of Upper Canada, 2014), r 4.01(1) [\textit{RPC}]. Although Ontario is the focus of this analysis, analogous concepts would apply for other Canadian jurisdictions.
\item \textsuperscript{69} \textit{Ibid} at 57 [emphasis added].
\item \textsuperscript{70} See e.g. \textit{ibid}.
\item \textsuperscript{71} Đamaška, \textit{supra} note 2 at 142–144.
\item \textsuperscript{72} See e.g. \textit{RPC}, \textit{supra} note 68, r 2.02(2)–(3) (encouraging compromise or settlement); r 4.01(2)(a) (not bring proceeding clearly motivated by malice and brought solely for the purpose of injury); r 4.01(2)(b) (not knowingly assist or permit client to do anything the lawyer considers to be dishonest or dishonourable).
\end{itemize}
Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.\(^{73}\)

Justice Osborne provides further guidance regarding the concept of proportionality in his Civil Justice Reform Project report that recommended this principle. He noted that “proportionality, in the context of civil litigation, simply reflects that the time and expense devoted to a proceeding ought to be proportionate to what is at stake.”\(^ {74}\) Of course, the question of “what is at stake” is a concept subject to different perceptions, and what judicial officers perceive as important will not necessarily be the same as a client’s perception. For example, given the dual roles of procedure and substance in the “conflict-solving” approach, a judicial officer may have different priorities and focuses than a client who will likely be more focused on substantive issues. The principle’s focus on procedure also reinforces the contest nature of civil litigation.

Other contextual mechanisms and incentives also need to be examined in order to understand how these various disconnected principles are reinforced through other ways. For example, the fact that the practice of law is often treated as a business is compatible with a lawyer’s professional duties to raise every issue (i.e. more fees can be charged by raising more issues). The lawyer’s economic self-interest becomes a key factor to ensuring that this principle is ultimately carried out. If the lawyer does not carry out these duties towards the client, the client also has clear powers to hold the lawyer accountable through complaints to the applicable Law Society and claims to the lawyer’s insurance. On the other hand, the same incentive mechanisms are not present for the principles of civil litigation. Instead, those principles are just to be used when interpreting the rules generally or when making orders or providing direction.\(^ {75}\)

While there is the outside possibility of court sanction in extreme situations, there are no direct analogous duties or incentives on lawyers. As a result, the lack of practical incentives for civil litigation principles raises questions about how they can be reinforced compared to the duties that lawyers owe their clients and others.

\(^{73}\) RCP, supra note 25 [emphasis added]
\(^{74}\) The Honourable Coulter A Osborne, Civil Justice Reform Project: Summary of Findings and Recommendations (Toronto: Ministry of the Attorney General, 2007) at 134 [emphasis added].
\(^{75}\) RCP, supra note 25, r 1.04. For example, these issues may have a role when determining costs (see Courts of Justice Act, supra note 23, s 131; RCP, supra note 25, r 57.01).
While such a disconnect is of lesser concern for litigation that is regarding essentially modest compensation disputes between individuals, this disconnect becomes more problematic when one is dealing with a broader dispute involving a state agent or larger accountability and financial issues (such as those involved in large-scale demonstrations). In such situations, the disconnect between these principles and duties can become amplified because of the complex nature of the issues involved. If judicial officers are primarily focused on pure financial claims as governing the proportionality principle and a large financial claim is not present, judicial officers can effectively limit the effectiveness of litigation to deal with broader accountability issues by limiting what can be explored and done in the litigation. Such an approach is consistent with the limited remedies available and what information can be put forward in a “conflict-solving” approach.\(^\text{76}\)

In such situations, courts ought to instead take into account and give more weight to broader considerations than the amount claimed and not treat a broader accountability case as a typical case. However, this approach is somewhat counterintuitive to the inherent biases of civil procedure (including its default “conflict-solving” nature) since the amount claimed usually determines what civil litigation process can be used (as discussed above). While this may be generally appropriate, clearer guidance should be provided for exceptions that acknowledge the different nature of broader accountability litigation, which will be more oriented towards a “policy-implementing” approach instead. For example, courts could consider how well-known the incident is known, how many people are involved, and whether substantive issues involving significant state actors are involved. It is important for the concept of rule of law that “what is at stake” remains broader than the amount being claimed for compensation.

In addition, in order to mitigate the disconnect between both sets of rules, it is worth considering whether some of these principles from the *Rules of Civil Procedure* ought to be converted into direct duties that lawyers owe their clients. Lawyers would then be directly accountable for when such duties are not followed, and it may also allow for the creation of counter-incentives to the lawyers’ other current duties and incentives to raise every issue. For example, current duties could be explicitly tempered by the financial realities that clients may face, which would be a

\(^{76}\) Damaška, *supra* note 2 at 117–119 & 136–137.
change that remains consistent with civil litigation’s overall “conflict-solving” nature. This change in turn could provide for better access to justice as lawyers may have less of an incentive to charge as many fees as possible to an individual client given the additional potential of an insurance claim if a lawyer does not properly consider such issues. Other incentives that reinforce the underlying principles of civil litigation may also be possible.

D. The Realities of Court Funding and Cost Incentives: Civil Litigation’s Liberal Assumptions

One of the issues inherent in the Canadian civil litigation system is that it reflects liberal assumptions implicit in Canadian society that do not reflect reality. Such liberal assumptions include: a preference for formal equality instead of substantive equality; capitalist concepts of public versus private spheres as well as rational actors; and a preference for private ordering over public ordering. Chayes notes that “[t]he traditional conception of adjudication reflected the late nineteenth century vision of society, which assumed that the major social and economic arrangements would result from the activities of autonomous individuals,” and these assumptions and perspectives are consistent with the “conflict-solving” nature of Canadian courts.

One of the most pervasive ideas is that the litigants approach litigation from equal positions and abilities. However, this assumption does not reflect the financial realities associated with civil litigation nor the impact of a litigant’s ability to pay for litigation. Such issues are particularly pertinent in the context of large-scale demonstrations as demonstrators often do not have access to the significant resources needed for litigation. This issue and the resulting impacts will be explored below by focusing on the issues of advanced funding and adverse costs.

1. (Very Limited) Advanced Funding Through Court Processes

The Rules of Civil Procedure generally do not include rules that explicitly focus on the ability of a litigant to pay for their role in litigation. Such an approach is consistent with the “conflict-

77 Chayes, “Role of the Judge”, supra note 61 at 1285.
78 See e.g. generally Damaška, supra note 2 at 106–109.
79 One exception is that the financial position of each party is to be considered in determining whether leave ought to be granted to allow oral examinations exceeding 7 hours (RCP, supra note 25, rs 31.05.1(1) & (2)(d)).
solving” approach that “[a]ll litigants must be treated as equal for the purpose of allocating procedural weapons”.

Instead, if it comes up at all, it usually arises indirectly with respect to a rule. For example, while there is a rule that allows for a party to seek security for costs in certain circumstances, impecuniosity is a key consideration as to whether the court should grant such a request. As well, the focus of the “proportionality” principle is arguably to keep overall costs more manageable for everyone and the system as a whole, but the principle’s focus is on the amount claimed rather than an individual’s ability to pay.

The lack of focus on these issues illustrates the liberal assumption of equal parties in an formal sense, despite usually very real substantive differences between the litigants. According to Damaška, “[i]nequalities which spring from sources other than ‘abstract’ procedural rules do not enter the balance” in a pure “conflict-solving” approach. Chayes reinforces this traditional perspective as factors such as “differences among potential litigants in practical access to the system or in the availability of litigating resources were not even perceived as problems.”

Given the potential effect of such differences to discourage litigation that ought to be otherwise brought, one would expect courts to take some steps to ensure access to justice, including potentially through advanced funding (also known as interim costs). However, the Supreme Court of Canada has instead set a very high threshold for an exception to the regular “conflict-solving” approach so that a litigant is eligible for such advanced funding.

In British Columbia (Minister of Forests) v Okanagan Indian Band, a majority of the Supreme Court of Canada identified three conditions that must be met to justify such potential funding in the context of public interest litigation:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.

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80 Damaška, supra note 2 at 107.
81 RCP, supra note 25, r 56.01.
82 See e.g. John Wink Ltd v. Sico Inc (1987), 57 OR (2d) 705, 15 CPC (2d) 187 (H Ct J).
83 See e.g. Damaška, supra note 2 at 106–107.
84 Ibid at 107.
85 Chayes, “Role of the Judge”, supra note 61 at 1288.
86 Such costs are available in certain martial, trust, bankruptcy, and corporate cases, but those circumstances would not apply in the context of large-scale litigation. See e.g. British Columbia (Minister of Forests) v Okanagan Indian Band, 2003 SCC 71 at paras 33–34, [2003] 3 SCR 371 [Okanagan Indian Band].
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.\(^87\)

However, the court was clear that these conditions were necessary but not sufficient conditions; the actual funding determination rested in the discretion of the court, and the jurisdiction to grant such funding was a narrow one.\(^88\)

While these criteria provided initial promise and potential opportunities, the Supreme Court of Canada then further restricted the potential availability of this tool. In *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, the majority made clear that access to justice is *not* the paramount consideration; access to justice should instead be considered with and weighed against other important factors.\(^89\) It was only the rare and exceptional case that should get such funding, and the standard was to be a “high one”.\(^90\) A compelling case for just an individual but not the public at large was ineligible, and not every case of interest to the public will satisfy this test.\(^91\) The litigant must also explore all funding options and show that they have been unsuccessful.\(^92\) Finally, if the matter at issue can be settled or the public interest issue satisfied without an advanced costs award, advanced funding should not be provided.\(^93\) These limitations reinforce the overall “conflict-solving” approach of Canadian civil litigation as they make it more difficult for exceptions to occur, but each of these limitations is problematic for different reasons.

First, the requirement of a public interest is concerning because how does one define what is of interest to the public? “Public” usually reflects a liberal assumption that divides the public and

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\(^{87}\) *Ibid* at para 40 [italics in original].
\(^{88}\) *Ibid* at para 41.
\(^{89}\) *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para 35, [2007] 1 SCR 38 [*Little Sisters #2*].
\(^{90}\) *Ibid* at para 38.
\(^{91}\) *Ibid* at para 39.
\(^{92}\) *Ibid* at para 40.
\(^{93}\) *Ibid* at para 41.
private realms without accounting for the public foundation of private rights.\textsuperscript{94} So is the focus on state action or public law? What if there are foundational issues about private rights that have their basis in legislation? For example, what if someone had wanted to challenge the former statutory restrictions on “Indians” hiring a lawyer to advance their claims?\textsuperscript{95} A minority’s private rights are being severely limited by a public law (to the point that the private litigant is not allowed to even pay for a lawyer);\textsuperscript{96} would such a case be public enough to be eligible for an advanced costs award? As well, what if the foundational issues are about other private rights that do not have a basis in a statute? As another example, aboriginal title was only first recognized in detail by the Supreme Court of Canada in 1973,\textsuperscript{97} prior to the fuller development and recognition of the sui generis nature of indigenous legal issues by the courts, would such a case have been considered private or public for advanced costs purposes? The point is that appropriate limitations should be in place for advanced cost awards, but it would have been better to use criteria that more clearly focus on the underlying questions and effect. For example, cases that involve developing key or new legal concepts should be eligible, and cases that involve a significant number of people’s interests should be eligible. However, cases between two individuals that are more factual and involve an application rather than a development of the law should not be eligible.

Second, the requirement to explore all funding options is a method that allocates the costs of litigation when the litigant cannot pay first to other organizations and interested parties rather the opposing party or the state generally. However, it is unclear why this method of allocation is necessarily better than other forms of cost allocation that may be more efficient and effective. For example, advanced costs regimes are regularly used in other areas of law,\textsuperscript{98} and the state and

\textsuperscript{94} In reality, private rights are the creation of public law with public enforcement, so it is difficult to disentangle the two realms when the concepts are examined critically (see e.g. Robert Hale, “Coercion and Distribution in a Supposedly Noncoercive State” (1923) 38:3 Poli Sci Q 470 at 471–474 & 476).

\textsuperscript{95} See An Act to amend the Indian Act, SC 1926–27, c 32, s 6, as re-enacted by Indian Act, RSC 1927, c 98, s 141, as repealed by The Indian Act, SC 1951, c 29, s 123(2).

\textsuperscript{96} The written consent of the federal Superintendent General was required (ibid), which raises obvious questions about how often such consent would be forthcoming, especially given the general attitudes and approaches towards “Indians” and their lands historically (see e.g. generally Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, vol 1 (Ottawa: Minister of Supply and Services Canada, 1996), ch 8–13; Calder v British Columbia (AG), [1973] SCR 313 at 345 & 426–427, 34 DLR (3d) 145 (aboriginal title claim against province precluded without provincial permission as sovereign immunity continued at that time)).

\textsuperscript{97} Ibid at 320ff, 352–355, & 375ff.

\textsuperscript{98} See e.g. Okanagan Indian Band, supra note 86 at paras 33–34.
society are often in a better position to absorb such costs, particularly when the litigation is about whether the state is acting appropriately. Grants through an arms-length funding system could also help ensure that meritorious cases that fit certain criteria (e.g. particular historic injustices or disadvantaged groups) are resolved rather than not. However, the court instead seems to prefer the stated default method because it is the most compatible with a liberal public/private divide and a “conflict-solving” approach (i.e. other supporting private parties should pay first). Such an approach is also consistent with the more passive approach associated with Anglo-American courts and the “conflict-solving” approach.99

Finally, the requirement to examine settlement or other methods of satisfying the public interest is problematic because the court does not seem to acknowledge the possibility that opposing parties can tactically use this limitation to their advantage. Instead, “conflict-solving” is privileged as the purpose of litigation, and an assumption of reasonableness and rationality among the parties prevails. As a result, a litigant is essentially required to show that an opposing party is essentially being unreasonable or causing the litigation in order to get advanced funding (as illustrated by the facts in Okanagan Indian Band).100 However, the practical result is that the litigant will usually need to devote significant resources in order to provide the evidence required to meet that threshold, and this approach sets up a power dynamic where the poorer party is essentially required to try to settle the case before they can get funding.

The practical effect of these clarifications is that it is extremely difficult to get advanced funding through a court process, which reinforces the standard “conflict-solving” approach to civil litigation. In fact, the majority in Little Sisters #2 acknowledged that it is a regular occurrence for litigants to have unequal resources.101 However, while troubling and unfair, the majority indicated that it would be “imprudent and inappropriate judicial overreach” for the court to bring, on its own, “an alternative and extensive legal aid system into being.”102 This approach and perspective unfortunately reflects the usually passive and limited role of Canadian courts in

99 Chayes, “Foreword”, supra note 60 at 4–5; “Role of the Judge”, supra note 61 at 1286; Damaška, supra note 2 at 79–80.
100 Supra note 86 at paras 2–5 & 45–46 (province caused litigation to go trial to rather than being dealt with in summary manner despite the costs, the band’s impecuniosity, and other issues facing the band).
101 Ibid at para 44
102 Ibid.
litigation, 103 which is consistent with a “conflict-solving” approach. 104 Given the difficulty of obtaining advanced costs against the state, a court would likely be even more hesitant to grant advanced costs against non-state parties unless the request is in an area where advanced costs are already granted. 105 This reality also potentially makes litigation against non-state parties even more difficult. This reticence also reflects the court’s current unwillingness to institute changes that relate to fundamental assumptions and biases present in both the court system and society at large. However, given the lack of action on the legal aid front since this decision, 106 there is a real question of whether the court should be taking a more active role with respect to funding in certain cases to counteract the effects of funding disparities. In such cases, the court could also generally take a different approach than the standard “conflict-solving” approach.

Given that the court’s goals of advanced funding are currently limited to necessity, providing “a basic level of assistance for the case to proceed”, and “restoring some balance” rather than “perfect equality”, 107 courts are accordingly willing to tolerate a large amount of unfairness in civil litigation (despite the general assumption that all parties are equal). It is only the truly exceptional case that will warrant advanced funding through the court system. As a result, the liberal assumption continues that the litigants before the court generally have the same resources and funding, even if that is not actually true, and a “conflict-solving” approach is reinforced. There are resulting consequences of some litigants being better placed for litigation (such as being able to hire more and better qualified lawyers given their resources), and the intended incentives of the litigation process will thus have different effects depending on the resources available to that party. 108 Consistent with a “conflict-solving” approach, the court’s focus instead seems to reinforce a more limited spotlight on the “efficient and orderly administration of

103 As an example, such an approach is also consistent with the view that courts should generally not be granting continuing orders in litigation (see e.g. Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62 at paras 91–92, 105–117, [2003] 3 SCR 3, LeBel & Deschamps JJ, dissenting; see also Damaška, supra note 2 at 117–119).
104 Ibid at 135–140.
105 See e.g. Okanagan Indian Band, supra note 86 at paras 33–34.
106 For example, the vast majority of Legal Aid Ontario’s legal aid certificates continue to be issued for criminal, family, and immigration/refugee matters (see e.g. Legal Aid Ontario, 2011/12 Annual Report (Toronto: Legal Aid Ontario, 2012) at 16, online: Legal Aid Ontario <www.legalaid.on.ca/en/publications/downloads/annualreport_2012.pdf>.
107 Okanagan Indian Band, supra note 86 at paras 43–44.
108 See e.g. Damaška, supra note 2 at 107–109.
justice”109 rather than dealing with systemic factors that negatively affect the ability of a litigant to obtain substantive justice. A liberal economic approach and its biases are also reinforced, especially since substantive equality is not as important as formal equality and since the litigation contest will determine the winner regardless of the substantive inequality (akin to analogous contests in the marketplace). As a result, it is practically more difficult for complex accountability litigation to occur if resources are not otherwise available since there is little chance of funding through a court process. The result is that the principle of “equal before the law” has an important caveat that one must be able to afford or otherwise carry out the litigation, otherwise the litigation and corresponding accountability may never occur.

2. Adverse Cost Incentives and Their Implications

In the Canadian civil justice system, the standard rule is that winners ought to be entitled to receive a portion of their costs from the losers due to reasons of indemnity.110 Although the court has a general discretion to depart from this standard practice for various policy reasons,111 the impact of indemnity realities on litigants and potential litigation is often understated and misunderstood. The reality is that the actual impact of adverse cost risks on broader accountability litigation will ultimately depend on the resources available to a litigant,112 and some of the related issues are explored below.

The characteristics of standard indemnity-based cost awards can be summarized as follows:

1. They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
2. Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
3. They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
4. They are not payable for the purpose of assuring participation in the proceedings.113

109 Okanagan Indian Band, supra note 86 at para 25.
110 See e.g. Little Sisters #2, supra note 89 at para 34; Okanagan Indian Band, supra note 86 at paras 19–21.
111 See e.g. ibid at paras 22–26; Courts of Justice Act, supra note 23, s. 131; RCP, supra note 25, r 57.01.
112 See e.g. Damaška, supra note 2 at 107–109 (other impacts that apply by analogy to adverse costs).
113 Okanagan Indian Band, supra note 86 at para 20, citing Hamilton-Wentworth (Regional Municipality) v Hamilton-Wentworth Save the Valley Committee, Inc (1985), 51 OR (2d) 23 at 32, 19 DLR (4th) 356 (Div Ct) [italics in original; underlining added]
These policies are consistent with a “conflict-solving” approach as essentially civil litigation is a contest where the winner is entitled to certain benefits.

However, the Supreme Court of Canada notes that various policy purposes are now used with respect to costs in addition to the standard indemnity rule.\textsuperscript{114} Such purposes include penalizing a party who refuses a reasonable settlement offer as well as sanctioning inappropriate behaviour during litigation.\textsuperscript{115} Rule 57.01 specifically outlines various non-exhaustive factors that a court may consider when awarding costs.\textsuperscript{116} Although various factors are listed, the ability of a litigant to pay costs is not an explicit factor. In fact, only one of the factors is regarding “the importance of the issues”\textsuperscript{117}; the focus of the remaining listed factors can be instead categorized as ensuring the “efficient and orderly administration of justice”.\textsuperscript{118} Such factors remain consistent with a “conflict-solving” approach as the factors generally relate to procedural rather than substantive issues.

The practical result is that, before any litigation commences, litigants must presume that costs may be awarded against them for the choices that they make during that litigation. According to the Supreme Court of Canada:

\begin{quote}
[Costs] act as a \textit{disincentive to} those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they \textit{make the legal system more accessible to litigants} who seek to vindicate a legally sound position.\textsuperscript{119}
\end{quote}

While these goals are laudable at a conceptual level, they assume a liberal equality and rationality among the parties that usually does not exist, especially in the context of significant accountability litigation.

For example, in the Ipperwash litigation involving then Premier Michael Harris, the legal fees for Mr. Harris once he obtained his own counsel were nearly $125,000 for just the initial 3.5 month

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\textsuperscript{114} Okanagan Indian Band, supra note 86 at para 25.
\textsuperscript{115} Ibid.
\textsuperscript{116} RCP, supra note 25.
\textsuperscript{117} Ibid, r 57.01(d).
\textsuperscript{118} Ibid, rs 57.01(0.a)–(c) & (e)–(h); Okanagan Indian Band, supra note 86 at para 25.
\textsuperscript{119} Ibid at para 26.
\end{flushleft}
period between September 15, 1999 and December 30, 1999. During that time, he successfully prevented himself from testifying in the lawsuit at that point (although he would have to testify later). By January 31, 2002, his cumulative total fees had nearly reached $950,000. Given that the lawsuit was only settled in early October 2003, the total defence costs would have likely been in the multi-million dollar range, especially once costs for all of the defendants’ counsel are considered. Such costs and the corresponding actions that required those costs do not reflect the assumed liberal equality and rationality among the parties that is supposedly present, particularly since the defendants in state accountability cases have access to practically unlimited resources relative to the plaintiffs.

In addition, there is an assumption that costs actually increase accessibility to the legal system, which is also flawed when examined closely. The flaws with both of these assumptions are reviewed in detail below.

a. The Flawed Equality/Rationality Assumption

With respect to the equality and rationality assumption, a simple theoretical example is useful to illustrate the flaws with the assumption. Presume that two plaintiffs have the same claim for compensation and will carry out separate litigation in the same manner against the same defendant. In other words, everything is equal, including their respective access to resources. In such a situation, both plaintiffs will have the same risk that adverse costs will be awarded against each plaintiff, and the quantum of such adverse costs will be the same. In this situation, costs acts as an equal disincentive, and this situation reflects the standard assumption present in civil litigation.

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121 Ibid.
124 See e.g. George v Harris, 2003 CanLII 27659, [2003] OJ No 3696 (QL) (Sup Ct J) [George cited to CanLII] (5 sets of lawyers represented the defendants).
125 For examples of such motions in George v Harris, which was a relatively litigious case, see the various citations and summaries listed infra at note 156.
Now presume that one plaintiff is poor and the other is wealthy, but everything else remains the same. From a relative perspective, any adverse costs would consume far less of the wealthy plaintiff’s resources compared to the poor plaintiff’s resources. Thus, setting aside other potential factors, the poor plaintiff will have a greater disincentive to bring the litigation. If brought, the poor plaintiff will also have an incentive to carry out the litigation in manner that minimizes the adverse costs risk as well as a greater incentive to settle in order to remove the costs risk. On the other hand, the wealthy plaintiff does not have the same disincentive and incentives, and the wealthy plaintiff may instead be willing to take more risks for strategic reasons or given the risk-reward ratio. The practical effect is that those with fewer resources are disproportionately affected by adverse costs regimes.

An actual recent and well-publicized case helps illustrate how a wealthy litigant is more likely to conduct litigation in a highly adversarial manner that uses all the available options. In *Morland-Jones v Taerk*, the plaintiffs brought a motion for an interlocutory injunction that “flow[ed] from the [p]laintiffs’ allegation that the [d]efendants have been misbehaving and disturbing their peaceful life in [their] leafy corner of paradise.” As part of the motion, the plaintiffs summoned four non-parties to testify as part of the motion. While this option was technically available under Rule 39.03, it is surprising that this rule was exercised in this way given the motion’s issues and the lack of supporting evidence that was ultimately obtained. However, this approach becomes more understandable when one appreciates the significant wealth of all of those involved in this case. The risk-reward of potentially calling the witnesses versus the cost helps explain why these plaintiffs took these unusual steps. Given the nature of the litigation’s issues, it is not surprising that the motions judge found that there was not even a serious issue to be tried when dismissing the injunction request. However, if the plaintiffs were not so well-

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126 For example, the poor plaintiff may be judgment-proof or far more passionate about the issue than the wealthy plaintiff.
127 While very poor judgment-proof plaintiffs may not have the same incentives directly, the potential role of very poor judgment-proof plaintiffs in such litigation is exceptional and can thus be ignored for the purposes of this chapter because they would usually not have the resources, access to professional expertise, or other capability to bring and continue the litigation in order to take advantage of their judgment-proof status.
130 *RCP, supra* note 25.
132 *Ibid* at paras 1–2 & 23.
133 *Ibid* at paras 26–27.
resourced, it is questionable whether such litigation, much less the motion, would have been brought at all.

Similar effects apply analogously to defendants in litigation. All other things being again equal, poor defendants who have less available resources face a greater relative impact of potential adverse costs compared to wealthy defendants. While the disincentive may be the same from the perspective of quantum, it is not the same from the perspective of amount relative to other resources the defendants have available to fight the litigation. Poor defendants will again have a greater incentive to settle a case or carry out litigation in a manner that minimizes adverse cost risk. On the other hand, richer defendants may be more willing to accept a greater risk of adverse costs for reasons analogous to those noted before. This reality helps explain why defendants often use procedural tactics, such as a motion to strike, to attempt to pre-emptively end litigation against them. These examples illustrate the flaws with the assumption of equality and rationality with respect to adverse costs.

b. The Flawed Accessibility Assumption

Moving on to the accessibility assumption present in the Supreme Court’s costs comment, this assumption also has key flaws when critically examined. The key issue is whether the system is more accessible because of cost awards. In order for this proposition to be true, litigants must be fairly certain that they will receive cost awards before the relevant proceeding or litigation step happens. However, litigants usually do not know if they will actually receive a cost award until after a decision is rendered. Instead, only a possibility of a favourable cost award exists, and there is also the distinct possibility of an adverse cost award.

In addition, a competent litigation lawyer would usually be very careful to avoid providing a definitive opinion on any litigation issue given the nature of the process. Ultimately, it is only a court’s determination that is definitive, not a lawyer’s opinion. This uncertain reality is illustrated by the recent issues regarding the attempted appointment of Justice Nadon to the Supreme Court of Canada. Although former Justices Binnie and Charon as well as Peter Hogg

134 See e.g. Morton, Iacovelli, & Steinberg, supra note 67 at 47–48 & 51–54; RCP, supra note 25, r 21.01(1).
held the view that Justice Nadon was eligible for appointment to the Supreme Court, the court ultimately disagreed in a 6-1 decision. If a client had relied on analogous supporting opinions from eminent jurists, scholars, and lawyers to justify a potential future costs award as part of undertaking litigation, they would be in a serious problem if the litigation does not turn out as expected (which is always possible). Instead, clients are thus far more likely to focus justifiably on the potential costs they have to pay if they lose. Given the court’s general principle of indemnity with respect to costs, clients would also likely receive little sympathy from a court for costs relief because they relied on a legal opinion in bringing the litigation.

Even if such an assumption was not an inappropriate ex post justification, the quantum of the costs awarded relative to the actual cost raises questions about how additionally accessible litigation would be. Modern litigation is expensive, and Justice Brown illustrated how a 10 day trial would cost the defendants conservatively today about $425,000 just for trial preparation and the conduct of the trial. With respect to that litigation, he further noted that:

[T]here is a prospect that defence costs will reach in excess of $800,000. If we have reached the point where $800,000 cannot buy you a defence to a $1.2 million fraud claim, then we may as well throw up our collective hands and concede that our public courts have failed and are now only open to the rich.

These realistic values show just how expensive litigation can be before a client takes into account any effect of a potential future cost award. It may accordingly be time to see if fee or other limits relative to the claims should be instituted to counter some of the previously discussed incentives that lawyers currently have to maximize their own revenue from each claim. Another question is whether such limits should be instituted in a way that maintains the “conflict-solving” approach (e.g. reduce the available procedural weapons) or is different.

135 Letter from the Honourable Ian Binnie to Department of Justice (Canada) (9 September 2013), online: Prime Minister of Canada <pm.gc.ca/grfx/docs/20130930_Binnie_cp.pdf>; Prime Minister of Canada, Backgrounder, “Qualification of a member of the Federal Court with 10 years of experience as a member of the Québec Bar to be appointed to the Supreme Court of Canada” (30 September 2013), online: Prime Minister of Canada <pm.gc.ca/eng/news/2013/09/30/qualification-member-federal-court-10-years-experience-member-quebec-bar-be>.
137 Such a risk is smaller in the Small Claims Court given the 15% adverse cost limit (see Courts of Justice Act, supra note 23, s 29).
138 York University v Markicevic, 2013 ONSC 4311 at para 52, [2013] OJ No 3014 (QL) [York University].
139 Ibid at para 64 [emphasis added].
Even if a litigant wins, any granted cost awards would also only be for a portion of the actual costs incurred. As noted by Justice Newbould in another case, the rates that are supposed to be used in Ontario’s cost award determinations are from 2002, and they “are completely outdated and unrealistic”. He instead posits that partial indemnity costs should be 60% of the actual rate charged, and substantial indemnity should be 90%. Thus, if the outdated rates associated with the *Rules of Civil Procedure* were used, a typical litigant could only hope to recover a small fraction of the actual cost. Even if more up-to-date rates were used instead, a considerable portion of the cost would still remain outstanding. After all, substantial indemnity costs are only awarded in very specific situations, and claimed costs are often reduced considerably by masters and judges to a smaller amount for the actual cost award.

The potential for such marginal success pales in contrast to the risk of adverse costs discussed above. After all, if the litigant loses, the litigant will be faced with the double-whammy of having to pay their own costs plus a significant portion of the opposing side’s costs. Litigants are thus far more likely to justifiably look at what they will be out-of-pocket in the worst-case scenario rather than the marginal costs offset they may receive if successful. While the potential amount will depend on the specific circumstances, it becomes apparent that this prospect will be much more of a disincentive to access rather than increasing access, particularly given the significant amounts associated with modern litigation. Given these realities, costs awards can only have a marginal effect on “making the legal system more accessible to litigants”.

Although the prior analysis focused on comparing the effects of adverse costs on differently-resourced litigants on the same side, a different perspective becomes apparent when one starts comparing differently-resourced litigants from opposing sides. Disparity consequences now become much more acute because opposing litigants may have significantly different resources

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140 *Stetson Oil & Gas Ltd v Stifel Nicolaus Canada Inc*, 2013 ONSC 5213 at para 22, [2013] OJ No 3702 (QL) [*Stetson Oil*] [emphasis added]. Although Justice Newbould’s comments were specifically in the context of “an action fought by two major downtown Toronto firms” (*ibid*), analogous issues would apply to litigation counsel from any location and firm type given the passage of time.

141 *Ibid* at para 25. The percentage for “substantial indemnity” reflects the rules’ definition that substantial indemnity is 1.5 times partial indemnity (see *ibid* at para 10; *RCP*, *supra* note 25, r 1.03, *sub verbo* “partial indemnity” & “substantial indemnity”).

142 See e.g. *ibid*, rs 49.10 & 57.01; *Standard Life Assurance Co v Elliott* (2007), 86 OR (3d) 221 at para 9, 50 CCLI (4th) 288.

143 See e.g. *Stetson Oil*, *supra* note 140 at paras 1 & 28 (claimed costs of over $2.1 million for an 11 day trial were reduced to about $1.6 million).
available. These resources in turn will shape their strategy and approach as one side may employ various motions and legal techniques to their advantage.\textsuperscript{144} Justice Brown eloquently notes that the result of this situation is a “snail-paced” progress of litigation that involves “endless interlocutory motions, where slivers of the merits of the case are subjected to intense scrutiny, but to no final result.”\textsuperscript{145} While consistent with a “conflict-solving” approach, particularly given the parties’ control over the proceedings,\textsuperscript{146} the outcome is that:

\begin{quote}
[A]s the money flows out of their pockets, all too often, at the point when the parties’ financial resources are exhausted, they raise their heads, look across the field, and discover that the other side – whence rests the final decision on their dispute – remains elusively distant and beyond their practical reach.\textsuperscript{147}
\end{quote}

This comment reinforces the combative contest nature and focus of the “conflict-solving” approach to resolving disputes rather than accurate fact-finding or resolving disputes efficiently.\textsuperscript{148} The parties also have to pay for that combat and all its associated parts, which results in the “conflict-solving” approach becoming akin to a “user-pay” system of dispute resolution.

If the opposing parties are equally matched, they will experience the noted exhaustion phenomenon at the same time. However, if one party has significantly more resources than the other, the poorer litigant is more likely to simply decide the litigation is not worth it. Such litigants will either concede, or they may not even bring or defend the litigation. Better-resourced litigants (and their lawyers) are well aware of this reality, and they have an incentive to use corresponding tactics to financially exhaust their opponents. The result is that better-resourced litigants can implement an effective strategy to defeat their opponents without ever having to actually deal with the merits of the issues.\textsuperscript{149} The seemingly neutral \textit{Rules of Civil

\begin{footnotes}
\footnote{144}{See e.g. Morton, Iacovelli, & Steinberg, \textit{supra} note 67 at 1–2, 35, & 47–48. See also Damaška, \textit{supra} note 2 at 108–109.}
\footnote{145}{\textit{York University}, \textit{supra} note 138 at paras 10 & 12.}
\footnote{146}{See Damaška, \textit{supra} note 2 at 109ff.}
\footnote{147}{\textit{York University}, \textit{supra} note 138 at para 10 [emphasis added].}
\footnote{148}{See Damaška, \textit{supra} note 2 at 78–80 & 122–123. Damaška explains how and why reactive states cannot use a conciliatory form or morphology, and they instead rely on combative contests to resolve disputes (\textit{ibid} at 78–79). However, the contest can only continue while there is a dispute. So, while a contest may have been previously ongoing before a judge, the “underlying animus” can be removed and the proceedings brought to an end if there is an out-of-court settlement (\textit{ibid} at 79).}
\footnote{149}{See e.g. \textit{ibid} at 108–109.}
\end{footnotes}
Procedure combined with the generally passive role of the judiciary thus result in the litigation process being skewed to the disadvantage of the less wealthy. In the context of demonstrations, this result means that the demonstrators’ interests in freedom of expression and dissent are often practically under-represented in the litigation process. In contrast to a purer “conflict-solving” approach, it may accordingly be worthwhile to examine whether differential costs penalties should be instituted in such situations so that parties and court time is more focused on resolving cases on their full substantive merits.\footnote{For example, higher cost penalties could be instituted by default for failed preliminary motions to provide a disincentive to such motions as well as to more properly compensate those who successfully defend such motions.}

\section*{E. A Reality Check on Other Key Aspects of Civil Litigation}

In addition to the issues discussed above, the work involved in bringing a case is distinctly different from defending a case. Although parties have control over the proceedings in accordance with a “conflict-solving” approach,\footnote{See \textit{ibid} at 109ff.} Justice Newbould notes that “it is normal that the work to be done by a plaintiff to build a case is far more than the work needed to be done by a defendant to defend the case.”\footnote{\textit{Stetson Oil}, supra note 140 at para 17.} This reality is present throughout the litigation as plaintiffs have the burden to \textit{prove} their facts as well as that they have a cause of action. Defendants can thus win by simply showing that the plaintiffs have not met various technical and procedural requirements, or defendants can win on the substantive merits. Such an approach is consistent with a more “conflict-solving” approach where both procedure and substance are important. In the context of civil litigation that is initiated to bring accountability for state actions involving large-scale demonstrations, these issues illustrate the difficult path that must be successfully navigated by the plaintiffs. Some of these other civil litigation issues are discussed below.\footnote{The issues discussed in this section are not intended to be an exhaustive list.}

1. Plaintiff(s) Limited to One Set of Counsel Whereas Defendants Not

One of the realities associated with holding the state accountable through civil litigation is the fact that multiple defendants are often involved in the key events and they must be named as part
of the litigation. However, a key resulting issue is that while the plaintiffs must have the same lawyer, defendants do not have that same requirement. In order to be successful in such litigation, plaintiffs must thus be able to fend off multiple attacks from multiple defendants and their lawyers.

This requirement has other implications. First, under the Rules of Professional Conduct, a lawyer is not allowed to act or to continue to act when there is or likely to be a conflict of interest, unless the clients consent after full disclosure. Such an approach is consistent with seeing disputes as contests where a lawyer can only advocate zealously for one party when conflicts arise. On the defendant side, this concern is less of an issue as a defendant can simply decide to have their own lawyer or jointly retain a lawyer with a defendant that has non-conflicting interests. However, on the plaintiff side in multi-plaintiff litigation, the requirement of having the same lawyer essentially means that there must be a fair amount of interest commonality among the multiple plaintiffs in order for the litigation to proceed. This in turn raises potential issues about reporting and who gives instructions. In short, it makes it more difficult for the contest to even begin.

If such commonality is not possible, a single case may be insufficient; multiple cases may need to be brought instead if possible. In theory, additional possible plaintiffs could be instead included in the same case by including them as defendants and then having those defendants

154 See e.g. George, supra note 124 (13 defendants were named with respect to the Ipperwash incident); Good v Toronto (City of) Police Services Board, 2013 ONSC 3026, 43 CPC (7th) 225 [Good], rev’d 2014 ONSC 4583, [2014] OJ No 3643 (QL) (Div Ct) (4 defendants were named with respect to the Toronto G20).

155 RCP, supra note 25, r 5.02.

156 See e.g. George v Harris, [1999] OJ No 639 (QL) (Ct J (Gen Div)) (motion to strike pleadings by 3 defendants); George v Harris (1999), 92 ACWS (3d) 959, [1999] OJ No 4544 (QL) (Sup Ct J) (motion to strike notice of examination); George v Harris (2000), 95 ACWS (3d) 823, [2000] OJ No 952 (QL) (Sup Ct J) (motion to set aside certificates of non-attendance, compel answers, and restrain plaintiff counsel’s contact with media); George v Harris (2000), 97 ACWS (3d) 225, [2000] OJ No 1762 (QL) (Sup Ct J) (motion to strike notice of motion); George v Harris (2001), 204 DLR (4th) 218, 12 CPC (5th) 272 (Ont Sup Ct J) (motion to strike pleadings by all defendants); George, supra note 124 (motion to adjourn start of trial).

157 RPC, supra note 68, rs 2.04(2)–(6), & (9).

158 See e.g. George, supra note 124 (5 sets of lawyers represented the defendants); Good, supra note 154 (3 sets of lawyers represented the defendants).

159 In single plaintiff litigation, such issues would not arise. However, it may still be worthwhile to consider and account for the interests of other people in order to obtain strategic support in various ways.

160 For example, in the context of class actions, only one set of representative plaintiffs and their legal team is generally allowed, which will be determined by a carriage motion if needed (see e.g. McQuade v Toronto (City of) Police Services Board, 2011 ONSC 5086, 38 CPC (7th) 168).
counterclaim or cross-claim as appropriate, but such an approach is unwieldy and requires a great deal of co-ordination. Another option is initiating separate litigation despite the related issues to allow for separate representation by separate counsel, and then the cases could be heard by the court at the same time to minimize hearing time given the overlap in the issues. However, such litigation faces analogous complications, especially if the plaintiffs fundamentally disagree on the issues and approaches. Interveners may also be added as parties who can lead evidence or as “friends of the court” who only provide argument, but the practical reality is that interveners are more likely to participate in a case on appeal once the record is set on a basis that minimizes their costs exposure.

The result is that, despite disparate interests, defendants in large-scale cases have a better ability to engage more counsel, strategically co-ordinate their attacks in the litigation, and distribute the costs of those attacks and the litigation among themselves. Such an approach reinforces the contest nature of litigation. In situations that involve the state, the state may also fund different counsel teams to represent different aspects of itself, which illustrates the significant financial resources that the state is able to provide. Further, there is ultimately no requirement that defendants must co-ordinate, and each defendant can act in its own self-interest as it sees fit. In other words, defendants can have the best benefits of both options, which reinforces a “conflict-solving” approach since the parties ultimately have control over the proceedings. On the other hand, the plaintiffs and their single team of lawyers will be usually required to respond to all of the various attacks regardless of defendant, and they ultimately bear the actual and potential adverse costs risk for those battles.

However, there are certain benefits to the plaintiffs’ requirement of a single set of counsel and significant interest commonality. First, a single set of counsel is ultimately in control of the

\[^{161}\text{RCP, supra note 25, rs 5.03(5), 27.01, & 28.01}\]
\[^{162}\text{Ibid, r 6.01}\]
\[^{163}\text{Ibid, rs 13.01–13.03.}\]
\[^{164}\text{For example, the terms of intervention orders in appeals often specify the time allowed for argument and that the intervenor is not liable for or entitled to claim costs.}\]
\[^{165}\text{For example, in Good, three different counsel teams represented the Toronto Police Services Board, the Government of Canada for the Royal Canadian Mounted Police, and the Government of Ontario for the Ontario Provincial Police [OPP] (supra note 154). In George, the five different counsel teams were likely funded by the state as all of the individual defendants were ministers, members of Ontario’s Legislative Assembly, or senior members of the (supra note 124).}\]
litigation on behalf of the plaintiffs, which minimizes issues of potential conflict and promotes efficiency as any conflict issues need to be usually dealt with largely at the beginning as part of the litigation strategy. The requirement for plaintiffs to consent up front to joint retainers thus ensures that they understand the basic ground rules and approach for the litigation.\(^{166}\) The plaintiffs can also dictate the litigation’s initial parameters through the Statement of Claim or Notice of Application.\(^{167}\) For example, the plaintiffs get to decide which defendants should be part of the litigation and what are the claims alleged against each of them.\(^{168}\) The single set of lawyers allows for a single strategy as to how the litigation will proceed against the defendants, which can be helpful in the planning of potential motions and responses against defendants. If there is significant media or other public interest in the issues, a single team allows for a single voice and message to be provided regarding the plaintiffs’ perspective. In short, the plaintiffs’ potential ability to singularly control and dictate the terms of the litigation for that side in a “conflict-solving” approach should not be underestimated.\(^{169}\)

2. The Benefits and Limitations of Discovery and Settlements

Assuming a plaintiff is able to survive the typical initial motions associated with civil litigation,\(^{170}\) one of the benefits of the civil litigation process due to its “conflict-solving” nature is the plaintiff’s documentary and oral discovery of all of the defendants. Discovery fits within a “conflict-solving” approach as the “compulsory exchange of information forces litigants to interact, enables them to appraise the relative strengths of their cases, and in doing so encourages settlement.”\(^{171}\) Accordingly, pursuant to Rule 30.02, “[e]very document relevant to any matter in issue in action … shall be disclosed” and “produced for inspection if requested”.\(^{172}\)

Documentary discovery thus provides a powerful mechanism for plaintiffs to get at key

\(^{166}\) See e.g. RPC, supra note 68, r 2.04(6).

\(^{167}\) See e.g. RCP, supra note 25, rs 14.03, 14.05, & 25.06.

\(^{168}\) However, when personal defendants are included in addition to their corporate entities, “[t]he pleadings must address specifically the cause of action asserted against the personal defendant and why he or she is being sued separately from the corporation” (Imnocreek Corp v Pretiosa Enterprises Ltd (2000), 186 DLR (4th) 36 at para 35, 131 OAC 358 (CA)). This issue is often applicable by analogy when trying to holding state actors accountable for their actions in protest situations.

\(^{169}\) See also Damaška, supra note 2 at 111–116.

\(^{170}\) E.g. motion for particulars (RCP, supra note 25, r 25.10); motion to strike the pleadings (ibid, rs 21.01 & 25.11).

\(^{171}\) Damaška, supra note 2 at 131.

\(^{172}\) RCP, supra note 25, rs 30.02(1)–(2).
defendant documents that would otherwise be unavailable. These documents can then be used in turn as part of examining a defendant for discovery either orally or through written questions.\(^{173}\) Another key strategic benefit of examination for discovery is that a plaintiff has the right to examine all personal defendants, and the defendants have a general duty to comply.\(^{174}\) For non-personal defendants such as corporations and non-corporate entities, a plaintiff can also usually choose which individual of that defendant the plaintiff wishes to examine.\(^{175}\) In all cases, those individuals being examined are required to answer proper questions relevant to the litigation.\(^ {176}\) Discovery thus has some potentially strong tools that can be used to hold state and other actors accountable as a result of the “conflict-solving” approach, particularly when the goal is to get information that would not otherwise be available.

However, these tools have their limits. First, defendants can refuse to produce documents or answer questions in these processes, and the plaintiff would then be required to bring a motion to compel production or answers,\(^{177}\) which results in increased costs. Second, proportionality is now a key factor in determining what documents and answers should be provided. Factors such as time, expense, prejudice, delay, and the overall volume of documents play a role in determining how such disputes should be resolved.\(^{178}\) Third, the Rules of Civil Procedure only allow a litigant to examine all other litigants (as well as third parties) for a total of 7 hours by default,\(^{179}\) which is in accordance with Justice Osborne’s recommendation that 7 hours would be sufficient for most cases and should be a default time.\(^ {180}\) While this limit can be exceeded with the consent of the parties or with the court’s permission in appropriate cases,\(^ {181}\) the reality is that

\(^{173}\) Ibid, r 31.02.
\(^{174}\) Ibid, r 31.03.
\(^{175}\) Ibid. However, in proceedings against the provincial Crown, the Deputy Attorney General instead designates the person who may be examined for discovery, not the adverse litigant (Proceedings Against the Crown Act, RSO 1990, c P.27, s 8(b)).
\(^{176}\) RCP, supra note 25, r 31.06(1).
\(^{177}\) See e.g. Damaška, supra note 2 at 131.
\(^{178}\) RCP, supra note 25, r 29.2.03.
\(^{179}\) Ibid, r 31.05.1(1). In contrast, similar default limits do not currently exist for cross-examining affidavits or for third party examinations on motions or applications (see ibid, rs 39.02 & 39.03).
\(^{180}\) Osborne, supra note 74 at 59.
\(^{181}\) RCP, supra note 25, r 31.05.1. Justice Osborne noted that “[t]here will be cases where more than one day [(i.e. 7 hours)] be required” (Osborne, supra note 74 at 59). He also noted that counsel should be able to agree in most cases whether more than the default time is needed, and he hoped that “it would be the rarest of cases that counsel require the assistance of the court” to resolve that issue (ibid).
A contested motion must be brought if the parties are unable to agree to extend the limit. A court would then be required to apply the proportionality principle to determine what an appropriate time limit would be. Procedural aspects of the “conflict-solving” approach can thus play a significant role in what occurs and how that happens.

In addition, as a result of the deemed undertaking rule, any information gained from discovery generally cannot be used for purposes other than that proceeding without consent, unless the information is filed with the court, given/referred to during a hearing, or the court orders otherwise. As a result, most of the information obtained under discovery must remain confidential between the parties unless it is put before the court for some reason, which limits the potential use and effect of the information to ensure public accountability and encourage corresponding change in ways outside of the court process. However, a strategic plaintiff can take advantage of a defendant who is being reticent on discovery or whose actions are causing numerous motions: the plaintiff then has a legitimate opportunity to file information from the discoveries in their motion materials, which is then public. When done appropriately, this strategic tactic results in legally making some information public that would otherwise be confidential. However, such actions would only result in a partial rather than full disclosure of all relevant information, which may be sufficient to keep media interest but insufficient for full public accountability.

Given various provisions of the Rules of Civil Procedure, it becomes evident that the discovery processes provided in the rules are part of a theme to encourage settlement, which is consistent

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182 See e.g. Osprey Capital Partners v Gennium Pharma Inc, 2010 ONSC 2338, 93 CPC (6th) 256 (Master) [Osprey].

183 RCP, supra note 25, rs 1.04(1.1) & 29.2.03. One decision holds that proportionality should only be used to downsize rather than expand discovery (Ontario v Rothmans Inc., 2011 ONSC 2504 at paras 163–164, 5 CPC (7th) 112, leave to appeal to Div Ct refused, 2011 ONSC 3685, [2011] OJ No 2811 (QL)). According to Justice Perell in that decision, justice can be done even in large cases such as class actions and other public interest litigation because “[t]he proportionality principle yields an ‘equality of arms’ by arms reduction[,] and [it] is not meant to prompt an arms race” (ibid at para 164). However, this view does not take into account the reality that a total of 7 hours is insufficient if there are multiple defendants, if there are highly complex issues that need to be dealt with, that each defendant has the ability to cross-examine for 7 hours, and other various factors (see RCP, supra note 25, r 31.05.1(2); Osprey, supra note 182).

184 RCP, supra note 25, r 30.1.01. For clarity, the deemed undertaking rule applies only to certain forms of discovery, and it does not apply to other evidence or information, such as motion affidavits or requests to admit (ibid, rs 30.1.01(1)–(2)).

185 See e.g the various articles listed infra at note 188. However, one must be careful to ensure that the information is properly relevant for the motion. Otherwise, the party or their counsel may be subject to sanction by the court.
with a “conflict-solving” approach.\textsuperscript{186} By allowing litigants to probe the other side’s case in a confidential manner, it gives a sense of their likelihood of success or liability and whether a settlement should be done instead. It is thus not surprising that the rules include a provision for settlement as well as additional cost consequences on a litigant if an appropriate settlement offer is not accepted and the end result turns out not to be better than the offer.\textsuperscript{187} Such provisions are consistent with a “conflict-solving” approach. However, if a settlement is accepted under the rules, much of the key information would remain confidential pursuant to the deemed undertaking rule. Other standard settlement offers also usually include clauses that do not admit liability and require total confidentiality. However, such confidentiality provisions are problematic for cases that are brought instead for purposes of broader public accountability rather than simply compensation.

As a result, public engagement and knowledge must be done through other ways in order to ensure continued public interest in the issues. For example, as a result of the ongoing litigation in \textit{George v Harris}, various information became public over time that would have been otherwise confidential.\textsuperscript{188} Such information was particularly crucial given the anti-indigenous perspective of news stories immediately after the shooting.\textsuperscript{189} Questions are thus raised as to whether exceptions ought to be made for cases that do not lend themselves to settlement and are instead about broader accountability issues.\textsuperscript{190}

\textsuperscript{186} See e.g. Damaška, \textit{supra} note 2 at 131. 
\textsuperscript{187} \textit{RCP, supra} note 25, rs 49.01 and 49.10. The additional cost consequences do not apply to class actions that are receiving support from the Class Proceedings Fund of the Law Foundation of Ontario (\textit{ibid, r 12.04(4)}). 
\textsuperscript{190} For example, “Sam” George did not accept a large sum of money to drop the lawsuit regarding Ipperwash before the change in government (Peter Edwards, “Sam George, 56, pushed Ipperwash Inquiry”, \textit{Toronto Star} (3 June 2009), online: Toronto Star <www.thestar.com/news/ontario/2009/06/03/sam_george_56_pushed_ipperwash_inquiry.html>. However, he had consistently offered to drop the lawsuit in return for a public inquiry (see e.g. Anthony Reinhart, “Sam George: Relentless in his pursuit of answers”, \textit{The Globe and Mail} (3 June 2009), online: The Globe and Mail <www.theglobeandmail.com/news/national/sam-george-relentless-in-his-pursuit-of-answers/article1198528/>),
In addition, given the number of years that the Ipperwash Inquiry took, it is difficult to see how a total of 7 hours of discovery would have been sufficient for such a case even with the litigation’s necessarily smaller scope. Further, because each party gets their own 7 hours, the defendants would have cumulatively had many more hours of discovery by default, which the defendants could have used to their advantage. Additional questions are thus raised about whether and how extended discovery can be appropriately allowed in cases involving broader accountability issues as well as whether a “conflict-solving” or another approach should be used in the context of discovery.

3. Other Procedural Requirements, Evidentiary Requirements, Causes of Action, and Remedies

Although this chapter cannot be comprehensive on the various issues that must be overcome in order for civil litigation to be a viable accountability method, it is important to keep in mind that various technical requirements must be met in order for such civil litigation to be successful. Such requirements include procedural requirements, evidentiary requirements, and the requirements for causes of action, which are all consistent with a “conflict-solving” approach where procedural aspects can be as important as the substantive merits. Each of these will be briefly examined in turn.

As discussed above in Section B.2, each litigation forum has different procedural requirements associated with litigating in that forum. However, that discussion is only the beginning of the various procedural requirements that must be met in any litigation. For example, in addition to the various prescribed forms that must be used when applicable, documents must be provided in certain acceptable formats depending on the nature of the document. Documents usually must be served upon other parties in accordance with one of the prescribed methods or as agreed among counsel. Motions have a particular process with its own documentary requirements, which ultimately occurred on “the eve of the 2003 provincial election” as he relied on the election promise of Liberal leader Dalton McGuinty that he would call an inquiry (Report of the Ipperwash Inquiry: Investigation and Findings, vol 1 (Toronto: Ministry of the Attorney General, 2007) at 636 [Ipperwash Report: Findings]).

191 RCP, supra note 25, r 31.05.1(1).
192 Ibid, r 1.06. See also Ontario Court Forms, online: Ontario Court Forms <www.ontariocourtforms.on.ca>.
193 RCP, supra note 25, rs 4.01–4.02, 4.07, & 4.09.
194 See e.g. ibid, rs 16–17.
195 See e.g. Watson & McGowan, supra, note 27 at PC-13 to PC-17.
which can be voluminous depending on the nature of the motion and the supporting evidence. If oral examinations occurred, transcripts must be ordered and paid for, and the cost will vary depending on the number of copies and how fast the transcript is required.\(^{196}\) After any decision is rendered, a court order must be obtained by following a particular process so that the order is formally enforceable.\(^{197}\) If the order is not voluntarily followed by the litigants, another process must usually be followed for the order to actually be enforced.\(^{198}\) Adding to this general complexity is the fact that each forum usually has its own particular rules, and the net result is that there is a great deal of procedural complexity that must be navigated in any litigation.

Assuming one can navigate the numerous procedural requirements, one must also be able to navigate the various evidentiary requirements in order for evidence to be properly before the forum. As discussed above, some forums, like the Small Claims Court and the Human Rights Tribunal of Ontario, have less formal requirements for evidence to be admitted. However, if a litigant is in one of the other forums, all of the formal requirements regarding how examinations may be conducted and the requirements for authentication of documents apply.\(^{199}\) The spectrum of evidentiary objections would also be available to be strategically used by the opposing side.\(^ {200}\) While parties could sometimes agree on the admission of various things or an agreed statement of facts to help limit the number of disputed issues, it may not be in a party’s interest to necessarily do that. Instead, it may be strategically more advantageous to force the opposing side to meet every technical requirement to provide more opportunities for a technical failing. For example, if a party fails to properly authenticate a document and it cannot be admitted, that result may be valuable if it is a key document to the other side’s theory of the case. In other words, what can be proven can unfortunately be more important than what actually happened.

In the context of broader accountability and large-scale demonstrations, this issue is particularly important as demonstrators can usually only provide limited evidence relative to the police officers. Only the officers involved know what information they had at the time to potentially justify their actions, and demonstrators only have their own perspective, which is usually more

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\(^{196}\) See e.g. *Fees for Court Transcripts*, O Reg 94/14, s 2.

\(^{197}\) See e.g. Watson & McGowan, *supra*, note 27 at PC-17 to PC-19

\(^{198}\) See generally *RCP*, *supra* note 25, r 60.


\(^{200}\) See e.g. *ibid* at 314–336.
limited with respect to documents and comprehensive information. The result is a game where demonstrators may have a sense of what potentially happened, but it is a live question as to whether they will be able to actually obtain or elicit that evidence in a way that can be used properly in court to prove their case. This result corresponds with Damaška’s comment that “[a] legal process aimed at maximizing the goal of dispute resolution [(i.e. a “conflict-solving” approach)] thus cannot simultaneously aspire to maximize accurate fact-finding.”

Finally, even if other requirements are met, the evidence and claim must ultimately meet the technical requirements of a cause of action for which the court can grant relief. All causes of action have technical elements that must be met in order for relief to be granted, and most causes of action also have defences that can be raised. For example, lawful authority is a valid defence to the torts of assault and battery. Assuming that a violation of a right under the Canadian Charter of Rights and Freedoms can be made out, there is usually a question of whether the violation can be saved under section 1. In order for the Human Rights Code to apply, there must be discrimination of the kind covered by Part I of the Code. In the context of broader accountability for large-scale protests, there is often an immediate attractiveness to torts such as negligent investigation, malicious prosecution, and misfeasance of public office. However, this intuitive attractiveness usually does not account for the high thresholds that must be met in order for such torts to be legally sustained. Even in other causes of action that do not have such difficult requirements, demonstrators must still be able to show that all of the technical requirements are met and not vitiated by a legal defence.

All of the above indicates the complicated maze that must be navigated successfully in order for civil litigation to be an effective accountability mechanism, which is consistent with a “conflict-solving” approach. Assuming one is successful, one must then think about what the appropriate

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201 Damaška, supra note 2 at 123 [footnote omitted].
203 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter]. Section 1 provides that Charter rights and freedoms are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (ibid).
204 Supra note 46.
remedy is. For example, many causes of action based on torts are geared towards compensation, but that may not be a sufficient vindication for the plaintiff, especially if a goal is to try to prevent analogous events from occurring again. Constitutional violations can be vindicated typically by both declarations and constitutional damages, but courts are usually wary of granting relief beyond those remedies. As a result, Canadian courts often have a limited willingness and ability to institute actual change in broader systemic or policy ways that help prevent the issues from reoccurring again, which is consistent with a passive and “conflict-solving” approach. Although the Human Rights Tribunal of Ontario has jurisdiction to grant general relief that “promote[s] compliance” with the Human Rights Code, this jurisdiction is only useful for human rights violations, which means that other elements of a claim and event may need to be ignored if this forum is going to be pursued by plaintiffs.

Given all of these considerations and difficulties, various issues associated with civil litigation as a result of its “conflict-solving” approach become apparent. These issues contribute to the requirement that significant resources, time, and expertise need to be invested in order for success to ultimately occur. There is an open question as to whether the litigation system should be modified in certain situations that involve substantial broader accountability. For example, the court could be more focused on the underlying substantive issues instead of the technical requirements, and a more active approach by the court may be more appropriate instead of the traditional passive approach. Regardless, if the civil litigation gauntlet can be successfully navigated, and even if the resulting possible remedies are not completely satisfactory, there is still potentially significant value in a set of good reasons by a court that can validate a position and provide a platform for future work or development. Conversely, a bad set of reasons may

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206 See Vancouver (City) v Ward, 2010 SCC 27 at paras 4 & 16ff, [2010] 2 SCR 28 (constitutional damages, including discussion of when declarations sufficient).
207 See e.g. Damaška, supra note 2 at 79–80 & 116–118.
208 Human Rights Code, supra note 46, s 45.2(1), para 3.
209 For example, although a criminal case, the conviction of Kenneth Deane in the death of “Dudley” George resulted in findings that: 1) “Dudley” George was not carrying a firearm at the time of the incident; and 2) Mr. Deane knew that Mr. George was not carrying a firearm. The trial judge further stated that “the story of the rifle and the muzzle flash was concocted ex post facto in an ill-fated attempt to disguise the fact that an unarmed man had been shot” (Ipperwash Report: Findings, supra note 190 at 624–626; see also R v Deane (2000), 143 CCC (3d) 84, 129 OAC 335 (CA), aff’d 2001 SCC 5, [2001] 1 SCR 279 (appeals affirming conviction)). These findings were particularly important as it undermined the OPP’s then version of the confrontation. In particular, an initial press release had been issued on the night of Mr. George’s death before the Special Investigations Unit arrived and placed a media embargo on the OPP, and that press release contained “erroneous inflammatory details regarding the circumstances of the confrontation” as well as “inaccurate information that was misleading and prejudicial to the
pose the opposite problem for broader accountability litigation.\(^{210}\) Ultimately, one must determine whether the “conflict-solving” nature and approach of civil litigation will provide the desired accountability or whether another mechanism should be pursued.

**F. Conclusion**

This chapter has sought to examine the potential issues associated with potentially using civil litigation as an accountability mechanism against state and other actors, particularly in the context of large-scale demonstrations. It has sought to illustrate some of the various issues, difficulties, and advantages that are present in the civil litigation process given its “conflict-solving” nature and the unequal effects of seemingly neutral rules of civil procedure on the less advantaged (such as demonstrators). These are all questions and concerns that must considered when determining whether civil litigation is an appropriate accountability mechanism for a situation, even with all of its inherent issues and limitations.

According to Justice Brown, the civil justice system should be fair, fast, cost-effective, and final so that litigants have their day in court,\(^ {211}\) which are laudable goals. However, the reality is far from that, and it will vary depending on the goals and strategies of the litigants (e.g. simply compensation versus whether there is a need for some broader accountability; whether the litigation should be drawn out to make it more costly for the other side; etc.). In addition, while Justice Brown attempts to distinguish between a “trial in the media” and a “trial in the public

\(^{210}\) For example, the motions judge hearing the certification motion for the proposed Toronto G20 class action stated that “[b]ehaviour modification in this case does not depend on a class action” given the various reviews and reports conducted by various groups (Good, supra note 154 at paras 257–259). However, it is unclear how non-binding reports would automatically result in binding changes, particularly since those reports and reviews had no jurisdiction to provide compensation or binding changes. In contrast, the Divisional Court found on appeal that the number of investigations was not persuasive that “the goal of behaviour modification has been achieved. … [If the alleged conduct] is made out, an award of damages to the individual citizens affected may be the most telling and lasting expression that such conduct should never be tolerated” (Good v Toronto (City of) Police Services Board, 2014 ONSC 4583 at para 95, [2014] OJ No 3643 (QL) (Div Ct)). Since behaviour modification is arguably a key goal of broader accountability, these different findings in the same case illustrate some of the potential different results as well as fundamental risks and questions that need to be considered in order to determine whether litigation is viable as a potential accountability mechanism.

\(^{211}\) York University, supra, note 138 at paras 13–14.
courts” with the view that the latter is preferable to the former,212 this view unrealistically discounts the potential role of the media with respect to disseminating information and promoting accountability, 213 particularly in a manner that is much less costly than litigation. As well, it must be kept in mind that court decisions often in turn become the basis of further reporting, and court decisions also have considerable weight that can influence the public’s perception of related issues and what ought to be done to remedy the situation.

The Supreme Court of Canada has noted that “[t]he justice system must not become a proxy for the public inquiry process, swamped with actions launched by test plaintiffs and public interest groups”, 214 which reinforces the “conflict-solving” nature of civil litigation. However, this sentiment does not reflect the public nature of the civil litigation process and the public role that court decisions have. It also does not take into account the reality that poor litigants are often unable to bring forward litigation by themselves due to the disadvantages they face, and civil litigation is often pursued when other accountability options are simply insufficient or unavailable for various reasons. After all, other processes are often at the discretion and control of other actors instead of the complainants, whereas, at least in civil litigation, the plaintiffs in a proceeding get to frame and control how the litigation proceeds as a result of its “conflict-solving” nature. However, there are various issues and limitations associated with civil litigation given its “conflict-solving” approach, which raises questions about the availability and viability of other approaches and non-court mechanisms to achieve accountability. Chapter 3 will accordingly examine various other non-court accountability options aside from the civil processes already discussed, and the focus will be on how such options may or may not be viable and useful in the context of large-scale demonstrations. Before that examination though, it is useful to first explore in the next chapter one aspect of civil litigation and its “conflict-solving” approach that often manifests in the context of demonstrations, which is interlocutory injunctions.

212 Ibid at paras 12–13.
213 See e.g. Aboriginal Legal Services of Toronto, supra note 189 at 18–23 (journalists’ nine core principles). See also Chapter 3, Section D.3.
214 Little Sisters #2, supra note 89 at para 39.
Chapter 2 – The Uphill Battle Demonstrators Face With Interlocutory Injunctions

A. Introduction

Prior to examining potential non-court accountability options in the next chapter, it is important to first explore in this chapter a key aspect of civil litigation that often manifests in the context of demonstrations: interlocutory injunctions. Interlocutory injunctions are a key legal option that can be used in theory both by and against political demonstrations given the nature of the formal equitable test. They are also different than other aspects of general civil litigation in the sense that injunctions can have an effect either prior to a demonstration or immediately on an existing demonstration, which is unlike the general ex post nature of most civil litigation and other non-court options. This potential is important because the police are in a much better position to use the criminal law against demonstrators in ways that have an immediate effect,¹ but protestors do not have similar tools open to them in the criminal realm.²

However, the practical reality is that such injunctions are weighted against demonstrators given when they typically arise and the issues involved. For example, property rights tend to prevail over freedom of expression and the right to express dissent. Injunctions are thus typically used against rather than by demonstrators given their nature. They are also typically not ideal as a broader accountability mechanism by themselves given their limited scope and interim nature. This chapter will examine a series of protest decisions to illustrate how and when interlocutory injunctions have been effective and to illustrate the underlying issues that make injunctions a tool that usually results in demonstrators facing uphill battles. This reality and slant reflects and reinforces the general “conflict-solving” approach of civil litigation discussed in the previous chapter as well as majoritarian and economically liberal tendencies. For clarity, this chapter focuses on injunctions related to political demonstrations rather than picketing in an employment context, although some of the principles and discussions may be transferable.

¹ See e.g. Criminal Code, RSC 1985, c C-46, ss 30–31 (warrantless arrest for breach of peace) & s 63 (charge of unlawful assembly). Corresponding arrests for applicable criminal or quasi-criminal charges can also occur, which can have an immediate impact on a demonstration, but such arrests can only be reviewed by criminal court well after the demonstration has already been effectively ended by the police.
² Assuming they are available and usable, private prosecutions and Special Investigation Unit investigations are ex post mechanisms given their nature.
Given the nature of the issues associated with such interlocutory injunctions (as well as statutory injunctions), this chapter also examines some of the legal doctrines often involved that compete and conflict in demonstration contexts. Unlike the previous chapter where the focus is on the nature of the forum itself (in which a large variety of legal issues can be raised), such an examination is possible in the context of these injunctions as similar legal issues and arguments reoccur in the reviewed cases. This chapter argues that, once a Hohfeldian analysis is applied to the cases examined here, courts appear to favour Hohfeldian “rights” (such as property rights) with their corresponding “duties” (such as the duty not to trespass) over “privileges” (such as freedom of expression) when making injunction decisions that involve demonstrations. This result has potential implications for freedom of expression as a concept in Canadian law, as well as potentially other freedoms protected by the Canadian Charter of Rights and Freedoms, especially when the freedoms interact with other Hohfeldian “rights” and “duties”.

The chapter accordingly begins by setting out the key Hohfeldian concepts as well as the formal tests for interlocutory and statutory injunctions. The chapter then proceeds to analyze a series of injunction cases that involved the Toronto G20 Summit, indigenous issues, and the recent Occupy movement. Although demonstrators have various inherent procedural challenges that must be dealt with as part of any injunction motion, the analysis indicates that demonstrators are rarely able to succeed in injunction motions, and only when they are able to successfully characterize their issues as involving specific Hohfeldian “rights” and “duties” rather than “privileges”. Instead, injunction decisions are more likely to go against them, particularly if they can only claim a “privilege” (such as standard manifestations of freedom of expression, including expressing dissent) that is competing against a “right” (such as exclusionary property rights). The practical result is that injunctions reinforce majoritarian and economically liberal perspectives and tendencies in the context of demonstrations, particularly since such considerations have an influential role when balancing the different involved interests.

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Wesley Hohfeld’s concept of fundamental legal relations provides a framework for analyzing why certain arguments are more persuasive in injunction motions that involve demonstrations.\(^4\) Rather than assume that all legal relations can be generally reduced to “rights” and “duties”, Hohfeld develops and uses more precise terminology.\(^5\) He posits that there is instead a scheme of jural “correlatives”, which are complementary and always present together.\(^6\) These jural correlatives as defined by Hohfeld are: “rights” and “duties”;\(^7\) “privileges” and “no-rights”;\(^8\) “powers” and “liabilities”;\(^9\) and “immunities” and “disabilities”.\(^10\) These concepts are briefly explored below.

According to Hohfeld, a “right” imposes a corresponding “duty” on third parties that is always present (e.g. to not violate the “right”).\(^11\) For example, if X has a “right” against Y to stay off X’s land, then Y has a corresponding “duty” to stay off the land.\(^12\) In contrast, “privileges” do not involve such “duties”, and “.privilege” is in fact the jural opposite of “duty”.\(^13\) For example, the “privilege” against self-incrimination is the negation of the “duty” to testify, and others have “no-right” to force the person to testify.\(^14\) A “no-right” is thus the jural opposite of a “right”.\(^15\) As another example, a person may also have the “privilege” of entering land they own, and others have “no-right” to prevent that entry.\(^16\) Freedoms (or liberties) in their basic form are thus more properly characterized as “privileges” rather than “rights”.\(^17\)

\(^5\) Ibid at 28ff.
\(^6\) Ibid at 30. He also posits that there are a series of jural “opposites” (ibid), which will be examined as part of exploring the concepts.
\(^7\) Ibid at 30ff.
\(^8\) Ibid at 32ff.
\(^9\) Ibid at 44ff.
\(^10\) Ibid at 55ff.
\(^11\) Ibid at 31–32.
\(^12\) Ibid at 32.
\(^13\) Ibid at 36–37.
\(^14\) Ibid at 40.
\(^15\) Ibid at 30.
\(^16\) Ibid at 33.
\(^17\) Ibid at 36–37 & 41–43.
On the other hand, a “power” is the ability to exercise one’s volitional control to effect a particular change in legal relations, and a “liability” is essentially the corresponding responsibility to abide by the resulting changed legal relations if the “power” is exercised. Hohfeld provides examples in a property context (e.g. the “power” to transfer one’s interests, which extinguishes a person’s own Hohfeldian legal relations with respect to the property and creates corresponding new legal relations in the other person) as well as contractual agency contexts (e.g. a principal will have “liabilities” to the agent, and the agent has the “power” to change the principal’s legal relations).

Finally, an “immunity” is “one’s freedom from the legal power or ‘control’ of another as regards some legal relation”, and a “disability” is essentially “no-power” (i.e. the opposite of a “power”). For example if X owns land, then Y has a “disability” to shift the legal interest to Y or another third party, and X has corresponding “immunity” from such acts. It will not be surprising that “immunity” is the jural opposite of “liability”.

According to Hohfeld, these eight conceptions “may be called ‘the lowest common denominators of law’”, and, by expressing “legal quantities” in such a way, it becomes easier to conduct comparisons and discover “fundamental similarities”. In the case of injunction decisions involving demonstrators, an application of Hohfeld’s definitions will show that successful arguments are repeatedly based on “rights” rather than “privileges” (as discussed below).

This distinction may not be immediately apparent in the cases examined for this chapter as the two involved legal concepts are property and freedom of expression. However, it has often been noted that “the law views property as a bundle of rights” (in the more general rather than Hohfeldian sense), and Hohfeld shows how such property rights are examples of “rights”, “privileges”, “powers”, and “immunities” using his fundamental legal conceptions. No single

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18 Ibid at 44–45.
19 Ibid at 53–54.
20 Ibid at 45–46.
21 Ibid at 55.
22 Ibid.
23 Ibid at 30.
24 Ibid at 58–59.
25 See e.g. Osoyoos Indian Band v Oliver (Town of), 2001 SCC 85 at para 81, [2001] 3 SCR 746.
26 Hohfeld, supra note 4 at 32–33, 45, 47–49, 52–53, & 55.
conception thus applies to what is considered property; instead all of them can and do apply. It is thus important to isolate the particular legal relation relevant for these cases, and it will become apparent from below that the “right” to exclude others or control access with the corresponding “duty” on others is the one that applies in these cases.

In examining the law regarding freedom of expression, a smaller “bundle of rights” (in a general rather than Hohfeldian sense) becomes apparent given how the law has developed. These rights in turn consist of different Hohfeldian concepts depending on the specific relations applicable in a particular situation, although the concept of “privilege” tends to dominate. Section 2 of the Charter provides that everyone has “fundamental freedoms”, and section 2(b) specifies that the key freedom for the purposes of the cases below is “freedom of thought, belief, opinion[.], and expression, including freedom of press and other media communication”. On first glance, the concept of freedom is akin to liberty, which would initially indicate that “freedom of expression” is a “privilege” in a Hohfeldian sense. This conceptualization makes initial intuitive sense (e.g. everyone has the “privilege” to think and say as they wish, and others have “no-right” to interfere with that), and this concept is accordingly the one that tends to dominate perceptions of freedom of expression.

However, Hohfeld notes that liberty has been used in ways that have different underlying concepts associated with it. For example, sometimes it refers to “rights” that have corresponding “duties”. Accordingly, there are limited situations involving freedom of expression where the circumstances of a particular case will determine whether the issue can be classified as a “right” or another conception in a Hohfeldian sense. Hohfeld notes that “[w]hether there should concomitant rights (or claims) is ultimately a question of justice and policy; and it should be considered, as such, on its merits.” In essence, the court plays an important role in determining whether other Hohfeldian conceptions may apply in the particular circumstances of a case.

A detailed review of the entirety of freedom of expression is outside the scope and focus of this chapter. However, Kent Roach and David Schneiderman have a useful article that details and

\[27\] Supra note 3.
\[28\] Hohfeld, supra note 4 at 36–37 & 41–43.
\[29\] Ibid at 36–37.
\[30\] Ibid at 36.
analyzes the current state of freedom of expression in Canada. That piece provides illustrative examples of how freedom of expression manifests in different contexts. For example, the defences to defamation law, particularly the new defence of “responsible communication on matters of the public interest” is an example of a Hohfeldian “immunity”. On the other hand, when governments try to completely ban expression in different contexts, the freedoms are arguably then treated as a narrow “right” to communicate with a corresponding “duty” for the state to not completely ban the expression. Blanket exclusions from public forums also result analogously in the treatment of expression as a narrow “right” with a corresponding “duty” on the state to not have complete exclusions. On the other hand, Roach & Schneiderman enumerate many other incidences where expression is treated much more like a general “privilege” before a section 1 analysis begins. This diversity reflects the fact that “freedom of expression has expanded well beyond its roots in democracy to encompass nearly all non-violent forms of expression”. It also likely reflects the individualistic and liberal economic assumptions of Canadian society as well as the corresponding role of expression in such a society.

However, the key next step in any Charter review is the section 1 analysis, which basically determines if the state has a “right” to interfere with or limit the “privilege”. If so, the state has such a “right”, and the person has a corresponding “duty” to comply. In other words, the state’s “right” trumps the person’s “privilege”, effectively reducing its scope. However, if not, the state has “no-right” and the person’s “privilege” continues as is. Courts are thus correspondingly determining if a state “right” should exist to trump the “privilege”. The actual determination of whether the state has such “rights” over “privileges” as a result of the section 1 analysis likely reflects the assessment of Roach & Schneiderman that the courts are assessing the “high” or “low” value of the expression in the section 1 analysis. The fact that “rights” regularly trump

32 Ibid at paras 127–129. The defence is a Hohfeldian “immunity” because, if successful, a plaintiff cannot change the legal relations with a corresponding defendant so that the defendant compensates the plaintiff for the alleged defamation.
33 See e.g. ibid at paras 17, 61, & 83.
34 Ibid at para 77.
35 See generally Roach & Schneiderman, supra note 31.
36 Ibid at para 2.
37 Ibid at para 11. Put simply, if the expression has a “low” value, it is more likely that the state will have a “right”. Conversely, if the expression is valued “high”, it is less likely that the state will have a “right”.

“privilege” in these analyses is likely because “the effects of Canada’s rather modest free expression tradition can still be felt in many areas of the law.”\textsuperscript{38}

There are practical implications for realizing and understanding this nuanced difference between “rights” and “privileges”. Although Hohfeld does not prioritize either “rights” or “privileges” over the other (i.e. he is simply classifying legal relationships more precisely rather than ordering them in a hierarchical way),\textsuperscript{39} courts on the other hand seem to prefer “rights” over “privileges” when they come into conflict or when they need to be balanced in the context of demonstration injunction cases. The \textit{CCLA Case} in the next section is an illustration of this preference, with the focus being more on the effect of property “rights” compared to the “privilege” of expression, and the other injunction cases discussed later in the chapter reinforce this inclination. This preference is understandable as one of the roles of courts is to act as an arbiter and balancer of competing “rights” and “duties”, which is consistent with the “conflict-solving” nature of civil litigation. If a party only has “privileges” instead of “rights”, a third party thus does not owe that person any corresponding “duties”, which can make court enforcement more difficult in a “conflict-solving” approach if a court is focusing more on “rights” and corresponding “duties”. Such an approach is also consistent with the court’s general unwillingness to extend a case beyond the parties and focus on larger goals or values,\textsuperscript{40} which reinforces the idea that a court does not readily intervene as part of the “conflict-solving” approach. It is also consistent with Mirjan Damaška’s “reactive state”, which is the state that typically uses the “conflict-solving” approach to resolve disputes between parties with a neutral and passive judge.\textsuperscript{41} Such states also prefer minimal governments given their nature,\textsuperscript{42} which further reinforces a preference to not readily intervene. As a result, such tendencies reinforce an economic liberal perspective and approach (e.g. individual rights, private property, and market considerations tend to prevail). Given their nature, Canadian courts may thus be better equipped and have a more appropriate role to practically deal with the correlative combination of “rights” and “duties” when they arise rather than the correlative combination of “privileges” and “no-rights”.

\textsuperscript{38} \textit{Ibid} at para 144.

\textsuperscript{39} My appreciation goes to Kerry Rittich for pointing this nuance out.


\textsuperscript{41} \textit{Ibid} at 73–74, 79–80, & 111–116.

\textsuperscript{42} \textit{Ibid} at 73–74.
This preference for “rights” and “duties” has consequences for litigation and injunctions. In short, demonstrators may need to characterize the underlying issue into a “right” that has a corresponding “duty” in order to increase their chances of success in court. Conversely, property owners will be at an advantage in securing an injunction against a demonstration if they can characterize their property interest as a “right” and persuade the court that protesters have a “duty” to respect that right by not trespassing or otherwise complying with the owner’s direction regarding use of the property. The analysis also suggests that freedom of expression loses some of its potential power once it gets characterized as a “privilege” rather than a “right” with corresponding “duties”. This power reduction is particularly noticeable when the freedom is subject to a general section 1 analysis under the Charter or balancing concepts inherent in the common law (such as the balance of convenience). For example, if the argument is more of a “privilege”-based argument, the likelihood of corresponding success diminishes, particularly since the other parties will not have “duties” that the court can enforce. While the focus of the analysis here is on the conflict between the “privilege” of freedom of expression with other “rights” and “duties” in the context of demonstration injunctions, questions are thus raised about whether similar outcomes arise in other contexts where Canadian courts must deal with potentially conflicting “privileges” (such as other Charter freedoms) and “rights”.43

C. The General Injunction Tests

Prior to examining the cases in detail, the general legal context for injunctions must also be set. The well-known 3-part equitable test for interlocutory injunctions is found in the Supreme Court of Canada’s seminal cases of Manitoba (AG) v Metropolitan Stores Ltd and RJR-MacDonald Inc v Canada (AG).44 Although these decisions involved the Charter, the court made clear that this test ought to be applied for interlocutory injunctions and stays in both private law and Charter cases,45 and both private law and Charter issues are often involved in protest cases. The test for statutory injunctions will also be briefly reviewed, although statutory injunctions have a much

43 Such an analysis would require more comprehensive reviews and comparisons, which is outside the scope of this thesis.
45 Metropolitan Stores, supra note 44 at 127; RJR-MacDonald, supra note 44 at 334 & 347.
more limited potential application compared to interlocutory injunctions. Regardless, before any case is heard, it will become apparent that demonstrators usually have uphill battles to face given the nature of the injunction tests.

At the first stage, an applicant must demonstrate that there is a “serious question to be tried”. It is a “preliminary and tentative assessment of the case”, and this stage is generally a low threshold to ensure that the case is not frivolous or vexatious, and a motions court accordingly usually only does a preliminary investigation of a case’s merits (although exceptions do apply in certain circumstances). As a general rule, most cases proceed to consider the second and third stages, particularly since public interest considerations are taken into account at the third stage.

At the second stage, an applicant must show “irreparable harm” if the relief is not granted. The key here is the nature of the harm rather than the harm’s magnitude. In Metropolitan Stores, the court noted that it “is harm not susceptible or difficult to be compensated in damages”. 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.” 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”, “irrevocable damage to … business reputation”, or “permanent loss of natural resources”. The focus is also on the harm to the applicant rather than the opposing party or the public interest at this stage.

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46 Ibid at 337 & 348. See generally ibid at 335–340.
47 Metropolitan Stores, supra note 44 at 127.
48 RJR-MacDonald, supra note 44 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).
49 Ibid at 348.
50 Metropolitan Stores, supra note 44 at 128.
51 RJR-MacDonald, supra note 44 at 348. See generally ibid at 340–342.
52 Ibid at 341 & 348.
53 Metropolitan Stores, supra note 44 at 128–129.
54 RJR-MacDonald, supra note 44 at 341.
55 Ibid.
56 Ibid at 341. Irreparable harm to the respondent or public interest is to be considered as part of the next stage (ibid).
The third part of the test involves considering the “balance of convenience”, which is also known as the “balance of inconvenience”. The goal is to determine “which of the two parties will suffer the greater harm” from granting or refusing the injunction. The court notes that the factors will be numerous and vary from case to case. For example, the harms to the parties will be considered as well as any applicable public interest factors. The concept of “public interest” is intended to be wide here as any party can advance such issues, and the Supreme Court noted that the public interest “includes both the concerns of society generally and the particular interests of identifiable groups”. Given the nature of this stage of the test, the court noted that “many interlocutory proceedings will be determined at this stage.”

However, public interest considerations have an important role in the balance of convenience for constitutional injunctions. Given the nature of Charter claims, the court notes that it is often difficult to determine the merits at an interlocutory stage rather than after trial, although there may be rare exceptional cases that involve only simple questions of law. As well, there are various consequences for granting a stay in constitutional cases. For example, a law may be completely suspended on a temporary basis or an exemption may be given to the particular litigant involved. 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. The court also notes that the law in question has been “enacted by democratically-elected legislatures and are generally passed for the common good.”

It will thus not be surprising that “the public

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57 Metropolitan Stores, supra note 44 at 129; RJR-MacDonald, supra note 44 at 348–349. See generally Metropolitan Stores, supra note 44 at 129–146; RJR-MacDonald, supra note 44 at 342–347.
58 Metropolitan Stores, supra note 44 at 129.
59 RJR-MacDonald, supra note 44 at 342.
60 Ibid at 344 & 348–349. For example, public interest factors may be determined by the nature of the applicants and the issues of the case (ibid).
61 Ibid at 344.
62 Ibid at 342.
63 Metropolitan Stores, supra note 44 at 130–133.
64 See generally ibid at 133–146.
65 Ibid at 134–135.
66 Ibid at 146.
67 Ibid at 135.
68 Ibid.
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.”

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.”

The role of statutory authorities in public interest considerations is also relevant. Where applicable, it is presumed that statutory authorities do not have an interest distinct from the public interest for the purposes of the balance of convenience stage, 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.”

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.” Courts should accordingly presume that irreparable harm will occur in most cases from restraining such action rather than determining whether actual harm would result.

As a result, in constitutional litigation, 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.”

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. Before the case has even begun, demonstrators are often against a governmental or other state authority (e.g. a municipality) who is automatically presumed to act in the public interest or support public interest considerations. It is assumed that restraining such authorities from carrying out their roles and duties constitutes irreparable harm to the public interest. There are also concerns about whether a suspension or an exemption from the law or

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69 Ibid at 147. See also RJR-MacDonald, supra note 44 at 346.
70 Ibid 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).
71 Metropolitan Stores, supra note 44 at 135–136.
72 Ibid at 149.
73 RJR-MacDonald, supra note 44 at 346.
74 Ibid.
75 Metropolitan Stores, supra note 44 at 146.
the authority’s role will deprive the rest of the public from the benefit of the law or the authority’s actions. Majority perceptions and assumptions (including liberal and capitalist perspectives) are thus more likely to dominate over the demonstrators’ minority perceptions when the public interest is considered as part of the balance of convenience. It is thus not surprising that Roach & 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.”

Such protection is ironic since property rights are not protected under the Charter, yet freedom of expression is supposed to be one of the freedoms guaranteed by the Charter. These issues also reinforce “the extent to which middle-class consumer values predominate under the [Charter],” which demonstrators may have difficulties in overcoming if they have a different view. Depending on the context and nature of the demonstration, these majoritarian perceptions and assumptions may thus also have more of a law enforcement focus and approach to restore what the majority believes should be the status quo.

The above 3-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, and different considerations apply in that situation, 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 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. As a result, obtaining an injunction can be somewhat easier, but only if a relevant statute provides explicit authorization for an injunctive remedy, such as found sometimes in a statute regarding municipal governance and powers.

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76 Roach & Schneiderman, supra note 31 at para 20.
77 See generally supra note 3. In contrast, see Canadian Bill of Rights, SC 1960, c 44, s 1(a) (right of the individual to enjoyment to property, for which there is no equivalent under the Charter).
78 Roach & Schneiderman, supra note 31 at para 33.
79 For example, a city by-law may not be followed by the demonstrators, and there will be calls for the by-law to be enforced. The corresponding legal question may thus be enforcement of the by-law, which has the effect of returning to the status quo before the demonstration began.
81 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 (ibid). Dawson J drew these principles from various authorities, which are omitted here.
82 See e.g. Municipal Government Act, RSA 2000, c M-26, s 554.
Demonstrators thus have even fewer options under such statutory injunctions as the injunction is more of an enforcement mechanism for certain particular rights.

This legal context sets the stage for analyzing how injunctions shape and affect demonstrations. As will be seen in the examples below, demonstrators 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 nature 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 majoritarian and economic liberal perspectives despite the underlying focus of the Charter). On the other hand, courts may simply not be the best institutions for the demonstrators to achieve their desired aims, but there may not be better options. Courts may thus need to be sensitive to the consequences that their injunction decisions ultimately have on demonstrators as well as on their ability to raise related issues as part of the political process.

D. The Rare Circumstances When Demonstrators Can Successfully Use Injunctions

Demonstrators are usually in the position of responding to rather than bringing interlocutory injunctions. However, a notable exception 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 Summit. This case illustrates the complications associated with trying to obtain injunctions for the benefit of demonstrators as well as the circumstances that need to be present in order for demonstrators to be successful.

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83 Canadian Civil Liberties Association v Toronto (City of) Police Service, 2010 ONSC 3525, 224 CRR (2d) 244 [CCLA Case]. Other personal applicants were formally named, but they were affiliated with the CCLA (see ibid at para 7).
1. The Details of the CCLA LRAD Case

The police services had obtained LRADs in close proximity to the Toronto G20 Summit, and their intention was to use them during the Summit “to help ensure public safety and health.” LRADs have two functions: 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. Depending on their volume setting and use, the LRADs have the potential to permanently damage hearing. The CCLA and CLC thus had serious concerns about the use of the LRADs potentially as a “weapon” that had not been approved in accordance with the requirements of the Police Services Act as well as the potential chilling effect of the LRADs on the constitutionally guaranteed freedoms of expression and association. The applicants accordingly initiated the related application and sought an interlocutory injunction regarding the general use of the LRADs as well as their use specifically during the Toronto G20.

However, this application and motion had to be brought on a highly expedited basis given how the issue developed. Although the Toronto G20 Summit was scheduled for June 27-28, 2010, the CCLA first became aware of the LRAD issue only on May 21, 2010, which left very little time before the Summit started. There was some intervening correspondence, and the application was formally initiated on June 9, 2010, which included the request for an interlocutory injunction regarding the LRADs. All of the intervening steps for the interlocutory injunction motion were dealt with on a “very compressed” basis, which is highly commendable given the procedural steps normally required. The injunction motion was ultimately heard on June 23, 2010, and a decision was rendered shortly thereafter on June 25, 2010 (i.e. two days before the start of the Summit). For reference, the short and urgent timeframe associated with this motion is atypical.
compared to regular civil litigation motions of a similar nature (although urgency and short-timelines can arise more often in injunction motions given their nature).

Although the case was formally analyzed using the standard injunction test,\(^{95}\) the case ultimately turned on two issues. First, was the potential chilling effect of the LRADs a violation of 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?

With respect to the first issue, the court found there was no serious question for trial regarding whether the LRADs would have a chilling effect.\(^ {96}\) 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 that the applicants were concerned about the impact on organizing lawful demonstrations and marches during the Summit,\(^ {97}\) and Justice Brown cited Supreme Court of Canada jurisprudence noting that “[v]iolent expression is not protected by the [Charter]” for various reasons.\(^ {98}\) 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.”\(^ {99}\) The court found the evidence to be “highly speculative, anecdotal hearsay, and lacking in substance”, which did “not allow for any reasonable prognostication about how many people may or may not attend the applicants’ planned demonstration and march”.\(^ {100}\) Further, “other causes might exist for any perceived difficulty in organizing the hoped-for turnout”.\(^ {101}\) These comments and findings reinforce a “conflict-solving” approach where the only substantive information that the decision maker considers is the information that the parties have put before the decision maker (instead of inquiring for or obtaining more information).\(^ {102}\)

\(^{95}\) *Ibid* at paras 81ff.
\(^{96}\) *Ibid* at para 113
\(^{97}\) *Ibid* at para 113.
\(^{98}\) *Ibid* at para 107, citing *Montreal (City) v 2952-1366 Quebec Inc*, 2005 SCC 62 at paras 60 & 72, [2005] 3 SCR 141.
\(^{99}\) *CCLA Case, supra* note 83 at para 113 [emphasis added].
\(^{100}\) *Ibid*.
\(^{101}\) *Ibid*.
\(^{102}\) Damaška, *supra* note 40 at 136–137.
Roach & Schneiderman make various criticisms of this part of Justice Brown’s judgment.103 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.”104 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.” However, out of fairness to Justice Brown, the current “conflict-solving” nature of the court limited him to consider only the information before him prior to the start 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 could have been arguably important context where guidance may have been helpful). Such a focus is the parties’ prerogative since they exercise considerable control in framing the factual and legal issues in a “conflict-solving” approach.105 As well, such an inquiry would be an *ex ante* examination of the police’s proposed tactics, and civil litigation is not well suited to make such inquiries given the civil courts’ “conflict-solving” nature.106 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. It would be unclear what actual dispute would be present for a “conflict-solving” court to solve at that point (i.e. nothing would have happened yet),107 and the police would have an incentive to participate as minimally as possible in such a proceeding 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.108 Further, there was irreparable harm due to the

104 Ibid at para 113.
106 This issue is explored more in Chapter 1.
107 See Damaška, *supra* note 40 at 77 & 79.
108 *CCLA Case, supra* note 83 at paras 103–104.
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”. 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. No injunction was granted regarding the Voice functions as non-harmful sound levels would occur given the protocols and the fact that “[t]he need for clear and effective communications by the police to demonstrators is very important”. On the other hand, the Alert function of the Toronto Police’s LRAD was enjoined as there was “a very real likelihood … that demonstrators might suffer damage to their hearing” given the Toronto Police’s LRAD operating procedures. In contrast, the OPP was not similarly restrained as the same likelihood was not present since the OPP adopted “more conservative crowd separation distances as well as lower maximum volume limits at shorter distances”.

The decision also had a relevant epilogue. The court included two conditions as part of its decision. First, the injunction against the Toronto Police would be lifted if the Toronto Police adopted the OPP’s limitations from the OPP’s LRAD operating procedures. The Toronto Police subsequently made those changes the same day, and the injunction was accordingly lifted. The LRAD was thus fully available for use by the Toronto Police during the Toronto G20 Summit, albeit with stricter limitations. Second, the applicants were expected to take the application “quickly to a final hearing” no later than October 30, 2010. In the end, the application was settled instead, which is consistent with a “conflict-solving” approach, and

109 Ibid at paras 117–118.
110 Ibid at paras 93 & 135–138.
111 Ibid at para 135.
112 Ibid at paras 136–138.
113 Ibid.
114 Ibid at para 142.
116 CCLA Case, supra note 83 at para 141.
117 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].
118 See Damaška, supra note 40 at 79.
the Ontario government reviewed the use of LRADs by the police.\textsuperscript{119} The relevant regulation under the \textit{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.\textsuperscript{120}

2. Further Analysis of the CCLA LRAD Case

The 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, this case illustrates several of the difficulties associated with demonstrators successfully using injunctions to protect themselves beyond the difficulties associated with the nature of “conflict-solving” proceedings discussed above and in Chapter 1.

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. All of these steps and requirements are consistent with how a “conflict-solving” approach works,\textsuperscript{121} and the CCLA, CLC, and their counsel are to be commended for what they were able to accomplish in such a short period of time, particularly since such motions typically require much more time. The outcome could have been very different if the 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 various legal issues that make the obtaining of such injunctions difficult in addition to those already noted above. For example, the judge quoted from Justice Sharpe’s “leading text on injunctions”,\textsuperscript{122} which noted that “interlocutory injunctions will be difficult to

\textsuperscript{119} Ontario, Ministry of Community Safety and Correctional Services, \textit{Review of Police Use of Long-Range Acoustic Devices} (Toronto: Ministry of Community Safety and Correctional Services, 2011).

\textsuperscript{120} \textit{Equipment and Use of Force}, RRO 1990, Reg 926, s 16, as amended by O Reg 36/13.

\textsuperscript{121} See e.g. Damaška, \textit{supra} note 40 at 109–111, 119–125, & 134.

\textsuperscript{122} \textit{CCLA Case}, \textit{supra} note 83 at para 84.
obtain in constitutional litigation”.

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”). 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 an injunction, and a Hohfeldian analysis provides some insight to this issue. In the CCLA Case, arguments about the “chilling effect” on relevant freedoms were largely dismissed as being speculative, anecdotal, and without substance. On the other hand, arguments about preventing actual harm were largely accepted with great practical results. Since both arguments are based off 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, is there another potential reason why one argument was more persuasive than the other?

The argument regarding Charter freedoms was ultimately a “privileges”-type argument. The nature of the claim that the LRADs would have a “chilling effect” on associated Charter freedoms was rather general and speculative, which is understandable given that the potential effect was in the future, the limited time to prepare related evidence, the court’s “conflict-solving” nature, and the fact that the LRAD was presumably not going to be used on lawful demonstrations. To the extent that freedom of expression was invoked, it would also need to be balanced with other competing interests in a section 1 type analysis, for which there will likely

123 The Honourable Justice Robert J Sharpe, Injunctions and Specific Performance (Aurora: Canada Law Book, 2009) (loose-leaf revision Release No. 22, November 2013), at para 3.1330, cited in CCLA Case, supra note 83 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.

124 CCLA Case, supra note 83 at paras 86–89.

125 Roach & Schneiderman, supra note 31 at para 113.
be competing visions.126 This approach instead reflected a situation where the demonstrators have a “privilege” and the police have “no-right” to interfere unless something happens (in which case, the police would acquire a “right” that trumps the “privilege”). It is consistent as well with the fact that 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),127 which is not surprising given the apparently limited evidence on this issue as well as the negative liberal assumptions of Canadian society. The argument was thus based more on the general propositions underlying the freedoms rather than any detailed requirements on the state, and as Justice Oliver Wendell Holmes noted in *Lochner v New York*:

*General propositions do not decide concrete cases.* The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end.128

On the other hand, the argument regarding harm to demonstrators was a “rights”-type argument. 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),129 including causing harm, and the state has a corresponding “duty” to avoid that. Section 1 and related balancing has also been largely read out in a practical sense for section 7 jurisprudence,130 which gives this right a preferred status in *Charter* litigation and makes it much more of a clear “right” with immediate “duties” that the state has to respect. The issue was specific and concrete as well rather than

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126 For example, in the context of large-scale demonstrations, there will be competing viewpoints of what is an appropriate balance between security and public order considerations versus the demonstrators’ interests of expressing dissent.
127 See e.g. *ibid* at paras 132–134.
128 198 US 45 at 76 (1906) [emphasis added].
129 *Charter,* supra note 3, s 7.
130 See e.g. *R v DB,* 2008 SCC 25 at para 89, [2008] 2 SCR 3 (“violations of s. 7 are seldom salvageable by s. 1”), 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 at para 133, [2001] 1 SCR 283 (“rare for a violation of the fundamental principles of justice to be justifiable under s. 1” [citation omitted]); *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9 at para 66, [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” [citation omitted]); *Canada (AG) 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 – Release 1) 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).
general (i.e. impact on hearing as well as the availability of data regarding acceptable limits), and it accordingly fitted better with the “conflict-solving” nature of a Canadian civil court. The court accordingly acted to protect a specific concrete “right” that had corresponding “duties”, even though the court was unwilling or unable to protect the “privileges”.

E. The Successful and Regular Use of Injunctions Against Indigenous Demonstrators

As noted above, the CCLA Case is the exception rather the norm as interlocutory injunctions are normally brought against demonstrators rather than in support of them. This section examines a series of injunction cases in the context of indigenous issues to illustrate the issues that demonstrators regularly face. As well, the analysis reinforces the idea that courts tend to protect and reinforce Hohfeldian “rights” and “duties” rather than “privileges” in demonstration contexts.

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. 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.

The first decision was a result of the Canadian National Railway [CNR or CN] moving for an ex parte injunction on an emergency basis on December 21, 2012 after the courts had closed. The blockade occurred on a “spur line” near Sarnia to apply pressure on the federal government regarding its recent passing of Bill C-45, and the indigenous demonstrators did not have any issue with CN directly. 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

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132 See e.g. ibid at 425.
133 Canadian National Railway Co v Chief Chris Plain, 2012 ONSC 7348 at paras 1–2, [2012] OJ No 6272 (QL) [Plain 1].
134 Ibid at para 7(c).
the *Environmental Assessment Act*, which were catalysts for the “Idle No More” movement.\textsuperscript{135} This particular protest thus consisted of members of the local indigenous community supporting the broader movement.\textsuperscript{136}

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 ‘Chemical Valley’”, and the “significant impact on CN employees”,\textsuperscript{137} which all have significant public interest overtones from an economic liberal perspective. Justice Brown applied the standard injunction test, and ultimately granted an interim injunction.\textsuperscript{138} A serious issue to be tried was found as the demonstrators were trespassing on CN’s “spur line” and blocking rail traffic.\textsuperscript{139} The court also found that the “widespread economic harm to industries in the area constitutes harm of an irreparable nature”.\textsuperscript{140} 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”.\textsuperscript{141} As well, the court noted that the demonstrators were not complaining against CN (i.e. the property owner), but they were instead focused on the federal government.\textsuperscript{142} The court’s following reasons provide important insight into the court’s corresponding thinking:

> 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*

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\textsuperscript{136} *Plain 1, supra* note 133 at paras 8 & 18.

\textsuperscript{137} *Ibid* at paras 10–14.

\textsuperscript{138} *Ibid* at paras 16ff and 25.

\textsuperscript{139} *Ibid* at para 21.

\textsuperscript{140} *Ibid* at para 22.

\textsuperscript{141} *Ibid* at para 23.

\textsuperscript{142} *Ibid.* However, Scott notes that “[w]e 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” (Scott, *supra* note 131 at 428).
The protestors carries little weight in the balance of convenience analysis in the particular circumstances of this case.\textsuperscript{143}

These comments reflect a particular concept of expression that is considered acceptable in Canadian society, which is arguably reflective of majoritarian and economic liberal assumptions that prioritize property rights over freedom of expression (including conveying dissent). For example, the focus on \textit{lawful} expression is again present by the judge’s reference to trespassing on private property.\textsuperscript{144} This view has the effect of categorically devaluing the protester’s actions and avoiding the sort of balancing associated with either section 1 or the common law concept of the balance of convenience. The comments thus result in characterizing the demonstrators’ expression at issue as a Hohfeldian “privilege” with the goal of others having “no-rights” to interfere with that privilege. On the other hand, the key “right” in this case was related to CN’s property rights, which imposed “duties” on others to respect CN’s exclusive access to, use of, and control of the property. In the result, CN’s “rights” and the correlative “duties” again trumped and limited the demonstrators’ “privilege” of expression, which is also consistent with an economic liberal approach.

These concepts are reinforced by the judge’s treatment of the potential consideration of aboriginal issues as part of the demonstrations. In \textit{Henco Industries Ltd v Haudenosaunee Six Nations Confederacy Council}, the Court of Appeal for Ontario noted that:

\textit{[T]he rule of law has many dimensions … including} respect for minority rights, \textit{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.\textsuperscript{145}

\textsuperscript{143} \textit{Plain 1}, supra note 133 at para 23.

\textsuperscript{144} 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” (Roach & Schneiderman, \textit{supra} note 31 at para 121). 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.

\textsuperscript{145} 82 OR (3d) 721 at paras 141–142, 277 DLR (4th) 274 [\textit{Henco}] [emphasis added].
On first glance, this excerpt would appear to provide guidance and caution for judges when adjudicating injunctions involving aboriginal issues. 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”. In other words, the judge was looking for a potential Hohfeldian “right” for which there would be a potential correlative “duty” (in a way that would be consistent with an economic liberal approach), 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”, which is general and consonant with the concept of a Hohfeldian “privilege” where others have “no-right” to interfere.

From a tactical point of view, the CNR plaintiff was now in a very strong position relative to the demonstrators. 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”, such a burden is likely met if the court is ultimately interested primarily in Hohfeldian “rights” and “duties” rather than “privileges”. The injunction also practically changed the legal status quo from potential uncertainty to being in favour of the railway plaintiff as it now has a court order in its favour that affirms its rights. The defendant demonstrators would thus have an uphill battle to change this status quo, particularly if they do not have Hohfeldian “rights” that can potentially counter those of the opposing party.

The follow up case to continue the injunction reinforces these advantages as well as the trumping of Hohfeldian “rights” and “duties” over “privileges”. Justice Brown again noted the broad nature of the demonstrators’ concerns (i.e. disapproval of Bill C-45; support for Chief Spence’s

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146 Plain 1, supra note 133 at para 24. Roach & Schneiderman note that “[i]t 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” (Roach & Schneiderman, supra note 31 at para 119).

147 Hohfeld himself noted that “claim” is perhaps the best synonym for “right” (Hohfeld, supra note 4 at 32).

148 Plain 1, supra note 133 at para 24.

149 Ibid at para 17.

150 Canadian National Railway Co v Plain, 2012 ONSC 7356, 114 OR (3d) 27 [Plain 2].
hunger strike; environmental issues; and other issues involving the federal government), but the judge again focused on the fact that the demonstrators were not seeking to advance any claim with respect to the property. 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.” 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.”

While such an approach would initially appear to ignore historic and long-standing underlying indigenous issues associated with the protest, such a view is again consonant with the judge looking for a Hohfeldian concept of “right” and “duty” (that would again be consistent with an economic liberal approach) but only finding a form of “privilege” instead. Such an approach may also explain the court’s frustration with the police using their discretion regarding how and when to enforce the injunction. In other words, from the court’s perspective, the “duties” and “rights” are defined and are to simply be enforced. However, the police are concerned about broader practical issues that largely reflect the concerns raised in *Henco* and will likely be present in future indigenous demonstrations on an ongoing basis.

This case is only an example of how indigenous demonstrators are often on the receiving end of an injunction. For example, another indigenous rail blockade occurred in 2013 with respect to a CN rail line between Toronto and Montreal in support of “Idle No More”.

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151 *Ibid* at paras 17–19.
153 *Ibid*.
155 *Ibid* at paras 32–43. However, Roach & Schneiderman note that “[i]n our view, 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” (Roach & Schneiderman, *supra* note 31 at paras 120 & 122 [footnotes omitted]).
156 See e.g. Scott, *supra* note 131 at 426.
157 *Canadian National Railway Co v Doe*, 2013 ONSC 115, 114 OR (3d) 126 [*Doe*].
again granted an interim injunction on an *ex parte* basis for similar reasoning to the Sarnia cases, which reinforces that the court is looking for Hohfeldian concepts of “rights” and “duties” consistent with an economic liberal perspective. This perspective is again reinforced by the judge’s comment that “[w]hile expressive conduct by *lawful* means enjoys strong protection …, expressive conduct by *unlawful* means does not.”158 The judge’s frustration and lack of understanding regarding the police’s tactics regarding injunction enforcement also builds upon the frustration mentioned in the Sarnia cases.159 This frustration may again reflect a focus on Hohfeldian “rights” and “duties” from an economic liberal perspective and not understanding why the police are not helping enforce what the judge views as key elements of the legal system (i.e. compliance with the “duty” that corresponds to CN’s overriding “right”).

However, these recent manifestations should not be taken as only a new development in the field of indigenous law. For example, an *ex parte* injunction was sought to end the protest in Ipperwash park back in 1995.160 Although the context literally changed overnight due to the death of “Dudley” George, the injunction was still granted (although it was never enforced).161 The basis of this injunction was largely the fact that Ontario had title to the park (i.e. with the corresponding 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 Hohfeldian “privilege” that others have “no-right” to interfere with). Although separated by over 17 years, this tactic and approach bears a striking resemblance to the approach used by CN in its injunction cases. Although the Ipperwash injunction case was different as the demonstrators could have had a defence of “colour of right” given their *bona fide* beliefs regarding their rights to the land (i.e. a potential Hohfeldian “right” to access the land as well as a potential “immunity” against conviction for related charges), this defence was not before the court at the time of the injunction, and it only came fully to light in the inquiry.162 As one can see, the approach and tactic of using injunctions against indigenous protestors is not a recent

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158 *Ibid* at para 11 [emphasis added].
162 See e.g. *ibid* at 93. See also *Trespass to Property Act*, RSO 1990, c T.21, s 2(2).
development, but one that is based in the history of civil litigation where “rights” tend to prevail over “privilege” in the context of demonstrations.

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

This tactic of using injunction proceedings against demonstrators is not limited to the indigenous context. It has also been used with success against the Occupy movements in Calgary and Vancouver. 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. In all of these cases, the demonstrators were largely unsuccessful, and the relevant by-laws, statutes, and notices were found to be constitutional. This series of cases reinforces the difficulties that demonstrators face in the court system with respect to overcoming injunctions and trespass notices. This lack of success also reinforces the court’s apparent focus and priority for Hohfeldian “rights” and “duties” compared to “privileges”.

These cases all have very similar bases and storylines. As part of the Occupy movement, tent cities were setup in certain parts of city-owned parks in Toronto, Calgary, and Vancouver. Eventually, after some time, the respective city sought to enforce various by-laws, which would have the effect of ending the 24-hour nature of the occupation at the specific locations. Such occupations were also not compatible with majoritarian expectations of how parks are to be used. In Toronto, this decision was ultimately enforced by the issuance of a trespass notice under the Trespass to Property Act. In Calgary and Vancouver, enforcement was instead through an application for a statutory injunction under the relevant municipal act.
the cases, the constitutionality of the relevant notices, by-laws, or statutes was examined as part of the litigation, and constitutionality was upheld in all of the cases.\textsuperscript{171}

The unanimity and consistency among these decisions reinforce the importance of Hohfeldian “rights” and “duties” in coming to these decisions. In all of the cases, the occupiers again were characterized as expressing themselves in the respective parks in a manner consistent with a Hohfeldian “privilege” (i.e. with the corresponding idea that others had “no-right” to stop their expression). The contrasting “rights” rested with the respective municipalities as the landowners and managers of the parks, and corresponding “duties” to comply applied to all third parties who wished to use the park. In all of these decisions, these “rights” and “duties” ended up taking priority over any “privileges” for the demonstrators to express themselves, especially when they are shown to not be acting in accordance with their “duties” (such as by-law requirements) given the municipality’s “rights”. The municipalities are also entitled to deference when it comes to public interest considerations given their nature (as discussed above in Section C). The above string of decisions shows how it is difficult for occupations to be successful in courts given the nature of the applicable legal analyses, including inherent majoritarian tendencies.

\textbf{G. Conclusion}

This chapter examines 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 \textit{CCLA Case} was the only example here of when an injunction motion’s result was even partially in favour of demonstrator interests. In addition to the issues that demonstrators must overcome given the “conflict-solving” nature of Canadian courts, this chapter also offers an additional explanation of why demonstrators have had limited success with respect to injunctions: put simply, courts prioritize the Hohfeldian concepts of “rights” and “duties” over “privileges” in the context of demonstrations, and the unsuccessful demonstrator arguments highlighted here were based on “privileges” rather than “rights”. Such a prioritization is also consistent with and reinforces majoritarian and economically liberal tendencies. It is an open question as to whether

similar prioritization occurs in other contexts, and further detailed analyses would be required to explore that issue. 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 true “rights” and “duties” in a Hohfeldian sense, demonstrators may be more successful in such litigation. It may also be time to more clearly specify what Hohfeldian “rights” are associated with freedom of expression (and potentially other freedoms) so that comparative analyses by courts involve at least the same rather than different types of Hohfeldian conceptions, which may make it more difficult to prioritize one legal concept over another. However, one must be careful that any such specification is not treated as an exhaustive and inflexible list, particularly given the incremental nature of the common law.

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 uphill battle if an injunction has been granted ex parte as a new legal status quo will be set up against them. Demonstrators will also need to overcome the difficulties inherent in the “conflict-solving” nature 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 fit within arguably majoritarian and economic liberal conceptions of 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” ultimately continues today as an underlying feature of the Canadian legal system and society.

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172 Such analyses are outside the scope of this chapter and the thesis generally.
173 For example, properly conceived, such “rights” and “duties” could protect or mitigate against majoritarian and economic liberal perspectives inherent in the balancing process.
One of the issues underlying these various propositions is the fact that courts may simply not be the best institution to deal with the issues raised by demonstrators in these contexts, particularly given their current “conflict-solving” nature, and other avenues may be more appropriate and successful. As noted by Wittman CJCQBA in the Occupy Calgary case:

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.175

Political, legislative, and non-court avenues may thus be better alternatives to advance and resolve such issues rather than courts, especially given the nature of courts.176 For example, it is not surprising that courts have repeatedly indicated that negotiation is the preferable way to resolve indigenous issues,177 which removes the dispute from the court’s “conflict-solving” approach to a potentially more conciliatory approach.178 The CCLA’s positive changes to the regulations regarding LRADs also shows how such results can be possible. However, this perspective assumes that there are receptive avenues where such issues can be discussed and resolved.179 If not, parties should act strategically and opportunistically in order to accomplish change where possible, and litigation in the courts may be part of that broader strategy at times. For example, a negative court decision may serve to galvanize opposition and create an impetus for legislative change. Demonstrators may sometimes be judgment-proof,180 so the awarding of damages or other remedies may not be as much of a concern for certain court challenges. It may also be possible to raise or set aside funds to cover the damages and costs that may be assigned

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175 *Occupy Calgary*, *supra* note 163 at para 51 [emphasis added].
176 See Chapter 1 for a further discussion of the nature of Canadian courts.
178 See Damaška, *supra* note 40 at 78–79.
179 See e.g. Chapters 1 & 3 for a further discussion of the potential limitations and issues associated with using civil litigation and other non-court mechanisms.
180 See e.g. *Indian Act*, RSC 1985, c I-5, s 89 (real or personal property of an Indian or band situated on reserve is not subject to seizure or execution except by an Indian or a band).
as a result of a court decision, especially if they are of a smaller scale.\textsuperscript{181} Courts should accordingly be aware and sensitive of these dynamics and realities rather than simply acting in isolation.

As well, it may be time to look at more creative solutions that allow freedom of expression to coexist better with property “rights”. For example, violations of property “rights” are often compensable given property’s basis in capitalism. The potential amount of compensation would vary depending on the nature and duration of the protest as well as the corresponding impact on the property “right”. On the other hand, most manifestations of freedom of expression are typically not compensable because the fluid expression is the key point (e.g. an idea can have an unpredictable nature as well as unpredictable broader consequences and results in society). Since protesters will typically not have the resources to provide compensation for property “right” violations, there may accordingly be a role for the state to facilitate expression and dissent by providing limited to full compensation in certain circumstances (e.g. protests regarding historic or systemic issues). Such compensation would be part of the price of maintaining overall peace in society by allowing an outlet for the expression and dissent, and the potential economic loss could be distributed to society as a whole rather than being borne by only the property owner. As an illustration, in \textit{Henco}, the province purchased the disputed land and allowed the indigenous protestors to remain there,\textsuperscript{182} so such creative options are possible.

Regardless, as the recent above litigation involving the Occupy and “Idle No More” movements illustrates, courts will be in the middle for some time. These underlying issues are systemic ones that cannot be simply addressed in one-off litigation or individual motions such as interlocutory injunctions that have a limited scope and are only interim by nature. Given the potential implications of court decisions for such negotiations and changes over the long-term, courts ought to be careful and wary of how their decisions may affect such discussions or otherwise be used, which would be in contrast to the standard method associated with the “conflict-solving”

\textsuperscript{181} In the case of \textit{Plain 1}, CN initially offered to resolve the application for $5,000, which was refused. At the hearing, CN sought $50,000 in damages, and $16,584.17 was ultimately awarded (\textit{Canadian National Railway Co v Plain}, 2013 ONSC 4806 at paras 3, 8, & 35, [2013] OJ No 3392 (QL); see also Scott, \textit{supra} note 131 at 426–427 & 428).

\textsuperscript{182} \textit{Supra} note 145 at para 5. Although the focus of that protest involved a long-standing land dispute and claim (\textit{ibid} at paras 14–19), analogous or other creative solutions should still be possible in other contexts.
After all, the members of such groups are often already disadvantaged in society, and they are often seeking ways for people to understand their issues, concerns, and plights, which may involve the use of non-violent demonstrations that are not lawful. If a significant incident occurs in a demonstration context, it may be accordingly best to seek accountability through *ex post* mechanisms outside of the courts, and the next chapter examines the potential and limitations of other non-court mechanisms to assist with such accountability (i.e. reviewing and resolving key issues as well as providing potential solutions to avoid the issues’ reoccurrence).

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183 Damaška notes that the “pure conflict-solving process demands” that the decision maker “be blind to any considerations that transcend the resolution of the dispute before him. In other words, he is not supposed to promote any larger goal or value” (*supra* note 40 at 140).
Chapter 3 – The Realities of Other Non-Court Options As Accountability Mechanisms

A. Introduction

While the first chapter examined how civil court options can be used as potential accountability mechanisms for large-scale demonstrations and the second chapter examined a particular manifestation of civil litigation in the form of interlocutory injunctions, those options are by no means exhaustive of the potential methods available to raise and resolve concerns as well as hopefully prevent the concerns from reoccurring (i.e. the key concepts relevant for “accountability” for the purposes of this thesis). There are various non-court methods that can be available to achieve such general accountability, and these methods are the focus of this chapter. These non-court options have the potential to avoid some of the disadvantages that protesters face in the civil litigation system. For example, as seen in Chapter 1, civil litigation often favours economically advantaged parties (such as the police and other representatives of the state). As seen in Chapter 2, civil litigation also often favours property owners who are able to assert their property interests as a “right” that protesters have a “duty” to respect by not trespassing on their land or by following the owners’ restrictions.

Ed Ratushny uses the term “inquiries” in a broad sense to encompass most of these non-court mechanisms,¹ which is understandable as all of the mechanisms “inquire” into a situation to a certain extent outside of the standard court process. However, despite certain commonalities across mechanisms, such a conflating definition is confusing given the different natures, roles, and goals of each mechanism. As well, while policy recommendations may result as part of any review, the focus of this chapter is specifically on how mechanisms can investigate a particular significant event to provide accountability rather than mechanisms that are solely policy-oriented. It is accordingly better to keep the mechanisms separate for the purposes of this chapter instead of using an overarching definition, especially when that definition has a greater natural affinity with one mechanism (i.e. public inquiries).

This chapter examines the availability and usefulness of some of these non-court accountability methods by mainly using the experience of Ipperwash and the Toronto G20 Summit as a case

study. The potential options examined in this chapter are: coroner’s inquests; public inquiries; reviews through other independent statutory offices, such as the Ombudsman and the Office of the Independent Police Review Director; internal police reviews; and reviews by external reviewers and other non-governmental bodies. The focus here will be on the Ontario versions of these mechanisms, although analogous processes and issues ought to be applicable in other jurisdictions. Although this assessment will be fairly comprehensive regarding the mechanisms reviewed here, it is not intended to be exhaustive of all the possibilities that may be available for a particular situation. The ultimate usefulness and outcome for each mechanism depends on the context, goals, and opportunities available, and each of these non-court methods has corresponding advantages and disadvantages that need to be understood.

First, one must be aware of the trigger method for the mechanism to be initiated. Is it at the discretion of a particular party? If so, is that party independent or susceptible to other influences and incentives? What factors may contribute to that party initiating or not initiating the mechanism? Is a particular event a prerequisite for a mechanism to be used? These issues must be considered in order to assess the potential availability of the mechanism as well as how political and other influences may need to be used to encourage initiation of the mechanism when applicable. After all, if the mechanism cannot be triggered, it will be unable to contribute to general accountability regarding the key event and the associated players.

Second, one must look at the mechanism’s jurisdiction as well as the scope of the review that the mechanism can conduct. Does the mechanism generally look at things broadly or narrowly? Are the terms of reference defined by statute or in some other way? If the latter, how can the terms of reference be shaped in such a way to encourage appropriate general accountability? The jurisdiction and terms of reference are extremely important to determine whether a review will able to contribute to a comprehensive analysis or only be able to contribute a small part of the bigger picture.

Third, one must look at the ability of the mechanism to gather evidence. Does the mechanism have the power to compel the testimony of witnesses and the production of other evidence? Or does the mechanism not have this ability? If not, what other options can be used to obtain the necessary information? What are the requirements and limits of evidence admissibility? Will
the evidence be received in a public hearing or through another way? Evidentiary issues are also key to understanding what can form the basis of a review’s conclusions as well as how the public becomes aware of the evidence. One must be careful to ensure that as much relevant evidence as possible can be considered as well as whether public hearings are needed given the nature and scale of the issues involved.

Fourth, from a logistical perspective, available resources are key to ensuring the viability and success of a mechanism. The mechanism must have sufficient funding to be able to carry out its mandate, and appropriate resources must be identified and available. Does special funding need to be provided or can it be done with existing funding to an office or budget? What supporting resources are available in order for the mechanism to properly conduct the review, analyze the evidence, and prepare the recommendations? If these issues are not considered, it will be more difficult to ensure that a mechanism is able to conduct a proper review and make corresponding recommendations.

Finally, one must consider the outcome of the mechanism and how to accordingly advance the results so that they have a real impact. Given that most of these mechanisms deliver non-binding results, it is important to understand how the resulting findings and recommendations can be used to make changes to prevent the issues from repeating in the future. While these processes can be used to air grievances about an issue in a cathartic manner, there is currently no binding or follow up mechanism to institute and encourage change. Instead, actual change is dependent on perceived political pressure, opportunities, and willingness by those involved to embrace and implement the change. A more interactive process to ensure that change subsequently occurs may be useful in certain situations, particularly since the results of most of these mechanisms cannot be currently used to establish civil or criminal liability.

This chapter analyzes the mechanisms to examine how the nature of most mechanisms is more of a “policy-implementing” rather than “conflict-solving” approach on Mirjan Damaška’s spectrum.

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2 John Willis notes that one of the psychological side effects of an inquiry’s “public hearings, public statements[,] and publications is that it cools the emotions. Like water dripping on a stone, these public hearings, statements[,] and publications gradually get across to the ‘silent majority’ the idea that there really is ‘a problem’ about which there can be discussion and on which there can be compromise” (John Willis, “Comment” in Jacob S Ziegel, ed Law and Social Change (Toronto: Osgoode Hall Law School, 1973) 98 at 99).
of proceedings. However, given the mixed nature of some of these non-court mechanisms, it is quite possible that a “conflict-solving” approach may become paramount in certain circumstances, which can have the effect of reinforcing an economic liberal system as well as those advantaged under that system. Each mechanism will also be explored to show how the mechanism potentially advances certain specific forms of accountability (i.e. literal, organizational, and social accountability) as well as whether the mechanism has ways of ensuring appropriate responsibility and consequences. Where applicable, psychological factors will also be considered, particularly since most of these mechanisms are ex post reviews that can only provide potential explanations for a past event and recommendations to prevent future occurrences (i.e. it is difficult for these mechanisms to prevent the event from initially occurring). It will be argued that the best non-court mechanism is one that combines the “policy-implementing” approach with an ability to do strong literal, organizational, and social accountability in a comprehensive way. Aside from the problematic trigger mechanism, public inquiries are the non-court mechanism that most closely fits this ideal.

After going over the key conceptual framework and reviewing the mechanisms in detail, a few other relevant issues and potential solutions will be reviewed through the lenses of Damaška’s approach-types, the specific accountability forms, and psychological considerations as applicable. In particular, this chapter will examine potential options to overcome jurisdiction fragmentation and limitations inherent in the mechanisms. An exploration will also occur of methods to address the current non-binding nature of the mechanisms. The importance of media and location to achieving successful accountability for mechanisms involving public hearings will be reviewed. Finally, it will be argued that parliamentary privilege should no longer be allowed for non-court mechanisms that have a “policy-implementing” approach in order to further literal accountability.

In conclusion, the chapter will argue that it is now time for an independent body to decide or recommend when major incidents should be examined in a more comprehensive rather than piecemeal fashion. Current statutory bodies are usually set up with specific mandates to only review certain issues that repeatedly occur. However, when a major incident like Ipperwash or

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the Toronto G20 Summit occurs, these limited mandates restrain what each body can actually review. As a result, multiple reports that look at the incident from multiple perspectives can be generated. However, while this result may be useful to keep the public engaged in the issues, it precludes a single comprehensive review of all of the issues associated with an incident. Given that some tribunals can have joint jurisdiction and the difficulties experienced with both Ipperwash and the Toronto G20, it is now appropriate for an arms-length independent body to determine when a comprehensive review (which would likely be an inquiry) is necessary for major incidents (although the body would not conduct the review itself) or whether another method would suffice.

This result could be accomplished by having a new body or organization that can cut across multiple mechanism jurisdictions to ensure that appropriate perspectives are accounted for. It can fill a role with respect to co-ordinating or consolidating reviews of major incidents that span multiple jurisdictions, especially when an incident can be potentially reviewed adequately by existing or combined mechanisms. It can also have an analogous role with respect to co-ordinating or consolidating the administration associated with various accountability mechanisms to be more effective and efficient. The goal of such a body would be to ultimately ensure that such incidents are reviewed in a more “policy-implementing” manner while achieving comprehensive literal, organizational, and social accountability. While the proposed body would not conduct the review itself, the proposed body can also have a role in following up on the various accountability reports and recommendations being produced to help ensure that the underlying issues do not reoccur in the future, particularly given the standard psychological response of people to bad decisions that are then reviewed. Finally, such a body could also be able to act as a mediator to minimize the duplication and re-litigation of already explored issues in other court processes.

There is a potential argument that, since governments would not be initiating such reviews under such a mechanism, there would be even less of a government incentive to implement any resulting recommendations (i.e. the government would have less ownership than if it initiated the review itself). However, as discussed below, the reality for major incidents such as Ipperwash and the Toronto G20 is that that governments are often the ones who are the problem since they are unwilling to initiate the review and investigation, which must be conducted before one can
begin discussing policy recommendations and their potential implementation. Gerald Le Dain notes that inquiries are “established in order to do something which Parliament cannot do for itself – that is, to conduct in public a fairly detailed examination of an issue”, and “[a] serious issue of public confidence has arisen, and it can only be set at rest one way or another by someone in whose judgment and independence the public will have confidence.”4 An inquiry’s three tasks are accordingly: “to identify the issues; to ascertain the facts; and to come to policy conclusions.”5 These ideas are arguably fundamental and applicable to any comprehensive examination of a major incident.

As well, as will be discussed below, the implementation of recommendations through existing review processes is already problematic for various reasons, so such a mechanism would likely be no worse than the status quo. It must also be remembered that such a mechanism would be focused on major incidents resulting in related serious concerns that require investigation. Pure policy reviews that are not connected to the serious concerns resulting from a particular major event would not be eligible as such decisions ought to properly remain within the discretion of government and other policy mechanisms. Accordingly, the value and improvement of a new mechanism being able to initiate a review and a corresponding comprehensive investigation when needed for major incidents should not be discounted simply because a government does not initiate the review.

Finally, another possible alternative option is that the courts could take on more of such a role instead of an arms-length independent body. A court could determine when such a review is necessary as well as potentially conduct the actual review and make binding determinations and solutions. However, such a mechanism would be very different from and potentially incompatible with the current “conflict-solving” approach used by Canadian courts, particularly since courts typically rely on the parties for information in a “conflict-solving” approach rather than conducting investigations.6 There is also a real question about whether it would be

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4 Gerald E Le Dain, “The Role of the Public Inquiry in our Constitutional System” in Ziegel, supra note 2, 79 at 82–83 & 91. Although a key focus of Le Dain’s article was on policy inquiries, many of his comments throughout are arguably applicable to all types of inquiries.
5 Ibid at 83.
6 See Damaška, supra note 3 at 119–125.
acceptable to judges, to politicians, and to the public that courts take on such a role. These and other issues will be further explored below as well as in the conclusion of the thesis.

**B. Key Conceptual Frameworks**

Prior to examining each of the non-court accountability mechanisms, it is useful to understand some relevant key concepts associated with both accountability generally and the nature of accountability mechanisms. Three concepts will be examined in turn: types of accountability, psychological responses to accountability, and the increased “policy-implementing” nature of non-court accountability mechanisms. The remainder of this chapter will then examine accountability mechanisms, issues, and potential solutions through these lenses.

1. **Types of Accountability**

Prior to examining the mechanisms in detail, it is important to understand what is meant by accountability for the purposes of this chapter. As noted by Kent Roach, “accountability is an elusive phenomenon”, and he helpfully defines three types of accountability: literal accountability, organizational accountability, and social accountability. Literal accountability is the process by which “individuals are forced to account for their actions”. Its focus is thus on individuals and the corresponding legal powers that compel someone to provide such accounts. On the other hand, organizational accountability focuses instead on “the process where organizations are called to account for events and policy failures.” The focus of this accountability form is more on organizational and sociological issues and explanations. Finally, social accountability is regarding essentially the “process of attitudinal change in which the interested public begins to demand answers about officially recognized problems.” In support of this last idea, Le Dain notes that the function of an inquiry “is to inform the public, to clarify

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8 Ibid at 269–270.
9 Ibid.
10 Ibid at 270–271.
11 Ibid at 270 [emphasis added]. See also ibid at 271–273.
12 Ibid.
13 Ibid at 274. See also ibid at 270 & 273–275.
the issues, and to promote understanding of a problem. [An inquiry] really speaks to the public through its report to the government.”

Although Roach was discussing these forms of accountabilities specifically in the context of public inquiries, they provide an initial and useful analytical framework for all of the mechanisms examined in this chapter, particularly since all of the mechanisms “inquire” to a certain extent. However, none of these types of accountabilities consider whether responsibility or consequences necessarily occur when warranted, particularly to prevent the issues from reoccurring (which is a key part of “accountability” for the purpose of this thesis). The accountability forms discussed above are primarily focused on providing the initial answers, and the assumption is that the answers will lead to consequences and changes over time. However, this distinction is important because answers do not necessarily lead to immediate or long-term consequences (as will become apparent below), and it is important to understand how to facilitate the next important step of corresponding changes when needed. It would have been ideal if such a result could be accomplished through a binding court system that uses a hybrid of both the “conflict-solving” and “policy-implementing” approaches when appropriate, but such an ideal state seems unlikely given the current preference for the judiciary to have more of a “conflict-solving” approach. Each mechanism will be accordingly examined to understand the different forms of accountability present as well as whether any mechanisms exist to ensure that appropriate responsibility or consequences follow when necessary.

14 Le Dain, supra note 4 at 82.
15 See e.g. Roach, supra note 7 at 272–273 (organizational accountability may stimulate organizational reform and public debate) & 274 (social accountability’s immediate sanction is “the anxiety and embarrassment caused by public criticism”). Le Dain also notes that “[a]n inquiry is an investigation followed by a report which does not in theory determine anything but, in fact, can have important effects on public opinion and attitudes, legislative initiative, and individual rights” (Le Dain, supra note 4 at 79 [emphasis added]).
16 This concept of a potentially ideal system will be explored further in the thesis’s conclusion.
17 See e.g. Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62 at paras 23–59, 91–92, & 105–117, [2003] 3 SCR 3 (court split 5-4 re: potential role of the court to provide a more supervisory remedy in the context of constitutional language rights). See also Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue), 2007 SCC 2 at para 39, [2007] 1 SCR 38 (“[t]he justice system must not become a proxy for the public inquiry process, swamped with actions launched by test plaintiffs and public interest groups”).
2. Psychological Responses to Accountability

Given that all of the mechanisms discussed here are ex post mechanisms, it is also important to remember how people respond to accountability demands in various circumstances. Philip Tetlock explored this issue in more detail from a psychological perspective.18 He notes that “[t]he simplest coping strategy is to make decisions that one is confident others will accept”, which is reinforced by laboratory and field studies.19 He particularly examined how people respond to accountability in a variety of contexts that are relevant for this analysis.

The first set of contexts is how people approach accountability for decisions that they have not yet made. Tetlock noted that “when subjects know the views of the audience and are not locked into any prior commitment, they shift their views towards the prospective audience.”20 In such situations, people appear to be “opportunistic [rather] than ideologues.”21 On the other hand, “when people do not know [what] the audience wants, and they are not constrained by prior commitments”, “accountability can motivate [people] to think in vigilant, complex, and self-critical ways.”22 In short, “[a]ccountability to unknown others motivates people to consider arguments on both sides to prepare themselves for a variety of critical reactions to their views.”23 In summary, a “forward-looking rationality” is thus usually used.24

However, key differences appear when people approach accountability for decisions that have been made and have ended badly (which is the situation that applies to most non-court mechanisms given their inherent ex post nature). Instead, a “backwards-looking rationality” is used as a “defensive search for ways of rationalizing past conduct.”25 As a result:

Once accountable subjects had publicly committed themselves to positions, the major function of thought became generating as many justifications for those positions as they could (subjects were far less likely to concede legitimacy to other points of view) and the

19 Ibid at 21.
20 Ibid at 21–22 [citations omitted].
21 Ibid at 22.
22 Ibid at 23.
23 Ibid.
24 Ibid at 25.
25 Ibid.
number of pro-attitudinal thoughts increased (subjects generated more reasons for why they were right).26

Investigators also noted there was “great pressure on decision-makers to increase their commitments to these failing policies”, which follows from cognitive dissonance and impression management theories.27 According to Tetlock, “[s]ubjects apparently sought to justify a poor decision by escalating their commitment to it.” 28 Demands for post-decisional accountability thus “sometimes motivate people to ‘bolster’ previous decisions, to be overconfident in those decisions, to over assimilate new evidence, and to deny difficult value trade-offs, particularly when the trade-offs require acknowledging flaws in one’s past decisions”.29 These issues must be considered when reviewing the potential effectiveness of accountability mechanisms and proposing other options.

3. The Increased “Policy-Implementing” Nature of Many Non-Court Mechanisms

Finally, as will become apparent, many of the non-court mechanisms discussed below are closer to the “policy-implementing” type of proceeding on Mirjan Damaška’s spectrum of proceedings.30 While these proceedings are often referred to as “inquisitorial” compared to “adversarial” civil and criminal proceedings, Damaška notes the reality that both adversarial and inquisitorial traits are present in justice systems that are typically perceived to be either adversarial or inquisitorial.31 These labels are thus not as effective as one may initially expect, especially since the various non-court mechanisms have both adversarial and inquisitorial traits (as discussed below).

Damaška’s spectrum of proceedings thus provides a better way forward, and it becomes apparent that the mechanisms discussed below have many features that are more consistent with a “policy-implementing” type of proceeding. While Damaška was reviewing these features in the context of binding court systems, the underlying features are still relevant for largely non-binding court

26 Ibid [emphasis added].
27 Ibid [citations omitted; emphasis added].
28 Ibid at 26.
29 Ibid [citations omitted].
30 See generally Damaška, supra note 3, ch V. As discussed in more detail in Chapter 1, civil litigation is closer to the “conflict-solving” type of proceedings.
31 Ibid at 5–6. See generally ibid at 3–6.
mechanisms in order to understand the differences with respect to the more “conflict-solving” approach used in Canadian courts. For example, a key feature of the “policy-implementing” approach is that:

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\text{[P]rocedure is basically a handmaiden of substantive of law. … A proper procedure is one that increases the probability—or maximizes the likelihood—of achieving a substantively accurate result rather than one that successfully effects notions of fairness or protects some collateral substantive value.}
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In other words, it is more important to find the substantive truth rather than just resolve the dispute, which is arguably an important prerequisite to developing potential policy recommendations. Otherwise, policy recommendations would not take into account the realities of the world in order to achieve their objectives. Procedural rules and regulations are thus created in such a way to “facilitate attainment of accurate outcomes.” Parties and other participants are used in a broader way to facilitate participation, and state officials have much greater control of the process compared to citizens. The decision maker is also much more active in the proceeding instead of passive, and such decision makers may have knowledge and experience beneficial for the issues being reviewed. These and other features are understandable given “the desire of the state to attain the correct disposition”, which is an ultimate goal applicable to most of these non-court mechanisms (especially since many of the issues they are dealing with have policy implications).

C. The Mechanisms and Their Issues/Limitations

There are a variety of non-court options that can be potentially used as accountability mechanisms, and this section reviews several key options, particularly as they were used and available in the context of Ipperwash and the Toronto G20 Summit. Each mechanism will be

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32 See generally Chapter 1.
33 Damaška, supra note 3 at 148 [emphasis added].
34 Ibid at 150.
37 Ibid at 168–173.
38 Ibid at 174.
reviewed in turn to highlight their contexts as well as their issues and limitations, especially with respect to the key conceptual frameworks.

1. Coroner’s Inquests

The first option to be examined is coroner’s inquests, which are generally governed by the Coroner’s Act. As inquests have a degree of independence and some ongoing resources, they have the potential to be useful broader accountability mechanisms when issues occur involving large-scale demonstrations. However, they do have various limitations, including the requirement that a death must occur, various process and funding issues, and the question of how much an inquest can review related and systemic issues. Given their non-binding nature, they are also unable to ensure that appropriate responsibility, consequences, or changes occur as a result of the reviews. While inquests can thus be a viable accountability mechanism in certain circumstances, one must carefully consider these and related issues to determine if an inquest can actually provide the desired broader accountability given the involved issues. These and other considerations are explored in more detail below.

Coroner inquests are focused on investigating deaths, and the focus of inquests is accordingly on determining 5 things: who the deceased was; how the deceased died; when the deceased died; where the deceased died; and by what means did the deceased die. When determining whether an inquest is necessary, coroners consider whether holding an inquest “would serve the public interest”, which includes considering whether the listed five issues are known, the desirability of the public being fully informed of the circumstances of the death, and the likelihood that an inquest might result in useful recommendations to avoid death in similar circumstances. Inquests are presided over by a coroner, who is a legally qualified medical practitioner (i.e. a medical doctor), and the coroner acts in a quasi-judicial role. A jury of 5 people inquires into

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40 Ibid, s 31(1).
41 Ibid, s 20.
42 Ibid, s 3(1). See also Ministry of Health and Long-Term Care Act, RSO 1990, c M.26, s 1, sub verbo “physician”; Public Hospitals Act, RSO 1990, c P.40, s 1, sub verbo “physician”.
the above 5 issues, and the jury ultimately returns a verdict on these issues by a majority vote.\(^{44}\)
In addition, a jury has the option to make recommendations in order to avoid death in similar circumstances or respecting any other matter arising out of the inquest,\(^{45}\) which can contribute to both organizational and social accountability depending on the nature of the recommendations. The location of the inquest determines which jury roll is used to draw an inquest’s jurors,\(^{46}\) so location plays a contributing role in determining the makeup of a jury. If there are concerns about the jury roll’s representativeness or other issues depending on the nature of the inquest,\(^{47}\) it is accordingly important to consider whether appropriate strategies ought to be implemented to mitigate those concerns (e.g. motions regarding location and/or the jury roll).

However, an inquest is not a criminal court of record,\(^{48}\) and juries may “not make any findings of legal responsibility or express any conclusion of law on any matter” related to the five main issues.\(^{49}\) Inquests can thus provide only limited individual accountability with respect to responsibility and potential consequences. In addition, while witnesses can be compelled to provide evidence through a summons (i.e. provide literal accountability),\(^{50}\) witnesses do have protections to ensure that any provided evidence generally cannot be used in other criminal or civil proceedings.\(^{51}\) In short, evidence and findings can only be generally used in a binding way for the purposes of the inquest, and it cannot be used in other forums. However, a jury’s ultimate recommendations may still influence other policy decisions and considerations.

The Office of the Chief Coroner’s *Aid to Inquests* makes clear what the general tone and approach of an inquest is supposed to be:

**What an Inquest is NOT**

*An inquest is NOT an adversarial process.* It is also neither a trial, nor a process for discovery. It is not a royal commission, a campaign or crusade directed by personal or philosophical agendas. *An inquest is an inquisitorial process designed to focus public attention on the circumstances of a death.* It is to be a dispassionate public examination

\(^{44}\) *Coroner’s Act, supra* note 39, ss 33(1) & 38.
\(^{45}\) *Ibid*, s 31(3).
\(^{46}\) *Ibid*, s 34(1).
\(^{47}\) See e.g. *Pierre v Ontario (Coroner)*, 2011 ONCA 187, 104 OR (3d) 321 (re: jury representativeness, particularly in indigenous context).
\(^{48}\) *Coroner’s Act, supra* note 39, s 2(2).
\(^{49}\) *Ibid*, s 31(2).
\(^{50}\) *Ibid*, s 40.
\(^{51}\) *Ibid*, s 42. There is a narrow exception only for “prosecuting perjury in giving such evidence” (*ibid*, s 42(1)).
into the facts and all participants have a responsibility to conduct themselves with dignity and respect.\textsuperscript{52}

This approach is reflected in the process associated with an inquest, which reflects its nature of being closer to a “policy-implementing” type of proceeding. For example, the coroner may be assisted in their investigation by current or retired nurses, paramedics, and police officers.\textsuperscript{53} Doctors and experts may also assist as required.\textsuperscript{54} The local police force is also required to make its officers available to assist coroners with carrying out their various duties under the Coroner’s Act.\textsuperscript{55} With respect to the actual inquest, the provincial government provides a lawyer to act as the coroner’s counsel,\textsuperscript{56} and inquests are generally open to the public.\textsuperscript{57} The coroner’s counsel usually takes the lead in co-ordinating key aspects of the inquest, including the “Pre-Inquest Meeting” as well as usually the initial examination of witnesses.\textsuperscript{58} Parties apply for standing in order to participate in an inquest,\textsuperscript{59} and they must be “substantially and directly interested in the inquest” to be granted standing.\textsuperscript{60} Parties granted standing have the right to cross-examine witnesses (as well as call and examine their own witnesses) and to present arguments and submissions.\textsuperscript{61} The rules of evidence are more flexible than a court as any oral testimony, document, or thing may be admitted as long as it is generally relevant.\textsuperscript{62} However, this flexibility does not extend to evidence that would be inadmissible due to privilege.\textsuperscript{63} Jurors are also entitled to ask the witnesses relevant questions if they wish.\textsuperscript{64}

The “policy-implementing” nature of an inquest also means that key aspects of the process are funded by the state. For example, the expenses of the coroner and those assisting the coroner

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\textsuperscript{52} Office of the Chief Coroner, \textit{supra} note 43 [bold and all caps in original; other emphasis added].

\textsuperscript{53} \textit{Coroner’s Act, supra} note 39, s 16.1; \textit{Appointment of Persons With Investigative Powers, O Reg 358/11, s 1}.

\textsuperscript{54} \textit{Coroner’s Act, supra} note 39, ss 15(4) & 16(1)–(5).

\textsuperscript{55} \textit{Ibid, s} 9(1). If considered appropriate, another police force may provide such assistance instead \textit{(ibid, s} 9(2)).

\textsuperscript{56} \textit{Ibid, s} 30(1).

\textsuperscript{57} \textit{Ibid, s} 32.

\textsuperscript{58} Office of the Chief Coroner, \textit{supra} note 43.

\textsuperscript{59} \textit{Coroner’s Act, supra} note 39, s 41(1).

\textsuperscript{60} Office of the Chief Coroner, \textit{supra} note 43.

\textsuperscript{61} \textit{Coroner’s Act, supra} note 39, s 41(2).

\textsuperscript{62} \textit{Ibid, s} 44(1). Such evidence may be excluded if it is “unduly repetitious or anything that the coroner considers does not meet such standards of proof as are commonly relied on by reasonably prudent persons in the conduct of their own affairs and the coroner may comment on the weight that ought to be given to any particular evidence” \textit{(ibid)}.

\textsuperscript{63} \textit{Ibid, s} 44(2).

\textsuperscript{64} \textit{Ibid, s} 37(2).
will be paid by the Office of the Chief Coroner. However, only limited other funding is available to the parties granted standing. If a party granted standing is the parent or spouse of the deceased and the deceased was the victim of a crime, such parties can apply for some government funding.\footnote{Ibid, ss 41(3)–(4).} Such funding is limited to $40,000 for legal fees and $5,000 for travel, although this amount may be doubled in certain exceptional circumstances.\footnote{Ministry of Community Safety and Correctional Services, \textit{Coroner’s Inquest Legal Fee Reimbursement Program Guidelines} at 2–3, online: Ministry of Community Safety and Correctional Services <www.mcss.gov.on.ca/stellent/groups/public/@mcss/@www/@com/documents/webasset/ec063495.pdf>. Exceptions are when an inquest runs longer than 20 days and/or the location of the inquest results in higher travel and accommodation expenses (ibid).} Further limitations exist as fees are limited to an hourly rate of $192 per hour for one legal representative to a maximum of 9 hours per day.\footnote{Ibid at 3. The 9 hours per day is intended to cover 7 hours of hearing time and 2 hours of preparation of time during an inquest (ibid).} If a party granted standing does not meet these requirements, they have to either represent themselves, pay for their own counsel, or make alternate arrangements for funding their legal representation (e.g. potentially from or as part of a settlement related to the death).

This process accordingly has benefits and limitations from an accountability perspective. First, while inquests are effectively at arms-length from government, a key requirement is that a death must have occurred before an inquest can be triggered. Thus, while an inquest was potentially available for Ipperwash due to the death of “Dudley” George,\footnote{In the end, an investigation was done, but no inquest was called as an inquest would have had a narrower scope than an inquiry. Once the inquiry was called, an inquest would have been duplicative given the inquiry’s overlapping mandate (\textit{Report of the Ipperwash Inquiry: Investigation and Findings}, vol 1 (Toronto: Ministry of the Attorney General, 2007) at 635 \textit{[Ipperwash Report: Findings]}).} no inquest was available for the incidents involving the Toronto G20 because no deaths occurred. A very high-threshold event is thus required to initiate the mechanism, and the ultimate harm must have occurred. Put simply, without a death, it is impossible to use this mechanism to contribute to literal, organizational, or social accountability. An inquest’s ability to conduct a broad systemic review is similarly limited given the inquest’s focus on the issues contributing to the death.\footnote{See e.g. \textit{ibid}.} An inquest’s ability to potentially contribute to organizational and social accountability is correspondingly hampered. However, depending on the circumstances, the death may have been the result of a flashpoint involving broader issues (such as “Dudley” George’s death in Ipperwash). As well, sometimes
multiple or repeated deaths in related circumstances instead of just a single death may need to occur to cause a broader review, which can contribute to corresponding organizational and social accountability. Regardless, without an initial death, an inquest’s ability to conduct detailed reviews regarding related issues is severely constrained.

Second, while some resources are available, the limited availability of funding increases the likelihood that only those with sufficient funding will be able to participate. In other words, those with limited funding options but worthwhile perspectives would be unable to participate, which limits and influences the views present and argued before the inquest. It is also a trait more consistent with a “conflict-solving” type of proceeding on Damaška’s spectrum. However, at least a process with some funding still exists for the immediate family to get a few answers and some closure. The opportunity for recommendations to come out of the process also provides an opportunity for a tragic death to become more meaningful to those most affected (instead of it being perceived as just senseless) as the death may be able to assist with preventing future deaths (i.e. the jury’s recommendations have the potential to contribute to organizational and social accountability).

Third, upon review, the process is not purely a “policy-implementing” type proceeding; it is actually more of a hybrid between the “policy-implementing” and “conflict-solving” types of proceeding. The reality is that various “conflict-solving” traits are part of the system. For example, not all the parties will always agree with all of the decisions made by the presiding coroner, which can result in a judicial review process before a civil court between a party and the coroner that will typically be more adversarial. In addition, disputed issues between the parties will likely involve a “conflict-solving” motion before the coroner, which in turn may also be judicially reviewed. For example, the scope of a potential inquest is often a contentious issue as it determines what will be relevant to the inquest. Scope definition is therefore likely a key

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71 See Damaška, supra note 3 at 106–109.

72 See e.g. Smith v Ontario (Coroner), 2011 ONSC 2844, 106 OR (3d) 254 (Div Ct) (judicial review re: refusal of a coroner to issue a summons).
factor as to whether people will ultimately view the inquest as successful or not, and there are accordingly incentives for the parties to take various adversarial steps so that the scope is defined in a way that best assists their own interests. This hybrid nature can accordingly be either an advantage or a limitation depending on the specific circumstances and how the system is used.

Finally, while coroner’s inquests have the ability to contribute to literal, organizational, and social accountability, it has a limited ability to contribute to actual responsibility and consequences. As noted above, inquests cannot make findings of criminal or civil liability. As well, the actual likelihood of organizational accountability needs to consider the fact that these inquiries occur after an event has already gone bad. People are thus more likely to generate more reasons for why they were right and be less likely to concede legitimacy to other points of view. Given that a jury’s recommendations are not binding, this psychological reality raises concerns about how effective an inquest’s recommendations can be over the long-term. There is also no corresponding enforcement mechanism to ensure compensation or change when needed.

2. Public Inquiries / Royal Commissions

The second option that will be examined is public inquiries, which are sometimes called “royal commissions of inquiry” at the federal level. When major events such as Ipperwash or the Toronto G20 occur, inquiries are often cited as the best mechanism to determine what occurred, review the related issues, and to make recommendations to prevent the issues from reoccurring. This default position is because inquiries have the potential ability to make broad systemic inquiries into the issues that are often difficult to do in other contexts. They thus tend to be a more “policy-implementing” type of proceeding, and they are well suited to contribute to literal, organizational, and social accountability in a comprehensive way. Their ability to make findings of misconduct also allows them to contribute to individual responsibility when needed. However, there are various issues and limitations that one must be aware of in order for an inquiry to be a truly effective and viable accountability mechanism, particularly with respect to reliable triggering issues and limitations regarding actual responsibility or consequences.
The provincial *Public Inquiries Act, 2009* is the focus of the analysis here as it illustrates many of the issues associated with such inquiries.\(^{73}\) Although this Act replaced less-detailed provincial legislation regarding inquiries,\(^{74}\) the key provisions regarding the substantive issues for the purposes of this chapter largely continued in the new legislation in a similar manner. Where a relevant difference arises between the current provincial Act, the previous provincial Act, or the federal *Inquiries Act*,\(^{75}\) the difference will be noted as required during the analysis below.

A key issue regarding how public inquiries are triggered is that they can only be initiated by the relevant government,\(^{76}\) which is consistent with a “policy-implementing” approach.\(^{77}\) The issues must thus be of a sufficient scope to justify the calling of an inquiry rather than using other mechanisms. As a result, one must be able to overcome political inertia, as well as any potential self-interest, in order for an inquiry to be called.\(^{78}\) Given the political nature of such a decision as well as potential negative ramifications, a government is therefore usually unlikely to call an inquiry into its own activities. For example, the provincial Conservative governments of Michael Harris and Ernie Eves generally refused to call an inquiry into the issues surrounding the death of “Dudley” George during the eight years they remained in power; it was only when there was a change in power that a new Liberal government ultimately called an inquiry into the issues.\(^{79}\) A government who does not want the additional scrutiny or different perspectives that an inquiry may bring accordingly does not have the incentive to call an inquiry into its own activities, which has the practical effect of preventing or limiting all forms of accountability as well as meaningful examinations of potentially important issues.

In order for a government to find such an examination to be politically acceptable, one must consider the nature of the issue, the allegations involved, how long has passed since the event originally occurred, and the degree of connection between the issues and the current government versus a former government. None of these issues will necessarily be determinative, and the last

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\(^{73}\) SO 2009, c 33, Schedule 6.

\(^{74}\) *Public Inquiries Act*, RSO 1990, c P.41 as repealed by *Public Inquiries Act, 2009*, supra note 73, s 37.

\(^{75}\) RSC 1985, c I-11.

\(^{76}\) *Public Inquiries Act, 2009*, supra note 73, s 3(1).

\(^{77}\) Damaška, *supra* note 3 at 154.

\(^{78}\) See e.g. generally Ratushny, *supra* note 1 at 105–108.

point regarding changes in government can apply whenever new leadership is in place, even if the same political party remains in power. For example, Paul Martin’s federal Liberal government called the *Commission of Inquiry into the Sponsorship Program and Advertising Activities* under Justice Gomery after a report by the Auditor General into the related issues and events, which was despite these events occurring generally under Jean Chrétien’s immediately preceding federal Liberal government. In addition to other factors, the combination of the Auditor General’s report plus the change in government leadership played key roles in the political calculus as to whether it was appropriate to call the inquiry. As another example, the Michael Harris provincial Conservative government called the *Walkerton Inquiry* given the deaths and illnesses that occurred due to the contamination of Walkerton’s drinking water. Even though the related issues occurred during that government’s mandate, the government still deemed it politically appropriate to call the inquiry given the issues involved. In particular, the calling of an inquiry may provide a mechanism for a government to show that it is trying to deal with the related issue and deflect corresponding political questions. As a result, it can provide a way for a government to strategically delay dealing with an issue as well as a method to shift corresponding accountability inquiries away from the government to another body and process. The political calculus to call an inquiry thus varies depending on the circumstances, and predictable or certain criteria do not exist for determining when an inquiry will be called (which is problematic as inquiry initiation is therefore unreliable).

Assuming an inquiry is called, the next issue is the terms of reference, which are set by the applicable government. The terms of reference define what the inquiry will look into, and they

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84 See e.g. generally Ratushny, *supra* note 1 at 130–144.
can accordingly be limited or broad. Broader terms of reference allow the commission to further explore factors and issues that contributed to the key event. For example, with respect to the Ipperwash Inquiry, the key terms of reference were:

The Commission shall:
(a) inquire into and report on events surrounding the death of Dudley George; and
(b) make recommendations directed to the avoidance of violence in similar circumstances.  

Such terms of reference allowed for a comprehensive inquiry and review of the relevant issues. In the case of the Ipperwash Inquiry, the result was a detailed 4-volume report totalling over 1,600 pages. The practical concern is to ensure that the terms of reference are not so limited as to prevent a thorough review of the issues associated with the key incident, yet not so broad that the inquiry will never end. It is thus unsurprising that, before someone agrees to be a commissioner, that individual is usually involved in developing the related terms of reference.  

Another key component regarding ensuring the success of an inquiry is ensuring an adequate budget in order to fully canvass the issues listed in the terms of reference. Governments must be careful not to stifle an inquiry’s budget to avoid allegations of improperly resourcing a supposedly independent review. However, this does not mean that an inquiry has a carte blanche to spend money endlessly. Instead, an inquiry needs to be practically aware that there is a point where the general value of the inquiry will become politically debatable compared to the resources being devoted to the inquiry. The provincial Public Inquiries Act, 2009 now explicitly codifies the fact that the applicable minister sets a corresponding budget in consultation with the commission, which is in contrast to a coroner’s inquest where funding is generally provided to the Office of the Chief Coroner as part of the annual government appropriations.

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85 OC 1662/2003, supra note 79, s 2 [emphasis added].
87 The Honourable Associate Chief Justice Dennis R O’Connor & Freya Kristjanson, “Some Observations on Public Inquiries” (Speech delivered at Canadian Institute for the Administration of Justice, 10 October 2007), online: Court of Appeal for Ontario <www.ontariocourts.on.ca/coa/en/ps/speeches/publicinquiries.htm>. According to O’Connor and Kristjanson, the Chief Justice may also play a role (ibid). See also Ratushny, supra note 1 at 144–147 & 150–154.
88 See e.g. ibid at 173–179.
89 See e.g. ibid at 46–50 (summary of Somalia Inquiry experience).
90 Public Inquiries Act, 2009, supra note 73, s 25. See also ibid, s 2, sub verbo “Minister”.
The other related big picture issue is the timeline for a report to be completed. Although the federal Act does not explicitly require that a deadline be included, the provincial Act now specifically requires that a date for delivery of the report be included as part of the establishment of a commission. There are advantages and disadvantages to having a hard deadline included as part of an inquiry’s terms of reference. Such a date allows for certainty as the commission then has a specific end-goal that it is working towards, and a corresponding budget can be developed. Clear targets and goals are thus set from the beginning, which can provide helpful direction and constraints. On the other hand, a hard deadline may not allow for a complete review of issues as they develop or of unknown or new issues that arise during the inquiry. However, from a practical perspective, the key requirement is that there be realistically adequate time to conduct an appropriate inquiry, including time for any hearings, the development of findings and recommendations, and any required translations. If necessary, this date can be amended, but such changes would likely need to be justified instead of granted as a matter of course since the initial end date is publicly included as part of the terms of reference.

The process of an inquiry will depend on the scope and scale of the issues that are being explored. It can vary from a very focused inquiry on specific policy issues to a much broader inquiry that involves considerable hearings and the calling of evidence to determine key facts. It is important to remember the distinction between inquiries focused solely on policy issues versus those more focused on fact-finding as each has different resource and process requirement. In particular, fact-finding inquiries are more relevant for this chapter as they are

91 See e.g. Ratushny, supra note 1 at 152–154
92 Inquiries Act, supra note 75, ss 2–5 & 11–13.
93 Public Inquiries Act, 2009, supra note 73, s 3(3)(d).
94 See e.g. Ipperwash Report: Findings, vol 1, supra note 68 at 645–649 & 658–661 (examples of racist and culturally insensitive comments and memorabilia that became apparent after the inquiry was called or during the actual hearings).
95 Ibid, s 21(3) (requirement under provincial Act that report be in both English and French). See also Tamar Witelson, “Declaration of Independence: Examining the Independence of Federal Public Inquiries” in Canada” in Allan Manson & David Mullan, eds, Commissions of Inquiry: Praise or Reappraise? (Toronto: Irwin Law, 2003) 301 at 325 (Somalia Inquiry’s experience with short inadequate time limits that resulted in multiple extensions and a final inflexible time limit that ultimately did not allow for an adequate investigation of some issues).
96 See e.g. OC 1873/2013, online: Elliot Lake Inquiry <www.elliotlakeinquiry.ca/li/pdf/MC-2013-6938.pdf> (extending deadline for Elliot Lake Inquiry to deliver report beyond initial deadline). See also Witelson, supra note 95 at 325 (extensions for Somalia Inquiry).
97 See e.g. Ratushny, supra note 1 at 153–154; Witelson, supra note 95 at 325 (Somalia Inquiry’s experience with not obtaining the full requested extensions).
98 See e.g. O’Connor & Kristjanson, supra note 87. See also Ratushny, supra note 1 at 108–112, 152, & 203–206.
the ones more likely to be needed for accountability purposes in the context of demonstrations. Such substantial fact-finding inquiries require significantly more resources, which will depend on the number of parties involved, the number of witnesses, and the scale of the issues. For example, the Ipperwash Inquiry was a fairly significant fact-finding inquiry. It involved a total of 29 parties with standing; 139 witnesses; 1,876 exhibits; 229 hearing days resulting in about 60,000 pages of transcripts; and 36 research papers and projects, all with a total cost of about $13.3 million. On the other hand, policy-focused inquiries have had much smaller scales. As a contrasting example, the SARS Commission only had 6 days of public hearings, and “[m]ost of the Commission’s investigation was carried out through personal confidential interviews and meetings and by examination of documents and consultations with experts.” Although some illustrative examples of primarily policy inquiries will be used at times in this chapter, the focus below will be on inquiries that involve significant fact-finding given the nature of the accountability issues that usually need to be explored with respect to events involving large-scale demonstrations.

In terms of specific process, the government will usually define as part of the order setting up the inquiry whether it can or should hold public hearings. In fact, under the provincial Act, an inquiry can only hold public hearings if specifically authorized by the government. If a hearing will be held, an inquiry has similar powers and process to an inquest. It has the power to compel witnesses to testify, which contributes to literal accountability, and witnesses have similar protections against potential civil and criminal liability. Although legislation does not limit who may be appointed to preside over an inquiry, it is often now a sitting or retired judge.

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101 See e.g. Ratushny, supra note 1 at 138–139.
102 Public Inquiries Act, 2009, supra note 73, s 14(1). The federal Act does not have similar provisions, although this issue is largely determined by context.
103 Ibid, s 10.
104 Ibid, s 16.
105 Ibid, s 3(3)(a); see also Ratushny, supra note 1 at 144–147.
106 See e.g. O’Connor & Kristjanson, supra note 87; see also Ratushny, supra note 1 at 45 & 154–157.
The commission also has the power to grant standing to potential participants, and participants with standing may be represented by themselves or through a lawyer or agent. In addition, unlike an inquest, all participants granted standing can apply for funding to pay for fees and expenses. This power is more consistent with a “policy-implementing” type of proceeding as it reduces some of the practical equality issues often present in standard litigation. However, there is a “difference in establishing a team for trial … and a team of lawyers for a[n] … inquiry,” and funding for such an equivalent trial team will not be provided. In cases involving multiple parties, this can pose interesting double-standards due to different parties still having potentially different access to resources and rights. For example, under the provincial Act, there is no privilege or confidentiality with respect to any funding provided by the provincial government to an inquiry participant, including “the existence of any funding and its nature, rate[,] and amount.” On the other hand, those not receiving such funding are able to continue to claim such privilege. Funding will also be provided only for the allowed amounts and number of legal staff, which are publicly known. However, another participant not subject to the funding restrictions has the ability and flexibility to devote such additional resources as the participant sees fit. The parties are thus in a potentially unequal litigation position before the inquiry, which may advantage parties with greater resources, although some elements of the practical equality issues are reduced in accordance with a “policy-implementing” approach. A potential result is that the public hearings may become more of a “conflict-solving” style proceeding unless they are controlled carefully by the commissioner.

Another issue similar to inquests is that inquiries have a great deal of other control over the process and evidence, which is also consistent with a “policy-implementing” type of proceeding. For example, the commission’s counsel often calls most, if not all, of the

107 Public Inquiries Act, 2009, supra note 73, s 15; see also Ratushny, supra note 1 at 185–193.
108 See e.g. ibid; Public Inquiries Act, 2009, supra note 73, s 7(2), para 9; Ipperwash Report: Process, vol 3, supra note 79 at 34–35 & 145–153.
109 See e.g. Damaška, supra note 3 at 106–108.
111 Public Inquiries Act, 2009, supra note 73, s 25(6).
112 Such an outcome is also potentially possible where an inquiry may be examining whether someone should be “blamed” for the incident in question, especially since fairness plays a bigger role in such decisions. For more information regarding the potential issues associated with “blaming”, see A Wayne MacKay & Monica G McQueen, “Public Inquiries and the Legality of Blaming: Truth, Justice, and the Canadian Way” in Manson & Mullan, supra note 89, 249. See also Ratushny, supra note 1 at 388–399.
113 Damaška, supra note 3 at 160–164.
witnesses, which contributes to literal accountability. While this has the advantage of allowing other parties to conduct their examinations in the nature of cross-examination, it also means that the parties usually do not have direct control of how a witness’s evidence is initially laid out and framed. The parties are practically subject to what the commission counsel and the commissioner believe the key issues are, and this different approach is in contrast to a trial (i.e. a more “conflict-solving” proceeding) where the plaintiff has control of the case and the story that they wish to portray. It is thus important that parties advocating for an inquiry are confident that the commission counsel and the commissioner understand and are willing to explore what the advocating parties believe to be the key issues. The commission also has “the power to control its own process and make rules regarding its practice and procedure”, which is rather broad and flexible. It is also consistent with a “policy-implementing” form of proceeding.

With respect to evidence more generally, inquiries are again very similar to inquests. Under the provincial Act, commissions are allowed to collect and receive any relevant and appropriate information regardless of form and whether it would be admissible in a court. Inquiries thus have an ability to consider broader materials beyond what a court can consider, which is again more consistent with a “policy-implementing” form of proceeding. However, privileged information remains inadmissible despite this broader general ability.

It must also be remembered that a commission is a classic administrative tribunal subject to administrative law. Accordingly, similar to an inquest, if a party does not agree with something that the commission is doing, the party must make a tactical decision regarding whether the issue should be brought before the commission in the form of a motion. If the parties are not satisfied with the commission’s decision or findings, parties may then choose to judicially review that decision or findings to a court in a civil proceeding, which may cause a

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115 Damaška, supra note 3 at 109 & 111–113.
116 Public Inquiries Act, 2009, supra note 73, s 7.
117 Ibid, s 8(1).
118 Ibid, s 8(3).
119 See e.g. Ratushny, supra note 1 at 1–4, 301–306, & 404–410.
120 See e.g. Ipperwash Report: Process, vol 3, supra note 79 at 156ff, 162ff, & 179ff.
significant delay or significantly damage or undermine the credibility of the commission.\textsuperscript{121} Such judicial reviews can also be very costly, which will depend on their nature and the number of courts involved.\textsuperscript{122} However, such an action may ultimately be in a party’s strategic interest given the impugned issue.\textsuperscript{123} Regardless, these facets of public inquiries are more consistent with a “conflict-solving” proceeding, especially since any judicial review would be before a traditional court in a civil proceeding. In other words, inquiries have a similar hybrid nature as inquests rather than being purely “inquisitorial”.

Despite the various issues above, inquiries have a considerable potential value once appointed and an appropriate mandate has been given. Given their ability to compel witnesses, they are able to contribute to literal accountability comprehensively in accordance with their mandate. This focus allows them to conduct comprehensive investigations and reviews into complex, systemic, or broad-reaching issues that would be difficult to do in “conflict-solving” types of proceeding (such as civil or criminal courts) or other venues. Le Dain notes that the function of an inquiry “is to inform the public, to clarify the issues, and to promote understanding of a problem.”\textsuperscript{124} He further notes that:

\begin{quote}
A commission of inquiry has three tasks: to identify the issues; to ascertain the facts; and to come to policy conclusions. In many ways, its most important task is to identify and place the issues in their proper relationships and perspective. It is that which creates the essential framework for analysis and debate.\textsuperscript{125}
\end{quote}

Public inquiries can thus also offer various recommendations for reform based on the results of their investigations and research, which can contribute to organizational and social accountability. As well, inquiries have the ability to make findings of misconduct against individuals,\textsuperscript{126} which allows for the assignment of limited responsibility and consequences, although not in a criminal or civil sense. While elements of both “policy-implementing” and

\textsuperscript{121} See e.g. Chrétien v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Ex-Commissioner), 2008 FC 802, [2009] 2 FCR 417 [Chrétien], aff’d 2010 FCA 283, 409 NR 193; see also Ratushny, supra note 1 at 301–306 & 404–410.
\textsuperscript{122} See e.g. Chrétien v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Ex-Commissioner), 2011 FC 1458, 403 FTR 121 (cost award of $200,000, which was about half of the applicant’s total cost for the judicial review).
\textsuperscript{123} See e.g. Chrétien, supra note 121 (review re: reasonable apprehension of bias).
\textsuperscript{124} Le Dain, supra note 4 at 82.
\textsuperscript{125} Ibid at 83 [emphasis added].
\textsuperscript{126} Public Inquiries Act, 2009, supra note 73, s 17. See also generally Ratushny, supra note 1 at 388–399.
“conflict-solving” types of proceedings may be present, they are thus as a whole more towards the “policy-implementing” approach.

However, given the non-binding nature of an inquiry report, their ability to contribute to organizational accountability and actual consequences is limited for reasons analogous to those discussed above in the context of coroner inquests. There is also an open debate about how radical an inquiry’s recommendations can ultimately be. Carolyn Johns and Gregory Inwood note that “[public inquiries] must be conscious of the feasibility of any policy change they recommend”, especially since the inquiries report back to governments “that may not take kindly to criticism or radical suggestions for change. Pragmatism over radical policy change, therefore may be the most that can be expected.”127 They also note various related arguments indicating that public inquiries can only be reformist and ameliorative rather than revolutionary, so they have to find a balance between the more radical suggestions and what reforms would be acceptable.128 However, Johns & Inwood may be overstating these potential impacts on and assessments of current inquiries since commissioners ought to be aware that past inquiry recommendations have usually not been implemented.129 Le Dain also notes that inquiries should not “be overly concerned with political feasibility.”130 As a result, commissioners have an incentive to create as comprehensive and thorough a review as possible with many recommendations to leave a foundation for future work by others. If governments are unlikely to implement the recommendations directly anyway, the findings, policy work, and recommendations could provide an important basis for future discussions and research as well as changes over the long-term. However, Le Dain does note that there needs to be “a sense of social feasibility – what the society was capable of”,131 which is consistent with Inwood’s & Johns’ more general statement that “[s]ome congruence of ideas coming out of [an inquiry] with the political, economic, and social ideas of the time is also important”.132

129 My appreciation goes to Kent Roach for pointing this reality out.
130 Le Dain, supra note 4 at 84. Although this comment was in the context of the policy-focused commission he chaired, it is arguably applicable by analogy to any inquiry where policy is an issue.
131 Ibid.
political feasibility may not be concern, broader social feasibility is still something that inquiries ought to be sensitive to.

Regardless, the underlying concerns about inquiries contributing to organizational accountability and having actual consequences are reinforced by the results after the Ipperwash Inquiry, which was able to conduct a detailed review of the numerous indigenous, policing, and government issues involved in Ipperwash.\textsuperscript{133} The end-result in that case was an over 1,600 page report over 4 volumes with 100 recommendations as a result of the extensive review. One of those recommendation was that a separate Ministry of Aboriginal Affairs with a separate minister be created,\textsuperscript{134} but this recommendation has not been followed continuously as the now separate ministry has both had its own sole minister as well as shared its minister with other ministries.\textsuperscript{135} As well, the Inquiry also recommended the creation of a Treaty Commission of Ontario,\textsuperscript{136} but that has yet to be implemented to date as well. The Inquiry also recommended relatively narrow amendments to the \textit{Police Services Act} in order to clarify police and ministerial responsibilities as well as promote ministerial accountability with respect to the Ontario Provincial Police,\textsuperscript{137} and those amendments have not occurred to date either. Without debating the correctness of these implementation decisions, these examples illustrate the non-binding nature of a report and its recommendations as well as the difficulties of ensuring organizational accountability and actual

\begin{footnotes}
\item[137] \textit{Ibid} at 342–343 & 357.  
\end{footnotes}
change, especially over the long-term. It is ultimately up to governments to decide what to do with a report and its recommendations, and the presiding reviewers typically do not play a role in the implementation of the reports, particularly if they are still a sitting judge or an ongoing member of an administrative tribunal. The practical result is that the prevailing order will instead be maintained or only incrementally changed due to the inquiry, and other options to ensure actual change ought to be explored.

The real value of a public inquiry is thus potentially in social accountability. Le Dain notes that:

"[An inquiry] has an effect on perceptions, attitudes[,] and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations. … The attitudes and responses of individuals at the various places at which they can affect the problem are of profound importance."

An inquiry thus “becomes, whether it likes it or not, part of [an] ongoing social process” that has longer-time effects as it is “a form of social influence”. For example, in the context of indigenous issues, a major contextual report was that of the Royal Commission on Aboriginal Peoples [RCAP]. This detailed and lengthy report explored various indigenous issues in-depth, resulting in a 5 volume report with a total of over 3,500 pages and over 400 recommendations. However, according to Peter Russell, the impact of RCAP “on policy change was marginal and limited” and that the most we can perhaps expect from inquiries like RCAP is that “[i]n the longer run, the ideas put forward … filter through to the broader public and in that way educate the country.” These elements are all consistent with notions of social accountability. As Roach notes, “[t]he act of appointing an inquiry may then begin a process of self-reflection and self-criticism that can exert influence long after … the inquiry”.

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138 See e.g. O’Conner & Kristjanson, supra note 87 (regarding judges in an inquiry setting, but analogous reasons would apply for other ongoing tribunal members (e.g. coroners)).
139 Le Dain, supra note 4 at 85.
140 Ibid.
141 Report of the Royal Commission on Aboriginal Peoples (Ottawa: Minister of Supply and Services Canada, 1996) vols 1–5. Although this report was the result of a policy-inquiry instead of a fact-finding inquiry, it is still useful for illustrative purposes.
143 Roach, supra note 7 at 276.
Overall, inquiries have the potential to be very good accountability mechanisms. They use more of a “policy-implementing” approach to contribute to literal, organizational, and social inquiries in a comprehensive way in accordance with their mandate. They are also able to attribute some responsibility and cause some consequences through findings of misconduct, but such responsibility and consequences are ultimately limited. However, there are issues about how they are initiated so that they can be available reliably when needed to examine issues in a more comprehensive manner.

3. Office of the Independent Police Review Director

In the case of the Toronto G20 Summit, the Office of the Independent Police Review Director [OIPRD] was one of the key accountability mechanisms available to those affected by the police’s actions. As the relevant OIPRD provisions were enacted only in 2007, it was not available to assist with Ipperwash’s issues when they occurred. OIPRD has particular potential benefits as it offers a way for demonstrators to independently review police conduct, particularly since OIPRD has various government resources available so that it can carry out its functions. However, this option has various limits given its bifurcated nature, and these issues are explored in more detail below. It will become apparent that the OIPRD disciplinary process is more of a “conflict-solving” proceeding that can provide some literal accountability, but limited organizational or social accountability. On the other hand, OIPRD systemic reviews are more of a “policy-implementing” type of mechanism that has the possibility of ensuring literal, organizational, and social accountability with respect to at least policing issues once initiated. Both mechanisms are also limited in terms of the actual responsibility and consequences that can occur as a result of the accountability.

OIPRD’s head, the Independent Police Review Director, is appointed by the government, but it cannot be a current or former police officer. The main function of the Director is to “manage complaints made to him or by members of the public” regarding police issues. Complaints

146 Ibid, ss 26.1(1)–(2).
147 Ibid, s 26.2(a). A number of policing related persons are excluded from making complaints (ibid, s 58(2)).
can be made regarding “the policies or services provided by a police force” or “the conduct of a police officer.” A key requirement is thus that police conduct, policies, or services must be involved in order for OIPRD to have jurisdiction. It is also largely a complaints-based system, which means that a complaint must generally be made in order for OIPRD to have jurisdiction to act. This approach is consistent with a “conflict-solving” type of approach as an individual must begin the complaint. However, OIPRD does have the ability to “examine and review issues of a systemic nature that are the subject of, or give rise to, complaints” and make resulting recommendations, which is consistent with a “policy-implementing” approach. Such systemic reports also have the greater potential to contribute to organizational and social accountability, but only OIPRD has the power to initiate this mechanism. In fact, this power has only been exercised once to date, and that report was OIPRD’s G20 Systemic Review Report, which was a relatively thorough report regarding the numerous policing issues experienced with respect to the Toronto G20 demonstrations. However, given OIPRD’s focus on policing, its jurisdiction and focus are limited to areas involving Ontario policing and not other potential broader issues in a comprehensive sense. Assuming that the Office does have jurisdiction, the Director has the corresponding power to investigate complaints, including the power to summons witnesses and evidence as well as to conduct corresponding searches. These features contribute to literal accountability and are consistent with a more “policy-implementing” approach.

On its face, this Office has promising powers and abilities. However, various limitations are inherent in the Office given its focus and nature. First, given OIPRD’s focus on officer conduct, its results and findings are to be used primarily for disciplinary proceedings under the Police Services Act. As a result, documents prepared by OIPRD are specifically inadmissible in other civil proceedings aside from the disciplinary proceeding. This exclusion is different than

148 Ibid, s 58(1).
149 Damaška, supra note 3 at 109–111.
150 See generally Police Services Act, supra note 145, s 57.
152 See generally Police Services Act, supra note 145, ss 26.4–26.9. By virtue of section 26.4 of the Police Services Act (ibid), section 33 of the Public Inquiries Act, 2009 (supra note 73) regarding summons also applies. See also Gareth Jones, Conducting Administrative, Oversight & Ombudsman Investigations (Aurora, Ont: Canada Law Book, 2009), ch 14 (investigating the police).
153 Police Services Act, supra note 145, ss 26.1(11) & 83(8).
“privilege” as privileged evidence can be allowed if the privilege is waived or not asserted. Under the OIPRD exclusion, there is instead a complete statutory bar. Given the wording of the exclusion, this limitation unfortunately applies to both individual and systemic reviews. As a result, despite the potentially more comprehensive nature of an OIPRD systemic review, it cannot have any legal weight in civil proceedings to resolve other issues. Indeed, unlike inquest and inquiry reports, it therefore cannot even have persuasive value in most civil proceedings because of the statutory bar against its admissibility. In fact, when determining whether to certify the proposed Toronto G20 class action, the existence of OIPRD complaints as well as OIPRD’s *G20 Systemic Review Report* were cited by the certification judge (without reviewing their contents) as part of the reason why behaviour modification did not depend on the proposed class action, although the Divisional Court disagreed with that reasoning on appeal. The ironic result was that although the plaintiff could not use the content from the complaints and OIPRD’s systemic review to advance the certification motion, the police defendant could still successfully use their existences as part of the reason to potentially deny certification. This procedural rather than substantive outcome is more consistent with a “conflict-solving” approach rather than a “policy-implementing” approach since maximizing dispute resolution “cannot simultaneously aspire to maximize accurate fact-finding.”

With respect to disciplinary proceedings specifically, there are various technical realities as a result of an OIPRD complaint that must be acknowledged and that reinforce a “conflict-solving” rather than “policy-implementing” approach when dealing with actual binding discipline. In contrast, OIPRD’s systemic reviews are not subject to similar requirements given their nature, which reflects and encourages a more “policy-implementing” approach with respect to such systemic reviews. Although investigations feed into both types of reviews, these differences reflect the separate yet parallel roles that OIPRD can play with respect to individual discipline and systemic policing issues.

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156 Damaška, *supra* note 3 at 123 [footnote omitted].
First, for a complaint to result in discipline, the complaint usually needs to be initiated within 6 months of the event, and the complaint usually needs to proceed to a hearing within 6 months of the complaint being initiated. If these presumptive times cannot be met, issues may arise with respect to the complaint proceeding, and the scale and nature of the event will contribute to whether exceptions apply. However, if a party is not satisfied with the outcome of an exception decision, judicial review and corresponding litigation may be required to obtain the desired outcome. Such litigation introduces further “conflict-solving” type mechanisms into the process as any such litigation would proceed before a civil court.

Second, in order for any complaint to proceed to a binding outcome, an identifiable officer must be involved. This requirement can be difficult at times depending on the circumstances and evidence available, especially given the nature of large-scale demonstrations and the number of individuals correspondingly involved. Further, even if an officer is identified, they can avoid discipline by resigning before the complaint is finally disposed of. These realities limit the potential literal accountability that can be available through the process and further contribute to a “conflict-solving” approach and perception with respect to individual discipline hearings.

Third, the requirement to make a corresponding finding in a hearing is “clear and convincing evidence”, which is higher than a balance of probabilities. The practical result is that a police force could have civil liability for an officer’s actions, but that standard is insufficient for disciplinary action. Such a higher standard for a statutory discipline process is highly unusual.

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157 Police Services Act, supra note 145, ss 60(2)–(3). See also Wall v Ontario (Office of the Independent Police Review Director), 2013 ONSC 3312 at paras 34–37, 362 DLR (4th) 687 (Div Ct) [Wall].
158 Police Services Act, supra note 145, ss 83(17)–(18). See also Figueiras v York (Regional Municipality of) Police Services Board, 2013 ONSC 7419 at para 72, 317 OAC 179 (Div Ct) [Figueiras], citing Ackerman v Ontario Provincial Police, 2010 ONSC 910 at para 21, 259 OAC 163 (Div Ct).
159 For example, exceptions were potentially applicable to the Toronto G20 complaints (see e.g. Wall, supra note 157 at paras 60–62, 79–80, & 85; Figueiras, supra note 158 at paras 22, 65–68, 70, & 72).
160 See e.g. Wall, supra note 157 (judicial review of OIPRD decision to not proceed with complaint); Figueiras, supra note 158 (judicial review of police board decision regarding hearing notice pursuant to complaint).
161 Office of the Independent Police Review Director, supra note 151 at 103–104, 119, & 120 (re: officers removing name badges).
162 Police Services Act, supra note 145, s 90(1).
163 Ibid, s 84; Penner v Niagara (Regional Police Services Board), 2013 SCC 19 at para 60, [2013] 2 SCR 125 [Penner].
164 A CanLII search of Canadian statutes and regulations using “clear and convincing” resulted in only one other policing act that uses this term in a discipline context (i.e. The Law Enforcement Review Act, CCSM, c L75, s 27(2)). The only other statutes or regulations where the phrase arose involved wills (i.e. Wills Act, RSNWT (Nu) 1988), c W-5, ss 11(4) & 13.1(2); Wills and Succession Act, SA 2010, c W-12.2, ss 37–39), maintenance
and it further reinforces a “conflict-solving” approach. An obvious question is whether this standard should be re-examined to ensure consistency with other jurisdictions and professions. As well, if the ultimate result is that misconduct occurred, the remedies available are limited to only employment-type remedies against the officer in question. As a result, even if literal accountability is feasible, these limitations make it difficult for actual responsibility and consequences to follow.

Accordingly, even if the current higher threshold is met under the “conflict-solving” approach, providing compensation to the complainant is unfortunately not a power available under the Police Services Act. As a result, complainants must conduct other separate civil proceedings if they wish to obtain compensation for the impugned actions. While the results of the discipline hearing and the corresponding information may be useful to encourage settlement in those other cases, re-litigation of the issues would be required in a worst case scenario, and there is a distinct possibility that different findings and results are possible. In order to encourage efficiency and immediate accountability as well as avoid duplication, it is thus worthwhile to explore whether some other remedies should be optionally available when the higher threshold is met in a “conflict-solving” disciplinary hearing to allow for some other issues to be resolved at the same time at the complainant’s option. However, the decision to not grant such remedies should not be “with prejudice” to other proceedings (including potential defenses of res judicata), particularly given the higher standards currently required for disciplinary proceedings as well as

enforcement (i.e. Maintenance Enforcement Act, RSY 2002, c 145, s 32(1)), and statutory accident benefits (i.e. Statutory Accident Benefits Schedule – Accidents After December 31, 1993 and Before November 1, 1996, O Reg 776/93, s 11(6)). Similar searches using “clear evidence”, “clear proof”, “convincing evidence”, and “convincing proof” provided very limited additional results, but none of these additional results were in the context of a statutory discipline regime.

165 Police Services Act, supra note 145, s 85.
166 Ibid.
167 Ibid. Since the complainant is a party to any such hearing (ibid, s 83(3)), there is the potential for an issue estoppel argument to be raised. However, the Supreme Court of Canada decided in a 4-3 decision that “[g]iven the legislative scheme and the widely divergent purposes and financial stakes in the two proceedings, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would determine the outcome of [the complainant’s] civil action” (Penner, supra note 163 at para 70). Although the majority saw “no reason to create a rule of public policy to preclude the application of issue estoppel in the context of public complaints against the police”, it would have been “fundamentally unfair” to apply issue estoppel to preclude a civil claim in that case (ibid at paras 69 & 71). However, given that the same legislative scheme and similar financial stakes would be involved in most other complaints, there are likely very few situations where such an issue estoppel argument would successfully prevent a civil claim.
the fact that a complainant may have good reasons for seeking remedies outside of the disciplinary process.

In summary, the OIPRD disciplinary process contributes primarily to literal accountability in more of an overall “conflict-solving” type of proceeding. However, the responsibility and consequences resulting from such proceedings are limited to employment-related consequences rather than broader civil or criminal responsibility, which makes it less useful for broader accountability purposes. On the other hand, OIPRD’s systemic reviews are more of a “policy-implementing” type of proceeding on Damaška’s spectrum, and they have the potential to contribute to literal, organizational, and social accountability. However, the review’s non-binding nature as well as its admissibility bar ensures that any review cannot guarantee that responsibility, consequences, or changes necessarily follow. There is also no method to automatically initiate the mechanism, and any review would limited to only policing issues within OIPRD’s jurisdiction. The OIPRD accountability mechanisms are thus not ideal for broader and comprehensive accountability involving complex situations, such as the issues associated with the Toronto G20 or Ipperwash demonstrations.

4. The Ombudsman

The Ombudsman is another accountability option that was available for and used in connection with the Toronto G20 Summit. Although somewhat independent and supported by some resources and statutory powers (i.e. the office is more of a “policy-implementing” type), this mechanism is not appropriate for dealing with all the issues that arise with respect to large-scale demonstrations given the Ombudsman’s nature and limits. However, despite these issues, the Ombudsman was able to partially contribute to Toronto G20 accountability through media communications and by examining in detail the one part of the Toronto G20 issues that was within his jurisdiction. These and other issues associated with the Ombudsman are detailed further below, and they illustrate how the Ombudsman was able to contribute to literal, organizational, and social accountability for what was within the office’s narrow jurisdiction.
The Ombudsman is an officer of the provincial legislature that is “appointed by the Lieutenant Governor in Council on the address of the Assembly.” It is thus independent from the government unlike other appointments, particularly since the position is specifically not considered to be a public servant. The Ombudsman also has security of tenure as the position is appointed for a five-year term and removable only for cause. The Ombudsman’s function is to investigate any provincial government decision, recommendation, act, or omission that affects “any person or a body of persons in his, her[,] or its personal capacity”, which is consistent with a “policy-implementing” type of proceeding. However, the Ombudsman’s jurisdiction is thus largely limited to examining issues involving only the provincial government, and the Ombudsman specifically does not have jurisdiction over complaints or disciplinary proceedings involving police. This limited jurisdiction is what was ultimately problematic in the context of the Toronto G20 as the Ombudsman could only review in detail other police decisions that did not involve discipline issues. It is thus not surprising that the substance of the Ombudsman’s review was limited to the Ontario government’s decision to implement a related regulation under the Public Works Protection Act.

With respect to evidence and process, the Ombudsman has the ability to summons, require people to provide information, and to enter related government premises for the purposes of an investigation. These abilities are consistent with a “policy-implementing” approach, and they contribute to literal accountability. In addition, unlike some of the other available options, all investigations must be conducted in private rather than publicly. This process thus limits the cathartic effect that sometimes occurs when a person is able to tell their story in a public hearing.

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169 Ibid, s 5(2).
170 Ibid, s 4(1).
171 Ibid, s 14(1). The Ombudsman also has limited jurisdiction to explore whether municipalities comply with certain requirements regarding meetings and closed meetings, but that jurisdiction is not relevant for this examination (ibid, ss 14(2.1)–(2.6)).
172 Police Services Act, supra note 145, s 97.
174 Ombudsman Act, supra note 168, ss 19(1)–(2) & 25. See also generally Jones, supra note 152.
175 Ombudsman Act, supra note 168, s 18(2).
and thus contribute to a perceived open airing of the key issues. After any investigation is complete, confidentiality and privacy is initially continued as the Ombudsman gives the head of the relevant government body his report and recommendations along with an opportunity to reply. If the Ombudsman considers any resulting action to be inadequate or inappropriate, it is only then that the Ombudsman has discretion to send a copy of the report and recommendations to the Premier and inform the Legislative Assembly as the Ombudsman sees fit, which allows the materials to then be public. As a result, the reports also contribute to organizational and social accountability. The Ombudsman’s actions are also generally immune from judicial review, except with respect to the narrow question of whether the Ombudsman has jurisdiction. The corresponding result is that judicial review is only available for limited purposes compared to other accountability mechanisms, which also limits how judicial review may be strategically used by parties dissatisfied with an Ombudsman decision or action. It also places greater limitations on how elements of a “conflict-solving” type of proceeding can enter into this “policy-implementing” type of process.

Since the Ombudsman can only make recommendations rather than binding decisions, the ultimate role and benefit of the Ombudsman is to thus bring public attention to issues within the Ombudsman’s jurisdiction when the government does not take action to remedy the issues (i.e. social accountability, which will also hopefully result in organizational accountability). Assuming such an issue can be identified, the effectiveness of the Ombudsman will thus largely rest upon the ability of the Ombudsman to engage the available publicity tools and media opportunities to draw public attention to the issues and encourage potential change. For example, with respect to the Toronto G20, the Ombudsman was able to effectively communicate and bring attention to many of the key issues he encountered. However, due to the

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176 For example, Le Dain notes that “hearings [provide] a public occasion for people to say things to each other that they had obviously never said before” (Le Dain, supra note 4 at 84).
177 Ombudsman Act, supra note 168, s 21(3).
178 Ibid, s 21(4).
179 Ibid, s 23.
180 See e.g. generally Jones, supra note 152, ch 11 (investigations and the media).
181 See e.g. Ombudsman, Backgrounder, “Key themes and quotes in Caught in the Act” (7 December 2010), online: Ombudsman .<www.ombudsman.on.ca/Files/sitemedia/Documents/Investigations/SORT%20Investigations/g20backgrounder-en-2.pdf>. At the press conference releasing his report, the Ombudsman characterized the Toronto G20 Summit as follows: “[f]or 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
Ombudsman’s limited jurisdiction, the Ombudsman was only able to look in detail at one small part of the overall issues related to the Toronto G20 (i.e. the impugned *Public Works Protection Act* regulation instituted by the provincial government at the request of the Toronto Police). In addition, the non-binding nature of his review is reflected in the fact that the *Public Works Protection Act* still has not been revised or replaced to date despite the Ombudsman’s recommendation to do so as well as the government’s “unequivocal commitment to act on all of [his] recommendations in a timely manner.”

The practical result is that this “policy-implementing” type of proceeding is able to contribute to literal, organizational, and social accountability to the limited extent available. However, it also has limitations for ensuring that responsibility or consequences actually occur if the Ombudsman’s recommendations are not agreed with or implemented.

5. Other Police Reviews

Another relevant accountability mechanism used in the context of the Toronto G20 Summit was various other police reviews. One of these was expressly provided for in the applicable legislation while others were non-statutory mechanisms instituted by the relevant body or police board at their respective discretions. The context and issues for each of these mechanisms will be discussed in turn by examining as a case study how the various forms of this mechanism reviewed police actions regarding the Toronto G20. It will become apparent that the more successful variation is the one that has more “policy-implementing” characteristics and was able to engages greater literal, organizational, and social accountability overall. However, all of the variations are ultimately limited by the fact that each version can only look at a single police force instead of all the issues comprehensively, and they also have limited abilities to ensure that actual responsibility and consequences necessarily occur.

civil liberties in Canadian history” (Robert Benzie & Rob Ferguson, “G20 law was ‘massive’ breach of rights, Marin says” *Toronto Star* (8 December 2010) A1 (QL)).


183 See e.g. generally Jones, *supra* note 152, ch 11 (investigating the police).
a. RCMP Complaints Commission Review

The Royal Canadian Mounted Police [RCMP] review was conducted by the Commission for Public Complaints Against the RCMP in accordance with the Royal Canadian Mounted Police Act. It has a statutory trigger mechanism that is complaint-based as a Commission review can be initiated by someone who is not satisfied with how the RCMP has dealt with a complaint. This general trigger is more reflective of a “conflict-solving” approach. However, the Commission Chairman also retains a discretion to institute an investigation or hearing as a result of a complaint if it is “advisable in the public interest”, which is what occurred in the case of the Toronto G20. When used, such an approach is more consistent with a “policy-implementing” approach. The Commission is thus somewhat independent from the RCMP, and it has access to certain resources and statutory powers to carry out its functions (including the ability to call hearings). These powers should be able to ideally contribute to literal, organizational, and social accountability.

However, the Commission can only review the actions of the RCMP instead of other police forces. This limitation is problematic in situations where multiple police forces are involved with each having different areas of “primary responsibility”, such as the Toronto G20 or other international summits. Such a limited approach is more consistent with a “conflict-solving” approach as “there are high barriers against extension” of the complaint. The ability to conduct literal, organizational, or social accountability is limited to just the RCMP, which is problematic given the involvement of other police forces in policing the Toronto G20. As a result, it is not surprising that the Commission’s limited review found that “appropriate [RCMP related] policies and procedures were in place” and that “no RCMP members used unreasonable force”, especially since “the Toronto Police Service … retains its primary responsibility and

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184 RSC 1985, c R-10, ss 45.42(3) & 45.43(3) [RCMP Act].
185 Ibid, s 45.41(1).
186 Ibid, s 45.43(1).
187 Commission for Public Complaints Against the RCMP, Public Interest Investigation Into RCMP Member Conduct Related to the 2010 G8 and G20 Summits: Final Report (Ottawa: Commission for Public Complaints Against the RCMP, 2012) at 3, online: Commission for Public Complaints Against the RCMP <www.cpc-cpp.gc.ca/cnt决策/cic-pdp/2012/g8g20/g8g20R-eng.pdf>.
188 See e.g. RCMP Act, supra note 184, ss 45.29 & 45.45.
189 See e.g. Commission for Public Complaints Against the RCMP, supra note 187 at 2.
190 Ibid at 31–32 & Appendix D (appendix pages are unnumbered).
191 Damaška, supra note 3 at 116–117.
authority for policing the City of Toronto”. The practical message and result is that many issues are ultimately the responsibility of the Toronto Police since the RCMP were following their orders. This mechanism would have been likely more effective if the Commission had taken a broader approach given that the RCMP actually has primary responsibility for the security of intergovernmental conferences by statute, including entering into corresponding arrangements with provincial and municipal police forces. The mechanism may have also been more effective if the RCMP was actually in more active command and control at the Toronto G20 and thus more directly responsible for the related issues. Instead, the result was a contribution to fragmentary jurisdictions and reviews despite the RCMP’s primary responsibility for Toronto G20 security, and it allowed the RCMP to pass on and avoid potential blame regarding an event for which it was supposed to have primary responsibility. This structure thus also provides the RCMP a template for how to avoid blame and reduce their responsibility in the future, which is problematic as it can use similar structures to continue avoiding responsibility.

As well, this Commission ultimately only has the power to make recommendations, which limits the ability of the Commission to ensure responsibility and consequences. In other words, unlike OIPRD, this Commission does not have any direct binding role (with respect to discipline or otherwise). Although it is still somewhat independent from the RCMP, its reports may play a persuasive role as a part of potential change and improvement. In the case of the Toronto G20, 19 findings and 7 recommendations were ultimately made regarding issues related to the RCMP, which could potentially contribute to RCMP organizational and social accountability. However, these recommendations are ultimately directed to the RCMP rather than other police forces, which limits their potential effectiveness as well as the potential accountability for other police forces. This mechanism is thus not ideal for complex situations, such as the Toronto G20.

192 Commission for Public Complaints Against the RCMP, supra note 187 at 1–2.
193 See e.g. ibid at 34–39.
195 RCMP Act, supra note 184, s 45.46.
196 See e.g. ibid, s 45.29(6) (no current member of RCMP eligible to be on Commission).
197 Commission for Public Complaints Against the RCMP, supra note 187 at Appendix C (appendix pages are unnumbered).
b. OPP and Toronto Police Internal Reviews

In contrast, the Ontario Provincial Police [OPP] and the Toronto Police each conducted internal reviews that took the form of each respective police force reviewing its own actions. These reviews were not automatically initiated by any external trigger mechanism, but each report was rather at the discretion of the respective police force, which is consistent with a “policy-implementing” approach. However, the reviews left much to be desired from an accountability perspective, particularly given Tetlock’s comments about how people tend to use a “backwards rationality” to respond to accountability for decisions that have been made but ended badly (i.e. a “defensive search for ways of rationalizing past conduct”). For example, a major issue with these reviews is that each force only had the jurisdiction to review itself. As well, there was also a clear question of perceived and actual independence with respect to the reviews since the reviews were conducted by the actual police forces instead of an independent party. It is thus doubtful how much these reviews could actually contribute to literal, organizational, or social accountability. These potential independence issues become more apparent when one realizes that neither the Toronto Police review nor the OPP review make any mention of the potential legal issues or violations associated with the Summit that are discussed in many of the other reviews. No public hearings were also conducted as part of these internal reviews, which reinforces the view that only the police force’s perspectives could be included. While such reviews may be useful for police and public relation purposes, the reviews are of limited benefit from a larger accountability perspective, particularly since the potential issues associated with large-scale demonstrations (such as the Toronto G20 or Ipperwash) usually involve perspectives that differ significantly from the police’s perspective.

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199 Tetlock, supra note 18 at 25. See also Section B.2 above.
200 See e.g. TPS Report, supra note 198 at 61–63.
c. Toronto Police Services Board’s Independent Civilian Review

The Toronto Police Services Board also commissioned an *Independent Civilian Review Into Matters Relating to the G20 Summit* that was conducted by the Honourable John W Morden.\(^{201}\) There was no external statutory trigger mechanism for this review, and it was instead initiated at the discretion of the Board, which is consistent with a “policy-implementing” approach. The selection of Justice Morden, a well-regarded retired judge and former Associate Chief Justice of Ontario,\(^ {202}\) reinforced the independent nature of this review relative to the internal reviews conducted by the Toronto Police and the OPP. The review team also had access to funding provided by the Board as well as the ability to “engage lawyers, experts, [and] research and other staff as the Reviewer deems appropriate,”\(^ {203}\) which is also consistent with a “policy-implementing” type of proceeding.

However, while this review was better than the internal reviews from an accountability perspective, it still had various issues. First, this review was “not a public inquiry”, and it thus could not have the power to compel the production of witnesses or evidence.\(^ {204}\) Instead, “it was necessary for the Review to utilize diplomacy to encourage the cooperation of the various law enforcement agencies and other entities that may have had evidence” relevant to the review’s terms of reference.\(^ {205}\) While there were no formal compulsions or sanctions available to obtain evidence, Justice Morden was “pleased with the participation of these agencies”,\(^ {206}\) which allowed this review to contribute to literal accountability. However, the unusual context for this participation includes the fact that various other reviews occurred in close proximity to the review (including OIPRD’s systemic review, particularly since OIPRD does have the power to compel evidence as discussed above). As well, Justice Morden was ultimately appointed by the board of the police force at the heart of the issues regarding the Toronto G20 Summit, and there was a clear direction from the Board for the Toronto Police Chief and members of the board to


\(^{202}\) See e.g. Kate Allen, “Retired judge to oversee G20 policing probe”, *Toronto Star* (23 September 2010), online: Toronto Star <www.thestar.com/news/gta/g20/2010/09/23/retired_judge_to_oversee_g20_policing_probe.html>.

\(^{203}\) Morden, *supra* note 201 at 360.

\(^{204}\) *Ibid* at 39.

\(^{205}\) *Ibid*.

\(^{206}\) *Ibid*. 
“cooperate fully” with the review. If analogous contextual factors are unavailable in other situations, it is unclear how much participation (and corresponding literal accountability) would have actually occurred. However, the nature of the mechanism and the actual resulting participation did help contribute to literal, organizational, and social accountability to an extent in this situation.

There were also issues with respect to both the initial and final limits of the report. The terms of reference for the review were initially broad and included a review of various issues involving both the Toronto Police and its Board. Justice Morden had the ability to conduct “such public or private meetings, interviews[,] and consultations” as he deemed advisable, and 3 days of public consultations were ultimately held. The review thus had the potential to significantly contribute to both organizational and social accountability. However, in the course of the review, Justice Morden chose not to deal with various issues in the terms of reference to avoid duplication since he did not see anything to contradict the findings of the OIPRD systemic review and the initial review by Toronto Police (i.e. the issues were covered elsewhere). As a result, much of his report focused primarily on issues not addressed in other reports, including the role of and issues related to the Toronto Police Services Board, which had the effect of limiting the actual organizational and social accountability provided. This effect is reinforced by the fact that OIPRD’s systemic review and Toronto Police’s internal review have two very different tones, approaches, and perspectives that are not necessarily compatible, which are left generally unresolved. General jurisdiction limits were also present as Justice Morden had to interpret his terms of reference “in a manner consistent with the limits of the jurisdiction of the Board”. These limits had the effect of limiting all the forms of accountability to essentially those involving the Toronto Police, although such a limitation was less problematic here given the Toronto Police’s central role in the events of the Toronto G20 Summit. In addition, Justice

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207 Ibid at 360. See also Allen, supra note 202. Ontario inquiries now also include an analogous direction for government bodies and officials to co-operate with an inquiry as part of an inquiry’s terms of reference (Ratushny, supra note 1 at 139–140).
208 Morden, supra note 201 at 360–365.
209 Ibid at 361.
210 Ibid at 41.
211 Ibid at 38 & 246.
212 See e.g. ibid at 37–38.
213 See generally Office of the Independent Police Director, supra note 151; TPS Report, supra note 198.
214 Ibid at 361.
Morden’s terms of reference did not allow him to express any conclusions or recommendations regarding civil or criminal liability,\textsuperscript{215} which is similar to other non-court mechanisms discussed in this chapter and was a missed opportunity. The report was also intended to not be binding as Justice Morden could only review, report, and make recommendations,\textsuperscript{216} which limited the ability of the report to ensure responsibility and consequences.

Although the Board did not have to follow an inquiry model, it chose to do so anyway despite the fact that it could have implemented other “out-of-the-box” options which could have contributed to broader accountability and resolution as well as potentially simplified other processes. For example, Justice Morden could have been allowed to acknowledge the Toronto Police’s civil liability and made public recommendations regarding potential amounts and how to resolve those issues. Instead, those issues remain to be resolved by civil litigation and its “conflict-solving” approach. As a result, the review was limited instead with respect to the actual responsibility and consequences that followed from the report.

While some of these limitations are understandable given analogous limits in other forums, these limitations were unfortunate as Justice Morden’s report could have been used more broadly in other forums compared to some of the other reviews. For example, unlike the OIPRD systemic report, there is no statutory bar associated with the admissibility of Justice Morden’s report. It was instead at the behest of the relevant police board, so it could have been used for a variety of purposes (including for responsibility and consequence purposes outside of the review), even if the report’s findings were prejudicial to the Toronto Police. Justice Morden’s decision to not directly examine some of those issues again in detail thus unfortunately ensured that no such findings could be used consequently in a binding litigation forum. Such a review and findings of fact or liability could have been used instead to potentially narrow or resolve some of the outstanding litigation issues. Instead, the value and issues associated with the report is thus similar to the results of a coroner’s inquest or a public inquiry in that it could only be persuasive; it is ultimately up to others to decide if they wish to implement Justice Morden’s recommendations, and, despite its potential, the report can only have limited consequences for related litigation. The report was also primarily focused on issues involving the Toronto Police

\textsuperscript{215} Ibid.
\textsuperscript{216} Ibid at 365.
that had not been dealt with elsewhere, which does not make it an ideal or comprehensive accountability mechanism.

6. Other Reviews

Although the above sections cover the major reviews regarding both Ipperwash and the Toronto G20 Summit, there are two other sets of reviews related to the Toronto G20 Summit that should be briefly discussed as potential accountability mechanisms as part of the case study. The first review is the one commissioned by the Government of Ontario regarding the Public Works Protection Act, and the second set of reviews is the various reviews that were conducted primarily by the Canadian Civil Liberties Association (CCLA). Each of these reviews had different accountability roles given their respective natures, which is examined in more detail below. Given their nature, the reviews were more of a “policy-implementing” approach, but they had limited literal, organizational, and social accountability. They also had no binding effect with respect to responsibility or consequences. These accountability mechanisms by themselves are thus not ideal for complex large situations, such as large-scale demonstrations. However, as the CCLA reports below illustrate, they can play important roles by continuing media interest in the key concerns and helping set the agenda of the significant issues that need to be explored by other mechanisms. They can therefore indirectly contribute to organizational and social accountability through this influence.

a. McMurtry Review of Public Works Protection Act

In light of the issues regarding the use of the Public Works Protection Act to protect the site of the Toronto G20 Summit, the Government of Ontario retained the Honourable Roy McMurtry to conduct a review of that Act.217 Unlike some of the other mechanisms discussed, there was no automatic trigger to initiate the review; it was instead initiated at the government’s discretion,

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which is consistent with a “policy-implementing” approach. The decision to retain Justice McMurtry, a former Chief Justice of Ontario, reinforced the independent nature of this review, but the terms of reference were also limited to conducting a review of the Act “to identify areas for reform and make specific recommendations for amendment of legislation.” This limitation correspondingly restricted the potential literal, organizational, and social accountability of his report. Justice McMurtry was also specifically to not “consider [nor] comment on any litigation or legal matters before the courts”, which also limited the potential role his report could have with respect to responsibility and consequences. Although Justice McMurtry was to hold “focused discussions with key stakeholder groups”, no provisions nor resources were included for more extensive hearings or reviews. Given the nature of the other reports discussed above as well as the detailed review by the Ombudsman, it is not surprising that his review was limited correspondingly. Similar to most of the other reports discussed above, his report and recommendations were not binding, which is reinforced by the fact that the recommended changes to legislation have still not been put in place, despite government commitments to do so. The lack of movement becomes understandable once one accounts for the need for political pressure to ensure that issues remain at the top of a government’s priority list so that actual change is implemented. This review was thus not an ideal nor comprehensive accountability mechanism given its considerable limitations.

218 Ibid at Appendix 1 – 2.
219 Ibid.
220 Ibid.
222 See e.g. Tanya Talaga & Robert Benzie, “‘Secret’ G20 law to be scrapped”, Toronto Star (22 February 2012) online: Toronto Star <www.thestar.com/news/canada/2012/02/22/secret_g20_law_to_be_scrapped.html>. Two relevant bills have been introduced, but both bills died on the order paper (Bill 34, An Act to repeal the Public Works Protection Act, amend the Police Services Act with respect to court security and enact the Security for Electricity Generating Facilities and Nuclear Facilities Act, 2012, 1st Sess, 40th Parl, Ontario, 2012; Bill 51, An Act to repeal the Public Works Protection Act, amend the Police Services Act with respect to court security and enact the Security for Electricity Generating Facilities and Nuclear Facilities Act, 2013, 2nd Sess, 40th Parl, Ontario, 2013).
b. CCLA Reports

The second set of relevant reports were those led by the Canadian Civil Liberties Association.\textsuperscript{223} Three reports were produced: a preliminary report in close proximity to the G20,\textsuperscript{224} a key update two months after the G20,\textsuperscript{225} and a more complete report in 2011.\textsuperscript{226} Since the reports were initiated and organized by the CCLA (sometimes with the assistance of other organizations), it had complete control and flexibility over the issues that the reports examined as well as the associated process,\textsuperscript{227} which is consistent with a “policy-implementing” approach. For example, the last report involved hearings in both Toronto and Montreal to give affected members of the public an opportunity to share their stories,\textsuperscript{228} and those hearings ultimately involved 63 participants.\textsuperscript{229}

However, these reports do have inherent limitations from an accountability perspective. First, the reports had no ability to force an examination of any evidence if people or organizations were unwilling to share their perspectives and materials. So, the police and government could not be compelled to participate or provide their perspectives, which limits the ability of the reports to be comprehensive and contribute to literal accountability. Second, given the non-profit nature of the CCLA, such organizations can usually only devote limited resources to conduct such reviews compared to other statutory mechanisms and other larger and better-resourced organizations. It is unlikely that relatively small non-profit organizations with limited resources would be able to fund significant investigations or to provide potential participants with substantial funding to participate in the process. Third, given the CCLA’s laudable focus on human rights and civil

\textsuperscript{223} The National Union of Public and General Employees was also involved in the final report, but their additional participation does not affect the issues discussed here. Their participation is accordingly not relevant and is generally ignored for the purposes of this chapter.

\textsuperscript{224} Canadian Civil Liberties Association, \textit{A Breach of the Peace: A Preliminary Report of the Observations During the 2010 G20 Summit} (Toronto: Canadian Civil Liberties Association, 2010), online: Canadian Civil Liberties Association <ccla.org/our-work/focus-areas/g8-and-g20/>.

\textsuperscript{225} Canadian Civil Liberties Association, \textit{Looking Back, Moving Forward: Two Months After the G20} (Toronto: Canadian Civil Liberties Association, 2010), online: Canadian Civil Liberties Association <ccla.org/our-work/focus-areas/g8-and-g20/two-months-after-the-g20/>.


\textsuperscript{227} See e.g. \textit{ibid} at 14–15.

\textsuperscript{228} \textit{Ibid}.

\textsuperscript{229} \textit{Ibid} at 53.
liberties, opponents can use this focus as another way to potentially undermine the objectivity, fairness, and independence of the resulting reports with respect to the issues (i.e. criticisms analogous to those applicable to internal police reviews), which has the potential to undermine any potential contributions to organizational or social accountability. Fourth, as the reports were not pursuant to a state oversight power or other legal authority, there was no way the reports could be binding to ensure responsibility or consequences for the police’s actions.

However, given various public perceptions and police statements as well as the nature of various internal police reviews, the CCLA reports provided an important public counterpoint to these contrasting perspectives. The CCLA reports also provided potential fuel to keep the stories and interest regarding the Toronto G20 Summit alive in the short-term while the various other reports were pending. The reports thus contributed to social accountability in an indirect way. As well, since the CCLA reports were public while the other mechanisms’ reviews were pending, the CCLA reports also helped set the agenda of the various issues that needed to be explored, so the reports also indirectly contributed to the organizational accountability provided by the other reviews. Such reports can thus play an important role contributing to the overall accountability process depending on the context and circumstances, although such reports by themselves are usually not the ideal nor best form of long-term accountability for complex situations.

D. Other Selected Relevant Issues and Solutions

The above section discussed the various contexts and issues applicable to the various non-court accountability mechanisms that were used with respect to Ipperwash and the Toronto G20 Summit. It also showed how most of the mechanisms were a “policy-implementing” type of proceeding. The above section also examined how the mechanisms dealt with literal, organizational, and social accountability as well as any potential formal responsibility or consequences that a mechanism could impose. However, there are certain other issues which have not yet been discussed as well as potential solutions to improve the accountability associated with non-court mechanisms. This section particularly examines jurisdiction fragmentation, the non-binding nature of many mechanisms, the importance of the media and

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230 See e.g. Canadian Civil Liberties Association, “About CCLA”, online: Canadian Civil Liberties Association <ccla.org/about-us/>. 
location, and whether claims of parliamentary privilege should be continued. These issues are considered and explored in more detail below.

1. Overcoming Jurisdictional Fragmentation/Limitations

Throughout the reviews of each accountability mechanism above, a consistent issue and theme is the limited jurisdiction that each mechanism has. As discussed before, some mechanisms’ jurisdictions are defined by statute (e.g. police complaint reviews), others are determined by terms of reference (e.g. external reviews), and some are a combination of the two (e.g. public inquiries). While such limited jurisdiction mandates may be useful for statutory mechanisms where a certain type of event is subject to repeated review (e.g. police misconduct complaints), such limitations are more problematic for larger complex events that engage multiple issues and potentially span the jurisdictions of multiple mechanisms (e.g. Ipperwash and the Toronto G20). The result is fragmented jurisdiction where a single mechanism has difficulty reviewing the totality of a significant event, which in turn results in fragmented literal, organizational, and social accountability.

It would thus be useful to have a central co-ordinating body that could decide when the review of major events is necessary and to independently recommend when larger reviews ought to be initiated instead of multiple piece-meal reviews. While the central co-ordinating body could play an administrative supporting role,\(^{231}\) it would not conduct the review itself. After all, such a comprehensive review would likely be initiated as a public inquiry with corresponding terms of reference, and it would be better to have a clear division regarding an initial determination that such a review is needed versus actually conducting the review. In addition to such comprehensive reviews potentially being more effective, they are also likely to be more efficient since a single central comprehensive review could occur. Such a review can in turn ensure comprehensive literal, organizational, and social accountability through a mechanism that uses a “policy-implementing” approach. This combination is consistent with what review mechanisms appear to produce the best results (i.e. inquiry-like reviews, as discussed above).

In addition, there may be benefits if the central co-ordinating body could take a larger role with respect to the administrative aspects of many of the accountability mechanisms. For example, the mechanisms may be able to share their administrative aspects, streamline analogous processes, and more easily share best-practices. The provincial government’s experience with clustering various tribunals would likely provide additional insight if a similar approach were used for some of the accountability mechanisms.\(^{232}\)

As well, one jurisdiction issue that has not yet been explored in detail is the limitations of federal versus provincial reviews. Given Canada’s division of powers between federal and provincial governments,\(^{233}\) an accountability review is inherently limited to either federal or provincial areas of jurisdiction depending on which government authorizes the review to occur.\(^{234}\) For example, the *Coroner’s Act* is a provincial act, which limits its potential impact on areas of federal jurisdiction (e.g. systemic issues involving indigenous peoples).\(^{235}\) As a result, depending on the systemic issues involved, a review may not be able to properly get at all the issues and circumstances that need to be considered in order to provide truly comprehensive literal, organizational, and social accountability as well as corresponding recommendations. The provincial Ipperwash Inquiry provides an illustrative example in the inquiry context as no detailed findings or discussions were undertaken with respect to the federal lands that were adjacent to Ipperwash Provincial Park.\(^{236}\) For certain issues that potentially span both levels of government, such as those involving indigenous peoples or policing related to international summits, the division of powers can accordingly prevent a comprehensive review of all the related issues that ought to be explored.


\(^{233}\) *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91–95, reprinted in RSC 1985, App II, No 5.

\(^{234}\) See e.g. Ratushny, *supra* note 1 at 262–269.

\(^{235}\) See e.g. *Pikangikum Review, supra* note 70 (report focuses on health care, education, policing services, child welfare services, and social determinants of health; no to very limited mention is made of historic or systemic issues that would fall under federal jurisdiction).

\(^{236}\) *Ipperwash Report: Findings*, vol 1, *supra* note 68 at 688–689. Some review of the related federal appropriation was included as it provided context for the areas that were under provincial jurisdiction, and there was some limited comments about what the federal government ought to do (see e.g. *ibid* at 75ff & 689). However, these comments were not a comprehensive review or analysis of the related federal legal issues.
One possibility to overcome this additional fragmentation problem is to build on the potential use of comprehensive joint reviews so that they are also able to cover both federal and provincial jurisdictions. While most of the accountability mechanisms do not explicitly consider the possibility of such joint reviews, the provincial Public Inquiries Act, 2009 explicitly allows for the creation of a joint commission with other governments.\(^{237}\) Federal and provincial governments have also in the past appointed joint inquiries.\(^{238}\) Such joint reviews would further ensure comprehensive literal, organizational, and social accountability. However, there are practical difficulties with respect to joint reviews as a joint public inquiry would need the agreement of both governments with respect to the key issues. For example, both governments must be willing to call the inquiry as well as agree on the commissioner, mandate, and funding. Political considerations and differences between the levels of government would also make it more difficult for all of the levels of government to agree, especially when such a review may or may not be in a particular government’s political interests. The Ipperwash Inquiry is an illustrative example: although the federal government was invited to apply for standing in the inquiry, it chose not to apply, and the federal government was thus not subject to the various obligations (such as disclosure) that applied to the inquiry’s parties under the inquiry’s rules.\(^{239}\)

To overcome these and other jurisdictional limitations in a systemic and structural way, it would be best to first work on methods that allow for comprehensive jurisdiction reviews within each of the federal and provincial spheres (i.e. avoid fragmentation at least within each level). As discussed above, such a mechanism to allow for comprehensive reviews at each level should also be able to initiate such reviews independently to ensure greater accountability and minimize actual or perceived political self-interest. As part of these separate systems at the federal and provincial levels, provisions could also be included to allow for joint federal-provincial reviews in appropriate circumstances. Such a system could use the experience of environmental and related law as a guide since joint reviews are already available under such statutes.\(^{240}\)

\(^{237}\) Supra note 73, s 4.
\(^{238}\) See e.g. Ratushny, supra note 1 at 26–27.
\(^{240}\) See e.g. Canadian Environmental Assessment Act, 2012, s 40, being s 52 of the Jobs, Growth and Long-term Prosperity Act, SC 2012, c 19; Environmental Review Tribunal Act, 2000, SO 2000, c 26, Schedule F, s 3.
Robert Centa and Patrick Macklem have previously proposed that Law Reform Commissions are an appropriate option to make such decisions in an inquiry context. However, as noted by Roderick Macdonald, who was a president of the Law Commission of Canada, such reviews are incompatible with the current general mandate of Law Commissions. While there may be concerns about whether an apolitical body should be making review initiation decisions that currently political decisions, these concerns can be addressed by defining the nature of the mechanism as well as the criteria required for a review to be initiated. For example, “[p]ublic inquiries are almost always created in order to examine the behaviour of the government itself”. They are typically only appointed for certain reasons that usually involve significant public concern, often entailing suspicions regarding authority. Le Dain notes that “[a] serious issue of public confidence has arisen, and it can only be set at rest one way or another by someone in whose judgment and independence the public will have confidence.” They are accordingly intended to deal with issues that go beyond the limits of the executive, legislative, and judicial branches, and they have been called with less frequency in recent years. Such inquiries should thus be the exception rather than the norm, and they should be initiated only when there is a major incident that warrants significant fact-finding and investigation. Such inquiries would still be able to look at policy issues, particularly since systemic failures are often the cause of the issues rather than individuals and since any inquiry answers are typically placed in a broader policy context. They would thus be able to: “identify the issues; ascertain the facts; and to come to policy conclusions.” However, such a mechanism to initiate a review would not extend to a solely policy inquiry, which should remain within the exclusive purview of government, particularly given the various policy options now available both inside and outside government to conduct such examinations. Governments would also retain a general

241 Centa & Macklem, supra note 231 at 117ff.
242 Roderick A Macdonald, “Interrogating Inquiries” in Manson & Mullan, supra note 89, 473 at 487–488. See also e.g. Law Commission of Canada Act, SC 1996, c 9, s 3.
243 See e.g. David P Shugarman, “Commentary” in Manson & Mullan, supra note 89, 127 at 137–141.
244 MacKay & McQueen, supra note 112 at 288.
246 Le Dain, supra note 4 at 91.
248 See e.g. ibid at 7.
249 Campbell, supra note 245 at 399; Inwood & Johns, “Why Study Commissions of Inquiry?”, supra note 82 at 14.
250 Le Dain, supra note 4 at 83.
251 Inwood & Johns, “Why Study Commissions of Inquiry?”, supra note 82 at 7.
discretion to call any inquiry as they see fit, and the ultimate goal ought to be to promote and co-
ordinate comprehensive literal, organization, and social accountability in a “policy-
implementing” type of proceeding that prioritizes truth and substance over procedure.

2. Addressing the Non-Binding Nature of Most Reviews

Another recurring theme among many of the review mechanisms is that any resulting report and recommendations are usually not binding upon either courts or governments (i.e. there is limited actual responsibility, consequences, and change). With respect to courts, the reports may be useful in a persuasive sense for related issues in court judgments, but that is the limit of their role (if they can properly be before the court at all). Such potential use will also be limited to the specific narrow issues before the court in individual cases rather than a more comprehensive approach. With respect to governments, it is ultimately up to a government to decide how much or little of a report it wishes to implement.

The result is that it is up to other interested individuals and groups to continue pushing for the actual implementation of a report’s recommendations or the resolution of the issues discussed in the report. As an example, the provincial government’s return of Ipperwash Provincial Park to the relevant indigenous peoples was likely due to the in-depth discussion of the issue in the Ipperwash report as well as the continued calling by “Sam” George for the government to return the park. While initial public accountability and an airing of issues may be useful to justify an accountability review and any corresponding public hearings, they can only provide a foundation for real future change, which usually requires substantially more long-term work beyond the completion of the applicable review.

253 As discussed above in Section C.3, a notable exception is that OIPRD documents are generally inadmissible in civil proceedings except for a resulting disciplinary hearing (Police Services Act, supra note 145, ss 26.1(11) & 83(8)).
254 See e.g. Inwood & Johns, “Commissions of Inquiry and Policy Change”, supra note 132 at 285.
Such work is particularly important in order for these reviews to be able to actually prevent similar situations from reoccurring in the future. Such additional work is understandable given Tetlock’s point that, when accountability occurs after the bad decision has already occurred, people are likely to increase their commitment to failing policies and poor decisions, and people are also less likely to concede legitimacy to other points of view. While it would likely be inappropriate for such a review to have direct implementation power regarding systemic solutions given the issues’ nature, the democratic nature of the Canadian state, and the potential policy and financial issues, there is no reason why additional follow up cannot occur to ensure that systemic recommendations are being considered, implemented, or not implemented with an explanation. The proposed independent body to recommend and co-ordinate reviews could take on such a role for both major comprehensive reviews as well as other reviews that are currently not following up on their recommendations. Such an approach would overcome the current functus officio problem that occurs once a reviewing body has rendered its final report, particularly since it can often be difficult or inappropriate for the reviewers to take on that role themselves. In essence, the independent co-ordinating body can take over the ongoing role of persuading relevant decision makers to implement the recommendations and their underlying goals or obtaining explanations regarding why it would inappropriate to do so. This approach would also further organizational and social accountability over the long-term.

In addition, given that inquiries are usually focused on state action, it does seem appropriate that inquiries ought to have the ability to grant some limited binding remedies against the state and its agents (such as compensation, which would could have applied in the context of the Toronto G20). Other administrative law bodies make analogous decisions all the time, and remedies would likely be less of a concern if the available remedies are of a limited nature against only the state and its agents. As well, such an option would minimize inefficiency and duplication as participants would not need to go through related issues in a litigation context again. Such an

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256 Tetlock, supra note 18 at 25–26. See also Section B.2 above.
257 See e.g. O’Connor & Kristjanson, supra note 87. In their view, O’Connor & Kristjanson “observe that an inquiry commissioner should play no role in the implementation of the recommendations contained in the inquiry report. Implementation of a commission report is a matter for the political process. In [our] view, once a commissioner delivers a report, that should be the end of his or her involvement. This is particularly the case when a sitting judge has served as commissioner. Commissioners should give reasons for their conclusions in the reports and leave it to others to debate questions relating to implementation” (ibid [emphasis added]).
approach would also directly promote organizational and social accountability through the partial implementation of attributing direct responsibility and consequences.

If that is not possible, it is worth examining whether the co-ordinating body could take a role in facilitating mediation on such litigation issues with a view to at least narrow, if not resolve, the issues. It may also be more palatable if inquiries instead gave specific public recommendations regarding compensation and potentially other remedies. For example, some past inquiries regarding wrongful convictions have been requested to review or provide recommendations regarding compensation, and there is no reason why such a role could not also occur in other inquiry contexts. It is important to remember that such compensation (or such recommendations) would likely only occur when an affected party requests it, which would not occur all the time. Some participants are instead interested in simply receiving “information that was true and detailed” rather than compensation. However, this possibility should not be used as a rationale to prevent any discussion of compensation, particularly for those who do want it.

3. Media and Location Are Key

A couple other key issues for accountability mechanisms that can be overlooked is the role of the media and the location of any hearings. Their importance will vary depending on context, but it is particularly important for mechanisms that involve public hearings. The role of and importance of this issue will be explored by using inquiries, and specifically the Ipperwash Inquiry, as an illustrative example. However, the points discussed below are applicable by analogy to other accountability mechanisms as well.

The media has an important role to play with respect to accountability mechanisms. Johns and Inwood notes that, in the context of inquiries, the media “can educate the public about the process and substance …, disseminate information, and gauge public interest about a given policy change.” Le Dain also acknowledges “the power of the media to identify issues, shape

258 Ratushny, supra note 1 at 69.
259 Margaret Allars, “Procedural, Strategic, and Legal Constraints Upon a Non-Statutory Inquiry: A Case Study” in Manson & Mullan, supra note 89, 407 at 425.
260 Johns & Inwood, supra note 127 at 40.
opinion[,] and affect reputation.” 261 Richard Ericson further notes that “[n]ews is a discourse of
government accountability, of official obligation to describe, assess, justify, excuse, and
recommend courses of action.” 262 With respect to issues involving police, it is also important to
remember that journalists have a dual role as they often willingly work with police “in the
process of knowledge production and distribution” regarding issues the police are involved in,
but they also “polic[e] the police as a mechanism of regulation and compliance, urging police
accountability.” 263 After all, “[c]ommunications do not stand apart from reality. …
Communications participate in the formation and change of reality.” 264 When used
appropriately, the media can thus be used to further organizational and social accountability. 265
It is also important to remember that “[k]nowledge becomes power through the ability to control
its distribution”. 266 News also “offers a pervasive and persuasive means by which authorities
attempt to obtain wider consent for their activities”, 267 so its effect and role should not be
underestimated, especially if it is being used to reinforce a certain perspective or the status
quo. 268

Location also plays a role in what coverage the media provides to a review that involves public
hearings. The practical reality is that the more costly it is for news organizations to have
reporters cover a story, the less likely it is that a story will be covered. The result is that day-to-
day coverage of an inquiry’s hearings may be largely by the local media that are more
conveniently located, and there will be more significant coverage only during key parts of the
inquiry. This situation played itself out in Ipperwash as the hearings occurred away from large
city centres. As a result, more local media were largely present throughout the inquiry’s
hearings, 269 but media outlets with a greater audience were more selective about when they were
present and what they covered (such as during the testimony of former Premier Michael

261 Le Dain, supra note 4 at 80.
135.
263 Ibid at 141–142.
264 Ibid at 144.
265 See e.g. Jones, supra note 133 at 346–351 & 408–414. See also generally ibid, ch 11.
266 Ericson, supra note 262 at 144.
267 Ibid at 151.
268 See e.g. ibid at 157–158.
Harris). The mechanism’s ability to provide corresponding broader social accountability may be accordingly affected.

However, there are other location considerations that must be kept in mind with respect to reviews that involve public hearings. For example, there are usually two key factors at play in location decisions. First, there is the question of what community is most affected and interested in the issues that the inquiry is exploring. Usually, such an issue will be determinative of an inquiry’s location, and the location will be not contentious. An inquiry after all allows for “broad public involvement and participation in issues of public policy”, and the roles of a commissioner include fact-finding, “a proposer for policy reform[, and] a healer for traumatized communities,” which is all consistent with the goals of organizational and social accountability as well as a “policy-implementing” approach. However, location issues are not always as a simple as they initially appear. For example, for the Ipperwash Inquiry, the key events played out both near Ipperwash Provincial Park and in Toronto, and these locations were the ones most seriously considered. There is thus a live question of whether inquiries may wish to divide their hearings depending on the issues and communities involved so that other interested communities can participate.

Depending on location, further difficulties and complications may also result from the practical requirements and timelines needed for the media to file their stories. While print reporters could file their stories electronically, it can be more difficult for television reporters to provide coverage. For example, during the Ipperwash Inquiry, it was only during key moments that satellite trucks were present to provide live television coverage. Otherwise, television reporters had to leave the hearing usually by mid-afternoon in order to have enough time to edit

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270 See e.g. ibid; Ipperwash Report: Findings, vol 1, supra note 68 at Photo Section 3, 7th page (photo section pages are unnumbered).
271 For example, the hearings for the Elliot Lake Inquiry regarding the mall collapse and related deaths in Elliot Lake were held in Elliot Lake (Elliot Lake Inquiry, “Questions and Answers About the Elliot Lake Inquiry”, online: Elliot Lake Inquiry <www.elliotlakeinquiry.ca/faq/index.html>).
272 O’Connor & Kristjanson, supra note 87. See also Le Dain, supra note 4 at 79.
274 In the case of the Ipperwash Inquiry, the decision was made to begin the hearings in Forest after considering various factors. The inquiry’s rules also explicitly stated that hearings might also be held in Toronto, although this event ultimately did not occur (ibid at 24–25).
275 See e.g. Ipperwash Report: Findings, vol 1, supra note 68 at Photo Section 3, 7th page (photo section pages are unnumbered; satellite trucks present in February 2006, which was when former Premier Michael Harris testified).
and file their stories for the evening news at locations more accessible for their television stations. However, since the inquiry’s conclusion in 2007, some of these issues may be partially mitigated by the development and acceptance of new technology and methods, such as the use of internet video conferencing (such as Skype) to provide television interviews and coverage, albeit usually at a lower image and sound quality. As well, there is a perspective that the goal of social accountability through court-like reviews (i.e. those that involve public hearings) is better served through print as it can provide “greater depth, a permanent record, and subtle influence on other media, legal agents, and public opinion” in a way that is more consistent with the nature of such review mechanisms.276 Regardless, while requirements and logistics may change over time, the underlying principles identified here are something that should always be considered when making location decisions. Otherwise accountability over the long-term may be compromised.

Finally, location can influence other practical support issues for an inquiry. If an inquiry is away from a large city centre, creative solutions may need to be found to provide the facilities needed for an inquiry. In the case of Ipperwash, the hearings were held in the Forest Memorial Community Centre in Forest, Ontario,277 and various practical issues needed to be resolved in order for the facility to be functional.278 If counsel are not from the area, additional costs are incurred as a result of travel time and expenses. Such costs could be alternatively avoided if the location is near where most of the counsel are based, although other resulting increased costs may need to be incurred (e.g. witness travel costs). Logistical supports may also be more difficult depending on the size of the community. In the case of Ipperwash, Forest is a small community that only had a population of 2,857 as of the 2001 census.279 As a result, the services available were very limited relative to other larger population centres. This reality over a lengthy inquiry can cause practical difficulties as many support services are often taken for granted when a hearing room is relatively close to one’s legal office or is in larger city centres. Such

276 Ericson, supra note 262 at 157.
278 Such issues included office space at the location and a media viewing room (ibid).
279 Statistics Canada, “2001 Community Profiles: Community Highlights for Forest” (Ottawa: Statistics Canada, [nd]), online: Statistics Canada <www12.statcan.ca/english/Profil01/CP01/Details/Page.cfm?Lang=E&Geo1=CSD&Code1=3538038&Geo2=PR&Code2=35&Data=Count&SearchText=forest&SearchType=Begins&SearchPR=35&B1=All&Custom=>. As of 2006, separate population figures for Forest are unavailable through the census due to Forest’s inclusion as part of the Municipality of Lambton Shores.
difficulties in turn can make the achievement of accountability more difficult overall as necessary structural foundations are not present or need to be built.

Although the Ipperwash Inquiry is illustrative of these issues, these issues are not unique to inquiries. They apply by analogy to the other accountability mechanisms discussed in this chapter, and other issues may apply that are particular to a mechanism. For example, as discussed before, an inquest’s location determines the jury roll from which potential jurors are drawn.\(^{280}\) This discussion is thus not intended to be exhaustive, and media and location issues should not be overlooked in order to ensure the viability and success of an accountability mechanism, particularly with respect to achieving organizational and social accountability as well as corresponding change over the long-term.

4. The Availability of Parliamentary Privilege Should Be Revisited

For all of the statutory mechanisms (which involve corresponding statutory powers), the ability of a witness to claim privilege continues to apply despite the otherwise less restrictive evidentiary rules compared to a court. The continuation of such protections may be generally appropriate for certain privileges given their nature, such as confidential communications and advice under solicitor-client privilege as well as analogous privileges between a client and their advisor.\(^ {281}\) However, for privileges that do not involve confidential communications and advice, there is an open question as to whether this general protection should continue to apply. In particular, given the broader investigatory nature of many of these mechanisms as well as the “policy-investigation” approach inherent in most of the non-court mechanisms, a serious question is whether parliamentary privilege should continue to enjoy protection. This section particularly examines whether claims of parliamentary privilege should continue to be available for these non-court mechanisms.

\(^{280}\) Coroner’s Act, supra note 39, s 34(1). See also Section B.1 above.

\(^{281}\) See e.g. Ratushny, supra note 1 at 340–354.
Parliamentary privilege essentially provides immunity to an individual for statements made in a legislative body (e.g. debates) as well as to its committees (e.g. witnesses).\textsuperscript{282} It thus makes literal accountability more difficult, which in turns makes organizational and social accountability more difficult. However, unlike most other privileges, the communications in question are usually not confidential as they are available to everyone. While there are policy reasons to ensure an appropriate divide between the legislative and judicial branches, the reviews by non-court mechanisms in their current form cannot ultimately be the same as a court. For example, although an inquiry does have the ability to make findings of misconduct, it does not have the ability to make findings of criminal or civil liability.\textsuperscript{283} Similar reasoning is applicable for other statutory mechanisms given their natures and purposes as discussed above. The court-like nature of some reviews must also be balanced with the fact that one of a review’s roles is to get to the truth using means that are usually unavailable in court processes and to make corresponding recommendations, which is more consistent with these mechanisms’ “policy-implementing” nature. If parliamentary privilege is asserted, it is thus worrisome that accountability mechanisms would be currently unable to review and consider such statements that are otherwise publicly known and available (i.e. literal accountability becomes more difficult).

Parliamentary privilege manifests in two main ways for the purposes of accountability reviews. The first main manifestation is the various statements made by members of a legislative body in the body itself. While political parties and political considerations influence such statements, they are ultimately made willingly and voluntarily without any real legal compulsion. It is well-settled that such statements can now be used to assist with the interpretation of relevant legislation,\textsuperscript{284} so their potential use beyond the legislature in a proceeding is not a new concept. The second main manifestation relates to the testimony and information that various individuals


\textsuperscript{283} \textit{Public Inquiries Act, 2009}, supra note 73, ss 15(2)(b), 16(b), 17, & 34(6).

\textsuperscript{284} See e.g Pierre André Coté, \textit{The Interpretation of Legislation in Canada}, 4th ed (Toronto: Carswell, 2011) at 462–468. Coté notes that “[t]here is no restriction as to either the circumstances under which the judge may consult relevant parliamentary history for the purposes of statutory interpretation or the ends to which such consultation is put” (\textit{ibid} at 465). However, how parliamentary history should be used as well as its weight will depend on various factors and interpretation principles (see e.g. \textit{ibid} at 466–468).
provide to a legislative body’s committees. Such individuals can be sub-divided into two groups: those individuals who provide information to committees voluntarily, which is often upon the individual’s initiative (i.e. without the coercion of a summons); and those individuals who are compelled (or likely to be compelled) by a summons to appear and provide the information. A distinction thus needs to be made for situations where the relevant statement is voluntary versus those situations where a summons or other coercion is needed to obtain the information. As discussed in detail below, it is questionable whether parliamentary privilege should continue for either situation with respect to non-court accountability mechanisms.

Put simply, when individuals have a fair amount of voluntariness or initiative to make a statement or otherwise provide information, accountability reviews ought to have the ability to use such statements and information if relevant. In other words, literal accountability ought to prevail. However, by virtue of parliamentary privilege, individuals in question can prevent the use of such statements in such reviews if the person believes it is in their interests to do so. Admittedly, there may be a lower likelihood that the privilege would be asserted given the voluntary nature of their statements and if the individual believes that their statements are truthful and helpful to their interests. However, given the political nature of legislative bodies, there are political incentives to not always be truthful in the legislature. For example, the Report of the Ipperwash Inquiry included findings that Premier Harris and Attorney General Harnick misled the legislature on key issues. If they had not previously waived parliamentary privilege during the hearings, those findings would not have been possible. In fact, if it appeared that such findings could have been possible at the time of the waivers, it is questionable whether the waivers would have actually occurred so that the potential basis for such findings would have been removed (i.e. literal accountability could have been prevented). The results of the Ipperwash Inquiry illustrate how increased accountability can occur if parliamentary privilege is not allowed, which is also consistent with the “policy-implementing” approach of most non-court accountability mechanisms. Accordingly, if relevant to an accountability review, such

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public statements ought to be generally available to such reviews to help ensure the literal, organizational, and social accountability of applicable government actions. Otherwise, such statements will usually only be allowed if they are consistent with the potential strategic goals of the individual who made the statements.

For those who are compelled or likely to be compelled to appear before a committee, there is an argument that parliamentary privilege should continue to apply due to a lack of voluntariness. However, this argument does not stand up to scrutiny when one examines the nature of the accountability mechanisms.

For example, statutory accountability reviews often have the same power as legislatures to compel witnesses and practically ask the same questions.287 In fact, such questioning is likely as the public statements would usually be considered as part of the parties’ examination strategies and potential questioning. In other words, the information will be used indirectly regardless of the privilege since it is public and not confidential.

In addition, both forums are equally public, so the damage of having one’s unflattering story aired publicly is equally applicable and may already be largely accomplished given the legislative testimony. As well, inconsistencies between a person’s testimony at an accountability review versus that at a legislative body can still be picked up by and reported on by the media to illustrate problems and issues with the witness’s statements and positions. It thus seems somewhat counterintuitive that an accountability review cannot use such inconsistencies to assist with its fact-finding and recommendations (in accordance with literal accountability and a “policy-implementing” approach).

Finally, concerns about a potential finding of misconduct in an inquiry setting (or analogous findings in other settings) fail to take into account that legislative committee reports can effectively make the same findings in their public reports if they so desire. Since both avenues can have negative reputational impacts, the real issue is whether civil or criminal liability can attach as a result of any findings, but neither accountability reviews nor legislative committees

287 See e.g. Public Inquiries Act, 2009, supra note 73, s 10(1).
can result in actual legal liability. Even if some of the additional remedies proposed in this chapter were made available, such remedies would be limited and focused more against the state rather than individuals. The potential availability of such remedies would thus not justify the continuation of parliamentary privilege once all of the issues are weighed.

Given the political and partisan nature that can be present in legislative reports without the potential for judicial review to ensure fairness and an absence of bias, it is difficult to see why legislative testimony and statements should not be allowed to be considered by more independent and fairer accountability reviews. After all, such reviews can usually be subject to judicial review for fairness, bias, and other issues if needed. As well, the consideration of such testimony and statements will not be necessarily determinative of final findings (which instead depend on the totality of the materials considered by a review). The reality is that parliamentary privilege creates an odd duality and legal fiction where everyone knows what is said in different contexts, but they cannot be directly used or referred to.

As noted by O’Connor ACJO and Freya Kristjanson, “[i]nquiries are not trials; they are investigations,” and this statement applies by analogy to most of the other accountability mechanisms. The Ipperwash Inquiry also illustrated the value of being able to look at statements covered by parliamentary privilege, which allowed the inquiry to comprehensively review and include related issues in the final report. Such use is also consistent with the goals of literal accountability and the “policy-implementing” approach that drives many of the non-court accountability mechanisms. Parliamentary privilege should accordingly no longer be allowed as

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288 The one possible exception is OIPRD given the binding disciplinary possibility as discussed above in Section B.3, but it is highly unlikely that an individual officer would testify to a legislative committee regarding such an event. For example, in the case of Toronto G20 Summit, the only police officers who testified at the relevant House of Commons committee were high-level officers rather than any individual officers who directly interacted with protestors on the ground (see House of Commons, Standing Committee on Public Safety and National Security, Issues Surrounding Security at the G8 and G20 Summit (March 2011) (Chair: Kevin Sorenson) at Appendix A). Regardless, it may still be useful for OIPRD to be able to use such statements and information in the context of systemic reviews rather than individual disciplinary proceedings.

289 See e.g. Ratushny, supra note 1 at 114–121 (re: legislative committee’s experience with Mulroney-Schreiber affair) & 371.

290 See e.g. Chrétien, supra note 121.

291 O’Connor & Kristjanson, supra note 87.
a way to prevent the consideration of key relevant information in non-court mechanisms, and such a change could be enacted by amendments to the relevant governing acts.292

E. Conclusion

From the above analysis, a few themes become apparent. First, all of these mechanisms are inherently ex post mechanisms, and most of them work from a more “policy-implementing” approach on Damaška’s spectrum of proceedings. It is thus not surprising that they are generally designed to help prevent similar events from reoccurring in the future by persuading key decision makers to make relevant policy changes. However, given the mechanisms’ ex post nature of review, they cannot prevent the original incident from arising; they can only help avoid analogous events from happening in the future. Second, given their non-binding nature, there is a real question about the ultimate long-term effectiveness of these accountability mechanisms (i.e. there is a lack of actual consequences and change). There is often cathartic value because affected people can be given an opportunity to provide and share their perspectives in a public hearing, particularly when they have been unable to do so previously.293 As well, an underlying goal of all of the accountability mechanisms is to arguably learn from past incidents and mistakes by contributing to literal, organizational, and social accountability. However, substantially more work must be done to advance the implementation of any resulting recommendations so that there is actual subsequent change to prevent the issues from reoccurring, which likely warrants the need for a mechanism or system to follow up on recommendation implementation. Third, the various trigger mechanisms as well as the fragmentation of jurisdiction poses problems for ensuring ideal and comprehensive accountability when a large-scale and complex event occurs that spans the mechanisms’ individual jurisdictions. While such limitations may not be problematic for typical reviews by the mechanisms (e.g. regular police complaints; deaths that are not related to a broader incident, etc.), complex large-scale events can instead result in multiple reviews with no review being able

292 See e.g. Report of the Ipperwash Inquiry, supra note 86 (Written Submissions of the Estate of Dudley George and Members of the Dudley George’s Family at 148–149, online: Ministry of the Attorney General <www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/closing_submissions/pdf/TheDudleyGeorgeEstateAndFamilyGroup_ClosingSubmissions.pdf>); Public Inquiries Act, supra note 73, s 25(6) (privilege does not apply re: inquiry funding).

293 See e.g. Le Dain, supra note 4 at 84.
to take a holistic and comprehensive perspective. This last issue is particularly pertinent when political considerations may prevent the initiation of a more comprehensive and efficient mechanism as well as the provision of corresponding adequate resources for a comprehensive mechanism to do a proper review.

It appears that the ideal accountability mechanism for a complex large-scale event is a review mechanism that looks at issues comprehensively, uses more of a “policy-implementing” approach, and focuses on achieving literal, organizational, and social accountability. Except for the trigger requirement, inquiries are the closest to this ideal. It is accordingly time in the evolution of accountability mechanisms for an independent body to be created that vets potential incidents to determine if a more comprehensive accountability review is needed. The focus would be on major events that require a significant investigation and review rather than just purely a policy or advisory review. Such a body does not currently exist given how these various mechanisms have developed incrementally over time as well as the traditional limits associated with an economic liberal society such as Canada, which generally prefers a “conflict-solving” approach. 294 As well, governments have a political incentive to keep control of more comprehensive mechanisms, especially if the current government is the target of a potential review.

The proposed body would therefore be independent from government to minimize such political considerations, and it should ideally be able to initiate more comprehensive review mechanisms when needed (although it would not conduct the review itself). Its corresponding initiation decisions would ideally be binding so that there is reliability and predictability regarding the process and how such comprehensive review decisions are made. Given the experience of the various mechanisms, any such comprehensive review should be in the form of a public inquiry, although other existing mechanisms could be used or combined if the issues are not substantial enough to justify an investigation by a comprehensive inquiry. General criteria could be set out in legislation to provide some guidance, but the proposed body should have some discretion in order to account for other factors that may arise. Governments should also retain a discretion to call any reviews they see fit, which maintains that part of the status quo. However, given

294 See e.g. Damaška, supra note 3 at 73ff.
political realities as well as the potential political reticence of allowing an independent body to make such decisions, it may be more politically palatable for the body to instead make public recommendations about when such reviews should occur. Such an option may be sufficient given the potential political fallout that would occur if the body’s recommendations are then not followed, particularly if the decisions are made by an individual who is respected across the political spectrum.\textsuperscript{295}

An alternative option is that a court could make a binding decision regarding whether a more comprehensive review ought to be conducted. In an ideal world, the court would also conduct such a review by using a hybrid of the “conflict-solving” and “policy-implementing” approaches in a binding manner. Such a hybrid approach would also be consistent with the public law litigation model put forward by Abram Chayes.\textsuperscript{296} However, Canadian courts have been reluctant to adopt Chayes’ model, which is unsurprising given their use of a more “conflict-solving” approach.\textsuperscript{297} This preference may also contribute to why Canadian courts are generally more reticent to get involved with issues that are seen to be more policy oriented.

As well, the preference of an economic liberal society for a “conflict-solving” methodology may be too much to overcome traditional courts taking on a different role. These and related issues will be explored more fully in the conclusion to the thesis. For example, there is a danger that demonstrators may be disadvantaged by having less resources than state actors as outlined in Chapter 1. If the assigned judges were not specialized and did not have a special interest and expertise in demonstrations, it is also possible that judges might prefer property “rights” with their corresponding “duties” on protesters (e.g. not to trespass or to follow management’s requirements and directions for access to and use of the property) over the more amorphous “privilege” of demonstrators to engage in free expression and dissent. Such a preference would occur in a manner similar to that discussed in Chapter 2. On the other hand, the originally proposed mechanism above would overcome these issues as it would decide when a different and separate review by a “policy-implementing” methodology is needed in light of the issues and potential policy changes that may be needed. In addition, aside from differences with respect to

\textsuperscript{295} See e.g. Hudson N Janisch, “Concluding Comments” in Manson & Mullan, \textit{supra} note 89, 489 at 498.
\textsuperscript{296} Abram Chayes, “The Role the Judge in Public Law Litigation” (1976) 89:7 Harv L Rev 1281 at 1302–1303.
\textsuperscript{297} See Chapter 1.
remedial issues and approaches, the proposed mechanism is also largely consistent with Chayes’ public law litigation model.\footnote{Chayes, supra note 296 at 1302–1303.} As well, since such reviews would be conducted separately from the court system, this more incremental dual-track approach may be more palatable overall. For example, there would be clear boundaries regarding which approach could be used where, and the courts would not need to change their current “conflict-solving” approach.

The proposed independent body can also have several other roles with respect to facilitating accountability mechanisms. For example, the independent body can serve in a co-ordinating role to ensure that fragmented jurisdictions and reviews can be co-ordinated or consolidated generally and for specific incidents to minimize costs and duplication. Such an effect could occur with respect to both hearings and background administration issues, particularly given Ontario’s experience with clustering tribunals. For comprehensive reviews, the proposed body can also set or recommend corresponding terms of reference and budgets when needed as well as provide administrative support to ensure that the issues will be appropriately canvassed in a comprehensive yet appropriate manner. From the proposed body’s financial perspective, it would be best to provide this body with separate fixed annual funding that can be used to finance any broader reviews it decides to initiate or recommend. If the entirety of the budget is not used in a year (or administrative savings occur as a result of administrative consolidation), the proposed body ought to be able to retain some or all of the remainder for future years to remove the incentive to call potentially unnecessary reviews so that the body uses up and maintains its annual funding allocation. Such a saving mechanism would also ensure stable funding for larger future reviews when the need arises.

In addition, it is also time to re-examine the availability of parliamentary privilege in statutory accountability mechanisms. Given that the state’s actions are often at issue in such reviews, parliamentary privilege should not be available as a way to prevent evidence from coming before a review unless it is in that person’s interests. Such an approach would be consistent with the “policy-implementing” approach of applicable non-court mechanisms as well as the concept of literal accountability. After all, the information is already public, and these reviews generally cannot make findings of criminal or civil liability. Even if such reviews have some binding
remedies in the future, the comprehensive nature of such an accountability mechanism, the likely limited remedies that would available against individuals, and the need to expedite resolution while minimizing duplication would likely still warrant the continued disallowance of parliamentary privilege for these mechanisms. Legal fictions should not handcuff accountability reviews and make it more difficult for such reviews to ascertain the truth. Only forms of privilege that involve confidential information and advice, such as solicitor-client privilege, should instead continue to be allowed for such accountability mechanisms.

Finally, processes and methods ought to be developed to increase the long-term effectiveness of the accountability mechanisms discussed in this chapter so that meaningful systemic change actually occurs over the long-term. Such mechanisms are particularly important given the standard psychological response of increased commitment and backwards rationalization for an already made bad decision that is then subject to an accountability review. There may thus be reticence to seriously consider and implement any proposed policy and systemic recommendations. For example, the proposed independent body can be empowered to follow up with applicable stakeholders to ensure that policy and systemic recommendations resulting from accountability reviews are being considered and implemented. If not, explanations should be provided regarding why the recommendations are not being implemented. While there is an argument that the proposed independent body should have the power to force the actual implementation of recommendations, that would be contrary to the democratic nature of the Canadian political system, especially if the implementation requires legislative changes, policy changes, or substantial financial or other resources. As well, there may be other developments and considerations that make the recommendations less effective than other options or moot. Accordingly, actual changes should be ultimately implemented by elected governments, but this requirement does not mean that the proposed independent body or another process cannot have a greater role in ensuring that the recommendations from accountability reviews and their underlying goals are actually being advanced over the long-term.299

As well, it is worthwhile to explore whether the proposed independent body or another process can have an active role in providing mediation opportunities to minimize the potential re-

299 To an extent, the Ombudsman already does some follow ups for his reports (Ombudsman Act, supra note 168, ss 21(3)–(4)).
examination and re-litigation of already explored issues in court or other processes. For example, such a mechanism could help more quickly resolve potential issues of civil liability and compensation that are related to the issues already examined in an accountability review, which would be more efficient and productive overall. In addition, such a mechanism may be useful to a limited extent in criminal contexts where the penalties are relatively minor. This approach may also help narrow potential issues for more significant criminal issues. However, the different nature of the criminal process as well as its usually different thresholds and requirements (e.g. the requirement of mens rea for many crimes as well as the typical requirement of proof “beyond a reasonable doubt” for a conviction) would need to be considered as part of the mediation process. In short, these non-court accountability mechanisms play important roles given their general use of a “policy-implementing” approach as well as their contributions to literal, organizational, and social accountability. These roles and contributions are usually all more difficult for the court system to currently do given its focus on a more “conflict-solving” approach. However, it is important to explore ways to make all of these mechanisms and the overall system more effective by resolving multiple parallel issues at the same time where possible as well as accomplishing real change over the long-term in order to prevent future issues from occurring.
Conclusion

This thesis explored how civil litigation and non-court mechanisms can be used to raise and resolve concerns in the context of demonstrations as well as potentially prevent the concerns from reoccurring. These key concepts collectively formed “accountability” in a broad sense for the purpose of this thesis, and both legal and political considerations from a practical perspective were used to facilitate the corresponding exploration. As became apparent, all of the mechanisms are ex post mechanisms, which severely limits the ability of the mechanisms to prevent the original incident from occurring. Each of the mechanisms also had various issues that limit the mechanisms’ abilities to contribute to broader and comprehensive accountability.

In particular, civil litigation has numerous difficulties associated with it, particularly since the Canadian court system is closer to a “conflict-solving” approach on Mirjan Damaška’s spectrum of types of proceedings.\(^1\) It thus tends to reinforce a negative liberal and capitalist approach to issues involving protests and demonstrations, particularly since the focus of the civil litigation system is on dispute resolution rather than substantive fact-finding.\(^2\) The interests and “rights” of property owners also seem to be considered usually more deserving of judicial protection than the “privilege” of protesters to dissent.\(^3\) In addition, the police and other state actors often have effectively unlimited resources and are able to strategically use nominally neutral rules of civil procedure to their benefit. For example, the police and others can prevent full adjudications of the demonstrators’ freedom of expression claims as well as the consequences of imposing limits on that freedom, and the corresponding analyses may be quick and cursory. Civil litigation is thus not an ideal mechanism for broader and comprehensive accountability, although there were some suggestions for potential improvement to better balance the system. However, the likelihood of these improvements being implemented is minimal as significant changes would need to occur to the courts’ current “conflict-solving” approach.

As well, an analysis of interlocutory and statutory injunctions in the context of demonstrations illustrated how the “conflict-solving” approach played out in that particular aspect of civil

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\(^1\) See generally Mirjan R Damaška, The Facets of Justice and State Authority: A Comparative Approach to the Legal Process (New Haven, CT: Yale University Press, 1986), ch IV. See also Chapter 1.

\(^2\) See Damaška, supra note 1 at 123 [footnote omitted].

\(^3\) See Chapter 2.
litigation. It became apparent that demonstrators usually face uphill battles in injunctions due to
the nature of the injunction tests (including inherent majoritarian and economically liberal
tendencies) as well as the fact that courts seem to generally prefer Hohfeldian “rights” (e.g.
property interests) held by the state and landowners over the Hohfeldian “privileges” asserted by
the demonstrators (e.g. freedom of expression). It is an open question whether this effect plays
out in other contexts or if the effect is limited to the context of demonstrations, but such
analyses are outside the scope of this thesis. However, it also became apparent that
demonstrators can be successful if they are able to instead assert Hohfeldian “rights” that
compete with the opposing “rights”, although this experience was the exception rather than the
norm. It may thus be time to examine the freedoms associated with protests in more detail and
determine whether any aspects of the freedoms should actually be “rights”, which may also help
overcome what Kent Roach & David Schneiderman characterize as “Canada’s rather modest free
expression tradition”.

4 See ibid.
5 For example, do analogous issues arise when other constitutionally guaranteed freedoms compete with other
rights?
6 See Chapter 2, Section D. See also Canadian Civil Liberties Association v Toronto (City of) Police Service, 2010
ONSC 3525, 224 CRR (2d) 244.
7 Kent Roach & David Schneiderman, “Freedom of Expression in Canada” (2013) 61 Sup Ct L Rev (2d) 429 (QL) at
para 144.
8 See Damaška, supra note 1, ch V. See also Chapter 3.
9 See e.g. Report of the Ipperwash Inquiry (Toronto: Ministry of the Attorney General, 2007) vols 1–4; 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), online: Office of the Independent Police Review Director
<https://www.oiprd.on.ca/CMS/oiprd/media/image-Main/PDF/G20_Report_ENG_single.pdf>; The Honourable
John W Morden, Independent Civilian Review Into Matters Relating to the G20 Summit (Toronto: Toronto Police
10 See Chapter 3, Section C (most mechanisms include discussions of potentially available funding). While some
inequality may still be present, it will be much less than what can be present in civil litigation.
predictably initiated as well as problems with the fragmented and limited jurisdictions of the mechanisms.\textsuperscript{11} They also all worked by persuasion rather than by a command model, so there was no way that most of the mechanisms could actually enforce or implement any responsibility or consequences.\textsuperscript{12} As well, most of the mechanisms could not even follow up on their non-binding recommendations.\textsuperscript{13}

Accordingly, in the last chapter, a proposal was put forward that would be better overall and help overcome some of these issues.\textsuperscript{14} In short, an arms-length independent body would be set up that would have the power to review the situation when a major incident occurs, determine if a comprehensive review is needed, and initiate such a comprehensive review when needed. However, the body would not itself carry out the review. Ideally, such initiation decisions would be binding, but it may be more palatable to instead have the body make public review recommendations that governments would then implement. Given the analyses above, comprehensive inquiries are the mechanisms that would likely be implemented in such situations, which would be separate from the body to draw a distinction between the decision to initially commence or recommend a review versus actually conducting the detailed investigation and developing policy solutions. When an incident does not justify a full comprehensive inquiry but the event instead spans the jurisdictions of multiple existing mechanisms, the independent body would also have a role with respect to co-ordinating and consolidating such reviews so that they occur more efficiently and effectively. The independent body can also have a role with respect to consolidating and co-ordinating administrative support across current accountability mechanisms as well as providing administrative services for any initiated inquiries. The body could also follow up on the recommendations of non-court mechanisms to ensure that change is actually being implemented in some form so that the issues do not reoccur again, which would overcome the current \textit{functus officio} problem associated with many of these mechanisms.

This last proposal is perhaps the most realistic given the nature of the current court system and other non-court mechanisms as it is an incremental improvement over what already exists.

\textsuperscript{11} See e.g. Chapter 3, Sections D.1 & E.
\textsuperscript{12} See e.g. Chapter 3, Sections C & D.2.
\textsuperscript{13} See \textit{ibid}.
\textsuperscript{14} See Chapter 3, Sections D.1, D.2, & E.
However, there is also the possibility for two more comprehensive options to overcome the various issues encountered, which are briefly discussed below.

First, in an ideal world, there would be appropriate accountability either before or as a key event is occurring. From a psychological perspective, Philip Tetlock notes that when people do not know who they are being accountable to before they make a decision, they generally try to take the most defensible position possible and essentially use “forward-looking rationality”. In contrast, as discussed above, there are issues with accountability after a bad decision has already occurred and it is then being reviewed. In such situations, there is instead “backwards-looking rationality”, which results in more commitment to the decision, finding additional reasons to support the decision, and a lack of willingness to see other perspectives. There is also pressure for decision-makers to “increase their commitment to … failing policies.“ The best accountability option would thus be something that has an ex ante rather than an ex post effect. However, the injunction chapter reveals the various problems and difficulties associated with demonstrators using civil litigation to conduct broader accountability in an ex ante or immediate way. Since civil litigation and the other non-court mechanisms are generally ex post reviews by their nature, is there another better option?

The best option would be to prevent the issues from ever arising. One of the consistent major features of policing large-scale demonstrations is the command structure generally associated with how decisions are made, and there is usually an incident commander who is the person that ultimately make the overarching decisions. In the case of the Toronto G20 Summit, the relevant incident commander was responsible for the decisions to conduct mass arrests of various

16 Ibid at 25.
17 Ibid.
19 See e.g. Ipperwash Report: Findings, vol 1, supra note 18 at 180; Morden, supra note 9 at 158; Office of the Independent Police Review Director, supra note 9 at 33–34; Good v Toronto (City of) Police Services Board, 2014 ONSC 4583 at para 3, [2014] OJ No 3643 (QL) (Div Ct) [Good].
groups of peaceful protestors after receiving a direction from the Deputy Chief to “take back the streets”. Is there a way that such a problem could have been mitigated?

Incident commanders usually rely on others for key advice (e.g. intelligence, logistics, etc.), which is not surprising given the nature and scale of such events as well as the resources that are typically allocated for and spent on such events. There is no reason why legal advice should also not be part of the planning for a major event as well as part of the advice that incident commanders receive as an event occurs. It is accordingly recommended that a legal advisor be included as part of the planning for an incident as well as part of the incident command structure so that the incident commander and those making the key decisions have immediate access to an independent assessment of potential legal options and concerns as issues develop. The legal advisor would not be accountable to the police force in question because that would compromise the advisor’s perceived (and potentially actual) independence and ability to give unfiltered advice. As well, there are potential psychological concerns of the advisor opportunistically reflecting the views of the person that is ultimately holding them accountable. Such legal advisors should accordingly be accountable to a police review body instead, such as the Ontario Civilian Police Commission or the Independent Police Review Director. The legal advisor would then have clear incentives to ensure that proper advice is being given. The advisor should also ideally have appropriate security of tenure as well as expertise with respect to relevant policing matters.

There is one other utopian option that is probably not feasible given the Supreme Court of Canada’s comments that it does not want the legal system to become a proxy for the public

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20 See e.g. Office of the Independent Police Review Director, supra note 9 at 37–38 & 40; Good, supra note 19 at paras 28–29, 59, & 61.
21 See e.g. Ipperwash Report: Findings, vol 1, supra note 18 at 186–187; Office of the Independent Police Review Director, supra note 9 at 37.
22 See e.g. 2011 Spring Report of the Auditor General of Canada to the House of Commons (Ottawa: Office of the Auditor General of Canada, 2013), ch 1 at 5, 12, & 22, online: Office of the Auditor General of Canada <www.oag-bvg.gc.ca/internet/docs/parl_oag_201104_01_e.pdf> (a total of $1.1 billion was approved for the 2010 G8/G20 meetings, of which $664 million was actually spent; of that, the RCMP was allocated $483.2 million, of which the RCMP actually spent $314.6 million; an additional $271.1 million was allocated for other police forces, of which $156.3 million was claimed).
23 See e.g. Tetlock, supra note 15 at 21–22.
24 See e.g. Police Services Act, RSO 1990, c P.15, ss 22 & 26.2
inquiry process. It is also probably not feasible given the economic and liberal assumptions that underlie much of Canadian society. In short, the courts would implement a hybrid of the “conflict-solving” and “policy-implementing” approaches to actually conduct inquiry-like reviews. Such an approach would be consistent with Abram Chayes’ model of public law litigation, and India and South Africa have implemented analogous systems that are partial manifestations of such a hybrid system.

Rather than the typical “conflict-solving” proceeding, the system would work by someone applying to court to commence an inquiry-like proceeding to review a situation. Once examined and approved on a threshold basis, the court would then begin an appropriate hybrid process to conduct such a review. Traditional rules regarding evidence, procedures, and standing would be eased to ensure that the court has access to as much information and as many perspectives as possible compared to the traditional “conflict-solving” approach. After all, since there are potential policy implications for any resulting decisions and an appropriate corresponding foundation is needed, the focus should be on maximizing the likelihood of accurate results instead of maximizing dispute resolution. The court would also use its discretion to award funding from the state in order to ensure that all parties are substantively equal rather than just formally equal. As well, given judges’ background experiences and their default tendencies as a result of the existing legal system, judges would need to be specially selected and trained to be able to use such a hybrid mechanism effectively without becoming too entwined in or defaulting to a standard “conflict-solving” methodology. The court would also be able to make binding

28 See Damaška, supra note 1 at 123 & 148.
29 A specialized team approach would likely be required, which has already been implemented to a certain extent in various parts of the Superior Court of Justice to deal with other specialities (see e.g. Ontario, Superior Court of
findings in such proceedings that result in broader substantive policy changes as needed, although negotiated solutions would likely be preferred to encourage “buy-in” by all stakeholders.  

Such a hybrid system would thus combine the best aspects of the “conflict-solving” approach and the “policy-implementing” approach.  

However, the court would have some discretion to ensure that it has the information needed to make appropriate decisions, and the court would not be strictly limited to just what the parties put before the court.  

As well, to overcome the *functus officio* problem, it would be better if the court could exercise some supervisory jurisdiction so that it is able to observe and manage potential issues over the longer-term rather than dealing with issues in only a single traditional hearing.  

However, such a hybrid system is utopian and unlikely to occur in Canada for a variety of reasons. For example, it is inconsistent with a negative liberal society that has capitalism as its underlying economic foundation because such “reactive” states tend to prefer minimal government, private rights (which results in assessments of formal equality rather than substantive equality), and a court system geared towards using contests to solve disputes between citizens that they cannot solve themselves (i.e. a “conflict-solving” approach).  

In order for a more hybrid system to be successful, the courts and society would need to be open and willing for these underlying assumptions to take a lesser role than today in accountability settings.

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30 See e.g. Chayes, *supra* note 26 at 1298–1302.  
31 See generally Damaška, *supra* note 1, ch IV & V.  
32 See e.g. *ibid* at 111–116.  
33 See e.g. *ibid* at 160–164.  
34 See e.g. *ibid* at 160–164.  
35 See e.g. *ibid* at 152–154.  
36 See e.g. *ibid* at 117–119 (contrasting view in “conflict-solving” approach).  
37 See e.g. *ibid* at 73–75 & 77–80. See also *ibid* at 106–108 (re: equality considerations in the context of a “conflict-solving” approach). See also *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 23–59, 91–92, & 105–117, [2003] 3 SCR 3 (court split 5-4 re: potential role of the court to provide a more supervisory remedy in the context of constitutional language rights, and cited paragraphs show the contrasting perspectives).
As well, such a hybrid approach would represent a significant departure from how courts do things currently, so it is probably too far from the status quo to be adopted quickly by the judiciary, much less the executive or legislative branches. In addition, courts would likely be wary of an approach that involves the dispersal of significant dollars to the parties before a determination of wrong-doing, particularly given the courts’ current reluctance to award advanced costs.\textsuperscript{38} The full ideal hybrid system is thus unlikely to be put in place in the immediate future through the court system, but it may be something to work incrementally towards as the Canadian state and Canadian society continue to change and evolve.\textsuperscript{39} It would thus be useful to explore the experience of India, South Africa, and other relevant jurisdictions to see what knowledge and expertise are available and what concepts may be useful for the Canadian context over both the short- and long-term.

Given the reality that movements like “Idle No More” and Occupy find their foundations in systemic issues in Canadian and western society, it is highly likely that demonstrations will be a key part of the Canadian context for the foreseeable future. In fact, it is unlikely that demonstrations will ever not be part of Canadian society. As a result, courts could simply ignore the demonstrations and assert majoritarian tendencies and assumptions to preserve the status quo; courts could attempt to work with demonstrators when injunctions arise to facilitate the demonstrators’ expression as well as make stronger legal footings for the associated expression; or courts can actively participate in modifying the legal system to better deal with the underlying issues that the movements are raising. Given the current preference for courts to have legislatures make significant changes,\textsuperscript{40} the reality is that civil unrest would likely need to considerably grow before courts looked at adopting the last or analogous options to potentially address such issues.

However, courts will be always be in the middle, and it may be useful to develop some principles and guidelines to assist courts so that they are dealing with such issues in a more thoughtful

\begin{footnotes}
\item[38] See Chapter 1, Section D.1.
\item[39] For example, such a system could be put in place through legislative or other changes. As an analogous example, see the \textit{Class Proceedings Act, 1992}, SO 1992, c 6 (statute that effectively enabled the modern class action in Ontario).
\item[40] See e.g. \textit{Little Sisters #2}, supra note 25 at para 44 (“[c]ourts should not seek on their own to bring an alternative and extensive legal aid system into being. That would amount to imprudent and inappropriate judicial overreach” [emphasis added]).
\end{footnotes}
rather than haphazard way. For example, courts should be aware that the neutral rules associated with civil procedure tend to benefit and advantage the state, corporations, and other well-resourced litigants far more than demonstrators. Courts should accordingly beware of this inherent advantage. As well, given that freedom of expression is supposed to have a higher status in the Canadian system in light of its constitutional protection, courts should be wary of mechanically preferring property “rights” in a way that imposes “duties” on demonstrators. Otherwise, freedom of expression is devalued as a key fundamental “privilege”, which is ironic since property is not constitutionally protected under the *Charter* like freedom of expression. Finally, courts should be more willing to take notice of the findings and recommendations of inquiries and other non-court mechanisms, even if they are unimplemented, so that the mechanisms have greater impact and teeth. After all, considerable resources, time, and thought have been invested to try to prevent the circumstances that caused the reviews from occurring again, and courts should not be shy to use that work to hopefully make things better for everyone over the long-term.

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42 As a contrasting example, see *Canadian Bill of Rights*, SC 1960, c 44, s 1(a) (right of the individual to enjoyment to property). However, no similar right is part of the *Charter* (supra note 41).
43 While such use has occurred to a limited extent (see e.g. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 85, 106, 123, 171, & 207, 153 DLR (4th) 193 (references to the Royal Commission on Aboriginal Peoples)), there is significant potential for courts to use such reports much more than what has occurred to date.