University of Calgary

PRISM Repository https://prism.ucalgary.ca

The Vault Open Theses and Dissertations

2012-07-13

Shifting the status quo of freedom: civil libertarians and the supreme court of canada

Newman, Andrew

Newman, A. (2012). Shifting the status quo of freedom: civil libertarians and the supreme court of canada (Master's thesis, University of Calgary, Calgary, Canada). Retrieved from https://prism.ucalgary.ca. doi:10.11575/PRISM/27776

http://hdl.handle.net/11023/117

Downloaded from PRISM Repository, University of Calgary

UNIVERSITY OF CALGARY

Shifting the Status Quo of Freedom:

Civil Libertarians and the Supreme Court of Canada

by

Andrew Robert Newman

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE

DEGREE OF MASTER OF ARTS

DEPARTMENT OF POLITICAL SCIENCE

CALGARY, ALBERTA

JUNE 2012

© Andrew Robert Newman 2012

ABSTRACT

This study examines the extent to which two civil libertarian interveners, the Canadian Civil Liberties Association (CCLA) and the British Columbia Civil Liberties Association (BCCLA), have been successful at achieving favourable policy outcomes through Supreme Court of Canada decisions. Cases directly and indirectly implicating fundamental freedoms under section 2 of the Charter of Rights were the focal point. The selected timeframe for this study was 1999-2009 and a total of thirteen cases in which the CCLA and/or the BCCLA intervened constitute the data set. Four of the cases invoke Charter section 2(a) ("freedom of religion") and nine invoke Charter section 2(b) ("freedom of expression)." Methodologies highlighting the legal issues at trial and those that considered how the litigation will influence a policy status quo were synthesized to accomplish this goal. Analysis of these cases reveals that civil libertarians were more likely to emerge victorious in common law as opposed to constitutional cases. Constraints imposed by "reasonable limits" under section 1 of the Charter and the presence of governments as direct parties proved to be a barrier to the success of civil libertarians in court. This explanation offered complements a finding in the literature that governments are the most successful "Repeat Player" in court.

ACKNOWLEDGEMENTS

I am unequivocally grateful to two scholars who have made this thesis a reality. First and foremost thank you to my supervisor, Dr. Rainer Knopff not only for his insurmountable patience and but also for his uncanny ability as a mentor. Dr. Knopff: it was a great honour to have you as my supervisor. Your academic wisdom has strengthened my ability as a writer and has given me clarity about my own future. I am greatly indebted to your service. To Dr. Troy Riddell: thank you ever so much for introducing me to the study of law and politics and, more importantly, encouraging me to follow my research interests at the U of C. My intellectual ability would have greatly suffered had you not pushed my political science education further.

The love and support of my family gave me the privilege to pursue my education at a graduate level. The emotional (and let's face it, fiscal) safety net graciously provided to me by my father, William and my mother, Nancy, speaks not only to their selflessness as parents but also to their altruistic nature as people. Thank you, Mom and Dad. To my brother, Chris: thanks, guy. A big thank you also to my Uncle Gary for the annual spring visits and to my Uncle Allan, Aunt Ann, Aunt Patty and little cousin Daniel. And yes, thank you, Hobbes.

Thank you to the Department of Political Science Faculty for facilitating an unparalleled environment of intellectual stimulation and financial support. Drs. David Stewart, Anthony Sayers, Thomas Flanagan, Gavin Cameron, Mark Dickerson, Keith Archer, Antonio Franceschet and Andrew Banfield: your commitment to your research and students have made you leaders of political science scholarship in this country (and in the southern hemisphere for that matter). It was humbling to say that I have either been taught or worked with any of you but I was lucky enough to say that I knew all of you on a professional level. Judi, Bonnie and Ella: this Department would be a very different place without your tireless efforts.

This thesis would not be possible without my fellow graduate student friends and colleagues. Colin (C-Mac), Katrine, Paul, Adam, Janine, Mateusz, Dave, Tim, Mark, Rob, David, Meredith, Tammy (Tam Lam), Kelly, Julie, Evan, Mitch, Geoff, Brett and Chance: your collective and undying passion for the study of politics continuously inspired me throughout my two and a half year stint at the U of C. Whether it was the simple favour of lending a book or the more arduous task of congregating to watch deplorable cinema, I truly appreciated everything the grad student community did for me. I wish all of you the very best in your respectively bright futures, just so long as they do not involve puppets (see: Fairie and D'Souza 2008).

There is one person, amongst many, who deserves particular adieu as our bond as office mates extended far beyond the reaches of the seventh floor. Without his unconditional companionship, sense of adventure, relentless optimism and words of wisdom when times were at their absolute toughest, I would not have been able to look back at my time in Calgary so fondly. Sean Hebert: you were the wind beneath my wings, bro. I cannot thank you enough. I'm sorry this isn't Comedy Central, but it will have to do. See you in HK.

For Hugh McDee, Steez T-Dot '86, Dave-o, Dan, Morgoon, Aid, Eric (Joby), Mike, Adam, Jamie, Christina P., Willy B., Bushey, Michelle P., Whit, Xtina, Amanda, Jlyn, Torith, Heather, J.J., Ian, Jame-o, Matty, Tania, Mr. Martin, Hunter, Becky, Stevie K, Nick, Sina T., Bryce (Bruce), Mike G., Greggie, Hamid (aka Sina), Evy P., Chris B. (the Beast), Brandi, Mike V., Jen (Gunner), Brittoria, Uncle Dave, Scotty, Ron Dodger, P.B. Ribbon, B-Wong and Chuck Clarke Nolan: each of your friendships guided me through this process. The chats, laughs and adventures we shared over the last two and a half years were priceless experiences I will forever hold dearly, no matter how reckless they turned out to be.

I came to this school for a good time, and as it turned out, a long time as well. But thank you, Calgary, Alberta. I learned ever so much about myself during my residency in this fair city and had a great time indeed. Forever I will remain strong and free.

Thank you. And yes, there's still a thesis after all this.

Go Leafs Go.

TABLE OF CONTENTS

ABSTRACT…………………………………………………………………… ii
ACKNOWLEDGEMENTS………………………………………………… iii
TABLE OF CONTENTS…………………………………………………… v
LIST OF TABLES……………………………………………………….. vii
LIST OF ABBREVIATIONS………………………………………………. viii

CHAPTER 1: INTRODUCTION…..…………………………………………... 1
1.1 Controversy and the Courts… ……………………………………… 1
1.2 Canadian Civil Liberties Groups: A Snapshot ……………………... 6
1.3 Plan of the Study…………………………………………………. 9

CHAPTER 2: INTERESTS GROUPS, THE COURTS AND MEASURING SUCCESS……………………………………………………. 11
2.1 Introduction……………………………………………………. 11
2.2 Legal Mobilization as a Means for Policy Reform…………………. 12
2.3 Interest Groups Appearing Before the Courts………………………. 15
2.4 Repeat Players 16
2.5 Strategies of Legal Mobilization……………………………………. 18
2.5.1 Law Review Lobbying……………………………………. 18
2.5.2 Direct Party Litigation…………………………………….. 20
2.5.3 Test Case Sponsorship…………………………………….. 20
2.5.4 Intervening………………………………………………… 23
2.6 Defining Success…………………………………………………. 25

CHAPTER 3: FREEDOM OF RELIGION…………………………………….. 34
3.1 Introduction……………………………………………………. 34
3.2 Direct and Indirect Charter Application…………………………….. 35
3.3 *Trinity Western University v. British Columbia College of Teachers* (2001) ……………………………..………………………… . 38
3.4 *Chamberlain v. Surrey School District No. 36* (2002)……………… 41
3.5. *Multani v. Commission scholaire de Marguerite-Bourgeoys* (2006) 46
3.6 *Alberta v. Hutterian Brethren* (2009)………………………………. 52
3.7 Conclusion……………………………………………………….. 57

CHAPTER 4: FREEDOM OF EXPRESSION………………………………….. 61
4.1 Introduction……………………………………………………….. 61
4.2 Charter Values Cases………………………………………………… 63

4.2.1 *RWDSU Local 558 v. Pepsi-Cola Beverages (West) Ltd.* (2002)……………………………………………………….. 63
4.2.2 *WIC Radio Ltd. v. Simpson* (2008)…………………………. 67
4.2.3 *Grant v. Torstar Corp.* (2009) and *Quan v. Cusson* (2009)... 70
4.2.4 Charter Values Summary…………………………………… 77
4.3 Direct Charter Application……………………………………………. 78
4.3.1 *UFCW Local 1518 v. Kmart Canada Ltd* (1999)…………… 78
4.3.2 *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (2000)………………………………… 82
4.3.3 *R v. Sharpe* (2001)………………………………………….. 87
4.3.4 *R v. Bryan* (2007)…………………………………………… 90
4.3.5 *Greater Vancouver Transit Authority v. Canadian Federation of Students* (2009)…………………... 93
4.3.6 Public Litigation Summary…………………………………. 98
4.4 Conclusion……………………………………………………………….. 99

CHAPTER 5: CONCLUSIONS AND STEPS FOR FURTHER RESEARCH….. 101

CASES AND FACTUMS CITED………………………………………………… 108

WORKS CITED…………………………………………………………………... 112

LIST OF TABLES

Table 3.1 BCCLA and CCLA Intervention in *Trinity Western University v. British Columbia College of Teachers* (2001)…………………………………………………..41

Table 3.2 BCCLA and CCLA Intervention in *Chamberlain v. Surrey School District No. 36* (2009)…………………………………………………………………...46

Table 3.3 CCLA Intervention in *Multani v. Commission scolaire Marguerite-Bourgeoys* (2006)…………………………………………………………..52

Table 3.4 CCLA Intervention in *Alberta v. Hutterian Brethren* (2009)…………………...57

Table 3.5 Total BCCLA and CCLA Section 2(a) – Freedom of Religion Interventions (1999-2009)……………………………………………………………….58

Table 4.1 Freedom of Expression Cases by Charter Application, BCCLA/CCLA Involvement (1999-2009)………………………………………………...63

Table 4.2 CCLA Intervention in *R.W.D.S.U. Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* (2002)……………………………………...66

Table 4.3 BCCLA and CCLA Intervention in *WIC Radio Ltd. v. Simpson* (2008)………..70

Table 4.4 CCLA Intervention in *Grant v. Torstar Corp.* (2009) and *Quan v. Cusson* (2009)…………………………………………………………………...76

Table 4.5 Total BCCLA and CCLA Section 2(b) – Freedom of Expression – Charter Values Litigation (1999-2009)…………………………………………………77

Table 4.6 CCLA Intervention in *UFCW Local 1518 v. Kmart Canada Ltd* (1999)……….81

Table 4.7 CCLA Intervention, BCCLA Direct Sponsorship of *Little Sisters Book and Art Emporium* (2000)……………………………………………...86

Table 4.8 BCCLA and CCLA Intervention in *R v. Sharpe* (2001)………………………...90

Table 4.9 CCLA Intervention in *R v. Bryan* (2007)……………………………………..93

Table 4.10 BCCLA Intervention in *Canadian Federation of Students v. Greater Vancouver Transit Authority* (2009)……………………………………………...97

Table 4.11 Total BCCLA and CCLA Section 2(b) - Freedom of Expression – Public Litigation (1999-2009)…………………………………………………………..…..98

LIST OF ABBREVIATIONS

ACLU	-	American Civil Liberties Union
BCCLA	-	British Columbia Civil Liberties Association
BCCT	-	British Columbia College of Teachers
CACSW	-	Canadian Advisory Council on the Status of Women
CBA	-	Canadian Bar Association
CBSA	-	Canadian Border Services Agency
CCLA	-	Canadian Civil Liberties Association
CFS	-	Canadian Federation of Students
CLC	-	Canadian Labour Congress
EFC	-	Evangelical Fellowship of Canada
LEAF	-	Women's Legal Education and Action Fund
NAACP	-	National Association for the Advancement of Colored People
NCC	-	National Citizens' Coalition
OS	-	"One-Shot" (or "One-Shotter")
PSQ	-	Policy Status Quo
RP	-	Repeat Player
RWDSU	-	Retail, Wholesale and Department Store Union
SCC	-	Supreme Court of Canada
TWU	-	Trinity Western University
UFCW	-	United Food and Commercial Workers

CHAPTER 1 – INTRODUCTION

1.1 – Controversy and the Courts

In 1995, John Robin Sharpe, a retired Vancouver city planner, was criminally charged with the possession of child pornography. Upon Sharpe's re-entry into Canada from the United States, Canadian Customs officials found undeveloped film and nude pictures of young boys in sexually provocative positions to be in his possession. Sharpe also had in his possession: "computer diskettes containing a collection of self-authored 'Boyabuse' stories – among them, 'The Spanking' and 'Suck It: A Devotee's Lament' – many of which were violent and sexually explicit" (Sauvageau, Schneiderman and Taras, 2006: 173). After seizing from his apartment an additional four hundred photographs of boys displaying their genital and anal regions, the RCMP charged Sharpe with illegal possession of child pornography under s.163.1 (4) of the *Criminal Code* and for the possession for the purposes of distribution of sale under s.163.1(3) of the *Code* (*R v. Sharpe,* 2001).[1] Refusing to accept the charges against him, Sharpe took it upon himself to challenge the constitutionality of the s.163.1(4) prohibition of possession of child pornography.

The Supreme Court of British Columbia, the trial court in this instance, agreed with him, ruling that: "the prohibition of the simple possession of child pornography as defined

[1] As stated in s.163.1(1) of the *Criminal Code of Canada,* the definition of "child pornography" incorporates: "visual representations that show a person who is or is depicted as under the age of 18 years and is engaged in or is depicted as engaged in explicit sexual activity and visual representations the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of 18 years" (*Sharpe,* 2001: para 7). This definition of child pornography also includes: "visual representations and written material that advocates or counsels sexual activity with a person under the age of 18 years that would be an offence under s.163.1(4) the *Code"* (*Sharpe,* 2001: para. 7).

under s.163.1 of the *Code* was not justifiable in a free and democratic society" (*Sharpe,* 2001: para. 13). The trial court's ruling was reaffirmed on the case's first appeal. When it reached its final appeal in the Supreme Court of Canada, however, the country's nine highest ranking judges interpreted Sharpe's defence in a slightly different manner.

Ruling on behalf of the majority, Chief Justice Beverley McLachlin overturned the lower courts' ruling and remitted the charges for trial. Although Chief Justice McLachlin found that the challenged provisions of the *Code* did violate guarantees of freedom of expression, the violation of Mr. Sharpe's Charter section 2(b) rights was proportional to the government objective of protecting children from sexual exploitation. Within their analysis, however, the Court ascertained that two provisions of the *Code* were too broad. The two constitutionally troublesome provisions were: 1) the prohibitions against written and visual representations that were created by the accused for personal use, and 2) visual recordings created by or depicting the accused that do not depict unlawful sexual activity and are held by the accused for exclusively for private use (*Sharpe,* 2001: para. 100). The Supreme Court concluded that the previous should not be considered child pornography, with the obvious remedy being to exclude these two provisions from the *Code* without nullifying the law altogether (*Sharpe,* 2001: para. 125).

The child pornography issues raised by *Sharpe* illustrate and represent the kind of intensely controversial policy questions that courts, and especially the Supreme Court, are called upon to address in the Charter era. Other well known examples include abortion (*R v. Morgentaler,* 1988, 1993), euthanasia (*Rodriguez v. British Columbia (Attorney General),* 1993), prostitution (*Reference re ss. 193 and 95 .1(1)(c) of the Criminal Code*

(Man), 1990), safe-injection drug programs (*Canada (Attorney General) v. PHS Community Services Society,* 2011) and same-sex marriage (*Reference re Same-Sex Marriage,* 2004). Given the high stakes policy significance of judicial decisions in such matters, it comes as no surprise that relevant interest groups line up to participate in the courtroom process. In all of the aforementioned cases, organized interests were active participants and played a significant role. This was certainly true of *Sharpe*, which saw 19 participants in addition to the direct parties (Sharpe and the government prosecuting him). This study contributes to the burgeoning literature on interest group participation in litigation, especially to that part of the literature that tries to assess the success of interest group litigation.

As *Sharpe* illustrates, the non-party interests in a case fall into two categories: governments and non-governmental interest groups. In public law cases such as *Sharpe*, a government or state agency is typically one of the direct parties, but additional state organizations often have a sufficient stake in the policy question to intervene on one side or the other. Thus in *Sharpe*, briefs were submitted in defence of the law by the Attorney General of Canada, Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba and Alberta, along with the Canadian Police Association (CPA) and the Canadian Association of Chiefs of Police (CACP). No state organizations sided with Sharpe in this case.

In exploring the courtroom success of non-party interests, this study will focus not on state organizations but on non-governmental interests. *Sharpe* also attracted a plethora of such interests. Siding with the governments and against Sharpe were Canadians Against Violence (CAVEAT), the Evangelical Fellowship of Canada (EFC), Focus on the Family,

Canadians Addressing Sexual Exploitation (CASE), End Child Prostitution, Child Pornography and the Trafficking in Children for Sexual Purposes (ECPAT) and the International Bureau for Children's Rights. Ranging from religious to human rights rationales for criminalizing the possession of child pornography, these groups provided an abundance of support for the Crown's case. Siding with Sharpe were three civil libertarian organizations: the British Columbia Civil Liberties Association (BCCLA), the Canadian Civil Liberties Association (CCLA) and the Criminal Lawyers' Association. Despite being so thoroughly outnumbered, the civil libertarian perspective prevailed in Sharpe's trial and in the B.C. Court of Appeal, though it clearly suffered a setback in the Supreme Court. It is the civil libertarian groups that participated in Sharpe that form the focus of this thesis. In particular, the thesis investigates the success of the CCLA and the BCCLA in Charter-based cases in the Supreme Court of Canada – i.e., cases like *Sharpe*. – in the 10 year period from 1999-2009.

In *Sharpe*, the civil libertarians found themselves embroiled in the classic and wide-ranging confrontation between libertarians and social conservatives, a dispute that is also present in such issues as abortion, euthanasia, prostitution, and drug policy. Canada's libertarians often find themselves fighting courtroom battles not only with social conservatives, however, but also with egalitarian interests, such as the Women's Legal Education and Action Fund (LEAF). LEAF, like social conservatives, favours some kinds of censorship – but for very different reasons, of course. Thus, LEAF clashed with the CCLA in the *R v. Keegstra* (1990) hate speech case and with both the CCLA and the BCCLA on the question of obscenity and pornography in *R v. Butler* (1992). More recently

the highly controversial litigation concerning polygamy in British Columbia pitted West Coast LEAF against the CCLA and the BCCLA (*Reference re: Section 293 of the Criminal Code of Canada,* 2011).

LEAF, the CCLA, and the BCCLA are all what the literature calls "Repeat Players" (RP) in policy oriented litigation, that is, organizations that look regularly and systematically to the courtroom as an arena of policy development, and participate often in litigation to pursue their policy objectives (see Galanter, 1973; McCormick, 1993; Songer et al, 1999). The literature distinguishes RP groups from One Shot (OS) players. This distinction will be discussed in more detail in chapter 2, but the labels make the main point clear enough for present purposes. Clearly, investigating litigation success rates of interest groups, as this study will do, makes sense mainly in the case of RP groups, such as LEAF, the CCLA, and the BCCLA.

In Canada, the investigation of litigation success by interest groups has not yet given much attention to libertarian groups, despite their prominence in many major policy controversies. LEAF and other feminist interests have received most of the attention, and work on these groups has generated important methodological innovations in assessing litigation success (see Morton and Allen, 2001; Manfredi, 2004). This study seeks to bring some of these methodological innovations together, integrating them more thoroughly than hitherto, and to apply that integrated approach to the other, libertarian side of the ledger.

1.2 - Canadian Civil Liberties Groups: A Snapshot

Civil liberties advocacy organizations are "non-profit, non-governmental organizations that work through a variety of means to ensure that government does not encroach upon individual rights and liberties" (Patrick, 2007: 188). Unlike "women's rights groups, civil liberties organizations are generalist groups that do not confine themselves to specific [political] issues" (Patrick, 2007: 188). Jeremy Patrick identifies five key components of civil liberties advocacy organizations: "focus on negative rights, limiting interventions to cases where government is involved, primary concern for domestic issues and both ideological and financial independence from government" (2007: 191-92).

In practice, civil liberties advocacy has proven to be more concentrated and unified in the United States than it is in Canada. The shining beacon of American civil liberties interest, the American Civil Liberties Union (ACLU), currently has over 500,000 members, is involved with almost 6,000 cases each year and has more appearances before the US Supreme Court than any other interest organization (http://www.aclu.org/about-aclu-0, Patrick, 2007: 189). The Canadian system, by contrast, is described by Jeremy Patrick as a "patchwork collection, of small independent groups that focus mostly on education, formal submissions before legislatures and third party involvement in appellate cases" (Patrick, 2007: 189). Patrick lists five main autonomous organizations: the Alberta Civil Liberties Research Centre (ACLRC), the Alberta Civil Liberties Association (ACLA) and the Manitoba Association for Rights and Liberties (MARL) in addition to the BCCLA and the CCLA. The last two, the CCLA and the BCCLA, proved to be most active in terms of appellate and Supreme Court litigation. It is because these two groups are the only

Canadian civil libertarian groups that qualify as Repeat Players in court, and especially in the Supreme Court, that they were chosen as the focus of this study.

The CCLA and the BCCLA have not always seen eye to eye (Clement, 2005; Patrick, 2007). In fact, John Dixon, past President of the BCCLA, often criticized the CCLA for portraying itself as a national organization, consistently lamenting that: "only groups located in British Columbia were the [most] appropriate advocates of local rights issues" (Clement, 2005: 63). Indeed, Dominique Clement sees the continuous tension between the BCCLA and the CCLA as "prevent[ing] the formation of a truly *national* organization for civil liberties and human rights [emphasis added]" of the kind represented by the US ACLU (2005: 63). Patrick describes the CCLA as inherently more conservative than the "more progressive minded BCCLA" and, as such, "less willing to intervene in controversial cases" (2007: 204). Nevertheless, as we shall see, when the two organizations participated in the same cases during this study's time frame, their legal submissions never disagreed.

The British Columbia Civil Liberties Association (BCCLA) arose out events on March 10, 1962, when "the RCMP went to the town of Krestova, BC to arrest 57 members of the Fraternal Council of the Sons of Freedom and charged them with conspiracy to intimidate the Parliament of Canada and the Legislature of British Columbia" ("BCCLA History", http://www.bccla.org/originsofbccla.htm). The Sons of Freedom were labeled by many as a terrorist group due to their forceful rejection of state materialism. Their unorthodox methods contributed to the group being labeled as a terrorist organization, as they were responsible for "1100 arsons and bombings, staging nude parades and burning

symbols of materialism" (ibid). Outraged by the arguably excessive charges against the Sons of Freedom, a group of University of British Columbia academics came together to raise funds for the accuseds' legal defence and to continue to "advocate for human rights in British Columbia" (ibid). Thus did the BCCLA come into being.

According to Patrick the BCCLA is not only the oldest civil liberties group in Canada, but also the most willing to take controversial positions on emerging issues" (Patrick, 2007: 200).[2] In recent years, the BCCLA has launched publicity campaigns supporting "the legalization of polygamy, argued that practitioners of bondage and sadomasochism should be free from government discrimination, stood against mandatory retirement and supported the right for private swingers clubs to operate" (Patrick, 2007: 200). The organization has appeared as an intervener in cases pertaining to state treatment of heroin addicts (*Schneider v. The Queen,* 1982), censorship of sexually lewd material (*R v. Butler,* 1992) and the decriminalization of marijuana (*R v. Malmo-Levine,* 2003).

The other of the two groups focused on in the study, the Canadian Civil Liberties Association (CCLA), formed just two years after the inception of the BCCLA, when a provincial bill that sought to increase police powers alarmed a group of civil libertarians in Toronto ("About CCLA," http://ccla.org/about-us/). Though the bill was eventually withdrawn, this academic coalition saw a need for an "ongoing watchdog group to guard against any potential threats to democratic rights" and thus the CCLA was born (ibid). The CCLA is committed to police accountability, freedom of expression, freedom of association

[2] This apparent willingness to intervene in "controversial" cases seems somewhat subjective, as will be discussed with regards to the CCLA

and freedom of religion and anti-discrimination. Its integrative theme is "curbing the abuses of power" (ibid). Diving head first into many civil liberties issues in the 1970s and 80s, the CCLA's initiatives included opposing invocation of the *War Measures Act*, exposing abuses of power and "dirty tricks" undertaken by the RCMP, and combating the federal government's creation of the Canadian Security Intelligence Service (CSIS) (ibid).

Since the entrenchment of the Charter, "the CCLA has focused [many of its legal endeavours] on the protection of fundamental freedoms (section 2) and legal rights (sections 7-14)" (Patrick, 2007). Its Charter-based legal interventions have included: protection against state surveillance on marijuana grow operations (*R v. Tessling,* 2004), protection against state seizure of sexually lewd and deviant material (*Little Sisters Book and Art Emporium v. Canada,* 2000)[3] and the Supreme Court reference to same sex marriage (*Reference re Same-Sex Marriage,* 2004). Recently, the CCLA, under new General Counsel Nathalie Des Rosiers, has spearheaded the movement to demand a public inquiry into police powers during the 2010 Toronto G20 summit. In light of these initiatives, it is not entirely clear why Patrick considers the CCLA more "conservative" than the BCCLA.

1.3 - Plan of the Study

The policy oriented use of the courts by "repeat player" interest groups – known in the literature as "legal mobilization" by interest groups – has burgeoned in Canada since the advent of the Charter of Rights in 1982. Scholarly attempts to assess the success of

---

[3] In addition to *R v Butler* (1992)

such “legal mobilization” have focused mainly on feminist groups, such as LEAF. There has not yet been a similar assessment of the success of civil libertarian “legal mobilization.” This study aims to begin that assessment, focusing on Canada’s two “repeat player” civil libertarian groups: the Canadian Civil Liberties Association (CCLA) and the British Columbia Civil Liberties Association (BCCLA). To keep things manageable, the study focuses on the ten years from 1999 to 2009, and considers only Supreme Court cases that engage the freedom of religion and freedom of expression guarantees of the Charter.

Chapter 2 establishes the context and the methodology of the study. It situates the courtroom activity of the CCLA and the BCCLA within the broader historical development of legal mobilization, and legal mobilization strategies, in Canada. Against this background, Chapter 2 then describes how the measurement and assessment of interest-group litigation success has evolved over time and sets out the methodological approach to be applied to the civil libertarian legal interventions under consideration. Chapter 3 applies this approach to Supreme Court cases engaging the Charter’s religious freedom cases between 1999 and 2009 in which either (or both) the CCLA and the BCCLA participated. Chapter 4 does the same with the relevant freedom of expression cases. Chapter 5 provides some concluding reflections.

CHAPTER 2 – INTERESTS GROUPS, THE COURTS AND MEASURING SUCCESS

2.1 - Introduction

In recent decades, Canadian courts have become battlegrounds for interest groups advancing policy agendas. When an interest group engages the judiciary in a proactive, systematic way, it is called legal mobilization, "a planned effort to influence the course of judicial policy development to achieve a particular political goal" (Manfredi, 2004: 10). For an interest group, achieving a policy goal can mean either seeking a change to the status quo, or ensuring that the status quo is upheld (Berry, 1989: 155), or what Morton and Allen (2001) call "offensive" and "defensive" challenges to the policy status quo. While interest group legal mobilization has a significant history in Canada, its scope and character changed dramatically with the advent of the Charter in 1982. This chapter has two objectives. First, in several substantive subsections, it describes and analyzes the development of legal mobilization in Canada, and the modes and strategies taken by interest groups to pursue their policy goals in court. This analysis provides the background and context for the legal mobilization of civil libertarians that is of primary interest to this study. Second, in its final section, the chapter sets out the methodological approach that subsequent chapters use to assess the success of civil libertarian participation in Supreme Court cases that engage the freedom of religion and freedom of expression guarantees of the Canadian Charter of Rights and Freedoms.

2.2 - Legal Mobilization as a Means for Policy Reform

Legal mobilization first emerged as a viable strategy in Canada in the 1930s when groups representing business interests engaged in litigated federalism cases “as a political tactic to oppose the welfare state” and protect property rights (Morton and Knopff, 2000: 65). With the exception of the Canadian Jewish Congress’ involvement in an Ontario court case in 1945, non-business interests rarely intervened in court cases until 1963, when a rights oriented, social reform intervention came before the Supreme Court in *Robertson and Rosetanni v. The Queen* (Brodie, 2002b: 295). In this case, the Lords Day Alliance intervened to support the continuance of Sunday closing laws for religious purposes (Brodie, 2002b). The Supreme Court also granted intervener standing to pro-life and pro-choice groups during *R v. Morgentaler* (1976) (Brodie, 2002b: 295). Generally speaking, however, non-business interests, such as women, First Nations, and linguistic, religious and racial minorities made only selective use of litigation for most of Canada’s history (Roach, 1993: 165).

Writing in the U.S. context, Richard Cortner (1968) observed that minority interests that were “disadvantaged” in the traditional arenas of policy change (the legislature and bureaucracy) often turned to the courts to pursue policy change when possible. Of course, such “outsider” groups, as they came to be known, can use the courts consistently and effectively only if adequate legal resources are available to them. In the United States, the Bill of Rights provided a particularly prominent resource of this kind, at least since the Warren Court era.

This does not mean that the traditional "insider" groups have stopped litigating or even that they are litigating less than the newly empowered "politically disadvantaged" groups. To the contrary, when Kim Lane Scheppele and Jack Walker Jr., in a pioneering study, surveyed 892 American interest groups to determine whether or not "groups that are considered political "outsiders" use the courts more than political 'insiders," they found that politically and economically established groups were the most likely to use the courts (1991: 182). In her study of conservative interest groups (e.g., Americans for Effective Law Enforcement), Lee Epstein (1983) reached a similar conclusion.

The entrenchment of the Charter*,* the analogous resource to the US Bill of Rights*,* changed the pattern of interest group litigation in Canada as well. After 1982, while business interests certainly continued to litigate (including under the Charter), a variety of other interests began to play a more prominent role in the courtroom (Brodie, 2002a). For many observers, the newly emerging interest group litigants went to court because they were "disadvantaged" in the traditional political process. Because it gives traditionally disadvantaged "outsiders" more political and policy influence, Charter-based legal mobilization – at least by non-business interests – is seen by many as an enhancement of democracy. Sigurdson, for example, heralded the Charter for "giving women and other disadvantaged groups access to an additional arena of democratic participation" (1993: 113). Gregory Hein's (2000) judicial democrat thesis similarly emphasized that the Charter-induced judicialization of politics has given disadvantaged minority groups greater access to political power. Miriam Smith (2005) echoed the judicial democrat thesis, adding

that the inclusion of disadvantaged groups has enhanced politics by bringing "civil society" into the traditional political process.

In Canada, Gregory Hein has noted that corporate interests outweighed all others in their use of the Charter during its first 10 years. Nevertheless, the advent of the Charter has meant that politically disadvantaged groups in Canada pursue the strategy of legal mobilization far more than they did before. Not everyone accepts the premises of the political disadvantage theory of legal mobilization. Ian Brodie, for example, has challenged Hein's view that "more decisions should be made by judges as a means of increasing representative democracy" (2002c: 361). Brodie questioned the ability of courts, which are made up of predominantly "wealthier, whiter and older sections of the population," to make more representative decisions (2002c: 361).[4] Brodie (2002c) also questioned the "disadvantaged" and "outsider" status of groups such as the Women's Legal Education and Action Fund (LEAF), which is mostly comprised of wealthy legal experts and was the recipient of substantial government funding.

This debate about the accuracy and democratic bona fides of the political disadvantage theory is interesting and important, but need not detain us further. The focus of this thesis is not on the institutional and democratic legitimacy of libertarian groups pursuing their policy agenda in the courts, or on whether such groups are best portrayed as insiders or outsiders, but simply on how successful those libertarian interests have been in their legal mobilization. The significant point for this thesis is that the advent of the

---

[4] Similar criticisms of the socioeconomic makeup of judicial panels were also made by Joel Bakan. See *Just Words: Constitutional Rights and Social Wrongs* (1997)

Charter in 1982 gave libertarians, among other groups, a new and broader foundation for legal mobilization at the constitutional level.

2.3 - Interest Groups Appearing Before the Courts

More often than not, interest groups in Canada have espoused policies beyond economic and financial issues. As a matter of fact, a significant portion of third party interveners appeared before the Supreme Court and provincial appellate courts to argue on behalf of “non-business” interests. In one of the most comprehensive studies of Canadian interest group litigation, Hein (2000) surveyed 819 claims between 1988 and 1998. During this time period, interveners were present in 30 percent of Federal Court and Supreme Court cases (Hein 2000). Hein placed these interveners into nine different categories and identified the laws that they supported or challenged in court. Six out of the nine classifications of groups represented non-business interests.[5]

Launching 77 claims between 1988 and 1998, **Aboriginal groups** (e.g., Assembly of First Nations, Congress of Aboriginal Peoples) primarily targeted federal government statutes that restricted treaty rights. **“New Left” activists** (e.g., Canadian Peace Alliance, EGALE Canada) advanced 37 claims to “overturn policies that exclude homosexuals and help poor people facing arrest” (Hein, 2000: 349). With a modest 18 claims, **social conservatives** and religious groups (e.g., REAL Women and Evangelical Fellowship of Canada) targeted a wide range of policies such as mandatory retirement laws and fetal rights. Filing only nine applications for intervention, **victims** (e.g., Canada Cancer Society,

[5] Hein’s (2000) three ‘business’ groups categories were: corporate interests, labour interests and professionals

Canadian Council on Smoking and Health) mostly made legal claims concerning "breach of trust and win compensation" (ibid).

The most active of the six, with a total of 80 legal claims, were **Charter Canadians**, a term originally coined by Alan Cairns (1992), which are organizations that speak on behalf of ethnic and linguistic minorities, women, and the disabled. Drawing inspiration from the Charter itself, particularly section 15 (equality rights), Charter Canadians opposed measures restricting abortion, chastised provincial governments for restricting language rights and made appeals to overturn election laws that discriminate against the mentally ill. Women's rights groups were the most prominent Charter Canadians, with LEAF being particularly active (see Brodsky and Day, 1989; Razack, 1991; Hausegger, 1994; Morton and Allen, 2001; Manfredi, 2004). **Civil libertarians**, the focus of this analysis, were also quite active, with 40 legal claims in support of the criminally accused and against policies that impaired fundamental freedoms.

2.4 - Repeat Players

As Hein's review makes clear, interest groups vary considerably in how frequently they use litigation as a political strategy. Some groups go to court only sporadically, while others are much more frequent and regular participants. The latter have become known in the literature as "repeat players."

Marc Galanter introduced the "repeat player thesis" in 1974. According to Galanter, would-be litigants fall into two main categories: "repeat player" (RP) and "one-shot" (OS) litigants. RP litigants obviously include governments, which are regularly in

court to defend and promote their policy agendas. Some interest groups also pursue an ongoing RP strategy. RP litigants are less interested in the outcome of specific cases than in pursuing a long-term policy agenda (Galanter, 1974: 97). Consequently, they will engage with the judicial process whenever fundamental rules affecting their long-term institutional interests are at stake (Manfredi, 2002: 331). In the United States, the National Association for the Advancement of Colored People (NAACP) pioneered a systematic, long-term, and successful RP strategy to dismantle *de jure* segregation (Tushnet, 2005). In Canada, as we shall see in more detail below, LEAF explicitly modeled itself on the NAACP in proposing to undertake equality rights litigation: “in a planned, responsible and expert manner” (Manfredi, 2002: 331).

OS litigants, on the other hand, go to court in response to perceived threats to their short-term interests (Galanter, 1974: 97). In Galanter’s words: “the spouse in a divorce case, the auto-injury claimant and the criminally accused are OS litigants; the insurance company, the prosecutor and the finance company are RPs” (1974: 97). Because of their proactive interest in the judicial process as a policy instrument, RP litigants acquire extensive legal expertise and financial resources. The reactive orientation of OS litigants, by contrast, means that they tend to have fewer resources, less experience and, consequently, lower “success” rates (Galanter, 1974).

In the US, the empirical work of Donald R. Songer, Reginald S. Sheehan and Susan Brodie Haire (1999) has confirmed Galanter’s view about the relative success rates of RP and OS litigants. RP participants, they found, consistently “won more cases than their OS counterparts” (1999: 812). Peter McCormick (1993) has shown that the same holds true in

Canada.[6] Both studies found that governments and corporations were the most prominent repeat players and enjoyed the highest success rates, with governments outperforming corporations. Non-business RP interest groups were next on the success hierarchy, with OS litigants lagging far behind. Clearly, interest groups that wish to engage in successful "legal mobilization" must become RP litigants. Only such repeat players engage in the kind of legal mobilization defined by Manfredi as "a planned effort to influence the course of judicial policy development to achieve a particular political goal" (2004: 10).

2.5 - Strategies of Legal Mobilization

RP interest groups have several strategies available to them. They cannot, of course, engage in the kind of direct, personal lobbying that occurs in the bureaucratic and legislative policy realms. Since they cannot "wine and dine" individual judges, RP interest groups rely on other strategies, both indirect and direct (Hausegger, Hennigar and Riddell, 2009: 220). Indirectly, they can engage in "law review lobbying." Directly, they can participate in court decisions in one of three ways: as "parties," as "sponsors," and as "interveners."

2.5.1 - Law Review Lobbying

Law review lobbying occurs when "legal experts affiliated with (or sympathetic to) particular groups publish articles in law reviews arguing in favour of particular legal

[6] McCormick formally incorporated Galanter's labels of 'RP' (repeat player) and 'OS' (one-shot) litigant within his own study.

interpretations" (Hausegger, Hennigar and Riddell, 2009: 220). The legal community is not composed solely of lawyers and judges; legal scholars also play a significant role, typically through their publications in law reviews. It is through these outlets that members of interest groups can make their voices heard by "writing articles…that evaluate the work of the courts and presenting arguments for the "correct" legal interpretation [in a recent decision]" (Hausegger, Hennigar and Riddell, 2009: 219). Obviously, interest groups use this strategy to create credibility and support for their own position. There is evidence to suggest that this strategy has been effective. Research has shown that judges "will use law reviews to provide themselves with the legal reasoning to move in a new direction and to bolster their position on a case" (Schlozman and Tierney, 1986: 363). This was especially apparent in the late 1960s to early 1990s when citations of academic articles in Supreme Court of Canada decisions greatly increased from a dozen a year in the 60s to hundreds upon hundreds in the 90s (Greene, Baar, McCormick, Szablowski and Thomas, 1998: 150).

This form of legal mobilization was pioneered in the United States by the NAACP, the first known interest group to formally incorporate "legal lobbying" into its arsenal in the 1940s (Manfredi, 2004: 10). In Canada, this strategy was not undertaken until the mid-1980s when LEAF came into being. Emphasizing the importance of this strategy in its annual reports, LEAF has encouraged affiliated scholars to publish an extensive amount of material advancing its policy on equality rights issues (Manfredi, 2004). These efforts have not gone unnoticed by judges. Although law review lobbying has proven to have an obvious effect on judicial decisions, however, direct strategies are far more common.

2.5.2 – Direct-Party Litigation

When pursuing their policy interests through the judiciary, interest groups are most likely to pursue litigation. Occasionally, an interest group may become a direct party in a case. This occurred when Operation Dismantle Inc. appeared as a direct party before the Supreme Court to challenge the Canadian government's decision to allow the United States to test cruise missiles in Canada (*Operation Dismantle v. the Queen* (1985)). Generally speaking, however, the rules of standing make it difficult for interest groups to appear as direct parties to a case; in this sense, *Operation Dismantle* is somewhat exceptional. The rules of standing allow groups to launch a case on their own behalf if three criteria are met: "a serious issue is at stake, the group attempting to bring the case has a genuine interest in the issue and, perhaps most importantly, there is no other reasonable and effective method for bringing the issue before the courts" (Hausegger, Hennigar and Riddell, 2009: 222). Because there are often other "reasonable and effective" ways for the issue to get into court, interest groups typically have to resort either to sponsoring cases or to intervening in them.

2.5.3 - Test Case Sponsorship

Sponsoring a test case occurs when an interest group provides complete financial backing and legal representation for a party that has standing to pursue a legal issue of interest to the group. Case sponsorship gives interest groups the opportunity to track cases in a given policy area and to look for "desirable litigants with a grievance of sufficient interest to assure access to the courts" (Hausegger, 1994: 16) and is thus an attractive strategy. Sponsorship gives the sponsoring groups considerable sway over the details of

the sponsored case; moreover, they can select pertinent cases to pursue as part of a long-term policy strategy (ibid).

The NAACP was the first interest group to make notable use of test case sponsorship when they established the Legal Defence Fund (LDF) in 1939 (Manfredi, 2004: 10). The purpose of the NAACP LDF was to incrementally dismantle the segregationist "separate but equal" doctrine by having full control of the litigation in that field (Manfredi, 2002: 330). With more than $500,000 raised over fifteen years as part of the LDF campaign, the NAACAP was able to successfully sponsor *Brown v. Board of Education* (1954), the legal endpoint of the "separate but equal" doctrine in the United States (Manfredi, 2002: 330). Prior to 1954, NAACP LDF provided the financial backing for numerous cases dealing with racial segregation that gradually eroded the "separate but equal" doctrine announced by the US Supreme Court's decision in *Plessy v. Ferguson* (1896) (Manfredi, 2004). Quite simply, precedents were incrementally created in cases hand-picked by the NAACP for their desirable facts and litigants (Hausegger, 1994). The direct sponsorships of *Smith v. Allwright* (1944) not only overturned Texas' use of all-white voting primaries but was also one of many cases within the NAACP's greater legal strategy. The NAACP then applied the precedents they obtained in cases (e.g.. *Smith*) to their fight against segregation in the primary and secondary education boards, the culmination being *Brown v. Board of Education* (Hausegger, 1994).

As indicated above, the NAACP litigation model would later provide inspiration to like-minded equality groups in Canada, most notably LEAF. In a study commissioned by the Canadian Advisory Council on the Status of Women (CACSW), Elizabeth Atcheson,

Mary Eberts and Beth Symes praised the NAACP LDF for "contributing to the development or elucidation of law in a particular area" (1984: 2). The CACSW study, *Women and Legal Action: Precedents, Resources and Strategies for the Future* – which coincided with and was connected to the establishment of LEAF (Hausegger, 1994: 36) – emphasized the need to establish a similar legal action fund concentrating on equality rights litigation under section 15 of the Charter and pursuing the systemic approach to litigation developed by the United States [NAACP] (Atchieson, Eberts and Symes, 1984: 166). In particular, direct sponsorship of litigation was seen to be "the most productive strategy and therefore the strategy of first choice for any Canadian fund" (Atcheson, Eberts and Symes, 1984: 167). Accordingly, a founding objective of LEAF was to "assist women with important test cases and to ensure that equality rights litigation is undertaken in a planned, responsible and expert manner" (Atcheson, Eberts and Symes, 1984: 167).

In practice, the model of test case sponsorship has proved to be less successful for Canadian interest groups than it had been for the NAACP. Direct sponsorship is not a cost-effective endeavour. Nor does it ensure victory in court. Since sponsorship seemingly requires high financial commitments that lack guaranteed payoffs, Schlozman and Tierney (1986) have argued that most interest groups are reluctant to pursue this strategy and have opted for more cost-effective initiatives. Schlozman and Tierney's argument has been especially pertinent to many Canadian interest groups' experience with sponsorship. The National Citizens Coalition (NCC), for example, sponsored an unsuccessful case against mandatory union dues in *Lavgine v. Ontario Public Service Employees Union* (1991) which resulted in them having to pay the costs for the union it had challenged.

Although it was initially part of their founding strategy, LEAF's direct sponsorship strategy has not often been put into practice. Since 1982, LEAF has only sponsored one case, *Schachter v. Canada* (1992), that has reached the Supreme Court bench (Manfredi, 2004: 17). Lori Hausseger (1994) has argued that LEAF's intention of following the NAACP's model was quite ambitious. In direct contrast to the NAACP's *de facto* monopoly over in racial civil rights litigation, LEAF was unable to fully control equality rights litigation due to the prevalence of other groups that were actively involved in womens issues (Hausegger, 1994: 40). This lack of control in the equality rights field "assured not only that some cases would be brought by other litigants, but that some of these litigants would have different and even opposing interpretations of equality to those held by LEAF" (Hausegger, 1994: 40). In sum, the high financial commitments of case sponsorship and difficulty in controlling the field of litigation has prompted interest groups of all policy ideals to seek more cost, and time, effective routes for legal mobilization. Intervening is the common choice.

2.5.4 - Intervening

When an interest group appears before a court as a third party intervener, it acts as *amicius curiae*, the Latin phrase for "friend of the court" (Brodie, 2002). An intervener "will offer a written and oral opinion on how the case affects the interests it promotes" (Brodie, 2002b: 298). The current rules for intervening, adopted by the Supreme Court in 1987, allow for interest group intervention "as long as their submissions would be useful to the Court and different from those of the other parties" (Sharpe and Roach, 2005: 389).

Interveners are restricted to discussing the legal issues at stake and cannot ordinarily introduce new evidence on the record (Brodie, 2002b). *Amicus curiae* have been common in the United States judicial system for some time. By the 1970s, for example, over half the US Supreme Court cases had third party interveners appearing before the panel of nine justices (Brodie, 2002b).

When the Canadian Charter first came into being, many scholars predicted that the Supreme Court of Canada (SCC) would follow the American liberal approach to granting standing to interest groups. This prediction did not immediately materialize, however, as the Supreme Court was initially reluctant to grant standing to "would-be interest group interveners," primarily due to an overwhelming workload of Charter cases (Brodie, 2002b). The CCLA, for example, was denied standing in *R v. Oakes* (1983), the case in which the Court would establish the framework for interpreting section 1, "the reasonable limits clause" of the Charter (i.e. the 'Oakes Test') (Brodie, 2002b). Not surprisingly, Alan Borovoy, general counsel of the CCLA, launched a protest in response to these denials by writing an open letter to the Supreme Court urging the justices to approve more applications for intervention (Borovoy, 2002). Throughout his brief, Borovoy stressed that the Charter had granted the judiciary a significant degree of power over public policy and concluded that scrutiny from citizens' groups within the judicial process was an issue of fundamental fairness (2002: pp.289-90). The SCC took note of these criticisms and called upon the Canadian Bar Association (CBA) to draft a series of recommendations. After a lengthy stage of public inquiry committees, in which LEAF and the CCLA both made presentations, the CBA concluded that it was most suitable for the Court to implement a

more liberal approach to interveners (Brodie, 2002b: 297). The recommendations were taken to heart by the country's highest-ranking judges and the much-sought liberalized approach was put into practice in 1987.

A "before and after" comparison demonstrates the effect of liberalized rules of standing. Between 1983 and 1986 the SCC accepted fewer than half the applications to intervene filed on behalf of third parties (Brodie, 2002b). From 1987 to 1990, by contrast, the Court's acceptance rate soared to 80 percent, where it remained until 2002 (Brodie, 2002b). The CCLA itself was a great beneficiary of this new approach as 19 of their 20 applications were approved between 1985 and 1999 (Brodie, 2002b: 297). It was evident that interest groups began to heavily lean upon interventions as a "go-to" strategy for influencing public policy, with civil liberties groups prominent amongst those turning to this new strategy.

Given the increasing prominence of interest groups in policy-oriented litigation, scholars began to investigate the success of the legal mobilization of various RP groups. Over time, the ways of assessing success have become increasingly nuanced. The rest of this chapter describes this methodological evolution and sets out the approach subsequent chapters will use to assess the success of civil libertarian interventions in "fundamental freedoms" cases under the Charter of Rights and Freedoms.

2.6 - Defining Success

We have seen that RP interest groups are more "successful" than OS groups in their interventions as third parties (though not as successful as governments). But how

successful? The answer to that question depends on how one measures "wins" and "losses." Such measurement has become increasingly nuanced over time.

Equating interest group success with the success of the direct parties in a case can be problematic because interveners tend to be more interested in the broader ramifications of judicial decisions than in the actual fate of the parties. In other words, interest groups care more about the policy consequences of a case than the bottom-line outcome itself. The bulk of the literature, however, has tended to overlook the policy dimension in measuring success. For instance, each of Galanter (1974), McCormick (1993) and Songer, Sheehan and Haire (1999) defined interest-group winners and losers according to their association with the party that won the case. In this approach, an interest group "wins" when it sides with the winning party at trial and "loses" when it backs the loser. As Morton and Allen (2001) have argued, such an approach is too simplistic. A more nuanced approach, they maintain, must take into account the existence of three different dimensions to success: dispute, law and policy (2001: 65).

Although winning the dispute is the priority of a direct party, often "it is secondary for interest group interveners," according to Morton and Allen (2001: 65). This is mostly because an intervener's prime interest rests in the precedent that will be set by the Court's interpretation of the Charter, statutes, or common law. Thus, winning the *dispute* in court and winning the *legal* dimension of a case are not necessarily equivalent for interveners. This was true, for example, for LEAF's intervention in *Andrews v. Law Society of British Columbia* (1989), the first section 15 equality rights claim brought before the Supreme Court. In their factum, LEAF took no position on whether Mr. Andrews, a non-citizen, had

a constitutional right to practice law (Morton and Allen, 2001). In effect, LEAF had no interest in the "dispute." Instead, LEAF advanced a set of interpretive rules for section 15, all of which the Supreme Court adopted (Morton and Allen, 2001). For Morton and Allen (2001), *Andrews* was a legal "win" for LEAF not because Andrews won, but because the Court's interpretation of equality rights improved the group's chances in its future litigation of sex-discrimination issues. In Peter Russell's (1985) terms, LEAF sought "legal resources" in the form of favourable doctrinal advances rather than immediate outcomes for any particular party. It is even possible to win doctrinal advances when the party supported by the group loses. In *Egan v. Canada* (1995), for example, the Supreme Court dismissed the appeal of a party supported by EGALE while simultaneously ruling that sexual orientation is an analogous ground under Charter section 15 and was therefore a prohibited ground for discrimination. Needless to say, *Egan* was a significant doctrinal victory for EGALE.

Christopher Manfredi (2004), following Morton and Allen's focus on legal or doctrinal wins and losses by interest-group interveners, has emphasized the importance of tracking the different legal issues in a case that may be of interest to the group. A common issue under the Charter is whether a right or freedom is interpreted broadly or narrowly. For example, does freedom of association include collective bargaining and the right to strike? If not, as the Supreme Court's early jurisprudence on this issue suggested (*Reference Re Public Service Employee Relations Act (Alta.)* (1987)), labour groups will have limited constitutional resources. If freedom of association does protect collective bargaining, as the Court's later jurisprudence has determined (*Health Services and Support*

– *Facilities Subsector Bargaining Assn. v. British Columbia* (2007)), then labour groups have broader constitutional grounds on which to stand. But the breadth or narrowness of a right or freedom does not necessarily settle the issue. Even if a broadly defined right is infringed, that infringement may nevertheless be a "reasonable limit" under section 1 of the Charter. Both definitional and justification issues must thus be addressed in any assessment of interest group success. In addition, whether a law infringes even a broadly defined right or freedom will depend on how that law is interpreted. Sometimes it is possible to win or lose a case on the basis of statutory interpretation or common law development without constitutional standards, such as the Charter, coming into play – even if the interest group would prefer to have developed higher and broader legal resources based on the Charter. In other words, an intervener may "lose" on one important legal issue (e.g., Charter applicability) and "win" on another (e.g., statutory interpretation). Accordingly this study follows Manfredi in closely tracking the Court's judgment in terms of interest-group "wins" or "losses" on the various legal/doctrinal issues in play. I will essentially ignore the immediate outcome as seen from the perspective of the parties.

Although legal or doctrinal changes may provide valuable resources for future litigation, they are worth less to an interest group if they do not lead to the policy outcome that the group is pursuing in the case at hand. A labour group, for example, may rejoice in a broadening of "freedom of association" to include collective bargaining but nevertheless despair when the law they are opposing is upheld as a "reasonable limit" on that right. As Morton and Allen put it, "a victory at the levels of dispute and law will usually have marginal value for an interest group if it does not include the sought after judicial remedy

ordering policy change" (2001: 67). Thus, in addition to tracking legal changes from the perspective of a target interest group, Morton and Allen pay close attention to how the remedial dimensions of legal judgment affects the actual "policy status quo" (PSQ).

Interest groups can either defend an existing PSQ against unwanted change or try to change the PSQ in a desired direction. Either kind of courtroom position can be accepted or rejected by judges, leading to four possibilities (arranged in order of their value to an interest group): offensive win > defensive win > offensive loss > defensive loss (Morton and Allen, 2001: 67). Beginning with losses, the worst outcome is the failure to prevent a negative change to the PSQ (defensive loss). For the interest group this is a real change in the wrong direction. In *R v. Seaboyer* (1991), for example, the Court struck down the rape-shield provision of the *Criminal Code,* a law that LEAF had intervened to defend (Morton and Allen, 2001: 68). By comparison, an offensive loss, while certainly regrettable for its failure to achieve desired advances, at least does not result in negative change; the PSQ remains in place. For example, feminist groups who intervened in *Symes v. Canada* (1993) and *Thibaudeau v. Canada* (1995) failed in their challenge to the constitutionality of existing childcare deductions and payment provisions under the *Income Tax Act.* The Court upheld the challenged provisions, thus maintaining the PSQ and handing women's right advocates two offensive losses.

Turning to courtroom victories, a defensive win is to be celebrated as preventing negative change sought by someone else; again the PSQ remains in place. As Morton and Allen put it, "the interest group normally does not lose anything in terms of policy that it had before" (2001: 67). Most valuable is an offensive win that changes policy in the

direction urged by the interest group. For example, the Supreme Court's nullification of the abortion provision of the *Criminal Code* in *Morgentaler* was a much-celebrated offensive win for feminist interveners. Feminists then contributed to the successful defence and consolidation of this new PSQ in *Borowski v. Canada* (1989) and *Tremblay v. Daigle* (1989).

If a group is on the winning side with respect to all of the relevant legal issues, it will typically also achieve its desired result with respect to the PSQ. But a group may win with respect to the PSQ while losing legal resources it had pursued. For example, in *R v. Butler* (1992), LEAF defended the policy status quo of censoring obscenity and pornography in part by arguing that the Charter's section 2(b) guarantee of freedom of expression did not extend to obscene or pornographic expression. The Supreme Court rejected LEAF's submissions on this issue, finding that pornography was, *prima facie*, covered by section 2(b). Despite losing on this legal issue, however, LEAF was ultimately on the winning side with respect to the PSQ – i.e., it contributed to a successful defence of censorship – in part because the Court agreed with LEAF that although pornography was covered by s.2(b), censoring it was nevertheless a "reasonable limit under section 1 of the Charter. In other words, LEAF had been on the winning side with respect to at least one critical legal issue, one that led to its desired result on the PSQ.

If a group achieves its PSQ goal, does it really matter on what legal grounds the Court bases that result? It can. This point is perhaps more easily seen by looking at *Butler* from the perspective of LEAF's interest-group opponent in that case: the CCLA. Just as LEAF was defending censorship, the CCLA was engaged in an offensive challenge to this

PSQ. The CCLA won on the very issue that LEAF lost (the broad application of s.2(b) of the Charter to include *prima facie* protection of obscenity and pornography), and lost on the issue LEAF won (that censorship was a section 1 "reasonable limit"). The CCLA thus lost its "offensive challenge." But it would have been much worse for the CCLA if it had lost because the Court interpreted the scope of section 2(b) narrowly. As a libertarian organization, the CCLA is interested in a very broad understanding of free expression, and winning that part of the case maintains a wide field of possible freedom-of-expression litigation and the hope that other restrictions might *not* be reasonable limits. "Reasonable limits," after all, are often fact and context specific, but the opportunity to even get to "reasonable limits" questions disappears with respect to forms of expression that are not even covered by section 2(b) of the Charter. In sum, although the courtroom fates of legal issues and PSQs are obviously related, it remains useful to maintain the analytical distinction.

The *Butler* case is actually more complicated than has yet become apparent. Although LEAF was certainly defending the PSQ of censorship, it was doing so only at a fairly high level of abstraction (i.e., that some censorship of pornography should be maintained). LEAF was not, however, defending the censorship law as it had originally been written and as it had traditionally been understood and interpreted, namely, as the legislative attempt to protect traditional sexual morality. To the contrary, LEAF argued that the Court should uphold the censorship law only after significantly re-interpreting it along feminist lines. In LEAF's view the law should censor only sexually explicit material that portrayed unequal relations between the sexes and involved harm to women or

children; it should no longer censor egalitarian and consensual "erotica" (Manfredi, 2004: 80). Thus, LEAF can be understood as simultaneously engaged in a constitutional defence of the status quo of (some level) of censorship and an offensive change to that status quo at the level of statutory interpretation. LEAF won on both dimensions (even though it lost on the issue of s.2(b)'s scope). Determining "wins" and "losses" along multiple dimensions, as indicators of interest-group success in court, can be a nuanced and complex undertaking.

Like Morton and Allen, this study maintains the distinction between legal issues and policy status quo, while acknowledging the subtle interaction between them. The PSQ either remains in place or is changed. The change may come through a judicial remedy such as striking a law down on constitutional grounds, or through reinterpreting a statute or modifying a common law rule. The answer to a particular legal issue may determine the fate of the PSQ, though not all legal issues in a case will necessarily contribute to that fate. Legal issues that do not determine the fate of the PSQ may nevertheless have important "legal resource" implications for an interest group. Following Manfredi, therefore, this study tracks "wins" and "losses" for the different legal issues at stake. In the case of the PSQ, wins and losses are further characterized as being either defensive or offensive.

Finally, it is important to acknowledge what this approach to measuring "success" cannot do. It cannot claim that an interest group "wins" because its submissions and arguments were more important in influencing or persuading the Court than the arguments and submissions of other participants supporting similar doctrinal and policy outcomes. Investigating the relative influence of participants on the winning side of any issue before the Court would require a detailed comparison of their submissions with each other and

with the relevant judgments. That kind of content analysis is beyond the scope of this study. As Manfredi notes, the kind of approach outlined above is limited to defining an interest group "win" as the Court "reach[ing] a decision *consistent with* the position advocated by" the interest group (Manfredi, 2004: 20, emphasis added); it cannot say the Court reached that decision *because of* the especially influential advocacy of the interest group in question.

With this qualification in mind, the next two chapters apply this methodology to civil libertarian interventions in Charter-based religious freedom cases (Chapter 3) and freedom-of-expression cases (Chapter 4).

CHAPTER 3 – FREEDOM OF RELIGION

3.1 - Introduction

Civil libertarians are centrally concerned with the "fundamental freedoms" guaranteed by section 2 of the Charter of Rights and Freedoms:

> **2.** Everyone has the following fundamental freedoms:
>
> (*a*) freedom of conscience and religion
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication.
>
> (*c*) freedom of peaceful assembly; and
>
> (*d*) freedom of association.

This thesis examines civil libertarian participation in cases arising under the first two sub-sections of this provision, with this chapter considering section 2(a) freedom-of-religion cases, and the next focusing on section 2(b) freedom-of-expression litigation.

The fundamental nature of the concept of freedom of religion treated in this chapter is: "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal and the right to manifest religious belief by worship and practice or by teaching and discrimination" (Greenspan and Rosenberg, 2010: 1726). Section 2(a) also extends to protection against "government coercion in matters of conscience and religion" (Greenspan and Rosenberg, 2010: 1726). Regardless of the judiciary's interpretation of freedom of conscience and religion, at the very least it means "the government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose"

(Greenspan and Rosenberg 2010: 1726). Moreover, section 2(a) has come to protect "not only the right to hold and manifest beliefs, but also the right to express and manifest religious non-beliefs and to refuse to participate in religious practice" (Greenspan and Rosenberg, 2010: 1726).

This chapter considers the four Supreme Court freedom-of-religion cases in which the CCLA and/or the BCCLA intervened between 1999 and 2009: *Trinity Western* (2001), *Chamberlain* (2002), *Multani* (2006), and *Hutterian Brethren* (2009). Two of these cases came from British Columbia, one from Quebec, and one from Alberta. For its part, the BCCLA intervened in the two BC cases, *Trinity Western* and *Chamberlain*.

Like the freedom of expression issues considered in the next chapter, these freedom of religion cases fall into two main categories: those to which the Charter applies directly, and those to which it applies only indirectly via so-called "Charter values." Before tackling the cases themselves, it is important to appreciate the distinctive features of these two kinds of cases.

3.2 - Direct and Indirect Charter Application

As specified in section 32 of the Charter, the document's rights and freedoms apply directly only "to the Parliament and government of Canada" and "the legislatures and governments of each province." That is, the Charter applies directly only to the state and its actions, including the "public law" produced by the state; it does not apply directly to "private" relations, such as those between private employers and employees or private landlords and renters.

This does not mean that the Charter is entirely irrelevant to private relations. For example, when the state enacts legislation that governs such relations – e.g., human rights legislation that prohibits private discrimination – that legislation is itself obviously a state action, or a "public law," that is directly subject to the Charter. This point is illustrated in *Vriend v. Alberta* (1998), in which the Supreme Court found that Alberta's human rights legislation, which regulates private activity, unconstitutionally excluded sexual orientation from its list of prohibited grounds of discrimination.

In addition, the Charter exerts indirect influence on private sector relations that are not governed by statute. In the absence of applicable legislation, much of the "private sector" is governed by "private law" in the form of judge-made law "common law." Because the reach of such "common law" is so broad – leaving few private relations untouched – making it directly subject to the Charter in the same manner as legislation threatens to undermine the apparent purpose of section 32. Accordingly, the Supreme Court has insisted – not without controversy! – that "private common law" is not directly subject to the Charter (*RWDSU v. Dolphin Delivery Ltd.,* 1986). At the same time, obviously unwilling to declare the Charter entirely irrelevant to "private common law," the Court has indicated that judges should exercise their power to develop judge-made common law in accordance with "Charter values," such as the "values" of freedom of religion and expression found in section 2 of the Charter (ibid). In other words, although Charter's *rights* and *freedoms* do not apply directly to common law, its *values* may nevertheless indirectly influence the judicial development of the common law.

At first glance, this may appear like a distinction without a difference, but in fact it has important consequences for the way in which issues are presented and resolved in litigation. The most significant of these for our purposes concerns the status and operation of section 1 of the Charter, the "reasonable limits" clause. When a statute is found to infringe a Charter provision, a court must consider whether it can nevertheless be justified as a reasonable limit under section 1. This is what occurred in *Butler*, the case discussed in the previous chapter in which the Court considered the constitutionality of censorship legislation. By contrast, when the Court finds a private common law rule to be out of step with "Charter values," it can make the changes necessary to bring it into line without considering whether the existing rule can be justified as a section 1 "reasonable limit" (Harding, 2011).

In addition to "private common law" cases, "Charter values" may sometimes exercise their "indirect" influence in administrative law cases when public (or publicly delegated) administrators – i.e., persons or bodies exercising state action – are applying administrative standards to private institutions. As we shall see in more detail below, this occurred in the case of Trinity Western University, a private post-secondary institution, whose teacher training program was subject to public administrative approval. In exercising their approval functions, the relevant administrators could not apply the Charter directly to a private institution, but they could bring "Charter values" to bear on their decision.

The freedom-of-religion cases examined in this chapter, like the freedom-of-expression cases considered in the next, come in both varieties – i.e., cases involving both

the direct application of the Charter freedoms to state action and also the indirect application of Charter values in litigation involving private actors. Of the four freedom of religion cases considered in this chapter, only one – *Trinity Western* – involves the indirect application of Charter values; we begin with that case.

3.3 - *Trinity Western University v. British Columbia College of Teachers* (2001)

Trinity Western University (TWU) is a private religiously based post-secondary institution that offers a variety of programs, including a five-year teacher-training course. The teacher-training program was structured so that the first four years were spent at TWU and the final year was to be completed at Simon Fraser University. As a means of strengthening their program, TWU applied to the British Columbia College of Teachers (BCCT), which exercised publicly delegated administrative powers, for approval to assume full control over the five-year curriculum. The BCCT refused TWU's request on the grounds that the school's code of conduct was discriminatory towards homosexuals, insofar as school community members were required to sign a document stating they would refrain from homosexual activities. Equality rights values of the Charter were invoked by the BCCT in support of their decision (*Trinity Western University,* 2001: para 6). This BCCT decision preserved the existing requirement that TWU education students must complete their program with a final year at Simon Fraser. This was the policy status quo that TWU challenged in court.

The BCCLA was involved with this dispute from the outset; the CCLA intervened when the BCCT appealed to the Supreme Court. Both sided with TWU. Four religiously

based social conservative interveners lined up on the same side: the Evangelical Fellowship of Canada (EFC), the Canadian Conference of Catholic Bishops, the Christian Legal Fellowship and Seventh Day Adventist Church in Canada. Intervening on the other side were the Ontario Secondary School Teacher's Foundation and EGALE Canada Inc. Governments were not involved with the *Trinity Western* litigation.

It was agreed in this litigation that the Charter did not apply directly to TWU as a private institution. The main questions were thus 1) whether the BCCT had jurisdiction to engage in the indirect application of Charter values, and 2) whether, if it *did* have jurisdiction, it had applied those values correctly. The BCCLA and CCLA both supported the BCCT on the jurisdictional question and TWU on the substantive Charter values question. That is, they considered it appropriate, as a matter of "public interest" that administrative entities like the BCCT had jurisdiction to consider and apply Charter values when assessing the policies and actions of private institutions like the TWU (Lindsay, 2001: para. 2; Lokan, Bowie and Van Bemmel, 2001: para. 5). At the same time, both civil libertarian organizations stressed that the BCCT had wrongly balanced and applied the relevant Charter values, and that TWU's program was protected by freedom of religion values (Lindsay, 2001: para. 3; Lokan, Bowie and Van Bemmel, 2001: para. 6).

Both positions make some sense from a civil libertarian perspective. Civil libertarians are strongly oriented to private freedoms and are often reluctant to allow equality concerns to trump those freedoms. Accordingly, in this case, the BCCLA and CCLA supported the religious freedom of TWU, especially since they saw no evidence that its teacher-training program, as such, produced teachers who practiced discrimination in the

classroom. At the same time, it is perhaps understandable that civil libertarian organizations would want administrative agencies to have authority to implement Charter values (as civil libertarians understand them, of course).

On the jurisdictional question, the civil libertarian groups failed in the trial court, where the judge found that it was not within the BCCT's jurisdiction, in accordance with the *Teaching Profession Act*, to consider whether TWU's practices were discriminatory in light of Charter values, but found themselves on the winning side in both the Court of Appeal and the Supreme Court, who reversed the trial court's jurisdictional ruling.

On the substantive question, all three courts agreed with TWU and the civil libertarian organizations that the BCCT had no reasonable basis for its ruling that the TWU program would produce discriminatory teachers. All three courts, furthermore, agreed that the appropriate remedy was a writ of *mandamus* ordering the BCCT to approve TWU's proposed five-year program. As the Supreme Court's 8-1 judgment made clear, the BCCT had not given the Charter value of religious freedom enough weight. Eight Supreme Court judges ultimately ruled as the intervening civil libertarians wanted them to. Insisting that it was important to balance freedom of religion with equality rights values when assessing TWU's code of conduct, the Court ruled that "the freedom to hold beliefs is broader than the freedom to act upon them" and absent substantive evidence that teachers trained at TWU would practice discriminatory behaviour in the public school, their beliefs must be respected (*Trinity Western University,* 2001: para. 36). The resulting *mandamus* authorizing the five-year program changed the policy status quo.

In sum, as displayed in Table 3.1, the CCLA and BCCLA had helped TWU mount a successful offensive challenge to a BCCT policy status quo requiring TWU education students to complete their teacher training at a secular university. In the course of achieving this offensive victory, the two libertarian organizations had also helped preserve the capacity of administrative agencies to consider Charter values in their decisions, thus providing the libertarian organizations – but also, of course, some of their opponents – with a valuable legal resource in future litigation to secure libertarian goals through administrative decisions. The Court decided every aspect of this case in the manner preferred by the CCLA and the BCCLA.

Table 3.1 BCCLA and CCLA Intervention in *Trinity Western University v. British Columbia College of Teachers* (2001)

		CCLA & BCCLA Position	**Result**
LEGAL ISSUES	Apply Charter *values*? Charter value restricted?	Yes Yes	Win Win
POLICY STATUS QUO	Truncated TWU Program	Offensive Challenge	Win

3.4 - *Chamberlain v. Surrey School District No. 36* (2002)

Unlike *Trinity Western*, which involved the Charter indirectly through "Charter values," the Charter applies directly (in principle, at least) to the other cases analyzed in

this chapter. This is true of *Chamberlain,* a public statutory case that sought to balance freedom of religion with equality rights. The dispute was brought before the courts after the Surrey School Board rejected the proposal of an elementary school teacher, Jason Chamberlain, to include in the curriculum books portraying same-sex parented families. This decision excluding depictions of same-sex relations from the curriculum was the policy status quo at stake in the *Chamberlain* litigation.

The trial judge quashed the Board's decision for violating Section 76 of the *School Act,* which stated that: "all schools and Provincial schools must be conducted on strictly secular and non-sectarian principles." The Board had infringed this provision insofar as its decision to exclude books portraying homosexual parents was motivated by a concern for the religious belief of parents opposed to such material in the curriculum. (*Chamberlain,* 2002: para. 45). The British Columbia Court of Appeal set aside the decision, ruling that the Board had acted appropriately within its jurisdiction.

Third party interveners appeared in *Chamberlain* right from the onset. The BCCLA was the sole intervener at trial and was subsequently joined by EGALE and the Evangelical Fellowship of Canada at the provincial Court of Appeal. The CCLA, however, did not intervene in the dispute until the case was heard before the Supreme Court. Mirroring *Trinity Western*, *Chamberlain* saw an influx of social conservative, equality and professional groups, in addition to the two civil libertarian interveners.

Unlike in *Trinity Western*, however, the BCCLA and the CCLA's arguments took the side of equality in opposition to the religious sensibilities of parents and the school board. The distinction seems to be that in *Trinity Western*, a public authority was imposing

secularism on a private religious institution, whereas in *Chamberlain* a public authority was imposing religious views and thereby limiting the liberties of families with different perspectives. In *Trinity Western,* in other words, the discriminatory actions against a homosexual lifestyle were taken by a privately funded, religious based institution that was not publicly mandated to guarantee secularism. Moreover, there was no evidence that the teachers produced by this institution discriminated against gay and lesbian students in their public classroom. In *Chamberlain*, by contrast, the School Board mandated discriminatory public classrooms.

EGALE and the Elementary Teacher's Federation of Ontario were the only two interveners in *Chamberlain* that tabled arguments similar to those of the BCCLA and the CCLA. A total of six groups – Families in Partnership, the Board of Trustees School District no. 34 (Abbotsford), the EFC, the Archdiocese of Vancouver, the Catholic Civil Rights League and the Canadian Alliance for Social Justice and Family Values Association – lined up in support of the Surrey School Board's decision. Governments were neither direct nor indirect litigants in this case.

Trinity Western raised the question whether an administrative authority could apply Charter values to a private entity that was not directly subject to the Charter. As we have seen, the civil liberties organizations took a broad view of Charter applicability in the *Trinity Western* case. They took the same position on a similar (though not identical) issue in *Chamberlain.* The latter case involved the decision of a public authority, the School Board, to which the Charter clearly applied; the kind of "private" discrimination alleged in TWU was not directly at issue. Nevertheless, it was possible to decide *Chamberlain* in a

minimalist fashion by focusing only on the issue of whether the Board had contravened the secularist requirements of its governing statute, the *School Act*, and avoiding comment on the Charter. While the civil libertarians certainly supported the statutory argument (Lokan, 2002: para. 4; Sanderson, Bergner and Gora, 2002: para. 12), they argued strongly that the courts should go further and overrule the School Board on Charter grounds as well. In other words, secularism within public schools was not only guaranteed by the *School Act* but also by section 2(a) of the *Charter,* according to civil libertarians (Lokan, 2002: para. 5; Sanderson, Bergner and Gora, 2002: para. 12-14).

While the civil libertarian groups were on the winning side concerning the application of Charter values in *Trinity Western*, they lost on the issue of applying the Charter in *Chamberlain*, with the Supreme Court majority choosing the minimalist option of statutory application and interpretation. Writing on behalf of the six-judge majority, Chief Justice McLachlin argued that the Board's decision was unreasonable because: "the process through which it was made took the Board outside its mandate on the *School Act*" (*Chamberlain,* 2002: para. 57). Moreover, the Court found that the Board proceeded "on an exclusionary philosophy…without considering the interests of same-sex parented families and children who belong to them in receiving equal recognition and respect in the school system" (*Chamberlain,* 2009: para. 58). Finding that it could settle the dispute on these statutory grounds, the majority chose not to address the Charter issues – not, it is important to note, because the Charter did not apply in principle, but simply because it was not necessary to address Charter issues in order to settle the dispute.

Dissenting Justices Gonthier and Bastarche *did* apply the Charter, but not in the manner that the civil libertarians would have preferred. Gonthier and Bastarache found that the School Board struck an appropriate balance between the Charter's freedom of religion and equality rights (*Chamberlain,* 2002: para. 206). The civil libertarians were undoubtedly happy that *this* application of the Charter did not prevail, though it seems likely that, had the majority decided to apply the Charter, they would have applied it differently.

As shown in Table 3.2, the Supreme Court did not side as completely with civil libertarian arguments in *Chamberlain* as they had in *Trinity Western*. Although the CCLA failed to persuade the Court's majority to apply the Charter, they were nevertheless once again on the winning side as far as the substantive policy issue was concerned. True, the Supreme Court majority did not directly order the Board to include the books at issue, as it had ordered the approval of the TWU program. Instead, it remanded "the question of whether the books should be approved to the Board, to be considered according to the criteria laid out in the Board's own regulation, the curriculum guidelines and the broad principles of tolerance and non-sectarianism underlying the *School Act*" (*Chamberlain,* 2002: para. 74). Still, it is hard to imagine how the Board could continue to exclude the books under this order. In effect, then, the civil libertarian groups were on the winning side in an offensive challenge to the policy status quo.

Table 3.2 BCCLA and CCLA Intervention in *Chamberlain v. Surrey School District No. 36* (2009)

		CCLA & BCCLA Position	**Result**
LEGAL ISSUES	Apply *Charter* to school boards?	Yes	Loss
	Did Board contravene *School Act*?	Yes	Win
POLICY STATUS QUO	Exclude same-sex materials from curriculum	Offensive challenge	Win

3.5 - *Multani v. Commission scolaire de Marguerite-Bourgeoys* (2006)

Like *Chamberlain*, *Multani* concerned a school board decision, though in this instance the decision involved secular concerns inconveniencing a religious minority rather than majority religious concerns inconveniencing non-religious minorities. At issue in *Multani* was the right to carry religious artifacts that could potentially be used as weapons in a public space. The object in question, the kirpan, is a ceremonial dagger that is to be worn by baptized Sikhs as a symbol of protection and strength. Although this artifact carries inherent spiritual symbolism for Sikhs, it was labeled a weapon by Quebec school board. Originally permitted as long as it was hidden, twelve year old Gurbaj Singh Multani was eventually forbidden from wearing his Kirpan as the Quebec school board's council of commissioners modified its policy so as to ban all weapons, including the religious dagger.

This comprehensive ban was the policy status quo challenged in court by Multani's family. In the meantime, they transferred Gurbaj to a private school.

The Superior Court judge granted the Singh family's motion and declared the council of commissioner's ban to be void. Though the Quebec Court of Appeal found that ban violated section 2(a) of the Canadian Charter and section 3 of the Quebec Charter, they upheld the school board's actions as a reasonable limit on the basis of "potential security concerns."

Convinced that their religious freedoms remained unjustifiably impeded, the Singh family took their legal grievance to the Supreme Court at which point the CCLA (but not the BCCLA) intervened in support of their cause. Three other interveners, the World Sikh Organization, the Canadian Human Rights Commission and the Ontario Human Rights Commission also appeared before the Supreme Court in *Multani.* All four interveners came in support of the appellant. There were no interveners on the other side.

As in *Chamberlain*, "judicial minimalism" was a possible way of resolving the *Multani* dispute in the manner substantively favoured by the civil libertarians. Because the decision of an "administrative agency" (the school board) was at stake, it was possible to use the principles of administrative law. That branch of law had developed to require administrative decisions to "reasonably accommodate" religious minorities. That is, a religious minority should be provided with "reasonable" exceptions from otherwise valid secular policies and decisions if those exceptions do not cause "undue hardship." If *Multani* could be reasonably accommodated in this way, he would win his case on administrative-law grounds without any need to resort to the Charter.

In both *Trinity Western* and *Chamberlain*, the civil libertarians opposed such restrictive or minimalist approaches to Charter application, and it thus should come as no surprise that they strongly favoured Charter application in *Multani*. "A decision maker acting pursuant to a delegated powers exceeds its jurisdiction if it makes an order that infringes the Charter*,"* argued the CCLA (Mahmud, 2006: para. 27). As a branch of government under the *Education Act*, in this view, the School Board cannot use its statutory powers to impose a total ban on kirpans without impeding constitutional guarantees of religious freedoms (Mahmud, 2006: para. 27-8). Deciding the case under administrative law alone, according to the CCLA, would neglect the application of the appellant's Charter rights.

According to the CCLA, Gurbaj Singh Multani's Charter-protected freedom of religion was clearly infringed under the three-part test established by the Supreme Court in *Syndicat Northcrest v. Amselem* (2004): "1) that Gurbaj had a subjective belief that wearing a kirpan was a precept of his faith; 2) that his belief is sincerely held; and 3) that the total ban on wearing kirpans interferes with his sincerely held belief in a manner that is not trivial or insubstantial" (Mahmud, 2006: para. 56). Multani's transfer to a private school was the exemplification of the third point of how the ban was not, in fact, trivial.

Most importantly, the CCLA took the position that the Court of Appeal erred in its judgment that the infringement of Multani's religious freedom was reasonably justified under section 1 of the Charter. In particular, the CCLA did not think the total ban on kirpans satisfied the "minimal impairment" component of the *Oakes* test. The CCLA's factum argued that "reasonable accommodation" was part of the minimal impairment

standard – that is, that when “reasonable accommodation” was possible, a total “zero tolerance” policy against kirpans could not be “minimal impairment” (Mahmud, 2006: para. 71). A “total ban in the absence of cogent evidence [concerning its necessity] incurs a significant risk that stated security concerns will virtually always trump freedom of religion” (Mahmud, 2006: para. 66). Not only was “cogent evidence” in support of a total ban lacking but there was strong evidence against it – i.e., the fact that public schools in Alberta, British Columbia and Ontario accommodated kirpans, without incident (Mahmud, 2006: para. 63). In effect, the CCLA was urging that the “reasonable accommodation” standard developed in administrative law be incorporated into the minimal impairment component of the *Oakes* test, and that Singh should therefore win his case on Charter grounds.

All nine Supreme Court judges agreed that the school board had failed to meet a legal obligation to “reasonably accommodate” Multani’s kirpan, thus siding with the offensive challenge to the policy status quo favoured by the CCLA. However, two of those judges, Justices Deschamps and Abella, did not accept the CCLA’s broad view of Charter application. For Deschamps and Abella, the issue was best settled in a minimalist fashion by applying the “reasonable accommodation” standard of administrative law to the Board’s kirpan decision. Moreover, Deschamps and Abella rejected the CCLA’s claim that the reasonableness of the Board’s decision, in light of the “reasonable accommodation” standard, was best conducted under the minimal impairment test of section 1 of the Charter. For these two judges, the decision of the Board was not “prescribed by law” as required by “reasonable limits” under section 1.

We have seen that a similar minimalism prevailed in *Chamberlain*. In *Multani*, by contrast, a five-judge majority of Supreme Court judges, in an opinion authored by Justice Charron, sided with the CCLA's broad view of Charter application. She concluded that Multani's Charter right of religious freedom had been infringed on the basis of the *Anselm* criteria cited in the CCLA's factum (*Multani*, 2007: para. 40). Nor was this infringement justified as a "reasonable limit" under section 1. In response to Deschamps and Abella's claim that section 1 did not apply, Justice Charron wrote that: "where a decision maker has acted pursuant to an enabling statute … any infringement of a guaranteed right that results from the decision maker's actions is also a limit 'prescribed by law' within the meaning of s.1" (*Multani,* 2007: para 22).

Applying the section 1 *Oakes* analysis, the majority conceded that, "the council's decision to prohibit the wearing of a kirpan was motivated by a pressing and substantial objective, namely to ensure a reasonable level of safety at the school, and [that it] had a rational connection with the objective." However, a complete prohibition on kirpans did not minimally impair the student's rights (*Multani,* 2007: para. 142). This failure to impair rights as minimally as possible was based on the premise that the claimant was willing to accept limitations, namely sewing a small kirpan into his clothing, when bringing it to school (*Multani,* 2007). In defence of a "zero tolerance" ban, the council argued that the kirpan could be stolen and that allowing one student to bring a knife to school would encourage others to do so. The majority, however, rejected this dual defence, given the student's non-violent history and the commission's reluctance to educate the school population about respecting multiculturalism and religious freedoms (*Multani,* 2007: para.

76). In summary, the council had not accommodated "the distinctive character of a burdened group…to the point of undue hardship" (*Multani,* 2007: para. 18). In short, the Board's kirpan ban was "unreasonable" under section 1 for precisely the reason suggested by the CCLA, namely, that "reasonable accommodation" was required by the "minimal impairment" component of the *Oakes* test.

Table 3.3 summarizes how the CCLA's positions fared in the *Multani* case. As in *Trinity Western*, all of the CCLA's major positions were favoured by the Supreme Court. Moreover, although a *Chamberlain*-like minimalist solution, one that did not reach Charter issues, was possible, it was rejected by the Multani majority in favour of the broad theory of Charter application advanced by the CCLA. And once again, as in the previous two cases, an offensive challenge to the policy status quo succeeded. However, this string of successes would come to an end in the next case.

Table 3.3 CCLA Intervention in *Multani v. Commission scolaire Marguerite-Bourgeoys* (2006)

		CCLA Position	**Result**
LEGAL ISSUES	Apply Charter to school board?	Yes	Win
	Kirpan ban restricts religious freedom?	Yes	Win
	Restriction justified?	No	Win
POLICY STATUS QUO	Kirpan Ban	Offensive challenge	Win

3.6 - *Alberta v. Hutterian Brethren* (2009)

In 2003, the Alberta government issued a new regulation implementing a universal photo requirement for vehicle licensing. This regulation overturned previous policy allowing for religious objectors to be granted non-photo licenses, which were called Condition Code G licenses. Of the Code G licenses in the province, members of the Hutterian Brethren colonies held a majority. The Hutterian Brethren sincerely believed that the Bible forbade them from having their photograph willingly taken and objected to any such requirements by the Province, claiming it was a violation of their Charter rights guaranteed under section 2(a). The two sides were unable to reach a compromise and the dispute entered the Alberta courts. The new universal photo requirement was the policy status quo at issue in this litigation.

At trial, the Wilson County Hutterian Brethren "led evidence indicating that if members of their community could not obtain a [photo-less] driver's license, the viability of their communal lifestyle would be threatened" (*Hutterian Brethren,* 2009: para. 8). Acknowledging that the law was a violation of section 2(a), the Alberta government claimed that the universal photo requirement was intended to reduce identity theft and was thus justified under Charter section 1. The chambers judge agreed that the law was "rationally connected" to a "pressing and substantial" government objective but that it failed the "reasonable accommodation" standard that *Multani* had incorporated into the "minimal impairment" component of the *Oakes* test (*Hutterian Brethren,* 2009: para. 16). A majority of the Alberta Court of Appeal upheld the trial court decision for the same reason.

When the Alberta government appealed the decision to the Supreme Court, the CCLA entered the fray. A total of eight interveners were present, four siding with the Crown and four with the Hutterites. *Hutterian Brethren,* like *Trinity Western*, was a case where civil libertarians would side with social conservative groups, this time the EFC and the Christian Legal Fellowship. The Ontario Human Rights Commission also intervened in support of the appellants. On side with the Crown were the Attorneys General of Canada, Ontario, Quebec and British Columbia.

In *Hutterian Brethren,* there was no issue of Charter application. The regulation was the policy of a government, not an administrative agency. Nor was there any question that government regulations are "prescribed by law" and thus, if they violate Charter rights, are subject to section 1 justification under the *Oakes* test.

Referring to the *Anselm* criteria used in *Multani*, the CCLA argued that a breach of section 2(a) was established. First, "the respondents sincerely believed that allowing themselves to be photographed infringes the Old Testament's Second Commandment against idolatry" (Mahmud, Feasby and Grossman, 2009: para. 15). Second, the impact of the Province's rule is neither trivial nor insubstantial, according to the CCLA, as the Hutterties would be unable to maintain their communal lifestyle without the ability to legally drive (Mahmud, Feasby and Grossman, 2009: para. 15).

Turning to section 1, the civil libertarians stressed that the respondent's section 2(a) rights were not infringed as minimally as possible. Repeating the arguments they made in *Multani*, and relying on the Supreme Court's majority judgment in that case (and the lower court decisions in *Hutterian Brethren*), the CCLA emphasized the Alberta government's duty to reasonably accommodate those adversely affected by the law (Mahmud, Feasby, Grossman, 2009: para. 23). In the CCLA's view, the Province "did not establish that it would suffer any undue hardship by accommodating 252 Hutterites out of a population of 2.5 million licensees" (Mahmud, Feasby and Grossman, 2009: para. 2). The Alberta government's objective of reducing identity theft could not be saved by section 1 as argued by the CCLA. In terms of the policy status quo – the universal photo requirement – the CCLA was supporting an offensive challenge.

To the dismay of the Alberta Hutterites and the CCLA, a narrowly divided seven-judge panel of the Supreme Court ruled in favour of the Province. Writing on behalf of a four-judge majority, Chief Justice McLachlin conceded that the law violated the Hutterites' section 2(a) rights but found that it was reasonably justified under section 1. The Court

determined that the government's objective to fight fraud was pressing and that driving was not a right, thus giving the Province legal justifications for attaching such conditions to an operator's permit (*Hutterian Brethren,* 2009: para. 56).

Most dramatically, Justice McLachlin rejected the idea – apparently established in *Multani* and relied on by the lower courts in *Hutterian Brethren* – that "reasonable accommodation" was required by the "minimal impairment" component of the *Oakes* test. McLachlin insisted that:

> A distinction must be maintained between the reasonable accommodation analysis undertaken when applying human rights laws, and the s. 1 justification analysis that applies to a claim that a law infringes the Charter. Where the validity of a law is at stake, the appropriate approach is a s. 1 *Oakes* analysis… A different analysis applies where a government *action* or administrative *practice* is alleged to violate the claimant's Charter rights. If a Charter violation is found, the court's remedial jurisdiction lies not under s. 52 of the *Constitution Act,* 1982 but under s. 24(1) of the Charter... (*Hutterian Brethren*, 2009: para. 65-66).

This is identical to the position taken by Justices Deschamps and Abella in *Multani* and rejected by Justice Charron's *Multani* majority. Chief Justice McLachlin had been part of that *Multani* majority.

The CCLA was no doubt shocked by this result. Based on the *Multani* majority judgment – which had so thoroughly agreed with their factum in that case, and which had been applied as they would have expected by the lower courts in *Hutterian Brethren* – CCLA lawyers surely thought their offensive challenge to the policy status quo of universal

photo identification would succeed. Instead, they saw it defeated by one of the judges who had seemed to be their ally in the earlier case. Not only did the offensive challenge to the PSQ fail, moreover, but the broad legal resource the CCLA thought it had gained in *Multani* – the incorporation of "reasonable accommodation" into "minimal impairment" analysis under *Oakes* – was at least cast into doubt, if it had not been reversed.

It is unclear what explains the tension – if not, indeed, the contradiction – between *Multani* and *Hutterian Brethren*, but the presence of government interveners in support of Alberta may be a contributing factor. *Hutterian Brethren* was the only one of the four cases considered in this chapters where governments – i.e., parliamentary institutions as opposed to administrative or delegated authorities – were involved both as direct claimants and interveners – and all on one side, supporting the constitutionality of Alberta's policy. As noted in the previous chapter, research on interveners shows governments to be the most successful "repeat player" litigators above all others, including civil libertarians (see Galanter, 1974; McCormick, 1993).[7]

Although the 2011 B.C. reference on the constitutionality of the *Criminal Code* prohibition of polygamy falls outside the timeframe established for this study, it is worth noting that both the *Multani* and *Hutterian Brethren* cases played a prominent role in that litigation. As one would expect, libertarians who opposed the polygamy ban as an unjustified infringement of religious freedom emphasized *Multani* while those who supported the ban emphasized *Hutterian Brethren* (*Reference Section 293 of CCC,* 2011).

[7] However, a government's repeat player advantage is not absolute as will be shown in *KMart* and *Pepsi-Cola* in the next chapter.

Could the somewhat odd (because unpredictable) outcome in *Hutterian Brethren* be explained in part by the Court's desire to make it easier to justify the polygamy ban in the much-anticipated litigation? Although this study cannot answer this speculative question, it is difficult to resist posing it.

Table 3.4 summarizes the fate of CCLA positions in the *Hutterian Brethren* case. Only at the broadest level – the finding that Multani's religious freedom had been infringed – did the Court side with the CCLA's perspective. By finding the infringement to be a reasonable limit under section 1, however, the Court turned back the CCLA's offensive challenge to the policy status quo. That status quo would remain in place.

Table 3.4 CCLA Intervention in *Alberta v. Hutterian Brethren* (2009)

		CCLA Position	**Result**
LEGAL ISSUES	Religious freedom restricted? Restriction justified?	Yes No	Win Loss
POLICY STATUS QUO	Universal license photo requirement	Offensive challenge	Loss

3.7 - Conclusion

Table 3.5, which aggregates key dimensions of the above discussion, helps to organize some concluding reflections.

Table 3.5 Total BCCLA and CCLA Section 2(a) – Freedom of Religion Interventions (1999-2009)

	CASE			
ISSUE	TWU	Chamberlain	Multani	Hutterian Brethren
1. Apply Charter or Charter Values?	Yes ✓	Yes ✗	Yes ✓	n/a
2. Charter rights or value restricted	Yes ✓	Yes (n/a)	Yes ✓	Yes ✓
3. s.1 reasonable limit?	n/a	No (n/a)	No ✓	No ✗
4. Statute infringed?	n/a	Yes ✓	n/a	n/a
5. POLICY STATUS QUO	Off ✓	Off ✓	Off ✓	Off ✗

The libertarian position with respect to legal issues and policy status quo is indicated by "Yes," "No," "n/a" (not applicable) and "Off (offensive). ✓=SCC support; ✗=SCC rejection.

As the final row of this table indicates, the civil libertarian interveners undertook offensive challenges to the policy status quo in all four cases, contributing to the success of three of them (*TWU*, *Chamberlain*, and *Multani*) and failing only once (*Hutterian Brethren*).

All four cases raised the possibility of applying Charter rights and freedoms or Charter values (row 1), but in only one of them (*Hutterian Brethren*) was Charter applicability clear and uncontroversial; this explains the "n/a" designation for *Hutterian Brethren* in the first row of the table (i.e., it is "n/a" not because the Charter was "not applicable" but because its applicability was too clear to raise an issue for libertarian factums to address).

Where Charter applicability was in question (the first three cases in Table 3.5), the libertarians consistently argued in favour of application, losing only once (in *Chamberlain*). However, the *Chamberlain* loss on this issue signified only that the Supreme Court majority preferred to settle the issue on more minimalist statutory grounds, not that the Charter *could not* apply in such cases. In other words, while the legal resource of Charter applicability was not brought into play, neither was it denied. Overall, the libertarians' preference for broad Charter applicability received strong support.

With the Court ducking the Charter in *Chamberlain*, the libertarian positions on Charter violations and whether they could be reasonably limited become effectively "not applicable" (n/a) in that case (rows 2 and 3). The offensive challenge to the policy status quo – exclusion of same-sex materials from the school curriculum – nevertheless succeeded (row 5), though it ultimately rested on statutory rather than constitutional grounds (row 4). This illustrates the difference between policy outcome and legal resources. It is possible for an interest group to help defeat or defend the policy of immediate concern without at the same time gaining all of the legal resources it had hoped for.

Hutterian Brethren illustrates the reverse: that victory at the broadest level of legal resources (i.e., that Charter rights are infringed) does not guarantee the policy outcome one desires. If the infringement is justified as a reasonable limit, the policy status quo remains in place. *Hutterian Brethren* also illustrates how fragile the legal resources apparently granted by the Supreme Court can sometimes be. On the basis of *Multani*, the CCLA had every reason to believe that "reasonable accommodation" had been incorporated into the minimal impairment component of the *Oakes* test. Had that belief been confirmed, it

would have been more difficult to uphold Alberta's universal photo requirement. But rather than confirming the CCLA's reasonable expectations, as the lower courts in *Hutterian Brethren* had done, the Supreme Court majority dashed them.

Despite the setback in *Hutterian Brethren*, however, the four cases analyzed in this chapter show impressive support by the Supreme Court, during the time frame of this study, for the overall libertarian perspective on religious freedom. Religious freedom is defined broadly, making it easy to find infringements, and offensive challenges to infringing policies succeeded in three of the four cases.

CHAPTER 4 – FREEDOM OF EXPRESSION

4.1 – Introduction

The constitutional guarantee of free expression is a cornerstone of liberal democracy. This freedom is based on the dedication to "government by rational and free public discussion among legally equal citizens" (Holmes, 1995: 183). By providing a mechanism "for testing the truth of opinions, freedom of expression is seen to improve the quality of collective decision making" (Manfredi, 2001: 60). Moreover, freedom of expression was entrenched in the Charter to "ensure that everyone can manifest thoughts, opinions, beliefs and indeed all expressions of the heart and mind however unpopular, distasteful or contrary to the mainstream" (Greenspan and Rosenberg, 2010: 1727). The relevant Charter provision is section 2 (b) "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

Compared to the freedom of religion interventions considered in the previous chapter, civil liberties groups were more involved with freedom of expression cases. This chapter considers the nine Supreme Court freedom of expression cases that attracted the participation of the CCLA and/or the BCCLA between 1999 and 2009. As with the freedom of religion cases, the Charter applied either directly or indirectly via Charter values. There were four Charter *values* cases (*Pepsi-Cola* (2002)*, WIC Radio Ltd.* (2008)*, Grant* (2009) and *Quan* (2009)) and five that entailed direct Charter application (*KMart* (1999)*, Little Sisters* (2000)*, Sharpe* (2001)*, Bryan* (2007) and *Canadian Federation of Students* (2009)).

The CCLA was the most active of the two civil libertarian groups, intervening in eight of the nine cases (four public cases and four Charter values cases). Five of the eight CCLA cases reached the Supreme Court from the British Columbia Court of Appeal, two came from Ontario and one originated in Saskatchewan. The BCCLA participated in four cases, three direct application cases and one Charter values case. Significantly, the BCCLA was a direct sponsor of the appellants in *Little Sisters*. The four cases that the BCCLA participated in came exclusively from British Columbia. The CCLA and/or the BCCLA offensively challenged the status quo in all nine cases. Table 4.1 below provides a full rundown of civil libertarian involvement with Charter section 2(b) cases between 1999 and 2009, according to Charter application and appearances by the CCLA and/or the BCCLA.

Table 4.1 Freedom of Expression Cases by Charter Application, BCCLA/CCLA Involvement (1999-2009)

Case	Charter Values	Direct Charter Application	CCLA Involvement	BCCLA Involvement
1. *KMart* (1999)		✓	✓	
2. *Little Sisters* (2000)		✓	✓	✓
3. *Sharpe* (2001)		✓	✓	✓
4. *Pepsi-Cola* (2002)	✓		✓	
5. *Bryan* (2007)		✓	✓	
6. *WIC Radio* (2008)	✓		✓	✓
7. *Grant* (2009)	✓		✓	
8. *Quan* (2009)	✓		✓	
9. *CFS* (2009)		✓		✓

Following the same approach as the previous chapter on freedom of religion, this chapter on freedom of expression will begin with the four Charter values cases. Within the two categories, the cases will be presented in chronological order.

4.2 - Charter Values Cases

4.2.1 - *RWDSU Local 558 v. Pepsi-Cola Beverages (West) Ltd.* (2002)

This case concerned the phenomenon of "secondary picketing," in which a striking union pickets not only its employer but also "secondary" businesses. Because Saskatchewan, unlike the nine other provinces, does not have secondary picketing

legislation, private common law regulated this issue in the province. Since the Charter does not apply directly to private common law, this dispute engaged the Charter indirectly, via the "Charter values" route.

The Retail, Wholesale and Department Store Union (RWDSU) engaged in a variety of lawful picketing activities during a strike at Pepsi's plants in Saskatchewan. RWDSU members also unlawfully "engaged in intimidating conduct outside the homes of the Pepsi's management" and "carried placards in front of a hotel where members of the substitute labour force were staying" (*Pepsi-Cola,* 2002: para. 7). The key issue for our purposes, however, arose out of the fact that union members picketed not only Pepsi, the direct employer in the case, but also retail outlets within the province to prevent the delivery of Pepsi products and to dissuade stores from accepting delivery. This was the "secondary picketing" at issue. The company sought and was granted an injunction preventing the picketing of secondary sites, which the employees appealed. Siding with the employees, the Saskatchewan Court of Appeal quashed the common law restraint against union members from picketing any location other than the premises of the company, thus allowing peaceful picketing of secondary locations. The company appealed this decision to the Supreme Court.

The CCLA intervened in support of the union when the case reached the Supreme Court. Siding with the CCLA was the Canadian Labour Congress (CLC); opposing them was the Attorney General for Alberta (the government of Saskatchewan, where the case arose, did not participate in this private common law case). The CCLA's interest in supporting the union members, however, was not vested in the union's right to strike

against this particular company or their freedom of association rights (under section 2(d) of the Charter). Rather, the civil libertarians were most concerned with protecting the Charter values of free expression against private common law impediments.

To support their cause for an injunction against the union, the company referred to *Hersees of Woodstock v. Goldstein* (1963), a pre-Charter Supreme Court decision that imposed a common law criminal ban on all forms of secondary picketing. The CCLA stressed that this common law was "difficult to apply and unnecessarily curtails the right to free expression" (Sheriff-Scott, 2002: para. 5). CCLA counsel argued that the Court should reject *Hersees* because of its conflict with the free expression values that had been constitutionally entrenched since *Hersees* was initially handed down (Sheriff-Scott, 2002: para. 12). The CCLA wanted the Court to establish a new common law precedent giving secondary picketing the protection of the Charter's freedom of expression values. *Pepsi-Cola* was thus an offensive challenge to the common law PSQ.

The Supreme Court's ruling in *Pepsi-Cola* established that all forms of speech are presumptively free and can only be limited if the speech is otherwise actionable (para. 68). Disapproving the *Hersees* precedent, the Supreme Court held that secondary picketing is lawful unless it involves other forms of tortious and criminal activity. A unanimous court wrote that *Hersees* was out of step with section 2(b) values as it "denies adequate protection for free expression and places excessive emphasis on economic harm" (*Pepsi-Cola,* 2002: para. 70). Using that logic, the Court ruled that "primary and secondary picketing engage freedom of expression [even if governments are not directly involved]," and must be permitted "except where it involves tortious or criminal action" (*Pepsi-Cola,*

2002: para. 68). In other words, the Court modified the common law rule to bring it into line with Charter values, as advocated by the CCLA. Since the Court ruled in a manner consistent with the CCLA's arguments, the issue in *Pepsi-Cola* was a decisive offensive win for the civil liberties group. Table 4.2 summarizes the issues and outcomes in *Pepsi-Cola*.

Table 4.2 CCLA Intervention in *R.W.D.S.U. Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* (2002)

		CCLA Position	**Result**
LEGAL ISSUES	Apply Charter *values*?	Yes	Win
	Charter value restricted?	Yes	Win
POLICY STATUS QUO	Common law impediments against "secondary picketing"	Offensive Challenge	Win

Notably, the CCLA emerged victorious despite the presence of a government intervener (Alberta). The discussion of *Hutterian Brethren* in chapter 3 suggested that the civil libertarians and religious groups alike were trumped by the government's repeat player advantage in the case. In *Pepsi-Cola*, the opposite happened and the participating government ended up on the losing side. Note, however, that this was an intervening government from a different province. The government of Saskatchewan, the province in which the case arose, appeared neither as a party (because this was a private law case) nor as an intervener. As we will see from the remaining Charter values cases in this chapter,

the civil libertarians appear to have a repeat player advantage of their own with Charter values litigation.

4.2.2 - *WIC Radio Ltd. v. Simpson* (2008)

Like *Pepsi-Cola*, the remaining indirect-application cases involved civil libertarian claims to bring the common law into line with Charter values. In all three of the remaining cases, *WIC Radio Ltd., Grant* and *Quan,* civil libertarians argued for the need to reconcile the private common law on defamation and libel with the constitutional values of free expression.

The cause of the dispute in *WIC Radio Ltd.* was the expression of strongly worded opinions during a radio talk show. Publicly recognized as a controversial radio talk-show host, Rafe Mair got himself into hot water when he compared Kari Simpson, an outspoken anti-gay social activist, to Adolph Hitler and the Ku Klux Klan. Simpson took Mair and his employer, WIC Radio, to court on the grounds that the comments he made were defamatory and, more specifically, that he was accusing her of condoning violence against homosexuals. Mair testified that no imputations of condoning violence were made, as his intention was merely to convey the point that Simpson was an "intolerant bigot." The trial judge accepted Mair's "defence of fair comment," a private common law defence that applies to defamation cases.

In Canada, the defence of fair comment was established in *Cherneskey v. Armadale Publishers Ltd.* (1979) prior to the entrenchment of the Charter. The *Cherneskey* fair comment doctrine was as follows: "(1) the words in question must be a comment based on

true facts (2) the comment must be a matter of public interest and (3) the comment must express an opinion honestly held by the speaker" (*WIC Radio Ltd.,* 2008: para. 27). The BC Court of Appeal reversed the trial judge's decision, ruling that the defence of fair comment was not available due to the absence "of an evidentiary foundation that Simpson would condone violence against homosexuals" (*WIC Radio Ltd.,* 2008: para. 33). In addition, Mair neglected to testify that he had an honest belief that Simpson would, in fact, condone violence. Mair appealed to the Supreme Court.

Third parties did not appear in this dispute until it reached SCC. Here the CCLA and the BCCLA were joined, in support of Mair, by a "media coalition" of eight news agencies and/or media advocacy groups: the Canadian Newspaper Association, Canadian Media Lawyers Association, British Columbia Association of Broadcasters, Association of Electronic Journalists, Canadian Publisher's Council, Magazines Canada, Canadian Association of Journalists and Canadian Journalists for Free Expression. No interest intervened on behalf of the respondent and no governments were present as either direct parties or interveners.

Relying on the *Pepsi-Cola* precedent, the interveners all urged the Court to modify the common law fair comment defence to bring it into line with the Charter's free expression values, particularly by abandoning the "honest belief" requirement of the defence. They successfully persuaded the Court that the honest belief requirement inhibits free speech because the value of opinion "lies not in whether it is honestly believed, but whether it advances the debate on a matter of public interest" (*WIC Radio, Ltd.,* 2008: para. 43). Acting as "devil's advocate," testing a theory or presenting the opinions of a third

party enrich public debate and should not be limited by an honest belief requirement when challenged (*WIC Radio Ltd.,* 2008: para. 42). Additionally, a speaker whose opinions are misunderstood would be unable to use fair comment to the extent that he or she "did not honestly believe a meaning that was erroneously imputed from their statement" (*WIC Radio Ltd.,* 2008: para. 42). The chilling effects of *Chernesky*, in this view, would prevent news agencies from expressing views of another without fear of liability (*WIC Radio Ltd.,* 2008: para. 43).

The Court, agreeing that the doctrine established in *Cherneskey* was in need of revitalization after nearly three decades, unanimously abandoned the honest belief requirement. Holding that Mair's comments were grounded in opinion as opposed to an honest belief in a statement of fact, the Court nevertheless upheld his appeal on the grounds that the utility of retaining the honest belief requirement had waned to such an extent that "it no longer offers anything of value in the exercise of balancing the right to comment fairly on matters of public opinion and free speech [Mair] against the right to reputation [Simpson] " (*WIC Radio Ltd,* 2008: para. 85). Moreover, "the elimination of that element would constitute a formal recognition that it is no longer justifiable, for purposes of the fair comment defence, to judge a person's opinions on an objective basis other than to require that they have some basis in fact" (*WIC Radio Ltd.,* 2008: para. 85).

Table 4.3 illustrates how the CCLA and the BCCLA were successful in *WIC Radio Ltd.* Of great significance to the civil libertarians' policy goals, the Court nullified the honest belief requirement of the fair comment doctrine. The CCLA and the BCCLA were successful with offensively shifting the PSQ in a much sought after direction.

Table 4.3 BCCLA and CCLA Intervention in *WIC Radio Ltd. v. Simpson* (2008)

		CCLA & BCCLA Position	**Result**
LEGAL ISSUES	Apply Charter *values*? Charter value restricted?	Yes Yes	Win Win
POLICY STATUS QUO	"Honest belief" requirement of common law "fair comment" doctrine	Offensive Challenge	Win

The civil libertarian campaign to apply free expression values to the common law on defamation did not stop at *WIC Radio Ltd.*, however. The CCLA would soon pursue similar policy goals in *Grant* and *Quan*.

4.2.3 - *Grant v. Torstar Corp.* (2009) and *Quan v. Cusson* (2009)

Grant v. Torstar Corp. (2009) and its companion case *Quan v. Cusson* (2009) involved private claimants bringing libel actions against a news agency. Although the CCLA filed separate briefs in the two cases, their *Grant* factum made repeated references to the arguments found in their *Quan* factum. Though they did not combine the two cases into a single process, the Supreme Court also took note of the parallels between the two disputes and directly applied *Grant* to *Quan*.

Both cases dealt with the same issues at litigation and were a balancing act between facilitating freedom of the press and speech on the one hand and protecting an individual's reputation on the other. The potential for journalists to face defamation claims over the publication of facts that may not be correct was the status quo that was challenged by civil libertarians. Prior to *Grant* and *Quan,* a plaintiff launching a defamation action was required to prove three things to be awarded damages: "(1) that the impugned words were defamatory, in the sense that they would tend to lower plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they would be communicated to at least one other person than the plaintiff" (*Grant,* 2009: para. 28). Someone accused of defamation could invoke the defence of "truth" or the defence of "fair comment" discussed above. In other words, one cannot be convicted of defamation for making statements of true fact about someone, or making statements of "opinion" that qualify as "fair comment." The CCLA was seeking to add a third defence, the so-called defence of "responsible communication on a matter of public interest," to enhance the common law protection for those accused of defamation.

First, consider the circumstances surrounding *Grant.* In 2001, the Toronto Star published a story concerning a proposed private golf course development and the environmental damages and potential corruption related to that development. The article alleged that Peter Grant, owner of Grant Forest Products Inc., was exercising political influence behind the scenes to secure government funding to build the course on his private estate. The reporter who wrote the article attempted to verify the accusations, but Grant himself refused to comment. Grant launched a libel action against the Star for publishing

an article that greatly harmed his reputation. At trial, the newspaper claimed that its article reflected "responsible public interest journalism," a UK common law defence that had yet to be addressed by Canadian courts. The news agency, along with the civil libertarians on their behalf, contended that this defence should be available within the Canadian common law. Despite their initial defence, the trial judge ruled it did not apply and the case went to the jury on the defence of fair comment (as seen in *WIC Radio Ltd.* above), which the jury would also reject and award damages to the plaintiff.[8] The Court of Appeal found that the trial judge had erred in not leaving the responsible journalism defence to the jury and ordered a new trial. Grant appealed to have the jury's verdict reinstated while the newspaper cross-appealed, asking the Court to recognize the responsible communication defence (*Grant,* 2009).

Grant made its way through the courts at roughly the same time as *Quan*. Shortly after the events of September 11, 2001, Danno Cusson travelled to New York City to assist with the rescue efforts without the permission of his employer. Douglas Quan, Kelly Egan and Don Campbell, staff writers with Ottawa Citizen, published three separate articles alleging that Cusson misrepresented himself to NYC authorities and interfered with the Ground Zero rescue efforts. In response, Cusson launched a libel action against the newspaper and the journalists. At trial, the defendants cited the responsible journalism defence, which the trial judge rejected. The jury found the Citizen's allegations against

[8] The trial took place prior to when the Supreme Court handed down their decision in *WIC Radio* (see case above). As such, the trial judge instructed the jury that a "fair comment" must be one that a "fair-minded" person would hold (i.e. the "honest belief requirement"), a tenet that was later rejected by the Supreme Court in *WIC Radio* (*Grant,* 2009: para. 22).

Cusson had no factual basis, and awarded him damages. The Court of Appeal upheld the decision, but established the defence of responsible journalism as a viable option in Ontario (*Quan,* 2009). Insisting that responsible communication applied to them, the three journalists and the newspaper appealed to the Supreme Court.

The CCLA intervened when the two appeals reached the Supreme Court, arguing for the exemption of reasonably made communications – spoken and written – from civil liability. *Grant* and *Quan* both had large-scale involvement from media groups. Siding with the CCLA in both cases was "media coalition" of eight groups[9] and four additional groups intervening independently: the Writer's Union of Canada, Professional Writers Association of Canada, Book and Periodicals Council and PEN Canada. With the exception of Grant Forest Products Inc. intervening in *Quan* and Danno Cusson intervening in *Grant*, there was limited third party opposition to the CCLA's arguments in court. That each of the claimants reciprocally intervened in the other case implied it was primarily a reactionary endeavour, thus making them One-Shot (OS) litigants.

As stated above, *Grant* and *Quan* dealt with the same two issues at litigation: should free expression values guide the common law on defamation and if so, does the common law need modification so as to protect comments and publications on matters of "public interest" that may be incorrect but are reasonably made?

---

[9] The eight groups that comprised the "media coalition" were: Globe and Mail, Toronto Star Corporation, Canadian Broadcasting Corporation, Ad IDEM/Canadian Media Lawyers' Association, RTNDA Canada/Association of Electronic Journalists, Canadian Publishers' Council, Magazines Canada, Canadian Association of Journalists, Canadian Journalists for Free Expression, Writers' Union of Canada.

On the issue of applying Charter values, the CCLA referred to how the Supreme Court previously held in *WIC Radio Ltd.* that traditional aspects of defamation require modification to accommodate free expression values (see *WIC Radio Ltd.* above) (Jackson, Bernstein and Conroy, 2009: para. 9). Since there was interpretive leeway within the common law on defamation, the CCLA argued that the responsible journalism defence should be recognized under Canadian common law. This defence grants journalists reporting on issues of public importance the right to be (unintentionally) wrong, thus defeating a libel claim if the journalist made his or her best effort to ensure that the reported facts were correct (Jackson, Bernstein and Conroy, 2009: para. 12). For the CCLA free expression values protect statements that are not necessarily correct, but are reasonably made. The civil libertarians stressed that adapting the common law to include this defence would help to broaden the public interest and foster debate on pertinent social, economic and political matters (Jackson, Bernstein and Conroy, 2009: para. 10). Perhaps most importantly, the CCLA argued that this defence should not be limited to journalists but extend to anyone communicating on matters of public interest.

Within their factum, the CCLA made reference to the British House of Lords decision in *Reynolds v. Times Newspapers Ltd.* (2001). In *Reynolds*, the House of Lords held that: "the courts should be slow to conclude that a publication was not in the public interest [especially as it relates to a person in a position of power or social elitism], and therefore, the public has a right to know" (2001: para. 15). Since this defence had traditionally not been recognized by Canadian courts, the CCLA was attempting to harmonize Canadian with British common law. In other words, the CCLA sought to import

an established PSQ from another polity, thus offensively challenging the Canadian counterpart. Relative to the CCLA's previous intervention in *WIC Radio Ltd., Grant* and *Quan* were a continuance of the same free-expression policy goals.

In each of the majority judgments for *Grant* and *Quan,* Chief Justice McLachlin held that the law of defamation protects the reputation of individuals but cannot trump freedom of expression values guaranteed in Charter section 2(b). "Productive debate," wrote Chief Justice McLachlin in *Grant*, "is dependent upon the free flow of information" (2009: para. 52). In order to foster productive debate and the free flow of information – both of which are vital to liberal democracy – "the law must not demand perfection and the inevitable silencing of critical comment that a standard of perfection would impose" (*Grant,* 2009: para. 61). Moreover, the Court specified that: "although the right to free expression does not confer a license to ruin reputation, when proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know" (*Grant,* 2009: para. 66). Having determined that the Canadian public has an interest in the facts surrounding *Quan* as well, the Court held that the responsible communication defence recognized in *Grant* is applicable "where the publication is on matter of public interest and, having regard to the relevant factors, the publisher was diligent in trying to verify the allegations" (*Quan,* 2009: para. 28). The Supreme Court ordered new trials in *Grant* and *Quan* with the responsible journalism defence being available to both news agencies and their journalists.

The success of civil libertarians in *Grant* and *Quan* is summarized in Table 4.4. In these "partnered" decisions, the Supreme Court, recognizing the need to reconcile Canada's defamation laws with "Charter values" and the common law of other countries, affirmed a wider availability of the responsible journalism defence in Canadian defamation cases. When applying responsible journalism to the Canadian common law, Chief Justice McLachlin found that the defence should be known as "responsible communication" so as not to limit it solely to journalists and persons employed by the news media (*Grant,* 2009: para. 7). Thus, the Court assured that bloggers and other people who disseminate information on a large scale are entitled to protection as well. Needless to say, both cases were decisive (and offensive) victories for the CCLA, and the media groups alike.

Table 4.4 CCLA Intervention in *Grant v. Torstar Corp.* (2009) and *Quan v. Cusson* (2009)

		CCLA & BCCLA Position	**Result**
LEGAL ISSUES	Apply Charter *values*? Charter value restricted?	Yes Yes	Win Win
POLICY STATUS QUO	Liability for publicized comments that may not be correct but are "reasonably made."	Offensive Challenge	Win

4.2.4 - *Charter* Values Summary

Table 4.5 organizes the findings of the Charter values cases:

Table 4.5 Total BCCLA and CCLA Section 2(b) – Freedom of Expression - Charter Values Litigation (1999-2009)

	CASE			
ISSUE	Pepsi-Cola	WIC Radio Ltd.	Grant	Quan
1. Apply Charter or Charter Values?	Yes ✓	Yes ✓	Yes ✓	Yes ✓
2. Charter rights or value restricted	Yes ✓	Yes ✓	Yes ✓	Yes ✓
5. POLICY STATUS QUO	Off ✓	Off ✓	Off ✓	Off ✓

The libertarian position with respect to legal issues and policy status quo is indicated by "Yes," "No," "n/a" (not applicable) and "Off (offensive). ✓=SCC support; ✗=SCC rejection.

The CCLA and the BCCLA were overwhelming and unanimously successful with free expression values cases, achieving desirable, offensive changes to the PSQ in all four cases. The relevant common law rules were changed to permit 1) the picketing of secondary sites during labour disputes (*Pepsi-Cola*); 2) strongly worded opinions directed at a specific party (*WIC Radio Ltd.*), even without an "honest belief" in their factual truth; and 3) the publicizing of reasonably made, but perhaps untrue, comments about a specific party (*Grant* and *Quan*).

In all four Charter values cases, civil libertarians sided with non-state interveners. Opposing interveners included: the Attorney General of Alberta (*Pepsi-Cola*), Grant Forest Products Inc. (*Quan*) and Danno Cusson (*Grant*). There were no opposing interveners in

WIC Radio Ltd. The opposition seen in *Grant* and *Quan* was from OS litigants whereas in *Pepsi-Cola* the CCLA squared off against a government repeat player.

4.3 - Direct Application of the Charter

The CCLA's and the BCCLA's experience with Charter values cases would almost give the impression that they are always successful when it comes to freedom of expression litigation. When the Charter was directly invoked in public section 2(b) claims, however, civil liberties interveners were less likely to achieve their policy goals. Civil libertarians intervened in five such cases between 1999 and 2009. One of these – *KMart (1999)* – dealt with the same secondary picketing problem raised in *Pepsi Cola* above, except that the challenge was to secondary picketing *legislation* rather than common law. The other cases concerned the censorship of sexually obscene material (*Little Sisters* (2000) and *Sharpe* (2001)), banning the dissemination of election results prior to national poll closure (*Bryan* (2007)), and the Central Federation of Students' (CFS) crusade to commission "political advertisements" on Vancouver area buses (*Canadian Federation of Students* (2009)).

4.3.1 - *UFCW Local 1518 v. Kmart Canada Ltd* (1999)

UFCW Local 1518 v. Kmart Canada Ltd. (1999) was a statutory case that challenged terms of the *Labour Relations Code* banning the distribution of leaflets on secondary sites (see similar circumstances in *Pepsi-Cola* above). At issue in *Kmart* was whether reading the *Code*'s definition of picketing to include leafleting infringes freedom of expression and whether or not the infringement is justifiable under section 1 of the

Charter. Section 1(1) of the *Code* defined picketing as "a means of attending at or near a person's place of business, operation or employment for the purpose of persuading a person…not to (a) enter the place of business (b) deal or handle that person's products and (c) do business with that person" (*KMart,* 1999: para. 60). In the midst of a "labour dispute with two KMart stores, members of the appellant union, the United Food and Commercial Workers (UFCW), distributed leaflets at other KMart stores (the secondary sites)" (*KMart,* 1999). If this was "picketing," then the ban on "secondary picketing" applied. If it was not "picketing," then the ban would not apply. In other words, there was an issue of statutory interpretation involved. As noted by the case docket: "[the distribution of pamphlets] was carried out peacefully and it did not impede public access to the stores" (*KMart,* 1999: para. 4). Evidence at trial, however, indicated that as a result of the distribution of leaflets a small number of customers decided to take their business elsewhere. The Labour Relations Board, which appeared as a respondent before the Supreme Court, interpreted "picketing" to include "leafleting" and ordered the union to refrain from such "picketing" at the secondary sites. The Board rejected the union's argument that this broad definition of "picketing" was unconstitutional and that the statutory restrictions should be read down to exclude leafleting in light of Charter section 2(b). Having no luck in convincing the British Columbia Supreme Court and the Court of Appeal to accept its arguments, the UFCW appealed to the Supreme Court of Canada.

The CCLA intervened on side of the UFCW in an attempt to offensively challenge the status quo. The CLC was the only other intervener to argue a similar position to the CCLA. The Attorney General of British Columbia, the Retail Council of Canada, the

Coalition of BC Businesses and Pepsi-Cola Beverages (West) Ltd. intervened in support of the company. In other words, the CCLA and the CLC were opposed by one government and three business groups, a total of four groups that could be considered repeat players. If this suggests the CCLA and CLC were disadvantaged, the results of the case proved otherwise.

In their factum, CCLA counsel fully supported the UFCW's argument that the definition of picketing contained in section 1(1) of the *Code*, if interpreted to include leafleting, constituted a breach of section 2(b) of the Charter. The CCLA emphasized the non-coercive nature of the leaflet distribution and the union's intent to educate the public about the facts of the labour dispute as legitimate exercises of free speech under section 2(b). According to the CCLA, the definition of picketing contained in the *Code* outlawed such activities (Laskin and Farrow, 1999: para 4).

Nor did the CCLA think the legislation was a reasonable limitation of section 2(b) rights. Though there may be legislative concern that striking employees distributing leaflets *en mass* may impede access to facilities and have the same effect as conventional picketing, the CCLA emphasized that peaceful leafleting is acceptable in other provinces and protected by free speech. To CCLA lawyers, "consumers would not be intimidated by a few people handing out pamphlets outside a shopping mall" (Laskin and Farrow, 1999: para. 12). Therefore, the legislation in question failed to impair the union members' section 2(b) rights as minimally as possible and could not be saved by section 1 (Laskin and Farrow, 1999: para. 6).

The results of *KMart* are summarized in Table 4.6. Echoing the appeal of the union, and the arguments of CCLA on its behalf, the Supreme Court held that the *Code*'s definition of picketing, which clearly included leafleting, caught "more expressive conduct than is necessary to achieve the legislative objective," meaning that the "requirement of minimum impairment is not met." (*KMart,* 1999: para. 78). The Court nullified section 1(1) of the *Code* signifying a change to the PSQ, with the CCLA being victorious.

Table 4.6 CCLA Intervention in *UFCW Local 1518 v. Kmart Canada Ltd* (1999)

		CCLA Position	**Result**
LEGAL ISSUES	Freedom of expression restricted? Restriction justified?	Yes No	Win Win
POLICY STATUS QUO	Statutory ban on leafleting "secondary picketing" sites	Offensive challenge	Win

Contrary to *Hutterian Brethren* (see chapter 3) and similar to *Pepsi-Cola* (see above)*,* the CCLA came out victorious when: (1) governments opposed their side and (2) there was greater third party support for the opposing side. *KMart* was perhaps a more significant victory for the CCLA than *Pepsi-Cola* as the third party opposition they faced was comprised of multiple, economically affluent actors, including business interests and governments. This would further suggest that the CCLA itself has considerable sway in court as a repeat player, especially as it relates to labour disputes.

This pattern of civil libertarian success does not extend to cases involving the censorship of obscenity, however. Of less frequency, but not necessarily less significance, was the direct and indirect involvement of civil liberties groups with possession of sexually obscene material cases. The CCLA and BCCLA were involved with two Supreme Court obscenity cases, *Little Sisters* (2000) and *Sharpe* (2001), both of which directly invoked the Charter.

4.3.2 -*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (2000)

As already noted, the BCCLA acted as a direct sponsor to the appellants, the directors and controlling shareholders of the Little Sisters Book and Art Emporium. Given the financial, organizational and time commitments associated with direct sponsorship, this case spoke to the fiscal strength of the BCCLA in addition to their commitment to pursuing civil liberties claims within their home province. The CCLA intervened in the case once it reached the Supreme Court.

Little Sisters Book and Art Emporium was, and continues to be, a specialty bookstore that caters to the Vancouver gay and lesbian community. Their inventory, which consisted of gay and lesbian books, travel information, academic studies, HIV/AIDS information and erotica, was 80-90 percent imported from the United States. Section 152(3) of the *Customs Tariff Act* prohibits the importation of “books, printed paper, drawings, paintings, prints, photographs or representations of any kind that….are deemed to be obscene by subsection 163(8) of the *Criminal Code*” (*Little Sisters*, 2000: para. 22).

Customs inspectors were given broad discretionary powers to determine what materials were obscene. Importers of questionable material are permitted to appeal the Canadian Border Service Agency (CBSA)'s actions; however, the *onus* is on the importer to demonstrate that the goods are not obscene (*Little Sisters,* 2000: para. 22). When the appellant bookstore fell victim to this set of policies, it challenged sections of the *Customs Act* for violating section 2(b) of the Charter.

At trial, the judge concluded that the CBSA systemically targeted the appellant bookstore's importations, did so on numerous occasions, and on the basis of legislation that ran contrary to section 2(b) of the Charter. Nevertheless, the trial judge found the law to be justified under section 1, on the basis of the *Butler* "community standard" test. The Court of Appeal would also dismiss the bookstore's appeal (*Little Sisters,* 2000).

Eight interveners, including the CCLA, were present in *Little Sisters* once it was appealed to the Supreme Court. On side with the CCLA and BCCLA were the Canadian AIDS Society, the Canadian Conference of the Arts, EGALE Canada Inc., Equality Now, PEN Canada and LEAF. The Attorney General of Ontario intervened in support of the Federal Minister of Justice. Unlike in *Butler*, the civil libertarian groups were on the same side with LEAF. These two repeat players, with the support of a variety of equality and arts groups, faced off against the governments of Canada, British Columbia, and Ontario.

The interest of equality groups that intervened in *Little Sisters* was the unfair treatment a marginalized group, the gay and lesbian community, received under the current application of the *Customs Act*. Logically, equality groups, such as LEAF, opposed the

legislation on section 15 equality rights grounds. The protection for minority interests, as seen by civil libertarians, was through the lens of free expression.

On whether the *Customs Act* was a restriction of Charter section 2(b), the CCLA and the BCCLA jointly referred to the problematic application of the *Butler* "community standard" by the lower courts. This framework was previously developed by the Supreme Court in *Butler* to determine "what the community would tolerate others being exposed to on the basis that of the degree of harm that may flow from such exposure" (1992: para. 15). In developing this standard, the Court ascertained that they cannot look to specific communities but instead must apply this idea on a national, "all community inclusive" basis (*Butler,* 1992: para. 15). However, the CCLA and the BCCLA argued that this status quo was unworkable. Since the courts must look to the standard of the community as a whole, the interveners argued at trial that courts are "obligated to ignore evidence which shows, as in *Little Sisters*, that material which might in other contexts be deemed harmful may actually have positive implications for a community such as the gay and lesbian community" (Jackson and Manson, 2000: para. 32). In short, the CCLA and the BCCLA stressed that *Butler* does not place heterosexual and homosexual interests on equal footing. Hence, *Little Sisters* was not just a challenge to the policy status quo of the CBSA, but also to the previous constitutional precedent established in *Butler.*

On the issue of reasonable limitations to section 2(b) rights, civil libertarians were troubled by the fact that Customs officials had the power to seize materials for indefinite periods of time without proper public scrutiny (Jackson and Manson, 2000: para. 7). More bothersome was the fact that the *onus* was on the accused and not the government to

demonstrate why the material was not offensive under the *Customs Act.* Moreover, the records of the lower courts and the BCCLA's own investigative study indicated some materials seized and detained pursuant to the customs legislation were the same as products that were produced and readily available in Canada (*Little Sisters,* 2000: para. 10). On any potential justifications for these restrictions on free expression under the *Customs Act*, the CCLA and the BCCLA stressed that legislation fails to impair free expression rights as minimally as possible.

A 6-3 Court delivered mixed results to the bookstore and their civil libertarian colleagues, as outlined in Table 4.6. Although (as we shall see in a moment), the Court found that a part of the legislation was an unjustified infringement of the Charter, it rejected most of the civil libertarian case. For example, the Court did not accept the argument that there were problems with the *Butler* community standard. Reiterating that *Butler* is based on "harm" and not "taste," the Court held that the "community standard" was, in fact, developed to protect minority rights in accordance with Charter section 15 – equality rights. Justices Iacobucci, Arbor and LeBel specified that there was no discrepancy between heterosexual and homosexual rights within the "community standard" test (*Little Sisters,* 2000: para. 66).

More importantly, the Court concluded that although the law infringed s.2(b) freedom of expression, most of it was justified as a reasonable limit under section 1 of the Charter. Parliament's legislative objective, "which is to prevent Canada from being inundated with obscene material from abroad, was seen to be pressing and substantial with the Customs procedures being rationally connected to that objective" (*Little Sisters,* 2000:

para. 147). The majority conceded, however, that the reverse *onus* placed on the importer, under section 152(3) of the *Customs Tariff Act*, is constitutionally problematic as it is the state that is ultimately responsible for justifying the denial of material. This single provision was deemed a violation of Charter section 2(b) and struck down, while the rest of the legislation stayed intact. In response to the accusation that CBSA officials were targeting the bookstore's materials, the majority asserted that Customs needed to revisit their methods and take into consideration that gay and lesbian materials are on equal footing with heterosexual material. Thus, the offensive challenge to the status quo failed overall though it did succeed on one small component issue.

Table 4.7 CCLA Intervention, BCCLA Direct Sponsorship of *Little Sisters Book and Art Emporium* (2000)

		CCLA & BCCLA Position	**Result**
LEGAL ISSUES	Freedom of expression restricted? Restriction justified?	Yes No	Win Loss
POLICY STATUS QUO	Customs ban on "obscene material."	Offensive challenge	Loss*

*Section 152(3) of the *Customs Tariff Act* was invalidated giving a very minor win to civil libertarians.

4.3.3 - *R v. Sharpe* (2001)

Sharpe is the second censorship-of-obscenity case that attracted civil libertarian intervention during our 10 year period (1999-2009). The case turned on section 163.1(4) of the *Criminal Code*: "every person who possesses any child pornography is guilty of (a) an indictable offence and liable to a prison term not exceeding five years and; (b) an offence punishable on summary conviction" (*Sharpe,* 2001: para. 6). The broad definitions of child pornography contained in this section of the *Criminal Code* were touched upon in the opening chapter of this study. Section 163.1(4) was struck down by the BC trial court and upheld by the BC Court of Appeal. Neither the CCLA nor the BCCLA intervened until the dispute reached the Supreme Court. As usual, the issues were whether the *Criminal Code* section infringed the Charter's guarantee of free expression and, if so, whether it could nevertheless be justified as a reasonable limit under s.1.

The inherent controversy surrounding child pornography did not make civil libertarian support for free expression all that popular. The protection of children, not freedom of expression, was the prime issue framing the reporting of *Sharpe* by a majority of Canadian news outlets (Sauvageau, Schneiderman and Taras, 2006: 189). Concern for protecting children was also reflected in third party involvement in court (see Chapter 1). Approximately nine state groups, seven attorney generals and two police chiefs' associations intervened in support of the Crown along with five non-state interests (see Chapter 1). The CCLA and the BCCLA were joined on the other side by only the Criminal Lawyers' Association.

The CCLA and BCCLA maintained that the definition of child pornography established in section 163.1(4) of the *Criminal Code* was worded too vaguely and subjectively. Because the law applied to visual representations of unlawful sex or sexual abuse with minors, the CCLA and the BCCLA insisted that it "captures material that is not pornographic and posses no harm or risk of harm to minors" (Jackson and Manson, 2001: para. 20; McAlpine, Ryer and Gay, 2001: para. 12). The definition, in other words, captures material of the imagination that does not involve the *actual* sexual abuse of a child or any other criminal activity for that matter. Valuable materials of artistic expression, such as paintings, drawings and sculptures, would be subject to criminal prosecution under this law, as the civil libertarians read it. The CCLA's factum cited reputable and scholarly works, such as Plato's *Symposium*, which detailed an approving dialogue of love between men and boys, as potential violations of said law (2001: para. 21). According to both organizations, the overbroad wording made the law unsalvageable under section 1 of the Charter because it failed to limit section 2(b) rights as minimally as possible. The CCLA and the BCCLA did not argue in favour of permitting outright child pornography; rather, they contended that the "chilling effects" of the law would infringe upon the artistic merit of (1) written materials or visual representations created and held by the accused alone, exclusively for personal use; and (2) visual recordings created by or depicting the accused that do not depict unlawful sexual activity and are held by the accused *exclusively* for private use (Jackson and Manson, 2001: para. 71; McAlpine, Ryer and Gay, 2001: para. 61). The CCLA and the BCCLA were obviously engaged in an offensive challenge to the policy status quo.

Chief Justice McLachlin, on behalf of the majority, held that possession of child pornography, as intellectual and artistic material, was worthy of very limited protection under Charter section 2(b). Parliament's legislative objective of preventing harm to children was rationally connected to the criminalization of child pornography (*Sharpe,* 2001: para. 210). However, the law was problematic in terms of minimal impairment, as it was found to capture two categories of material – those outlined by the CCLA and the BCCLA – that would not be typically considered child pornography (*Sharpe,* 2001: para. 210). In short, the majority held that the law was, in fact, too broad. The Court asserted that the appropriate remedy was to read exceptions for these two categories into the law, but leave majority of the law intact (*Sharpe,* 2001: para. 122). In doing so, the Court did specify that artists would continue to be subjected to criminal penalties for publicly displaying material that depicted juvenile sexual activity, a legal doctrine that civil libertarians were taking a stand against.

What was striking about *Sharpe* was that both sides claimed victory, though civil libertarians as a whole were not entirely on board with the Court's ruling. Child protection advocates and governments overwhelmingly applauded the Court for upholding a majority of the "child porn laws" and remitting Sharpe's charges for trial (Sauvageau, Schneiderman and Taras, 2006: 183). While the two exceptions read into the law conceded something to the libertarian view, there was a cleavage between the BCCLA and the CCLA's levels of satisfaction. BCCLA president, Craig Jones, described the decision as "overwhelmingly positive" with BCCLA counsel, Bruce Ryder, stating that *Sharpe* was a "real achievement" (Sauvageau, Schneiderman and Taras, 2006: 185). However, Sauvageau, Schneiderman

and Taras wrote that CCLA counsel expressed some discontent with the Court's failure to consider the "chilling effect" of their ruling on artists (2006: 187). In the cases examined in this thesis, *Sharpe* was the only case where there was evident public disagreement between the CCLA and the BCCLA regarding the Court's decision. Given that both the trial and appellate courts struck down the law altogether, it is only logical to assume that reinstating the law – albeit with the two exceptions – was a step backwards for civil libertarians. For the purposes of this study, *Sharpe* was coded as a loss as shown in Table 4.8.

Table 4.8 BCCLA and CCLA Intervention in *R v. Sharpe* (2001)

		CCLA & BCCLA Position	**Result**
LEGAL ISSUES	Freedom of expression restricted? Restriction justified?	Yes No	Win Loss
POLICY STATUS QUO	Ban against material "depicting" child pornography	Offensive challenge	Loss

4.3.4 - *R v. Bryan* (2007)

R v. Bryan (2007) was an appeal to reconcile arguably archaic election laws with modern technology, more specifically, online blogs. Bryan, an avid politics blogger from Atlantic Canada, was charged under the section 329 of the *Canada Elections Act* for transmitting the election results of 32 ridings on his website during the 2000 federal

election before the polls had closed throughout the country. Mr. Bryan challenged the law as infringement of his Charter section 2(b) rights. Ruling in Mr. Bryan's favour, the summary conviction judge found the law to be unconstitutional and that it could not be saved under section 1. The Court of Appeal overturned the lower court's decision and restored Mr. Bryan's conviction.

Intervening in support of Mr. Bryan's appeal to the Supreme Court, the CCLA challenged s.329 of the *Elections Act* as a violation of free expression. *Bryan* was a case where the deck was stacked against the CCLA in terms of opposing third party involvement. Of a total of 13 interveners, 12 media companies argued in support of the Crown. Arguing that news stations were the gatekeepers to divulging polls results were: the Canadian Broadcasting Corporation, CTV Inc., TVA Group Inc., Rogers Broadcasting Limited, CHUM Limited, Sun Media Corporation, Sun Media (Toronto) Corporation, Canadian Press, Globe and Mail, CanWest Media Works Inc., CanWest Media Works Publications Inc. and Canoe Inc. Unlike in *WIC Radio Ltd., Grant,* and *Quan,* where civil libertarians and media groups were courtroom allies, they were opponents in *Bryan*. In the latter case, the interest of the media groups was not in preventing liability claims against their journalists but rather in maintaining their oligopoly over election news. Civil libertarians, on the other hand, believed that anyone who has the capability to release such information should be allowed to do so and is protected by free speech.

For the CCLA , Mr. Bryan's actions invoked the very core of section 2(b), namely, "convey[ing] or attempt[ing] to convey meaning in the form of political information" (Mahmud and Feasby, 2007: para. 40). The precedent set by *Thompson Newspapers Co. v.*

Canada (1998) was most heavily cited by the CCLA in their application to intervene. In *Thompson Newspapers,* the Supreme Court ruled that pre-election polls constitute “political information” that formed an important part of political discourse, a cornerstone of free expression (Mahmud and Feasby, 2007: para. 43). Given that *Bryan* pertained to actual election results as opposed to pre-election opinion polls, the CCLA was attempting to modify a policy status quo so as to include the former. Or, more directly, the CCLA was engaged in an offensive challenge to the policy status quo that prohibited the premature publication of election results.

The challenged provisions of the *Elections Act* could not be saved by reasonable limits, according to the CCLA, due to the absence of a pressing and substantial objective. Parliament’s stated objective for blacking out electoral districts in different time zones was to protect electoral fairness and to ensure that voters will not be swayed by the voting behaviour of other provinces (Mahmud and Feasby, 2007: para. 61). The idea that voters in western provinces would be persuaded to vote in accordance with the publicized results of the Atlantic provinces assumes that citizens are incapable of making rational decisions, according to the CCLA (Mahmud and Feasby, 2007: para. 61). In support, the CCLA noted the Court’s position in *Thompson Newspapers* that voters are “not a vulnerable group” as they exhibit “maturity and intelligence” (Mahmud and Feasby, 2007: para. 52). It was for these reasons that the CCLA believed that section 329 of the *Elections Act* could not be saved by section 1 of the Charter and should be consequently nullified.

Table 4.9 outlines the eventual failures of the CCLA in *Bryan*. A majority of the Supreme Court rejected the CCLA’s argument, claiming the *Elections Act*’s infringement

of freedom of expression was justified by the reasonable limits clause. Reaffirming the core value of 2(b) as a *modus operandi* for political expression, the Court willingly accepted that Bryan's actions constituted expression (*Bryan,* 2007: para. 25). The government's objective of limiting this form of expression under the *Elections Act* was justified, however, as a means of ensuring confidence in the electoral system. Previous parliamentary debates regarding the *Elections Act*, in addition to maintaining informational equality amongst the electorate, were the basis of the Court's decision (*Bryan,* 2007: para. 49). As in *Little Sisters* and *Sharpe*, a change to the status quo did not occur due to the imposition of reasonable limits on the free expression violation.

Table 4.9 CCLA Intervention in *R v. Bryan* (2007)

		CCLA Position	**Result**
LEGAL ISSUES	Freedom of expression restricted? Restriction justified?	Yes No	Win Loss
POLICY STATUS QUO	Dissemination ban on poll results prior to nationwide closure	Offensive challenge	Loss

4.3.5 - *Greater Vancouver Transit Authority v. Canadian Federation of Students* (2009)

In the most recent free expression case to be heard before the Supreme Court during this study's time frame, the BCCLA intervened in support of the Canadian Federation of

Student (CFS)'s attempt to commission advertisements on public transit vehicles that encouraged students to vote in the provincial election. In accordance with standing policy, which allowed commercial but not political ads, the transit authority refused to print said ads on the sides of their vehicles at the CFS's request. With the support of the BCCLA, the CFS challenged the policy in court as a violation of section 2(b) of the Charter. The trial judge sided with the transit authority's refusal, but the BC Court of Appeal found the policy to be an unreasonable violation of freedom of expression. The transit authority challenged the Court of Appeal's decision in the Supreme Court on the basis that the Charter did not apply to them because they were a private entity (*Canadian Federation of Students,* 2009). The Attorney Generals of New Brunswick and British Columbia intervened in support of the Transit Authority. Adbusters Media Foundation, a left-leaning media advocacy group, tabled an argument similar to that of the BCCLA.

There were three issues brought before the Supreme Court in this litigation: 1) does the Charter apply to municipal transit authorities; 2) does banning political advertisements on transit vehicles restrict free expression and if so; 3) is this restriction justified on the basis of reasonable limits?

At the core of the BCCLA's intervening argument was that the Charter applies to the transit authority as it is formally recognized as agent of government. This position was supported by four hallmarks that the Court previously set out in *Godbout v. Longueil (City)* (1997) to determine whether an administrative body is considered government. In accordance with these criteria, the BCCLA asserted that the transit authority is: (a) comprised of elected board members that are publicly accountable; (b) has the ability to

tax; (c) has the power to make laws and by-laws; and, (d) has obligations to provide public transportation that would otherwise be provided by another body of government, namely the legislature (Sanderson and Wilson, 2009: para. 9).

Flowing from this analysis, the BCCLA argued that the locations of the proposed ads and their non-violent message were reasonable expressions of free speech. To rule otherwise would prioritize commercial over political speech, a ranking inconsistent with the fundamental freedoms guaranteed in the Charter. Accordingly, the BCCLA argued that "if government is to be permitted to control content the way it did in this case, there would be nothing to stop it from limiting political speech on the sides of buses only if it was favourable to particular candidates or parties" (Sanderson and Wilson, 2009: para. 37).

A complete ban of political ads on public transit could not be justified by reasonable limits (Sanderson and Wilson, 2009: para. 45). The BCCLA led evidence that "the sides of buses have been the site of historical expression" (Sanderson and Wilson, 2009: para. 40). Allowing for expression to continue and permitting those "who wish to use the space to present their own message would in no way hamper the activity of the buses" (ibid). The Transit Authority's policy was not rationally connected to the objective of ensuring rider safety, according to the civil libertarians. The BCCLA's arguments clearly mounted an offensive challenge to the status quo.

The BCCLA's successful challenged is depicted in Table 4.9. A majority of seven judges, with Justice Fish in concurrence, ruled that the transit authority should be formally recognized as an arm of the state. The Supreme Court came to this conclusion on the basis that "the creation of the transit authority by the Greater Vancouver Region District (GVRD)

was not an attempt to privatize transportation services but was rather an administrative restructuring designed to place more power in the hands of local governments"; therefore, the realignment of public powers into an new entity could "not be considered a Charter free zone" (*Canadian Federation of Students,* 2009: para 22). The BCCLA was successful on the issue of Charter application.

On the core issue of whether or not political ads were entitled to freedom of expression protection, the Court held that the transit authority inhibited the CFS's free expression. This was primarily because political speech *prima facie* engages section 2(b). The transit authority's legislative objective of limiting political content in advertisements was for the intention of providing a "safe, welcoming public transit system" (*Canadian Federation of Students*, 2009: para. 76). However, the Court was not convinced that political content, especially of a non-violent nature that the CFS put forward, would constitute a genuine safety risk. A blanketed ban on all political advertisements was not rationally connected to the objective of maintaining safety on transit vehicles, under section 1. A new PSQ was created, much to the CFS and BCCLA's joint benefit.

Table 4.10 BCCLA Intervention in *Canadian Federation of Students v. Greater Vancouver Transit Authority* (2009)

		CCLA Position	**Result**
LEGAL ISSUES	Apply Charter to municipal transit authorities?	Yes	Win
	Freedom of expression restricted?	Yes	Win
	Restriction justified?	No	Win
POLICY STATUS QUO	"Political advertisement" ban on BC transit vehicles	Offensive challenge	Win

4.3.6 - Public Litigation Summary

Below, table 4.11 summarizes the five public freedom of expression cases

Table 4.11 Total BCCLA and CCLA Section 2(b) - Freedom of Expression - Public Litigation (1999-2009)

	CASE				
ISSUE	KMart	Little Sisters	Sharpe	Bryan	CFS
1. Apply Charter or Charter Values?	n/a	n/a	n/a	n/a	Yes✓
2. Charter rights or value restricted?	Yes✓	Yes✓	Yes✓	Yes✓	Yes✓
3. s.1 reasonable limit?	No✓	No✗	No✗	No✗	No✓
5. POLICY STATUS QUO	Off✓	Off✗	Off✗	Off✗	Off✓

The libertarian position with respect to legal issues and policy status quo is indicated by "Yes," "No," "n/a" (not applicable) and "Off (offensive). ✓=SCC support; ✗=SCC rejection.

As illustrated in the final row of the Table 4.10, the CCLA and BCCLA mounted offensive challenges to a policy status quo in all five cases. Civil libertarians ultimately came out successful in two of them (*KMart* and *Canadian Federation of Students*) and failed on the remaining three (*Little Sisters, Sharpe, Bryan*) (though they arguably won small, partial victories in the first two of these cases).

The issue of Charter application surfaced only once (*Canadian Federation of Students*) with the BCCLA arguing in favour. The Court opted to apply the Charter giving

the BCCLA a "win" on this issue. In the other four cases, Charter application was not at issue. This explains why the remaining four cells in the Charter application row are labeled "n/a."

Civil libertarians argued that a Charter right was violated in all five cases with the Court agreeing in every case. Contrary to the Charter values cases, however, these direct-application cases then proceeded to the question of reasonable limits.

Civil libertarians argued across the case set that the restrictions on free expression were not reasonable justified. In *KMart* and *Canadian Federation of Students* the Court agreed with their arguments and struck down a challenged law. These two cases also resulted in a change to a policy status quo. The Court was not sympathetic to doing the same in *Little Sisters, Sharpe* and *Bryan,* much to the dismay of civil libertarians. In *Little Sisters* and *Bryan,* the Court upheld the challenged laws on the basis of reasonable limits. Though they read two exceptions into the law in *Sharpe,* civil libertarians were not unanimously satisfied with the Court's final decision.

4.4 -Conclusion

In the previous chapter, we saw that the civil libertarian groups mounted successful offensive challenges to the policy status quo in three out of the four freedom-of-religion cases during this study's 10-year time frame. During this period the Court dealt with more than twice as many freedom-of-expression cases, and the civil libertarians experienced a somewhat lower (though still impressive) success rate. Again, all of the freedom-of-expression cases involved offensive challenges to the policy status quo, but this time they

succeeded only two-thirds (instead of three quarters) of the time. All of the Charter values cases were successful, perhaps in part because they involved judicial adjustment of the common law (the judiciary's particular lawmaking domain) while the direct-application cases involved policies enacted by the rival legislative branch. It is noteworthy that the Court always agreed with the civil libertarians – both in freedom of expression and freedom of religion cases – that the relevant Charter right had been infringed, and that it only found against the civil libertarian arguments on "reasonable limits" grounds when legislation was being considered under section 1 of the Charter. In these direct-application cases, the civil libertarian success rate fell to 40%. Such cases, of course, necessarily involve the relevant government as a direct party, perhaps helping to explain the lower success rate of civil libertarians in those circumstances (governments being the ultimate "Repeat Players"). Such factors will be given further consideration in the next and concluding chapter.

CHAPTER 5 – CONCLUSIONS AND STEPS FOR FURTHER RESEARCH

John Robin Sharpe's mission to constitutionally protect his right to possess controversially obscene material was but a drop in the bucket of civil liberties claims that are brought before the Supreme Court of Canada. For Sharpe himself, appearing before Canada's highest-ranking judges to argue that a law infringed his right to free expression was an exceptional moment. For other "more established" civil liberties advocates, namely the CCLA and the BCCLA, legal mobilization has become a routine task. Canadian law and politics scholarship has largely focused on the activity of groups that regularly litigate for policy change, labelling them "repeat players" (RPs). RP litigants are commonly broken down into three categories: governments, corporations and non-state "issue-based" organizations. Civil libertarians qualify as non-state interests. Prior to this thesis, equality groups have been the Canadian non-state actors to receive extensive coverage within the literature, with LEAF being a centerpiece of numerous studies. This gap in the literature concerning civil libertarians was the starting point for this thesis.

The purpose of this thesis was to assess civil liberties interveners, and how "successful" those groups have been in influencing legal issues in Charter section 2 "fundamental freedoms" cases and in affecting the policy status quo. Methodologies for measuring success – particularly those that focus on the different legal issues at trial (Manfredi 2004) and those that consider how litigation affects the policy status quo (Morton and Allen 2001) – were integrated to accomplish this goal. A ten-year snapshot, 1999-2009, was taken of the CCLA and the BCCLA's fundamental freedoms litigation in the Supreme Court of Canada. Over the course of this time period, civil libertarians were

involved with four section 2(a) freedom of religion cases and nine section 2(b) freedom of expression cases, for a total of 13 Supreme Court interventions.

In all 13 cases, civil libertarians mounted offensive challenges to the policy status quo (PSQ). This is perhaps not surprising, given the general civil libertarian opposition to public policy that constrains individual liberty.

Sometimes the challenged PSQ was embodied in judge-made common law, in which case the civil libertarian challenge had to rely on the indirect influence of "Charter values" rather than the direct application of Charter "rights and freedoms." This occurred in four of the freedom-of-expression cases (*Pepsi-Cola, WIC Radio, Grant, and Quan*). The civil libertarian challenge to the PSQ succeeded in all four of these cases, and in the process civil libertarians won on all of the relevant legal issues.

One reason for this unblemished record of success may be the nature of the opposition faced by the RP civil libertarian groups. Governments, identified in the literature as the ultimate and most successful RP participant in litigation, did not feature prominently in these common law cases. True, Alberta intervened against the libertarian side in *Pepsi-Cola*, but, by definition in this private law case, no government was a direct party, and the government of Saskatchewan (where the case arose) did not participate. In the other three cases, governments and public agencies were entirely absent, and the civil libertarian RP groups confronted mainly one-shot (OS) litigants.

The indirect application of Charter values also occurred in one of the religious freedom cases – *Trinity Western* – though in a slightly different way. This case did not focus on the common law but rather on the question whether a publicly delegated

administrative authority (the BCCT) could base its decision regarding a private educational institution – to which the Charter did not directly apply – on "Charter values." The answer was that the BCCT could resort to Charter values, but that they had applied those values incorrectly, in violation of Trinity Western's religious freedom – precisely what the civil libertarian groups had argued. The result, moreover, was a successful challenge to the PSQ, which had prevented TWU from offering a full teacher education program. The BCCT may be an administrative authority, but it is not the kind of RP player represented by the government itself, as typically represented by its Attorney General.

Overall, the five "Charter values" cases considered in this study gave the civil libertarians their highest success rate. Not only did the civil libertarian challenge to the PSQ succeed in every one of these cases; so did the civil libertarian position on all of the legal issues.

Where the Charter is directly applicable, governments or their prominent agencies are more regularly involved as direct parties and interveners. In our eight direct-application cases, the results were more mixed from a civil libertarian perspective. In one of those cases – *Chamberlain* – the Court's majority chose to sidestep the Charter issues, even though the Charter could, in principle, have been applied. The majority preferred to resolve the issue on the grounds of statutory interpretation instead. It did so in a manner that changed the PSQ in the way that the libertarians preferred, but it did not choose the libertarians' preferred route of applying the Charter (though it did not deny the potential applicability of the Charter either). Overall, the case remains a strong victory for the civil libertarian groups.

The Court did not similarly sidestep the Charter in the other 7 cases in which it could be directly applied. In those 7 cases, the Court answered the threshold legal issue – whether the PSQ infringed the relevant Charter provision – in the manner preferred by the civil libertarians – i.e., the Court always found a Charter violation. Very early on, the Supreme Court chose to interpret freedom of religion and freedom of expression very broadly, making it easy to find infringements, and shifting the bulk of analysis to the question whether the *prima facie* infringement can be justified as a "reasonable limit" under section 1 of the Charter. The cases considered in this study were no exception. However, while the civil libertarians always saw their position on Charter violations vindicated by the Supreme Court, they did not as regularly succeed on the section 1 issue.

In four of the seven cases where reasonable limits were considered, the Supreme Court upheld a challenged law on the basis of reasonable limits (*Hutterian Brethren, Little Sisters, Sharpe, Bryan*); in these cases the civil libertarians not only lost the section 1 legal issue, but also failed in their offensive challenge to the PSQ. In the other three cases that addressed the issue of section 1 justification (*Multani, KMart* and *Canadian Federation of Students*), the challenged laws were struck down as being "unreasonable" limits on Charter rights; these, obviously, were victories for the civil libertarians. On the critical section 1 issue, in other words, civil libertarians had a success rate of less than 50 percent – a far cry from their unblemished record in Charter values cases (where section 1 does not typically arise) and their similarly impressive record on the question whether Charter rights or values have been infringed. In this group of cases, moreover, the Court's answer to the section 1 issue determined the fate of the civil libertarian challenge to the policy status quo.

Although the state was involved in all seven direct-application cases, it is worth noting that federal or provincial governments successfully defended the policy status quo (and civil libertarians lost their offensive challenges) in all four cases in which governments were direct parties (*Hutterian Brethren, Little Sisters, Sharpe, Bryan*). This is consistent with the litigation advantage ascribed by the literature to repeat player governments. The CCLA and the BCCLA are also repeat players, of course, but, at least in our case set, they did not do well against governmental repeat players.

By contrast, civil libertarians won their challenges against the state when the direct party was not a government *per se*, but a state agency like a school board (*Multani*), a transit authority (*Canadian Federation of Students*), or a labour relations board (*KMart*). Such agencies are not repeat players in the manner of either governments or the civil libertarian organizations we are considering. Nor, it bears noting, did governments *per se* intervene in two of these cases (*Multani* and *Canadian Federation of Students*). A governmental repeat player, the Attorney General of British Columbia, did intervene against the libertarian side in *KMart*, but obviously did not succeed in the manner of direct-party governments (much as the Alberta government's intervention in *Pepsi-Cola* did not succeed in defending the PSQ). Two state agencies – the Canadian and Ontario Human Rights Commissions – *did* intervene in *Multani*. These agencies are more plausibly included in the RP category, but they intervened as allies of the CCLA.

Overall, our admittedly small case set supports the general findings of the literature – i.e., that repeat players have a litigation advantage and that the greatest advantage goes to RP governments (i.e., governments *per se* rather than state agencies). Based on our case

set, one might wonder – but only wonder because the evidence is too skimpy – whether RP governments have a greater advantage as direct parties than as interveners. In fact, the set of cases examined in this study is too small to be more than suggestive on many of the issues and questions we have addressed. At the same time, this study's analysis of an admittedly small dataset establishes the groundwork and the methodological framework for a broader analysis of civil libertarian policy litigation.

Additional research on civil liberties and other non-state interveners can be undertaken to broaden and further support the findings of this thesis in two main ways. The first and most logical step would be to consider a wider timeframe of cases. The ten-year time frame for this study (1999-2009) could obviously be expanded to include both earlier and more recent cases. Among other things, a larger number of cases over the course of the Charter's history would facilitate meaningful statistical analysis. It would also allow scholars to assess civil libertarian influence and success in cases where they are opposed not just by governments but by opposing repeat players, such as LEAF. LEAF and the civil libertarians were on opposite sides in *Butler* and in the recent B.C. polygamy reference, with the side favoured by LEAF prevailing on many legal issues, and on the decisive PSQ, issues in each case. But both of these cases fall outside this study's time frame. In fact, the confrontation between egalitarian and libertarian positions in our case set seems less prominent than it seems to have been at other times. A more complete and accurate picture of such interactions between libertarians and non-libertarian repeat players would clearly be possible in a longer time frame.

Second, a wider array of Charter issues should be considered. This study focused only on the freedom of religion and freedom of expression issues raised by section 2 of the Charter. But civil libertarians, including the CCLA and the BCCLA, have been very active in litigating the Charter's "legal rights," such as the section 8 guarantee against unreasonable search and seizure or the section 9 guarantee against arbitrary detention. When claimants bring section 8 and 9 rights infringements before the courts, governments are almost always a direct party, thus allowing for a more extensive test of the claimed governmental RP litigation advantage. Does that advantage look the same with respect to legal rights cases as it does with respect to the fundamental freedom cases considered in this study? Does it look the same over a longer time frame with respect to any particular issue? Future research must address such questions if we want to understand libertarian legal mobilization as well as we do, say, feminist legal mobilization. One aim of this thesis has been to lay the foundation for such ongoing research.

CASES AND FACTUMS CITED

- *Alberta v. Hutterian Brethren of Wilson County* [2009] 2 S.C.R. 567
    - Mahmud, Jamal, Colin Feasby and David Grossman. Factum for the Canadian Civil Liberties Association (intervener). Court File no. 32186
- *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143
- *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342
- *Brown v. Board of Education of Topeka* [1954] 347 U.S. 483
- *Canada (Attorney General) v. PHS Community Services Society* [2011] 3 S.C.R. 134
- *Chamberlain v. Surrey School District no. 36* [2002] 4 S.C.R. 710
    - Lokan, Andrew. Factum for the Canadian Civil Liberties Association (intervener). Court File no. 28654.
    - Sanderson, Chris W., Keith B. Bergner and Christopher E. Gora. Factum for the British Columbia Civil Liberties Association (intervener). Court File no. 28654.
- *Cherneskey v. Armdale Publishers Ltd.* [1979] 1 S.C.R. 1067
- *Dagenais v. Canadian Broadcasting Corp,* [1994] 3 S.C.R. 835
- *Egan v. Canada* [1995] 2 S.C.R. 513
- *Ford v. Quebec (Attorney General)* [1988] 2 S.C.R. 712
- *Grant v. Torstar Corp.* [2009] 3 S.C.R. 640
    - Jackson, Patricia D.S., Andrew E. Bernstein and Jennifer A. Conroy. Factum for the Canadian Civil Liberties Association (intervener). Court File no. 32932
- *Greater Vancouver Transit Authority v. Canadian Federation of Students* [2009] 2 S.C.R. 295

  - Sanderson, Chris W. and Chelsea D. Wilson. Factum for the British Columbia Civil Liberties Association (intervener). Court File no. 31845

- *Godbout v. Longueuil (City)* [1997] 3 S.C.R. 844

- *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* [2007] 2 S.C.R. 391

- *Hersees of Woodstock Ltd. v. Goldstein* [1963] 2 O.R. 81

- *Hunter et al. v. Southam Inc.* [1984] 2 S.C.R. 145

- *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000] 2 S.C.R. 1120

  - Jackson, Patricia D.S. and Tycho M.J. Manson. Factum for the Canadian Civil Liberties Association (intervener). Court File no. 26858.

- *Multani v. Commission scholaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256

  - Mahmud, Jamal. Factum for the Canadian Civil Liberties Association (intervener). Court File no. 30322.

- *Operation Dismantle v. The Queen* [1985] 1 S.C.R. 441

- *Plessy v. Ferguson* [1896] 163 U.S. 537

- *R v. Bryan* [2007] 1 S.C.R. 527

  - Jamal, Mahmud and Colin Feasby. Factum for the Canadian Civil Liberties Association (intervener). Court File no. 31052.

- *R v. Butler* [1992] 1 S.C.R. 452

- *R v. Keegstra* [1990] 3 S.C.R. 697

- *R v. Malmo-Levine* [2003] 3 S.C.R. 571

- *R v. Morgentaler* [1988] 1 S.C.R. 30

- *R v. Morgentaler* [1993] 3 S.C.R. 462

- *R v. Oakes,* [1986] 1 S.C.R. 103

- *R v. Seaboyer* [1991] 2 S.C.R. 577

- *R v. Sharpe* [2001] 1 S.C.R. 45

    - Jackson, Patricia D.S. and Tycho M.J. Manson. Factum for the Canadian Civil Liberties Association (intervener). Court File no. 27376.

    - McAlpine, John D., Bruce Ryder and Andrew D. Gay. Factum for the British Columbia Civil Liberties Association (intervener). Court File no. 27376.

- *R v. Tessling* [2004] 3 S.C.R. 432

- *RWDSU v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573

- *RWDSU Local 558 v. Pepsi-Cola Beverages (West) Ltd.* [2002] 1 S.C.R. 156

    - Sheriff-Scott, David. Factum for the Canadian Civil Liberties Association (intervener). Court File no. 27060.

- *Reference re Public Service Employee Labour Relations Act (Alta.)* [1987] 1 S.C.R. 313

- *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698

- *Reference re Section 293 of the Criminal Code of Canada* [2011] B.C.S.C. 1588

- *Rodriguez v. British Columbia (Attorney General)* [1993] 3 S.C.R. 519

- *Schachter v. Canada* [1992] 2 S.C.R. 679

- *Schneider v. The Queen* [1982] 2 S.C.R. 112

- *Smith v. Allwright* [1944] 321 U.S. 649

- *Symes v. Canada* [1993] 4 S.C.R. 695

- *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551

- *U.F.C.W., Local 1518 v. KMart Canada Ltd.* [1999] 2 S.C.R. 1083

- *Quan v. Cusson* [2009] SCC 62
  - Jackson, Patricia D.S., Andrew E. Bernstein and Jennifer A. Conroy. Factum for the Canadian Civil Liberties Association (intervener). Court File no. 32932
- *Quebec (Attorney General) v. Laroche* [2002] 3 S.C.R. 708
- *Thibaudeau v. Canada* [1995] 2 S.C.R. 627
- *Thompson Newspapers Co. v. Canada* [1998] 1 S.C.R. 877
- *Tremblay v. Daigle* [1989] 2 S.C.R. 530
- *Trinity Western University v. British Columbia College of Teachers* [2001] 1 S.C.R. 722
  - Kenney, Lindsay. Factum for the British Columbia Civil Liberties Association (intervener). Court File no. 27168.
  - Lokan, Andrew, Heather Bowie and Eduard Van Bemmel. Factum for the Canadian Civil Liberties Association (intervener). Court File no. 27168.
- *U.F.C.W., Local 1518 v. KMart Canada* [1999] 2 S.C.R. 1083
  - Laskin, John B. and Trevor C.W. Farrow. Factum for the Canadian Civil Liberties Association (intervener). Court File no. 26209.
- *Vriend v. Alberta* [1998] 1 S.C.R. 493
- *W.I.C. Radio Ltd. v. Simpson* [2008] 2 S.C.R. 420
  - Cameron, Jamie, Matthew Milne-Smith and John McCamus. Factum for the Canadian Civil Liberties Association (intervener). Court File no. 31608.
  - Holmes, Robert D. and Christina Godlewska. Factum for the British Columbia Civil Liberties Association (intervener). Court File no. 31608.

WORKS CITED

- Atcheson, M. Elizabeth, Mary Eberts and Beth Symes. 1984. *Women and Legal Action: Precedents, Resources and Strategies for the Future.* Ottawa: Canadian Advisory Council on the Status of Women.

- Bakan, Joel. 1997. *Just Words: Constitutional Rights and Social Wrongs.* Toronto: University of Toronto Press.

- Baker, Dennis. 2010. *Not Quite Supreme: the Courts and Coordinate Constitutional Interpretation.* Montreal: McGill/Queen's University Press.

- Berry, Jeffrey. 1989. *The Interest Group Society (Second Edition).* Boston: Little, Brown.

- Borovoy, Alan. 2002. "Interventions and the Public Interest." In F.L. Morton, ed., *Law, Politics and the Judicial Process (Third Edition):* 289-95. Calgary: University of Calgary Press.

- Brodie, Ian. 2002a. *Friends of the Court: the Privileging of Interest Group Litigants in Canada.* Albany: SUNY Press.

- Brodie, Ian. 2002b. "Intervenors and the Charter." In F.L. Morton, ed., *Law, Politics and the Judicial Process (Third Edition):* 295-98. Calgary: University of Calgary Press.

- Brodie, Ian. 2002c. "Response to Gregory Hein." In F.L. Morton, ed., *Law, Politics and the Judicial Process (Third Edition):* 360-1. Calgary: University of Calgary Press.

- Cairns, Alan. 1992. *The Charter versus Federalism: The Dilemmas of Constitutional Reform.* Montreal: McGill-Queen's University Press.

- Clement, Dominique. 2005. "An Exercise in Futility? Regionalism, State Funding and Ideology as Obstacles to the Formation of a National Social Movement Organization in Canada." *BC Studies* 146: 63-91.

- Cortner, Richard. 1968. "Strategies and Tactics of Litigants in Constitutional Cases." *Journal of Public Law* 17: 287-307.

- Epstein, Lee. 1985. *Conservatives in Court.* Knoxville: University of Tennessee Press.

- Flanagan, Thomas. 1997. "The Staying Power of the Legislative Status Quo: Collective Choice in Canada's Parliament after Morgentaler," *Canadian Journal of Political Science* 30: 31-54.

- Flanagan, Thomas. 2002. "Canada's Three Constitutions: Protecting, Overturning and Reversing the Status Quo." In Patrick James, Donald E. Abelson and Michael Lusztig, eds., *The Myth of the Sacred: the Charter, the Courts and the Politics of the Constitution in Canada.* Montreal: McGill-Queens University Press.

- Galanter, Marc. 1974. "Do the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change," *Law and Society Review* 9: 95-160.

- Greene, Ian, Carl Baar, Peter McCormick, George Szablowski and Martin Thomas. 1998. *Final Appeal: Decision-Making in Canadian Courts of Appeal.* Toronto: Lorimer.

- Greenspan, Edward L. and Marc Rosenberg. 2010. *Martin's Annual Criminal Code 2010.* Aurora: Canada Law Book.

- Harding, Mark. 2011. "Value Added?" MA Thesis, University of Calgary.

- Hausegger, Lori. 1994. "The Effectiveness of Interest Group Litigation: An Assessment of LEAF's Participation in Supreme Court Cases." MA Thesis, University of Calgary.

- Hausegger, Lori, Matthew Hennigar and Troy Riddell. 2009. *Canadian Courts: Law Politics and Process.* Toronto: Oxford University Press.

- Hein, Gregory. 2000. "Interest Group Litigation and Canadian Democracy," *Choices* 6: 3-32.

- Hogg, Peter and Allison A. Bushell. 1997. "The Charter Dialogue Between the Courts and Legislatures (or Perhaps the Charter Isn't Such a Bad Thing after All)", *Osgoode Hall Law Journal* 35: 75-124.

- Holmes, Stephen. 1995. *Passions and Constraints: On the Theory of Liberal Democracy.* Chicago: University of Chicago Press.

- Knopff, Rainer and F.L. Morton. 1992. *Charter Politics.* Scarborough: Nelson Canada.

- Manfredi, Christopher P. 2001. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism (Second Edition).* Don Mills: Oxford University Press.

- Manfredi, Christopher P. 2002. "Constitutional Rights and Interest Advocacy." In F.L. Morton, ed., *Law, Politics and the Judicial Process (Third Edition):* 329-43.

- Manfredi, Christopher P. 2004. *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund.* Vancouver: UBC Press.

- Manfredi, Christopher P. and James B. Kelly. 1999. "Six Degrees of Dialogue: A Response to Hogg and Bushell," *Osgoode Law Journal* 37: 513-27.

- McCormick, Peter. 1993. "Party Capability Theory and Appellate Success in the Supreme Court of Canada," *Canadian Journal of Political Science* 26(3): 523-40.

- Morton, F.L. and Avril Allen. 2001. "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada," *Canadian Journal of Political Science* 34: 55-84.

- Morton, F.L. and Rainer Knopff. 2000. *The Charter Revolution and the Court Party.* Peterborough: Broadview Press.

- Patrick, Jeremy. 2007. "Civil Liberties Advocacy in Canada: A Survey and Critique," *Oklahoma City University Law Review* 32: 188-213.

- Razack, Sherene. 1991. *Canadian Feminism and the Law: the Women's Legal Education and Action Fund and the Pursuit of Equality.* Toronto: Second Story Press.

- Roach, Kent. 1993. "The Role of Litigation and the Charter in Interest Advocacy." In F. Leslie Seidle ed., *Equity and Community: the Charter, Interest Advocacy and Representation.* Ottawa: Institute for Research on Public Policy.

- Russell, Peter. 1985. "The Supreme Court and Federal-Provincial Relations: the Political Use of Legal Resources," *Canadian Public Policy* 11(2): 161-70.

- Sauvageau, Florian, David Schneiderman and David Taras. 2006. *The Last Word: Media Coverage of the Supreme Court of Canada.* Vancouver: UBC Press.

- Scheppele, Kim Lane and Jack L. Walker. 1991. "The Litigation Strategies of Interest Groups." In Jack L. Walker, ed., *Mobilizing Interest Groups in America.* Ann Arbor: University of Michigan Press.

- Schlozman, Kay Lehman and John T. Tierney. 1986. *Organized Interests in American Democracy.* New York: Harper and Row.

- Sharpe, Robert J. and Kent Roach. 2005. *The Charter of Rights and Freedoms (Third Edition).* Toronto: Irwin Law.

- Sigurdson, Richard. 1993. "Left- and Right-Wing Charterphobia in Canada: A Critique of the Critics," *International Journal of Canadian Studies* 7-8: 95-115.

- Smith, Miriam. 2005. "Social Movements and Judicial Empowerment: Courts, Public Policy and Lesbian and Gay Organizing in Canada," *Politics and Society* 33: 327-53.

- Songer, Donald, Reginald Sheehan and Susan Brodie Haire. 1999. "Do the Haves Come Out Ahead Over Time?" *Law and Society Review* 33: 811-32.

- Tushnet, Mark V. 2005. *The NAACP's Legal Strategy Against Segregated Education, 1925-1950.* Chapel Hill: University of North Carolina Press.

- "About CCLA." http://ccla.org/about-us/. (Accessed September 20, 2011).

- "BCCLA History." http://www.bccla.org/originsofbccla.htm. (Accessed September 20, 2011).