Has Public Protest Gone to the Dogs? A Social Rights Approach to Social Protest Law in Canada*

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A. Introduction

How should the law react to social protest? Should it facilitate it? Should it limit it? This question is particularly poignant today, when protests such as the Occupy movement, the Québec student tuition protests and the Idle No More movement demonstrate the continued importance of protest as a form of social action. In this chapter, I argue that the social rights approach to resolving social conflict can be applied to develop a progressive legal framework for dealing with social proteSt

To determine the proper role of law in regard to social protest, I begin by examining what "legal rights" are.[1] The traditional approach to rights treats them as having determinate content – each right can be given a legal meaning. For instance, the right to privacy is the right to be free from unreasonable intrusion into personal life by the state.[2] Moreover, in the traditional approach, rights holders can come into conflict. When they do, the role of law is to resolve their competing rights claims. The essential paradigm of the law that animates the traditional view is one of *conflict* and *confrontation.* Two or more rights holders enter into conflict, and the conflict must be resolved through a *theoretical confrontation* between competing rights holders undertaken in the abstract by legal tribunals.

In this paper, I compare this traditional approach to a *social rights* approach. The *social rights* movement, which expands the panoply of rights from traditional political rights to socio-economic rights, is marked not just by

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1 I do not think that law can be reduced to an understanding of the meaning of legal rights. Elsewhere, I have examined the law from the point of view of our experience of judgment (see Graham Mayeda, "Uncommonly Common: The Nature of Common Law Judgment" (2006) 19:1 Can JL & Jur 107 [Mayeda, "Uncommonly Common"]) and as the nexus of principle and pragmatism ("Between Principle and Pragmatism: The Decline of Principled Reasoning in the Jurisprudence of the McLachlin Court" in Sheila McIntyre & Sanda Rodgers, eds, *The Supreme Court of Canada and the Achievement of Social Justice: Commitment, Retrenchment or Retreat* (Markham, Ontario: LexisNexis, 2010) 41 [Mayeda, "Between Principle and Pragmatism"]. But a reflection on the role of social rights in social protest naturally leads to a consideration of the nature and meaning of legal rights.

2 *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 159**.**

its broader conception of rights, but by its understanding of what rights are, how social conflicts arise, and how they should be resolved. The fundamental approach adopted by the social rights movement is that social justice is not just about balancing rights but about creating the conditions for a truly deliberative form of democracy in which the law both reflects and plays an integral part in social transformation. The social rights movement considers rights discourse as an essential part of the achievement of social justice.

For the social rights movement, conflict need not be approached as a competition between competing rights-holders. First, rights have shifting meanings – they mean different things to different people depending on who they are and the social conditions in which they live.[3] Second, when social conflict arises, rather than framing it as a conflict between individuals or between an individual and the state, a social rights approach sees the conflict as a *transformative moment* – i.e., an opportunity to reassess past interpretations of a right in light of newly emergent social circumstances and to engage the public in the process of articulating the meaning of rights in a particular social context. In this way, a social rights approach to law sees conflict as contributing to the strengthening of the social fabric by engaging us in democratic deliberation.

The purpose of this paper is to consider how these different paradigms frame the issue of social protest and to develop a legal framework for the social rights model of social proteSt I will not deal with the criminal law response to social protest except in a general way. However, I will discuss civil law approaches, including injunctions, contempt of court proceedings, and various legislative approaches to public protest such as anti-SLAPP suit legislation.[4] As we will see, a social rights approach to social protest advocates for legal rules that facilitate peaceful protest, which is an important part of democratic deliberation. It also advocates inclusiveness to ensure that all social groups are able to use protest as a means of testing the legitimacy of our existing legal and social order.

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[3] Nancy Fraser explains the varied understandings of the substance of justice claims: "'. . . class-accented appeals for economic redistribution are routinely pitted against minority recognition,' while feminist claims for gender justice often collide with demands for supposedly traditional forms of religious or communal justice. The result is a radical heterogeneity of justice discourse. . . ." (Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009) at 2).

[4] A SLAPP suit is a Strategic Lawsuit Against Public Participation. The lawsuit is not necessarily initiated with the prospect of winning it, but rather as an intimidation tactic to prevent public participation in debate.

B. What is social protest?

1) The Goals of Social Protest

Social protest is a form of social action that aims at making the public aware of the interests of a group or, more rarely, of an individual. It is at once an appeal for awareness, an appeal for engaged deliberation, and an appeal for action.[5] For example, the Occupy movement seeks to bring public attention to systemic injustice that arises from our global financial system and the disproportionate impact of this injustice on marginalized groups.[6] Its goal of engaging public deliberation is expressed in one of its principle driving forces, which is "[e]ngaging in direct and transparent participatory democracy."[7] Similarly, the Idle No More Movement has focused on raising awareness among indigenous peoples and others in order to empower them to engage with issues of indigenous sovereignty and the protection of the environment and to bring about change through this engagement.[8] Protest is a call for a further deliberative process. The legal institutions that structure social protest ought to reflect this by recognizing the marginalized interests given voice at the protest and creating a forum for public deliberation that can lead to cooperative action to resolve the issues being raised.

One of the many concerns about the Occupy protests was that they create a forum for other forms of illegality such as violence, drug use, alcohol abuse, etc. In the traditional competing rights model, this is an excuse for placing the "public interest" in the balance against the interests of individual

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5 Social protest does not necessarily have all of these goals at once, nor does it necessarily pursue all of them with the same energy. As Herbert Blumer points out, social movements, of which social protest often forms a part, can be general, in which case they "take the form of groping and uncoordinated efforts. They have only a general direction, toward which they move in a slow, halting, yet persistent fashion" (Herbert Blumer, "Social Movements" in Vincenzo Ruggiero & Nicola Montagna, eds, *Social Movements. A Reader* (London: Routledge, 2008) 64 at 65 [Ruggiero & Montagna]). However, specific social movements can also develop. In these movements, "agitation" plays a role, which Blumer describes as "arousing people" (informing them) (*ibid* at 67), "jar[ring them] loose from their customary ways of thinking and believing" (*ibid*) (public deliberation), and finally, "liberat[ing] them for movement in new directions" (*ibid* at 68) (action).

6 See for example, Matt Taibbi, "Wall Street Isn't Winning-It's Cheating" *Rolling Stone* (25 October 2011), online: Rolling Stone www.rollingstone.com. On its website, Occupy Wall Street states that it "aims to expose how the richest 1% of people are writing the rules of an unfair global economy that is foreclosing on our future" (http://occupywallStorg/about/).

7 New York City General Assembly, "About", online: NYC General Assembly www.nycga.net.

8 Idle No More, "Press Release: January 10, 2013 for immediate release", online: Idle No More http://idlenomore.ca.

protestors seeking to exercise their right to free speech. However, a better way of understanding these inter-linked phenomena is to see the message of peaceful protestors and violence, drug and alcohol abuse as part of the phenomenon of marginalization that motivates most social protests.[9] This marginalization – often as a result of state suppression – has the effect of attracting to the protest those who are marginalized in diverse ways, and at the same time motivating suppressors to corral other marginalized groups together with protestors.[10] The violence, the manifestation of petty illegality, and expressions of indigence and poverty are not good reasons to increase state suppression. Indeed, they are often the result of such suppression.

For instance, the Occupy protests express the economic marginalization of a large group of people, and it is no surprise that complaints about employment, economic stability and so on are intermixed with the manifestation of actual poverty and marginalization. Those who are marginalized for other reasons find themselves attracted to the location of public protest – occupied spaces attract the homeless, the criminalized, and so on, in the hope that they will be able to capture some of the power that comes from the visibility of peaceful protestors who have attracted the public eye. If the movement is perceived as efficacious, people will be drawn to it.[11]

Another way of understanding the intermixing of these phenomena of exclusion is as different manifestations of the state's power to exclude. When the state wishes to hide certain kinds of marginalization, it often resorts to burying them within other forms of marginalization that it can more successfully control. For example, the marginalization of which Occupy protestors complain is vilified, labelled and thereby controlled by associating

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[9] While marginalization is often at the root of social protest, I am not arguing that marginalization and reaction against it is the primary impetus for social mobilization. Indeed, the success of mobilization depends in large part on the availability of forms of organization such as social networks that lower the costs of building coalitions and hence the costs of group mobilization (in this regard, see Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics,* 2d ed (Cambridge: Cambridge University Press, 1998) at 23; see also Marco Giugni's discussion of resource mobilization theory in *Social Protest and Policy Change. Ecology, Antinuclear, and Peace Movements in Comparative Perspective* (Oxford: Rowman & Littlefield, 2004) at 148-150).

[10] By "attracting," I mean that those marginalized by poverty, substance abuse, mental disorder and so on are attracted, be it ideologically or psychologically, to participate in a social proteSt By "corralled", I mean that the process of state suppression is over-inclusive, capturing within the boundaries of its suppressive force groups that may not naturally have coalesced at the proteSt For instance, at the Occupy Wall Street Protest, police officers tended to corral the homeless and other marginalized groups into the occupation site, either accidentally or as a means of disrupting the proteSt

[11] Gerald Marwell & Pamela Oliver, *The Critical Mass in Collective Action: A Micro-Social Theory* (Cambridge: Cambridge University Press, 1993), reprinted in part in Ruggiero & Montagna, above note 5, 128 at 131.

it with violence and morally reprehensible behaviour. In practical terms, this means police corralling the poor, the criminalized and so on into territories occupied by peaceful protestors to elicit public condemnation of the protest itself.

Some may argue that explaining the reason for the nexus between social protest and anti-social behaviour (or, at least, behaviour perceived as anti-social by particular social groups) does not provide a justification for allowing this behaviour. However, the result of suppressing the anti-social behaviour is generally to suppress the legitimate ends of social proteSt This is not an incidental result of state suppression. While the state may claim that its goal in dealing with anti-social behaviour is to channel protest into alternate, more acceptable public fora, such a rationalization is not legitimate if no such forum exists. The effect of state suppression is usually to deny *any* forum to social protest of the marginalized. As political scientist Doug McAdam points out in his work on the political causes of social protest, social mobilization is a form of resistance to institutionalized political power. It is a response to the "enormous obstacles [that excluded groups face] in their efforts to advance group interests. Challengers are excluded from routine decision-making processes precisely because their bargaining position, relative to established polity members, is so weak."[12] Social protest is in part the result of the inaccessibility of other "legitimate" public fora, and so state suppression cannot hope to shift social protest into them.

2) Social Protest as a Social Phenomenon

I have described social protest in terms of its social and political roles as a mechanism for initiating or continuing a process of deliberative democracy and as a way of challenging and hence ensuring the continued validity of the state monopoly on force. But to understand the appropriate role of law in regulating social protest, we must identify the source of the normative meaning underlying it. This requires us to understand what social protest expresses as a *social phenomenon*, which means understanding how we experience social protest in order to comprehend what it tells us about our collective social life. To do this, we must acknowledge that we experience injustices of individuals and groups – even of those from radically different cultures, religious, classes, etc. – *as a society*. From the point of view of social experience, protest is a way to communicate to others the experience of injustice of the protestors. Through this experience emerges the normative force of public protest, which arises from the recognition of a tear in the social fabric and the need to respond to and take responsibility for it.

There is a large phenomenological literature on how we experience the intersubjective or social dimensions of human experience. In East Asian

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12 Doug McAdam, *Political Process and the Development of Black Insurgency 1930-1970* (Chicago and London: University of Chicago Press, 1982), excerpted in Ruggiero and Montagna, above note 5, 177 at 179.

philosophy, phenomenologists such as Watsuji Tetsurō have adumbrated the ways in which we directly experience the suffering of others. For instance, in a famous passage from his *Ethics*, Watsuji describes that we have direct experience of the suffering of those cut off from us by a natural disaster. When the disaster occurs, lines of communication are damaged, and this can be felt as a physical wound by society as a whole:

> [I]f a certain area [of a country] were to be cut off from the services of communication, news reports, transportation, and so forth, then the people in this region would be cut off from the wider public. In this case, so far as physical space is concerned, however, there is no change. As extended, the greater public suffers damage. No matter how distant this region is, whether a remote place in the mountains or a secluded island, it is usually quite removed from the intense contact of communication, transportation, and the like. If this contact is interrupted against the will of the local people, then this event itself comes to emerge as an event of the gravest public concern. The interruption of contact is felt as physical damage by that society, so to speak.[13]

Here, Watsuji refers to communication as a phenomenon of everyday life that manifests our capacity for experiencing the life of others as part of our society. I suggest that a truly *social* theory of social rights should likewise be able to account for protest as a social phenomenon involving damage to intersubjective life. Such a theory takes into account our direct experience of others.

If this experience of the social is to inform the theory of social rights, then it must have some normative force. After all, the law is a normative institution. In the East Asian tradition, Confucianism has long held that the normative force of another's distress is experienced directly. The story of the child falling in to the well that we find in *Mencius* is a famous example.[14] There, Mencius explains that when we observe a child falling in to a well, regardless of our life experience, our first instinct is to save it. As we reflect on what we have witnessed, we may well hesitate or justify non-action to ourselves, but the initial normative force of witnessing a tragedy is experienced the same by all.

In Western philosophy, Emmanuel Levinas explains in many of his writings the different ways in which we are confronted by others and brought to acknowledge the responsibility that these encounters engender. He highlights the normative force of our experience of the suffering of another, and describes how, when we come face-to-face with this suffering – say a panhandler on the street – we directly experience the accusation that that

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13 Tetsurō Watsuji, *Tetsurō Watsuji's Rinrigaku,* (Albany : State University of New York Press, 1996) 158-159.

14 *Mencius*, translated by David Hinton (Washington, DC: Counterpoint, 1998).

persons makes against us, and simultaneously, acknowledge the responsibility we bear for alleviating that person's suffering. Indeed, the very act of justifying to ourselves why we should not help – because the panhandler will just spend the money on alcohol or drugs, or because she should just get a job and help herself, etc. – attests to the initial experience of accusation (we feel accused by the person in need) and the presumption of responsibility. The encounter with another in need puts my self-identity and my abundance of resources in question. Whether rich or poor, everything I have becomes surplus in the face of the needs of the other.[15]

In addition to explaining that our experience of responsibility is universal, Levinas adds to this experience the dimension of justice. Whether the panhandler, the child falling into the well or the effects of a natural disaster, we are called to responsibility, which means called to respond, not just to ourselves, not just to our conscience, but to a third party.[16] This is the meaning of justice – to be called to explain to a third party how our response to the need of another can be justified. How is our treatment of a particular person in need a just treatment of all who need?

From a phenomenological point of view, we experience social protest as a wound to the social fabric. When others protest, they and we feel unease, as the protest communicates dissatisfaction with the social *status quo*. Indeed, we may even feel accused if we are targeted for criticism by protestors.. Moreover, our immediate normative experience of this tearing of the social fabric is always one of responsibility – we are responsible for the suffering of others – indeed, we are accused by their suffering. And while we may then follow this experience with *ex post* rationalizations and justifications of our behaviour and condemn the protestors, this merely reinforces the underlying unease that we experience when encountering proteSt The unease is an indication that we recognize our responsibility to them and for the issues they raise, and our evasion is unjust if it avoids justifying to them and others why our inaction is reasonable. I shall make the link between this experience of social protest and legal responses in a subsequent section. For now, I turn to how the law interacts with social protest, and how it may better respect the normative force of protest by moving beyond the prevailing competing rights paradigm.

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15 Robert Bernasconi, "Strangers and Slaves in the Land of Egypt: Levinas and the Politics of Otherness" in Asher Horowitz & Gad Horowitz, eds, *Difficult Justice: Commentaries on Levinas and Politics* (Toronto: University of Toronto Press, 2006) 246 at 249 [Horowitz & Horowitz].

16 Gad Horowitz, "Aporia and Messiah in Derrida and Levinas" in Horowitz & Horowitz, 307 at 310.

C. Legal paradigms for dealing with social protest – the competing rights paradigm and the social justice paradigm

1) Introduction

The "competing rights" paradigm has been the most prevalent legal paradigm for addressing marginalization and oppression, of which social protest is a manifestation. When applied to social protest, those using this paradigm first seek to find a right of the protestor that is infringed – common choices include rights to free speech, association, freedom or security of the person. Once this right is identified, using a competing rights approach to the *Charter* framework, the state may justify the infringement by proposing and defending an important social goal that it achieves. Outside the *Charter* context, which applies only to conflicts involving the rights enumerated in constitutional documents, legal actors resolve conflicts by determining if the protest affects other public or private legal interests not protected by the constitution, and weighing these competing interests in a balance or bringing them into "dialogue" with each other.

The competing rights approach has been used in protest cases, most recently, in cases dealing with the various Occupy movements in cities such as Toronto and Vancouver, to which I now turn as examples.

2) The Competing Rights Paradigm in the *Charter* context

In *Batty v City of Toronto,*[17] DM Brown J of the Superior Court of Justice for Ontario dealt with Occupy Toronto protestors' challenge of the City of Toronto's trespass notice issued to occupiers of St James Park, part of which is public property. In rejecting their challenge, he appeals to the need to balance competing rights under the *Charter*. In response to the protestors' views that they were free to occupy St James Park, he explained

> The *Charter* offers no justification for the Protesters' act of appropriating to their own use – without asking their fellow citizens – a large portion of common public space for an indefinite period of time.
> The *Charter* does not remove the need to apply common sense and balance to the way we deal with each other in our civic relationships. The *Charter* does not remove common sense from the process of trying to figure out how to balance the competing rights which now characterize our contemporary Canadian policy. On the contrary, the *Charter* speaks of "reasonable limits" on guaranteed freedoms, thereby signalling that common sense still must play a role – indeed, a very important role – in that balancing exercise.[18]

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17 2011 ONSC 6862 [*Batty v City of Toronto*].

18 *Ibid* at paras 12-13.

Having set out the general competing rights framework, Brown J then reviewed the nature of the encampment at St James Park and the goals of the Occupy Toronto protestors in occupying it in order to identify the right they asserted. The occupiers claimed that the occupation represented an open, democratic process and was a manifestation of their rights of freedom of speech and association. Moreover, they argued that the occupation of the park was a essential to the exercise of these rights.[19]

Accepting that the protestors were invoking s. 2 rights,[20] Brown J sought to identify the competing right that would be balanced against speech interests. He found that the protestors' use of the park had "materially altered the traditional use of the Park and has prevented traditional Park users from using and enjoying the Park. . . ."[21] The right of the occupiers to exercise free speech was thus in competition with the right of local residents to access a public space without impediment and with a feeling of safety and enjoyment, as well as a right to use their private property without nuisance.The state – in this case, the City of Toronto – likewise identified interests that were infringed by the protestors' occupation. It quoted numerous by-law infringements[22] in support of the claim by non-protestors that access and use of the park was limited by the proteSt

In his section 1 analysis under the *Charter*, Brown J assessed the protestors' claim as a competition between the protestors' rights under s. 2 of the *Charter* and the public interest of "all to share a common resource and ensuring that the uses of the parks will have a minimal adverse impact on the quiet enjoyment of surrounding residential lands."[23] In Brown J's view, the government objective of ensuring that public resources are shared was a pressing and substantial objective.[24] Having so found, it then followed that the trespass notice and Parks By-law were rational means of achieving these objectives, as they "ask one group of the public to let go of their monopoly over the use of the Park and share the Park with other people in Toronto. . . ."[25] The measures minimally impaired the protestors' s. 2 rights, because the protestors could continue to exercise their s. 2 rights by other means – just not by occupying St James Park and erecting structures in it.[26]

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19 *Ibid* at para 64.

20 *Ibid* at paras 70-72.

21 *Ibid* at para 41.

22 *Ibid* at para 48.

23 *Ibid* at para 95.

24 *Ibid* at para 96.

25 *Ibid* at para 97.

26 *Ibid* at para 104.

The Judge rejected the protestors' contention that the occupation was an important part of their message that could not be communicated by other means. He explained, "If I were to accept the applicants' argument, then any protest group could come along, assert that monopolizing a particular piece of public space was an important part of their political message, and the City would be powerless to object."[27] The Judge seemed particularly offended by the suggestion of protestors that those unwilling to use St James Park during the occupation use other parks.[28] He felt that the logic of the protestors would lead to an eventual occupation of all Toronto parks, to the entire exclusion of local residents.[29] Finally, Brown J explained that it is entirely impractical to impose on the City the constitutional requirement to consult with protestors before issuing a trespass notice. Such consultation might be a matter of political prudence, but it cannot be a constitutional obligation.[30]

In regard to the last part of the *Oakes* test, the assessment of the proportionality of the salutary and deleterious effects of the measure, Brown J concluded that the test was met.

> I have no hesitation in concluding that the evidence shows that there is proportionality. In seeking compliance with two provisions of the Parks By-law, the Trespass Notice would have the effect of ending the Protesters monopoly of a public park in downtown Toronto and requiring them to share it with the rest of the public. The Protesters have ample means left to express their message, including continued use of the Park (but no structures or "midnight hours"), and other Torontonians can resume their use of the Park. In my view such a result would more than meet the test for proportionality of deleterious and salutary effects.[31]

In the Superior Court's judgment, we see a clear example of the competing rights approach to a protest case. The case is framed as one of competition between protestors, who are asserting the right of freedom of expression under the *Charter*, and local residents, who wish to have access to a public space and to use and enjoy their own private space without nuisance. The drawbacks of this approach are: First, the Court balances a constitutionally-protected *right* – freedom of expression – against a collective *interest* in using public property. We are not given a criterion for measuring the appropriate balance between a right and a collective intereSt The Supreme Court of Canada in *R v Oakes* required the government objective to be

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27 *Ibid* at para 105.

28 *Ibid* at para 112.

29 *Ibid* at para 113.

30 *Ibid* at para 115.

31 *Ibid* at para 123.

"pressing and substantial."[32] As Peter Hogg points out after a review of that seminal case, its language "indicate[s] that a reviewing court should engage in a rigorous scrutiny of the legislative objective."[33] However, Brown J does not conduct such a review, and one is justifiably left wondering how an essential right such as freedom of expression must yield to those who wish to walk their dog in St James Park.[34] To mimic Justice Brown's alarmist concerns, this certainly gives dogs a very high place in our constitutional order – or at least a place far above that of social activists with an important democratic message.

Also troubling is the Court's failure to deal with the importance of the competing rights and interests being asserted to the identity of the parties. Clearly, the protestors felt that the occupation of the park was an essential part of their goal of communicating an alternative form of social and democratic organization, whereas the local users of the park did not express any close relationship between their identities, either as individuals or as a group, and their use of the park. The rights of association, assembly and speech are at the core of a protestor's identity – they are essential to the purpose of proteSt However, the interest in using a public park is only a peripheral aspect of most local residents' interests and identities. The Court failed to take in to account the social context in which rights and interests were being asserted in the process of dialogical balancing. The Judge did not directly question whether local residents could or should exercise their interest in accessing a public space at a different park. Instead of assessing the constitutional rights claimed in the specific context in which they were claimed and with proper regard for the power relationships that exist between protestors and residents, he awoke the spectre of a rabid spread of occupations to every Toronto park, as if the Occupy Toronto protest threatened the use of every public space, and so genuinely threatened the residents interest in access to public space generally. At para 13 of his judgment, Brown J wrote

> . . . if the Protesters possess a constitutional right to occupy the Park and appropriate it to their use, then the next protest group espousing a political message would have the right to so occupy another park, say, Moss Park; and the next group the next park, and so on, and so forth. So would result a "tragedy of the commons", another ironic consequence of a movement advocating greater popular empowerment.

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32 *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

33 Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Carswell, 2007) at 38.9(b). I expand on this point in Mayeda, "Between Principle and Pragmatism", above note 1 at 54-55.

34 Most of the residents quoted in the judgment encountered protestors while walking their dogs.

At a more fundamental level, there is something troubling about the balancing approach used in the application of the competing rights paradigm. Protestors and local residents all acknowledged the experience of unease caused by the demonstration. Protestors were uneasy about many important social issues, but primarily about the lack of a public forum where they could voice them. Residents felt this unease and experienced it directly in their confrontations with protestors. Isn't this experience of a common communal life a signal that there is a real issue to be dealt with? Is it effective to deal with this issue by subordinating marginalized views (those of protestors) to those of the majority (the convenience of local residents) as the competing rights paradigm forces us to do? Are there more productive ways of transforming a situation of tension into one of problem-solving rather than confrontation? In my view, pitting dog-walkers against protestors is not a productive way of using a protest as a catalyst for democratic discourse. A different approach to the proportionality analysis under *Oakes* should be adopted. Such an approach would recognize that the interests of an individual or group should not be given the same weight as legally-protected rights. It would take into account the centrality of a given right or interest to the identity of the group asserting it, and it would recognize social protest as an essential part of the deliberative democratic process rather than as a competition between groups. In such a competition, marginalized groups inevitably lose out to majoritarian values.

3) Applying the Competing Rights Paradigm in Civil Law: Injunctions as an Equitable and Statutory Remedy

Public protest is not only dealt with in the *Charter* context; indeed, it is more often dealt with by civil law outside of a constitutional framework. In most cases, protestors are not challenging the constitutionality of state action. Rather, they become subject to state action because the state or a private party initiates a civil action against them, in the context of which they can obtain an interlocutory injunction to restrain protestors pending resolution of the civil action. Such injunctions are backed by the threat of state force should they be disobeyed. Often, the party challenging protestors has no actual intention of continuing with the civil action – the action is begun strategically in order to make injunctive relief possible. In such cases, this party hopes that, having put an end to a protest temporarily, they will in effect prevent it from continuing at all. Such civil suits, brought strategically to prevent public protest, are often called "SLAPP" suits (Strategic Lawsuit Against Public Participation).

Two cases illustrate the application of the competing rights paradigm in the civil law context. The first continues the theme of Occupy protests, this time in Vancouver. The second is illustrated by non-aboriginal protestors at Sharbot Lake, who were protesting uranium exploration on Crown land near their residences and the failure of the Crown and Frontenac Ventures Corporation, a mining company, to fulfill their legal obligation to consult with local First Nations in regard to their exploration activities.

a) *Vancouver (City) v O'Flynn-Magee* – The Occupy Vancouver Protest

In *Vancouver (City) v O'Flynn-Magee*,[35] we observe an indirect application of the competing rights paradigm. The case involved the issuing of an injunction against protestors to require them to remove the structures they had built on occupied lands. As we will see, the test for issuing an injunction to enforce a law presumes that, once the City has demonstrated breach of a law, unless there are strong countervailing factors, the injunction should issue. This presumption is based on the presupposition that the protestors' rights to free speech and association (not to mention their right to housing, to adequate financial security and other rights that motivated the protest) are outweighed by the public interest in state regulation of public space, barring exceptional circumstances. The courts assume that in passing by-laws about the use of public space, public officials have already balanced the interests of various sectors of the public, and so there is little balancing for them to do. This approach is an indirect application of the competing rights paradigm – the court proceeds on the basis that law-makers are best situated to balance competing rights, and it does not question whether the balance itself violates constitutional norms.[36]

The judge in this case, the Associate Chief Justice of the BC Supreme Court, was uncertain about the appropriate legal test to apply in assessing the suitability of an injunction. An injunction can be an equitable remedy, in which case the test across Canada is contained in the case *RJR-MacDonald Inc v Canada (Attorney General)*.[37] Alternatively, it can be a statutory remedy, used when the state seeks to enforce its laws. In the latter case, the British Columbia precedent is *Maple Ridge (District) v Thornhill Aggregates Ltd*.[38]

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35 2011 BCSC 1647 [*Vancouver v O'Flynn Magee*].

36 One might argue, as the judge did in *Vancouver v O'Flynn Magee*, that it is up to the parties to challenge the constitutionality of laws if they disagree with the constitutionality of the balance these laws strike between competing rights. This overlooks the fact that the law for issuing injunctions may itself violate the constitution. In the administrative law context, the Supreme Court of Canada has acknowledged that an administrative decision-making process ought to take into account *Charter* values (*Doré v Barreau du Québec*, 2012 SCC 12). Likewise, I believe that the process used by judges to render their decisions can be more or less supportive of democracy, a fundamental value underlying not only our written constitution but our unwritten common law constitution (on the norms informing this common law constitution, see David Dyzenhaus, "The Deep Structure of *Roncarelli v Duplessis"* (2004) 53 UNBLJ 111).

37 [1994] 1 SCR 311 [*RJR-MacDonald*].

38 (1998) 162 DLR (4th) 203 [*Maple Ridge*]. A similar case in Ontario is *Newcastle Recycling Limited v Clarington (Municipality)* (2005) 204 OAC 389 at para 32.

The test for the statutory remedy is relatively straightforward. First, it places the onus on the public authority to demonstrate a breach of legislation. Once this has been demonstrated, the injunction will be issued unless there are exceptional circumstances, which can include

> . . . the willingness of the defendants to refrain from the unlawful act, the fact there may not be a clear case of "flouting" the law because the defendant has ceased the primary unlawful activity, or the absence of proof that the activity carried on was related to the mischief the statute was designed to address.[39]

In contrast, the test for the equitable remedy has three steps:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.[40]

It is easier for the state to obtain the statutory remedy because it is presumed that the state, in enforcing its laws, is acting in the public intereSt In consequence, when seeking a statutory remedy, there is no need for the Court to consider the balance of convenience or the existence of irreparable harm as is the case with the equitable remedy.[41] Justice MacKenzie concluded that in the case of the Occupy Vancouver protestors, it was not necessary to decide on the appropriate test; regardless of which was applied, she found that an injunction should be ordered.

The equitable remedy leaves more of the balancing to courts, which must determine if the City would suffer irreparable harm and balance this harm against the inconvenience to the protestors. The application of the competing rights paradigm is more overt in such a case than when a party seeks a statutory remedy. In either case, what is being placed in the balance are the rights of a minority – the protestors – and the rights of the majority, as expressed by the public interest embodied in the City's by-law.

As we can see, when the State applies for an equitable injunction or an injunction to enforce a statutory regime, balancing is involved. While this is not a balancing of competing constitutional rights and/or important public

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39 *Vancouver v O'Flynn-Magee*, above note 35 at para 47, referring to *British Columbia (Minister of Environment, Lands & Parks) v Alpha Manufacturing Inc et al* (1997), 150 DLR (4th) 193 (BCCA) at para 32.

40 *RJR-MacDonald*, above note 37 at 334.

41 *Vancouver v O'Flynn-Magee*, above note 35 at paras 27-28.

interests as occurs in the *Charter* context, courts nonetheless balance the protestor's interest in continuing the occupation to assert their constitutional rights against the rights and interests of the applicant seeking the injunction. It is thus a clear application of the competing rights paradigm. Moreover, it is a problematic application of that doctrine, as it overlooks the social significance of protest as part of a dialogical process of deliberative democracy.

b) *Frontenac Ventures Corporation v Ardoch Algonquin First Nation* – The Sharbot Lake Protests

In the previous cases, the interests of a public authority and private individuals are placed in the balance. However, sometimes the competing rights of two private parties are in competition, as is the case with the Sharbot Lake protests. In the cases that emerged from this protest, Frontenac Ventures Corporation (Frontenac), a mining exploration company, had obtained provincial permission to conduct mining exploration activities on Crown land near Sharbot Lake, just north of Kingston, Ontario. Two local First Nations groups, the Ardoch and the Shabot, which had historic land claims to this Crown land, objected to these activities. They combined with local non-aboriginal environmental activists to conduct a protest at one of the exploration sites.

Frontenac began a civil suit against the Ardoch and Shabot, part of the Algonquin First Nation, seeking $77 million in damages. They then used this suit to bring an application for an interlocutory injunction to put an end to the proteSt The Superior Court heard the application *ex parte*, as the Ardoch and Shabot refused to participate in the proceedings until the Crown had fully discharged its obligation to consult in good faith with them in regard to their land claim. Justice Thomson issued the order enjoining the protest, which was subsequently enforced by the Ontario Provincial Police and through contempt of court proceedings, as a result of which a number of local aboriginal residents were sentenced to prison. The order took the form of what is called a "John Doe and Jane Doe" injunction, which applies to all unnamed parties found in violation of it.[42]

A John Doe and Jane Doe injunction is an equitable remedy. As we have seen, the appropriateness of such a remedy depends in part on weighing the rights and interests of protestors against those of a private party such as a natural resource extraction company. While not directly a party, the state is not wholly irrelevant, as it is responsible for enforcing the injunction through sheriffs, local police forces, and contempt of court proceedings. Quasi-

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42 For an overview of this kind of order and problems with it, see Julia Lawn, "The John Doe Injunction in Mass Protest Cases" (1998) 56:1 UT Fac L Rev 101 [Lawn].

criminal penalties are also possible, including fines and imprisonment.[43] Moreover, in the case of natural resource extraction companies, the private party is benefitting from a public resource, be it plants, animals, minerals and so on, to which it has been granted a right of extraction or exploitation by the state.[44] Thus, the state – representing the public interest – is also implicated in this way.

The balancing of competing rights and interests typical of the competing rights paradigm is evident in the Sharbot Lake case. Indeed, in overturning the prison sentences imposed on some of Ardoch and Shabot, the Ontario Court of Appeal made it clear that Courts are involved in balancing private interests against opposing private and public interests. They criticized the Superior Court for issuing the injunction *ex parte* without taking proper account of the aboriginal rights of the Algonquin. Writing for the Court, Laskin J stated:

> I am quick to point out that in this case, the AAFN [Ardoch Algonquin First Nation] did not appeal either the interim or the interlocutory injunctions granted by Thomson J. and Cunningham A.S.C.J.C. It is thus not for this court to address the merits of either order. However, I think it is important to give judicial guidance on the role to be played by the nuanced rule of law described in *Henco* when courts are asked to grant injunctions, the violation of which will result in aboriginal protestors facing civil or criminal contempt proceedings. Where a requested injunction is intended to create "a protest-free zone" for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations. The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it. Good faith on both sides is required in this process.[45] [citations removed]

This is a clear statement that courts issuing injunctions in such cases should be responsive to the competing rights at issue – in this case, aboriginal rights protected under s. 35 of the *Constitution Act, 1982*, the public interest in developing its natural resources, and the private interest in exploiting them. Indeed, one of the criticisms brought against John and Jane Doe injunctions

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43 Graham Mayeda, "Access to Justice: The Impact of Injunctions, Contempt of Court Proceedings, and Costs Awards on Environmental Protestors and First Nations" (2010) 6:2 JSDLP 143.

44 Chris Tollefson, "When the 'Public Interest' Loses: The Liability of Public Interest Litigants for Adverse Costs Awards" (1995) 29 UBC L Rev 303 at 316.

45 *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534 at paras 47-48.

issued *ex parte* is that they do not properly allow the specific rights and interests of defendants to be represented in Court for consideration by it when issuing the injunction.[46] Even in the case of a dispute between private parties, courts frame the issue using the competing rights paradigm.

D. The Social Rights Paradigm – Transformative Constitutionalism and Deliberative Democracy

I wish to contrast the traditional competing rights model used in the cases discussed in the previous section with the social rights approach. The social rights paradigm is often construed narrowly to refer to an expansion of human rights from civil and political rights such as the right to freedom of expression and assembly to include socio-economic rights such as the right to an adequate standard of living, to housing, to access to adequate health care, and the right to education, among others. However, a broader interpretation of social rights sees the whole panoply of human rights as essential elements in the pursuit of a healthy and inclusive society – what I have called a healthy "social fabric."

A very comprehensive consideration of the principled justification of a social rights approach has been undertaken by Sandra Liebenberg.[47] She locates the social rights movement within an approach to constitutional rights that she identifies as "transformative constitutionalism,"[48] and which is based

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46 For these criticisms, see Lawn, above note 42 at 124-125.

47 Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Claremont: Juta, 2010) [Liebenberg]. For other articulations, see David Robertson, "Thick Constitutional Readings: When Classic Distinctions are Irrelevant" (2007) 35 Ga J Int'l & Comp L 277; Dikgang Moseneke, "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" (2002) 18 SAJHR 309; Heinz Klug, "Five Years On: How Relevant is the Constitution to the New South Africa?" (2001-2002) 26 Vt L Rev 803; Cathi Albertyn & Beth Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 SAJHR 248.

48 This idea is articulated in the work of Karl Klare, who describes transformative constitutionalism as follows:

> [Transformative constitutionalism is a] long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.

(Karl Klare "Legal culture and transformative constitutionalism," (1998) 14 SAJHR 146 at 150).

on the jurisprudence of the Constitutional Court of South Africa.[49] In her view, the underlying norms of this approach are dictated by the need to ensure the full participation of all members of a society in the process of transforming it. These norms can be identified with a broad conception of human rights, which includes socio-economic rights. These rights, she asserts, are essential for ensuring that everyone has a voice in the articulation of social goals and the way to achieve them.

In addition to identifying the rights that must be in place in order for everyone to have access to the democratic deliberation regarding the process of social transformation, Liebenberg identifies a procedure for judgment that legal actors – especially judges – must employ in order to ensure that legal norms reflect the constantly changing composition of society and its evolving goals. In Liebenberg's words, legal reasoning must reflect the fact that the law is an "open-ended process of ongoing dialogue and contestation in the quest for a more just society."[50] To do so, legal rights must be interpreted differently than in the traditional competing rights approach. First, these rights are not static – through democratic deliberation, society is constantly interpreting and reinterpreting them to reflect current social conditions. Second, the process of giving meaning to legal rights is responsive both to the context in which social conflict arises and to the identity of those in conflict.[51] In other words, legal rights are truly social rights – rights defined in and through a dynamic process of social change and social locatedness.

To reflect this concept of legal rights, the process of legal reasoning must be reconceived. Legal reasoning and legal judgment must be seen as part of the process of transformative constitutionalism – i.e., part of a deliberative democratic process.[52] As such, legal judgment must be open to and permeated by the broader democratic deliberation that exists in a healthy democratic society.

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49 For example, in *S v Makwanyane*, [1995] ZACC 3 at para 262; *Du Plessis v De* Klerk [1996] ZACC 10 at para 157; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15 at paras 73-74; *Minister of Finance v Van Heerden* [2004] ZACC 3 at para 142; *City of Johannesburg v Rand Properties (Pty) Ltd,* [2006] (6) BCLR 728 (W) at paras 51-52; *Rates Action Group v City of Cape* Town, [2004] (12) BCLR 1328 (C) at para 100; *Treatment Action Campaign (TAC) v Minister of Health*, [2002] (4) BCLR 356 (T); *Government of the Republic of South Africa v Grootboom*, [2000] (11) BCLR 1169 (CC). Many of these are cited in Liebenberg, above note 47 at 25.

50 Liebenberg, above note 47 at 29.

51 *Ibid* at 47-48.

52 On the compatibility of social rights with democracy, see Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory" in Malcolm Lanford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 3 at 32-33.

This process of deliberation reflects the complexity and diversity of the social fabric. There are no readily identifiable universal social goals. Instead, as Iris Marion Young points out, democratic deliberation must reflect the differences redolent in society. Liebenberg relies on Young's view, which she explains as follows:

> Young points out that an emphasis on reasoned, dispassionate deliberation, and the assumption of a unity of ends, values and interests among participants, particularly under circumstances of social inequality, 'sometimes excludes the expression of some needs, interests, and suffering of injustice, because these cannot be voiced within the operative premises and frameworks' (Young, *Inclusion and Democracy*, 37). She thus argues for a model of deliberative democracy which does not assume, or even aim at, a commonality of ends or interests, but seeks the more modest goal of reaching 'situation-specific agreements' which are always 'provisional and renewable' (ibid 43).[53]

From this perspective, courts must reflect the complex patterns of the social fabric by being responsive to the various sources of marginalization in society. As such they must adopt an "open-textured" approach to interpreting rights that is receptive to social inequality.[54] Liebenberg identifies the role of the court as follows:

> First, it (*sic*) can provide a forum where the impact of legislation and policies on the lives of the poor receives serious and reasoned consideration in the light of the values and commitments of the Constitution. Second, it can facilitate meaningful participation by civil society and communities in the formulation and implementation of social programmes by requiring such participation as a component of the relevant rights, and by requiring transparency in the formulation of social policies and programmes. Third, it can develop the normative basis of those parts of our legal system that regulate traditionally private relations in ways that protect and facilitate poor people's access to socio-economic resources. Finally, it can prod our polity as a whole to be more responsive to systemic socio-economic inequalities and deprivations.[55]

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53 *Ibid*, footnote 37 at 31.

54 Liebenberg, above note 47, explains the importance of this "open-textured approach":

> The interpretation of open-textured human rights norms provides particular scope for developing interpretations of rights which are as responsive as possible to the disjuncture between lived experiences of poverty and deep power imbalances and the constitutional ideal of social justice. (at 34)

55 *Ibid* at 37-38.

What can litigants hope for from courts? According to Liebenberg, they can expect remedies that will align legal norms with the concrete reality of their lived experience: "The significance of the courts' remedial jurisdiction is that successful litigants can expect some concrete measures aimed at aligning social realities with constitutional rights and values".[56]

The social rights approach as articulated by Liebenberg identifies legal conflicts as contributing to an ongoing process of articulating social norms through democratic deliberation. A constitution provides certain basic rights, but to take advantage of these rights, the full panoply of socio-economic rights must be recognized and realized as the preconditions of meaningful participation in transformative democratic deliberation.

1) Applying the social rights paradigm to social protest

The social rights approach can be extremely useful in reimagining the law's response to social action. However, I suggest that Liebenberg's articulation of the social rights paradigm within the context of transformative constitutionalism must be adapted in order to apply to a different form for democratic deliberation – social proteSt

According to the competing rights model, social conflict is conceived as a conflict between individual rights holders (or holders of group rights), and it can be resolved through a dialogue between rights holders, which often takes the form of a balancing of competing rights and interests. According to the social rights model, on the other hand, the law should contextualize conflicts and not be bound by formalistic interpretation of rights. Moreover, the law must facilitate full participation in society by guaranteeing and actualizing a full range of socio-economic rights.[57] To achieve this goal, rights must be interpreted to recognize the social reality of the marginalized, which is constantly changing, and legal remedies should be aimed at aligning these realities with an interpretation of constitutional norms based on the inclusion of previously marginalized voices in the process of deliberative democracy.

For the social rights approach to be useful in creating the legal norms and institutions for dealing with social protest, it must recognize what the social phenomenon of a protest is. In Section II, I examined the sociological and political role of social protest as an expression of democratic dialogue. This concept of social protest was in turn analyzed as a *social phenomenon* in order to understand its underlying normative content, which in turn can inform the framework of legal norms that should apply to structure it.

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56 *Ibid* at 66.

57 For a good overview of the role of social rights as tools for challenging "structural disadvantage and social exclusion," see Martha Jackman & Bruce Porter, "International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection", Working Paper, (Social Rights Advocacy Centre, September 2011) at 4, online: CURA http://socialrightscura.ca.

A truly social approach to law must integrate the social fully – i.e., acknowledge that the social is a dimension of our experience of togetherness with others. This experience demands that we take responsibility for the suffering others, seek to understand this suffering in the context in which it arises and evaluate it in social context. When making a decision about how to react to the situation, a social rights approach should demand that we act in a way that is responsive to the experience of the other and to all those who are in similar situations. .

Liebenberg has admirably articulated the role of courts in resolving conflicts of rights when participants in the conflict have chosen the courts as their deliberative democratic forum. However, to understand how the law should deal with social protest, in which participants have chosen a different public forum than the courts, one must integrate what social protest expresses more deeply into the social rights approach. As I have explained, social protest expresses a tear in the social fabric, and the normative response is a recognition of the need to take responsible for this tear.

To truly take responsibility for what is expressed in social protest, we must use our social experience as the touchstone of our acts. Because experience is necessarily circumstantial and situational, just outcomes cannot be determined beforehand by a legal principle alone. Instead, a social rights approach to social protest must take into account the situational factors that have brought about the dissatisfaction expressed in the protest, consider the probable effects of a proposed solution on all those likely to be affected by it, and choose a solution that can be justified to those affected based on the circumstances observed.

2) A New Social Rights Approach to the Law of Social Protest

I have articulated from a theoretical perspective what the social phenomenon of protest represents and how a phenomenological approach can enrich Liebenberg's social rights approach by enabling it to respond to this phenomenon. I now wish to turn to the concrete ways in which the social rights paradigm will change the practice of law. In doing so, I hope to reflect the benefits of the phenomenological approach to social rights.

In the previous section and in Section B, I explained that a phenomenological approach to social rights recognizes the way that we experience others in society. Most of us immediately jump from news about the marginalization or oppression of others into pre-determined assessments of whether these claims are right or wrong. Indeed, this is the approach on which the competing rights model is based – the presumption of an opposition between competing claims and the presumption of a need to accept one side and reject the other. When we examine media reports, public protest often elicits this kind of polarizing response.

However, underlying these ideological responses are other experiences that are more fundamental. When we witness public protest first- or second-hand, we immediately understand that what is being expressed is dissatisfaction with social conditions. We might have different views about

whether this dissatisfaction is warranted. We might have different views about its source. But we all experience the expression of dissatisfaction. In my interpretation of the social rights approach to law, one must begin with what is communicated by social phenomena such as public proteSt Such an approach resists immediately jumping to an assessment of whether those communicating are right or wrong. It delays judgment in an effort to give voice to what is being expressed. It facilitates transmission of expressions of marginalization and oppression into a system of democratic deliberation. It is for this reason that those advocating social rights promote access to justice, as access to the legal system is a major conduit for ideas to enter into the public forum. It is also for this reason that the conduct of justice must treat all with equal respect, even if this requires differential treatment. Only in this way can those who are expressing marginalization and oppression be truly given the voice they need to give their input and allow a public discussion about the merits of their claims.

a) How to Balance Rights and Interests within the Social Rights Paradigm

In practice, a social rights approach in law requires a shift away from the traditional competing rights approach, instead adopting a contextualized process of decision-making that recognizes the social function of conflict that openly acknowledges competing positions as part of an integrated process of democratic decision-making. Courts should try as much as possible to understand rights-based challenges as contributions to improving and creating a just society, rather than as claims that are opposed to state and public interests. Rights-based challenges are part of the democratic process of ensuring the legitimacy of the law; they are not necessarily corrosive to the public intereSt

In regard to the constitutional evaluation of the enforcement of by-laws to suppress free speech, as occurred in the *Batty* case, the approach to social rights that I have articulated recommends a different approach from that taken by the trial judge. The potential contribution of social protest to democratic decision-making must be taken seriously. In consequence, when applying the *Oakes* test to establish whether the rights-infringing law is justifiable in a free and democratic society the search for a pressing and substantial objective must involve a probing inquiry. In the *Batty* case, the Court found that the objective of the City of Toronto in passing its by-laws was to "enabl[e] all to share a common resource and ensur[e] that the uses of the parks will have a minimal adverse impact on the quiet enjoyment of surrounding residential lands." This goal was found to be pressing and substantial. In my view, it should be a rare case in which a state interest such as this will be considered pressing and substantial enough to warrant over-riding a constitutional right in a situation such as a public protest that not only

expresses a social injustice, but contributes to the democratic debate about government and private sector policies.[58]

b) A New Approach to Judgment: Sensitivity to Context and a Principled Approach

Courts should take an approach to adjudication that is more sensitive to the context in which a dispute arises and that is more responsive to those affected by the judgment. To do so, they may have to alter some legal rules. For instance, the rules of evidence must facilitate rather than hinder the introduction of social science evidence and other kinds of evidence that illustrate the social context in which a decision is to be rendered.[59] Courts have already greatly expanded the role of social context evidence in adjudication, so further developments in this regard are not radical.

As well, judges may need to adopt a different approach to judgment. The role of the judge will be less formalistic, instead requiring the judge to place herself in the position of those who will be affected by her decision in order render a just decision.[60] Moreover, reasons for judgment will have to be based on principle rather than formalism, meaning that they will have to be responsive to the arguments that parties and those affected by the judgment would consider reasonable and coherent.[61]

c) Adapting the Civil Law of Injunctions and Contempt of Court to Reflect a Social Justice Approach

In addition to changes in the rules of evidence and a more principled and context-sensitive approach to judgment, there must also be changes in the way that the legal system deploys state-sponsored force. I will not address this in the context of the criminal law response to social protest, but instead return to the issue of civil law approaches to resolving disputes arising from social proteSt The legal framework for social protest should have the following characteristics:

1. Take protests seriously as part of the democratic process and create public mechanisms that foster and promote them as important contributions to the democratic process;

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58 For an elaboration of this view, see Mayeda, "Between Principle and Pragmatism," above note 1.

59 See Graham Mayeda, "Taking Notice of Equality: Judicial Notice and Expert Evidence in Trials Involving Equality-Seeking Groups" (2009) 6:2 JL & Equality 201.

60 Mayeda, "Uncommonly Common" above note 1.

61 Mayeda, "Between Principle and Pragmatism," above note 1.

2. Adopt laws that enhance democratic process by:

    a. Creating a legislative framework for negotiating responses to social protest;

    b. Modifying the law of injunctions to discourage SLAPP suits and limit John/Jane Doe injunctions;

    c. Changing the law of contempt of court, which is an outdated remedy in the context of public proteSt

A social rights approach to social protest would include *democratic* methods for determining whether certain uses of public space are in the public intereSt At the very least, there should be some formalized way for the public to meaningfully influence the state's decisions to enforce by-laws that restrict public proteSt Perhaps an ombudsperson would be useful as an intermediary between protestors and the state. Maybe certain public spaces can be arranged to facilitate peaceful public protest rather than to hamper it. At any rate, more creative legislative schemes are possible that facilitate dialogue and negotiations between the state and the public seeking to use a public space for democratic purposes. We must recognize that public protest is evidence of a dynamic and engaged public.

Injunctions are an unwieldy tool for brokering democratic deliberation, as their enforcement necessarily involves the use of state force or the threat of it. A different approach could be taken. Perhaps courts should be able to require the state to devote resources to mediating disputes, working together with protestors to find meaningful solutions to ongoing problems. Anti-SLAPP suit legislation – legislation that would prevent the strategic use of litigation by private and public bodies to prevent democratic public protest – would also be useful in order to prevent private interests from seeking injunctions that quell public democratic deliberation for private ends. The existence of such legislation would give protestors some comfort that when they arrive in court, they have a legal basis for challenging the legitimacy of law suits begun against them.

Courts can also play a role in fostering a social rights approach by modifying the law of injunctions and contempt of court in order to adapt it to the modern realities of democratic public proteSt Some appellate courts are already supportive of such a move, as demonstrated by their criticism of and hesitation in applying the law on injunctions in cases of public proteSt

For instance, in *R v Bridges*,[62] Southin J of the British Columbia Court of Appeal points out that it may be inappropriate to apply the law of injunctions, developed in the context of labour disputes in a time when courts were decidedly anti-union, to modern social protests, which are increasingly

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62 *R v Bridges* (1990), 78 DLR (4th) 529 at 541-42 (BC CA) [*Bridges*].

recognized today as an important contribution to the democratic process. She says of the order issued by the lower court in *Bridges*,

> It is obvious to me that the terms of this order were taken from precedents developed during the course of labour disputes. There is much to be said for the proposition that such precedents should be put permanently away and the court should give, in these cases where the citizens take to the streets and an injunction is sought, a fresh consideration to the extent to which the court should go. That consideration should, in every case, depend on the precise nature of the dispute, the precise conduct in issue and so on.[63]

This contextual approach to equitable remedies such as injunctions is supported by *dicta* from the Supreme Court of Canada. In *Pro Swing Inc v Elta Golf Inc*,[64] Deschamps J, writing for the majority, emphasized that equitable remedies must be adapted to social realities.[65]

The overall approach to equitable remedies must be flexible and responsive to context. It is for this reason that I think that the *RJR-MacDonald* test for equitable injunctions applied in the *Vancouver v O'Flynn Magee* case is not well-suited to the context of most public proteSt In particular, it does not take in to account the role of public protest in democratic debate, and more specifically, it does not require the court issuing the injunction to consider whether the parties have sought to negotiate a solution that respects the contribution of the protest to democracy.

There are precedents for such a contextual approach in cases dealing with protests by Canada's indigenous peoples. These cases require courts to take a contextual approach to the rule of law and to ensure that the government is respecting its constitutional obligation to consult indigenous people in good faith.[66] I suggest that a similar approach should be taken in all public protests – the state should be required to negotiate with protestors to find a solution that enhances democratic participation and takes into account other interests engaged by the protest such as access to public space. Indeed, the requirement of consultation in aboriginal law may be a good model for public protests generally. On this approach, governments would be obliged to consult with protestors, accommodate them where they are contributing to the public good, and implement the outcome of these consultations. The fulfillment of this duty to consult would in turn be an important element in the assessment of whether an equitable injunction ought to be issued to stop the proteSt

Some changes could also be made to the rules on injunctions when the latter are used to enforce by-laws. As discussed above, the presumption of the courts is that law-makers have already balanced competing interests when

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63 *Ibid* at 542.

64 2006 SCC 52.

65 *Ibid* at para 22.

66 *Ibid* at paras 140-42.

creating by-laws for access to public spaces. This overlooks the iterative nature of democratic dialogue. As Seyla Benhabib has explained in many of her writings, democratic participation involves constantly revisiting norms as society and social context changes.[67] A law is made that is thought to cover all relevant contingencies, but then a situation arises that was not foreseen or not adequately debated, and views differ about how to apply the law to that situation.

To apply this idea in context, while it might be true that municipal councils have considered many of the competing interests in establishing by-laws relating to public spaces, emerging circumstances such as the Occupy protests may not have been considered – or may not have been adequately considered, with full consultation of affected parties. In recognition of the fact that a public protest might be a democratic iteration – a demand for democratic discussion about the application of a law in an emergent social context – courts should not automatically grant injunctions to enforce by-laws in cases of social proteSt In consequence, the presumption that exists in cases such as *Maple Ridge*[68] that an injunction should be granted absent exigent circumstances should be re-examined by courts in cases of legitimate public proteSt

E. Conclusion – Reconciling Dog-Walkers and Protestors by Means of the Social Rights Paradigm

Public protest is not anti-social behaviour. It is not aimed at preventing dog-owners from enjoying parks. Rather, it is an important social phenomenon by means of which individuals and groups seek a response to social harms such as marginalizaton and exclusion. An application of the phenomenological approach to social rights that I have articulated can help us to recognize this and give this recognition legal effect. Indeed, the recognition is inherent in our very social existence. When we read about public protests, watch recordings of protestors' activities, and listen to reports of their doings, our natural response is one of unease. This unease is a sort of responsibility – we understand that the actions of our fellow community members are asking us to respond to what they are expressing. Naturally, each one of us, based on his or her past experiences and tendencies, will wish to respond in different ways – anger and resentment, anger and sympathy, and so on. Each of us will assess the legitimacy of the claim that protestors make. But none of us ignores what is being expressed.

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67 Benhabib defines democratic iterations as "linguistic, legal, cultural, and political repetitions-in-transformation, invocations that are also revocations. They not only change established understandings but also transform what passes as the valid or established view of an authoritative precedent" (Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006) at 48).

68 *Maple Ridge* above note 38.

A legal system that is true to the nature of our social existence would facilitate peaceful public protest, because it is part of the process of democratic deliberation and decision-making. A social rights approach must not exclude protestors or cast them in opposition to the rest of the public. To do so would be to fail to acknowledge the claim others are making against the justice of our social order. Rather, a social rights approach to law must be inclusive – it should seek to promote democratic input and present it to the public to assess as a means of testing the legitimacy of the existing order. Such a legal system requires legal norms and institutions that adequately distribute justice – i.e., institutions that ensure access to legal means of dispute resolution and the process of law-making. It also requires substantive justice – the law must recognize the substantive claims to exclusion being brought to light by protestors and create legal mechanisms for taking responsibility for them rather than creating legally-justifiable excuses for ignoring our responsibilities. In other words, the law must be just in the sense of responsive to claims of need of all kinds.

The returns of a social rights approach to the law of social protest would be real. The competing rights paradigm that seeks to place different social groups or individuals in opposition to each other can be exchanged for a paradigm that gives voice to both sides, calls on law-makers and judges to place themselves in the positions of all the parties when making law or enforcing it, and requires these decision-makers to render their decisions in language that is responsive to all parties, even if it must ultimately vindicate one against another. With an eye to practice, I have explained how the proportionality analysis conducted under s. 1 of the *Charter* can be modified when dealing with public protest in the constitutional context. I have also explored ways in which civil law rules such as the law of injunctions and contempt of court can be changed to channel public protest – an important democratic process – into the broader process of public deliberation that involves both law-makers and courts.

The social rights approach to law may well give the appearance of a less stable society. But in essence, it recognizes the transformative role of public protest in a democratic state. In the long run, by acknowledging marginalization and oppression and confronting it head on, the social rights approach will help us all to understand each other better and encourage us to engage in the iterative processes of a democratic society. By renewing faith in democracy, we can avoid the divisive approaches that have become so common in our political culture, and that are exacerbated by our legal culture.