

Righteous Litigation: An Examination of Christian Conservative Interest Group
Litigation before the Appellate Courts of Canada, 1982-2009

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Introduction

As a result of the adoption of the *Canadian Charter of Rights and Freedoms* (henceforth simply “the Charter”) in 1982, and the subsequent move by the Supreme Court of Canada to take on a more political role and to occasionally act as a policy maker, “interest group use of litigation as a political tactic has flourished.”¹ Within the discipline, this is seen as being the cause of polarized debate. On one hand, proponents of an increasingly open and active judiciary that is willing to permit participation by groups who offer social facts in support of historically put-upon minorities tend to argue that this has had a positive result, generally for groups they favour.² Charter critics and advocates of traditional parliamentary supremacy, more often found on the right but also existing in the centre or on the left of the political spectrum, stand in staunch opposition to this. They argue that the inclusion of interest groups in court proceedings has served to undermine democracy, as courts, supposedly at the whim of special rights advocates, now order elected officials to comply in ways they never had in the pre-Charter era.³

Two such critics, F.L. Morton and Rainer Knopff, are well known for their work on the courts in the post-Charter era. In *The Charter Revolution and the Court Party*, Morton and Knopff state that small but increasingly powerful groups of national unity advocates, equality seekers, postmaterialists, civil libertarians and social engineers have joined together in an attempt to promote judicial power over parliamentary supremacy, empowering judges and putting the power to make policy in the hands of an unelected, unaccountable body.⁴ Although they had been present in traditional, electoral politics and had found some success in having sympathetic individuals placed in strategically significant positions of government, these groups had generally failed to enact change through traditional means and had thus turned to the courts after the adoption of the Charter. This “Court Party” thesis, as it is known, has been widely cited by law and politics scholars.

The Court Party thesis has attracted several critics. Lisa Young and Joanna Everitt, for example, take issue with the thesis for a number of reasons, but one such reason is notably important for the purposes of this study. They assert that Morton and

¹ F.L. Morton and Avril Allen, “Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada,” in *Canadian Journal of Political Science* 34, no.1 (March 2001); 1. See also Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany, New York: State University of New York Press, 2002), 1, Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto, Ontario: Thompson Educational Publishers, 1989), Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women’s Legal Education and Action Fund* (Vancouver, British Columbia: UBC Press, 2004), xiii, Andrew Petter, “Canada’s Charter Flight: Soaring Backwards into the Future,” in *Journal of Law and Society* 16, no.2 (Summer 1989); 151-165, and Richard Sigurdson, “Left- and Right-Wing Charterphobia in Canada: A Critique of the Critics,” in *International Journal of Canadian Studies* 7-8 (1993).

² See Didi Herman, *Rights of Passage: Struggles for Gay and Lesbian Legal Equality* (Toronto, Ontario: University of Toronto Press, 1994), Miriam Smith, *Political Institutions and Lesbian and Gay Rights in the United States and Canada* (New York, New York: Routledge, 2008), Miriam Smith, “Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada,” in *Policy and Society* 33, no. 2 (2005); 327-353, and Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality Seeking, 1971-1995* (Toronto, Ontario: University of Toronto Press, 1999).

³ See F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ontario: Broadview Press, 2000), Brodie, *Friends of the Court*, Mandel, *The Charter and Legalization of Politics*, Manfredi, *Feminist Activism*, and Petter, “Canada’s Charter Flight.”

⁴ Morton and Knopff, *The Charter Revolution*, 59.

Knopff's "assessment ignores the extensive use that other groups – notably business, but also social conservatives – make of the courts,"⁵ drawing on Gregory Hein's work to support their argument. Hein's study, which criticizes conservative judicial critics for their failure to present a complete and unbiased picture of interest group litigation,⁶ measures organized interests in court between 1988 and 1998. He finds that business interests have brought the highest number of claims,⁷ and while many of the groups identified by Morton and Knopff as part of the Court Party have higher numbers of claims than do social conservatives, the latter are by no means absent or the least-represented interest participating in the courts.⁸ Social conservatives and even more specifically Christian conservatives can actually be classified as 'repeat players,'⁹ groups which not only use the courts, but do so repeatedly. Regardless of this, very little attention is paid to them in the Canadian interest group literature.¹⁰ This paper seeks to address Young and Everitt's criticism of the Court Party thesis by examining the litigation efforts of the Evangelical Fellowship of Canada (EFC) in an attempt to provide empirical data for the growing body of literature on interest group litigation. We then examine the Court Party thesis in light of this new evidence.

Methodology

We modelled the method for selecting and coding cases largely after that developed by Morton and Allen's study of feminists' success before the courts.¹¹ To achieve a systematic study, we used the following case selection criteria: the case must be an appeal court ruling; the EFC participates in the case as an intervenor; and the case is decided between 1982 and 2009. One of Morton and Allen's criteria cannot be adopted, however: they look not only at LEAF, but any feminist interest group litigant and any case that engages a feminist issue.¹² Due to length restrictions (and the fact that Morton and Allen's approach blurs their findings about LEAF specifically), we examine only those cases in which the EFC has participated. Trial court rulings are not included, and if a case has appeared before more than one court of appeal (the Ontario Court of Appeal and the Supreme Court of Canada, for example), only the Supreme Court decision is included in the coded results to avoid double-counting, and in recognition of the fact that the outcome in the higher court of appeal is the more important one.

Like Morton and Allen, this paper examines multiple dimensions of success: in the immediate dispute, in law, and in policy.¹³ As they point out, "the most obvious aspect of success is the outcome of the dispute: does the litigant...win [their] case?"¹⁴

⁵ Lisa Young and Joanna Everitt, *Advocacy Groups* (Vancouver, British Columbia: UBC Press, 2004), 114.

⁶ Gregory Hein, "Interest Group Litigation and Canadian Democracy," in *Law, Politics, and the Judicial Process in Canada, 3rd Edition*, ed. F.L. Morton, 344 (Calgary, Alberta: University of Calgary Press, 2002).

⁷ *Ibid.*, 349-350.

⁸ *Ibid.*, 350.

⁹ Marc Galanter, "Why the 'Haves' Come out Ahead: Speculation on the Limits of Legal Change," in *Law & Society* 9 (1974); 95-106.

¹⁰ The only existing literature to be found that examines the success rates of socially conservative groups in Canada is Jeremy Clarke's "Social Conservatives in Court: A Reassessment of Canadian and U.S. Experience" (MA thesis, University of Calgary, 2003).

¹¹ Morton and Allen, "Feminists and the Courts," 59.

¹² *Ibid.*, 59.

¹³ *Ibid.*, 65.

¹⁴ *Ibid.*, 65.

The second dimension, law, refers to the precedent created through legal interpretation. Interest groups may have no interest in the actual dispute at hand. Instead, their interest often lies in achieving “favorable jurisprudence”¹⁵ which can be used to achieve future policy goals.¹⁶ Moreover, a litigant may “win” the dispute, but for the “wrong” legal reasons from their perspective. The final dimension of success, policy, can often be the most important. If the objective of the litigation is to challenge the validity or constitutionality of a policy, the alteration (nullification, severance, addition, or modification)¹⁷ by the courts or the subsequent repeal of the impugned policy by legislative means, achieves the policy goal. However, Morton and Allen explain the double-edged nature of the policy dimension: “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.”¹⁸

Morton and Allen differentiate between the different forms of litigation based on the purpose of the group’s positions relative to the policy status quo (PSQ). Groups can either be proactive or reactive: proactive groups are ‘offensive,’ challenging existing laws and policies. Reactive groups, on the other hand, intervene in an attempt to defend legislation that has been challenged.¹⁹ For both offensive and defensive cases, there are two outcomes: a win and a loss. This results in four possible combinations. In order of preferred outcome, these are offensive win, defensive win, offensive loss, and defensive loss. Offensive wins are the most preferred outcome because they result in a change in the challenged policy status quo, which is not easily dislodged by subsequent legislative action. Ultimately, this is what a group wants. Defensive wins occur when a group successfully intervenes to maintain the existing policy status quo; they are “less preferred” than offensive wins only because a defensive win simply retains the existing PSQ, and “[i]n this respect...is not much different from an offensive loss.”²⁰ Offensive losses are the second most unfavorable outcome. This type of loss results in wasted resources, but there is no change in the policy status quo. A defensive loss, however, results in both wasted resources and a negative change in the policy status quo.

The EFC in Court: Overview and Statistical Findings

To determine how successful an intervenor group has been before the courts, the cases must be coded according to the three dimensions of success utilized by Morton and Allen in *Feminists and the Courts: Measuring Success in Interest Group Litigation* and by Jeremy Clarke in *Social Conservatives in Court: A Reassessment of the Canadian and*

¹⁵ Ibid., 65.

¹⁶ Morton and Allen cite *Andrews v. Law Society of British Columbia* [1989]. The purpose of LEAF’s intervention “was to encourage justices to adopt a set of interpretive rules that would enhance the policy leverage of section 15 for future feminist claims.”

¹⁷ The courts are capable of changing government made policy in four different ways: nullification; severance; addition; and modification. Nullification occurs when the impugned law is struck down entirely. Severance and addition are similar in that the impugned legislation is found to missing something, perhaps a group of individuals. In the case of severance, the court excises the offending portion of the legislation. Addition, as it implies, occurs when the court adds something to the law. Modification occurs when the courts change something about the impugned legislation such as the intent.

¹⁸ Morton and Allen, “Feminists and the Courts,” 67.

¹⁹ Ibid., 67.

²⁰ Ibid., 68.

United States Experience. Here, we present the coded results of this analysis, providing empirical results that can later be discussed in the context of the Court Party thesis. We begin by outlining the coding scheme and annotation used, and then present the actual coded results. We then provide coded results by court to illustrate the success rate of the Evangelical Fellowship of Canada (EFC) by province and level of court. Finally, cases in which the outcome for the group do not match the final blended score used in this methodology are reexamined and taken into account (specifically, the outcome of *Egan*).

Coding: An Overview

The annotation used in the coding of these results is, for the sake of consistency, identical to that used by Morton and Allen in their examination of feminists before the court, but differs slightly from that utilized by Clarke in his examination of social conservative litigants. Table 1 below presents the total coding for all cases, regardless of policy issue, province, or court. Cases are arranged alphabetically in the first column and are italicized when the case results in a change in the policy status quo. The second column indicates whether the EFC's intervention in the case is an attempt to challenge the existing status quo (offensive, annotated "Of") or to protect the existing status quo (defensive, annotated "De"). The third column, the policy status quo (PSQ), is a measurement of the policy outcome relative to the intervening group. Here, a positive result (+) is coded when the group engages in offensive litigation and overturns the existing PSQ in favour of a more desirable policy. A "no change" (0) can be coded in two different situations: a defensive win and offensive loss. A defensive win occurs when the court upholds the existing policy status quo, which the intervenor supports in their factum or oral argument. An offensive loss similarly results in no change to the policy status quo. The intervenor, in an attempt to overturn the existing PSQ with one they find preferable, is unsuccessful, resulting in the policy staying in place. When the group fails to defend the existing policy status quo, we assign a negative score (-).²¹

The fourth, fifth, and sixth columns (Dispute, Law, and Policy) are all coded in the same manner, in keeping with the methodology utilized by Morton and Allen. A win in any of these three columns is coded as a 1. A loss, conversely, is coded as a 0. In the event of a partial win/loss or an ambiguous result, both Morton and Allen, and Clarke, use a 0.5 to indicate an ambiguous outcome. In a number of non-Charter cases, not applicable (n/a) is coded in the law column because, as Morton and Allen note, "they do not create new constitutional precedents that carry over into other policy fields,"²² the group is simply not interested in these aspects of the case (the Policy coding in *Lafontaine*), or the courts do not address the issue (the Law coding in *Borowski*). The seventh and final column represents the average of these three, which Morton and Allen

²¹ Clarke's approach to coding the PSQ differs slightly from Morton and Allen's. While Morton and Allen make use of a +, 0, - scale, in which - is a loss, + is a win, and a 0 is used to indicate no change in the PSQ, Clarke uses a -1 to 1 scale, resulting in a more complex coding scheme that includes "offensive splits" and "defensive splits." A win is coded as a +1. An offensive split is annotated 0.5, and occurs when a group is partially successful in overturning a policy they disagree with. A 0 is still used to indicate a defensive win or an offensive loss, but a defensive loss is coded as a -1. A defensive split rests between a loss and no change in the PSQ at -0.5, and is defined as a partially failed attempt by a group to defend an existing, favourable PSQ. We follow Morton and Allen's approach.

²² Morton and Allen, "Feminists and the Courts," 69.

refer to as a “blended score.”²³ This blended score provides a more holistic and accurate evaluation of a group’s success before the court in place of the comparatively simple success by dispute measure and, like Morton and Allen, we require a score of 0.67 to be achieved before considering the final outcome a success.²⁴ Finally, cases that appear as “u/c” are uncoded due to being unable to obtain the factum submitted by the EFC.

Analysis

Of the 24 cases in which the Evangelical Christian Fellowship has intervened since 1982, two-thirds have been Charter disputes. Sixteen of these cases involve some kind of Charter challenge, while eight do not.²⁵ As Tables 1 and 2 indicate, the EFC fares much worse in Charter cases than in non-Charter cases. In non-Charter cases, the Evangelical Fellowship is successful in three of the seven cases coded here. In Charter cases, however, their success rate plummets to approximately thirty-three percent.

Table 1: Non-Charter Cases

Case and Court	Of/De	PSQ	Dispute	Law	Policy	Average
<i>A.A. v. B.B.</i> (ONCA)	De	-	0	0	0	0
<i>Chamberlain</i> (SCC)	De	-	0	0	0	0
Dobson (SCC)	De	n/a	0	0	n/a	0
Harvard College (SCC)	De	0	1	n/a	1	1
McRae (FCA)	u/c	u/c	u/c	u/c	u/c	u/c
Mossop (SCC)	De	0	1	0.5	1	0.83
<i>Owens</i> (SKCA)	Of	+	1	n/a	1	1
Winnipeg CFS (SCC)	Of	0	0	n/a	0	0
	Of=2	+=1	Wins=3	Wins=0	Wins=3	Wins=3
	De=5	0=3	Loss=4	Loss=4	Loss=3	Loss=4
	u/c=1	-=2	n/a=0	n/a=3	n/a=1	u/c=1
		n/a=1	u/c=1	u/c=1	u/c=1	
		u/c=1				

The most immediately obvious difference between this analysis and that conducted by Morton and Allen, as we can see in tables 1 and 2, is the number of cases included. That study included cases in which not only feminist interest groups had participated, but also those that engaged a feminist issue. This yielded a total of 47 cases. Of these, feminist interest groups intervened in 29 (62%).²⁶ This is comparable to the number of cases in which the Evangelical Fellowship has been granted leave to intervene.

²³ Ibid., 71.

²⁴ Clarke, “Social Conservatives and the Courts,” 22-23, Morton and Allen, *Feminists and the Courts*, 71, and Razack, *Canadian Feminism and the Law*, 128.

²⁵ It is worth noting that in one of the non-Charter cases, *A.A. v. B.B.*, a potential Charter conflict is brought up on appeal but is not considered by the court.

²⁶ Morton and Allen, *Feminists and the Courts*, 62-63.

Table 2: Charter Cases

Case and Court	Of/De	PSQ	Dispute	Law	Policy	Average
Adler (SCC)	Of	0	0	0	0	0
<i>Amselem</i> (SCC)	Of	+	1	1	1	1
<i>Barbeau</i> (BCCA)	De	-	0	0	0	0
Borowski (SCC)	Of	0	0	n/a	0	0
Egan (SCC)	De	0	1	0	1	0.67
<i>Halpern</i> (ONCA)	De	-	0	0	0	0
Hutterian Brethren (SCC)	Of	0	0	0	0	0
Lafontaine (SCC)	Of	0	0.5	0	n/a	0.25
Latimer (SCC)	De	0	1	1	1	1
<i>M. v. H.</i> (SCC)	De	-	0	0	0	0
Rodriguez (SCC)	De	0	1	1	1	1
Rosenberg (ONCA)	u/c	u/c	u/c	u/c	u/c	u/c
<i>Sharpe</i> (SCC)	De	-	1	0	0.5	0.5
Spratt (BCCA)	Of	0	0	0	0	0
Trinity Western (SCC)	De	0	1	1	1	1
<i>Vriend</i> (SCC)	De	-	0	0	0	0
	Of=6	+=1	Wins=6	Wins=4	Wins=5	Wins=5
	De=9	0=9	Loss=9	Loss=10	Loss=8	Loss=10
	u/c=1	-=5	n/a=0	n/a=1	n/a=1	u/c=1
		n/a=0	u/c=1	u/c=1	u/c=1	
		u/c=1				

However, Morton and Allen's study examines feminist litigation over a period of only 14 years, from 1982 to 1996; LEAF and other feminist interest groups have participated in more cases in less than half of the total time covered in this study, which examines the EFC's litigation from 1982 to 2009. Manfredi's work indicates that LEAF has continued to intervene and (to a lesser extent) succeed before the Supreme Court.²⁷

In none of the columns representing the different dimensions of success is the Evangelical Fellowship more successful than they are unsuccessful. The dimension in which they come the closest is the policy dimension in non-Charter disputes, in which they have three coded wins and three losses. This is, however, subject to further re-examination due to this author's inability to obtain the submitted facta for two cases: *McRae v. the Queen* [1997], which was heard before the Federal Court of Appeal; and *Rosenberg v. Canada* [1995], heard before the Ontario Court of Appeal. In both of these cases, the Evangelical Fellowship was granted leave to intervene. However, due to the lack of case facta, these cases are coded as "uncoded" (u/c).

²⁷ Manfredi, *Feminist Activism*, 16-18.

One case that must be reexamined and recoded is *Egan v. Canada*. Technically, *Egan* represents a win for the EFC as the group successfully saw victory in both the dispute and policy dimensions, giving them a blended score of 0.67. This signifies a win. However, what is sometimes more important than winning the case is establishing the legal precedent that will assist in winning future legal battles. The decision in *Egan*, while not entirely favourable to gays and lesbians (as a majority of the justices found that there was no material disadvantage conferred upon gay and lesbian couples by denying them access to the spousal supplement of the *Canadian Pension Plan*), did establish sexual orientation as a protected ground under s. 15 of the Charter.²⁸ For gays and lesbians, this is Morton and Allen's "blessing in disguise"²⁹; for conservative Christians, however, it is an unmitigated disaster.

Tables 1 and 2 also illustrate the positioning of the Evangelical Christian Fellowship relative to the existing policy status quo. Morton and Allen's examination reveals that feminist interest groups predominantly make use of the courts as an instrument of social change, with twenty nine of forty seven cases (62%) being offensive in nature, and eighteen of these twenty nine challenges being successful (62% of the total offensive cases, 38% of the total number).³⁰ The Evangelical Fellowship's rate of intervention is significantly lower, with only eight of twenty-four cases (33%) being offensive in nature. Only two of these offensive cases, *Amselem* and *Owens*, are successful offensive cases. The policy status quo, which is typically resistant to change through "traditional political means,"³¹ poses no such problem for the courts that can overturn policy through judgments. Despite their attempts, the EFC has largely been unable to convince the courts to do so. However, this result also engages Hein's concept of the "judicial democrat," a group that uses the courts to point out deficiencies in the political system and enhance democracy.³² He states, "they [judicial democrats] should listen to groups that lack political power, protect vulnerable minorities and guard fundamental values."³³ This assumes that groups that lack political clout are exclusively members of minority groups. The fact that Christian groups who are ideologically conservative are the ones unable to influence the government to achieve the desired policy are, in these circumstances, the minority without political clout. The term "judicial democrat," then, appears to simply apply to groups who use the courts. The difference, then, is whether or not the judicial democrat is proactive, meaning the group initiates a court challenge or intervenes to support such a litigant, or reactive, meaning it intervenes in an attempt to protect the policy status quo. The EFC can be classified as a primarily reactive judicial democrat as they tend towards intervening in cases where they attempt to support the existing status quo, but they do, although less frequently, intervene to challenge the government.

By individual court, tables 1 and 2 also demonstrate that the Evangelical Fellowship is most active at the Supreme Court level. The Fellowship has only participated in five different courts: the British Columbia Court of Appeal (BCCA); the

²⁸ *Egan v. Canada*, [1995] 2 S.C.R. 513

²⁹ Morton and Allen, *Feminists and the Courts*, 81.

³⁰ Morton and Allen, *Feminists and the Courts*, 70-71.

³¹ Thomas Flanagan, "The Staying Power of the Legislative Status Quo: Collective Choice in Canada's Parliament after Morgentaler," in *Canadian Journal of Political Science* 30 (1997), 31-53.

³² Hein, "Interest Group Litigation and Canadian Democracy," 345.

³³ *Ibid.*, 345.

Saskatchewan Court of Appeal (SKCA); the Ontario Court of Appeal (ONCA); the Federal Court of Appeal (FCA); and the Supreme Court of Canada (SCC). A full fifteen of the EFC's twenty-four cases (63%) have been before the Supreme Court. Of these fifteen, seven (47%) are victories according to the initial blended score. This is reduced to six (40%) after we take into account the recoding of *Egan*. At the Ontario Court of Appeal, the group has participated in three (13%) cases, none of which are successful endeavors. The British Columbia Court of Appeal heard two cases (8%) in which the EFC participated, both of which were losses. The Fellowship participated in *McRae* before the Federal Court of Appeals, which remains uncoded. The final case, *Owens*, representing approximately 4% of the total number of cases participated in, was heard before the Saskatchewan Court of Appeal.

Having demonstrated that the Evangelical Fellowship does not fare particularly well in their court interventions, the next step that must be taken is a systematic examination and evaluation of the argumentation put forth by the group in the form of the facts presented to the courts. In doing this, we uncover the legal and political agenda which cannot simply be inferred by identifying the cases in which the EFC intervenes. Though the reasons interested third parties may seek to intervene in a case are sometimes evident because of the nature of the case, there are instances in which the purpose of intervention is much less clear.³⁴ In the next section, we examine cases by policy area. We begin by presenting data showing which cases engage these specific policy areas, and then proceed with our examination, beginning with cases involving homosexuality, freedom of religion, abortion, other sanctity of life issues, and ending with expression.

Analysis of EFC Arguments by Policy Area

As a religious advocacy group, one might assume the cases intervened in are in some way related to the maintenance or promotion of an evangelical Christian way of life. The majority of the EFC's interventions are not, however, in cases that engage the Charter's s. 2(a), freedom of religion and conscience protections. As illustrated by Table 3, only 3 of the 24 total cases involve an active s. 2(a) claim by the plaintiff. The group, while not engaging in cases that are explicitly religious in nature, intervene in cases that could *potentially* affect the religious freedoms of Canadians. The cases this group chooses to intervene in most are those involving issues surrounding homosexuality and gay rights (11 of 24 cases), of which 7 deal with s. 15 equality rights.³⁵ The remainder of the cases, which deal with the issues of abortion, the sanctity of life, and free expression, have not garnered as much attention as have cases involving issues brought forth

³⁴ Morton and Allen point to the intervention of LEAF in *Andrews v. Law Society of British Columbia* as an example of this. The plaintiff in *Andrews* was male and the case itself did not engage a feminist issue. Instead, the factum submitted by LEAF urged justices to narrow the eligibility for s. 15 claims to "historically disadvantaged groups," to broaden the scope to include discriminatory purpose *and* effect, and to shift the burden of proof from plaintiff to government. See footnote in *Feminists and the Courts*, 65.

³⁵ While only 6 of the 11 cases involving homosexuality include s. 15 claims, there are 9 cases in total that deal with s. 15. The other s.15 cases are *Rodriguez v. British Columbia*, which involved the issue of a disabled woman's attempt to challenge the criminal ban on assisted suicide, *Adler v. Ontario*, which involved a challenge to the constitutionality of publically funded religious schools, and *Borowski v. Canada (Attorney General)*, which challenged the constitutionality of abortion. While the majority decision in *Rodriguez* found that this case was not properly a s. 15 case, one dissenting justice found that it was.

Table 3: Profile of Cases (In Alphabetical Order)

Case Name	Law	Policy Area
A.A. v. B.B.	Children's Law Reform Act	Gay Rights
Adler	Charter, 2(a), 15(1), Education Act	Religious Freedom
Amselem	Charter, 2(a)	Religious Freedom
Barbeau	Charter, 15(1)	Gay Rights
Borowski	Charter, 7, 15, Constitution Act, Criminal Code	Abortion/Fetal Rights
Chamberlain	School Act	Gay Rights/Religious Freedom
Dobson	Tort	Abortion/Fetal Rights
Egan	Old Age Security Act, Charter, 15 (1)	Gay Rights
Halpern	Charter, 15(1)	Gay Rights
Harvard Mouse	Patent Act	Other Sanctity of Life
Hutterian Brethren	Charter, 2(a)	Religious Freedom
Lafontaine	Charter, 2(a)	Religious Freedom
Latimer	Charter, 12	Other Sanctity of Life
McRae	Income Tax Act	Tax Law
Mossop	Canadian Human Rights Act	Gay Rights
M. v. H.	Family Law Act, Charter, 15(1)	Gay Rights
Owens	Saskatchewan Human Rights Code	Expression/Religious Freedom/Gay Rights
Rodriguez	Charter, 7, 12, 15(1), Crim. Code	Other Sanctity of Life
Rosenberg	Income Tax Act, Charter, 15(1)	Gay Rights
Sharpe	Charter, 2(b)	Obscenity/Expression (Child Pornography)
Spratt	Charter, 2(b)	Expression/Abortion/Fetal Rights
Trinity Western	Teaching Profession Act	Religious Freedom/Gay Rights
Vriend	Individual Rights Protection Act, Charter, 15(1)	Gay Rights
Winnipeg CFS	Mental Health Act	Abortion/Fetal Rights

regarding the rights of gays and lesbians. We proceed with the qualitative examination of the EFC's litigation efforts first by policy area, and within those areas, by chronological order.

Profile of the Case Arguments

Homosexuality

Despite primarily intervening in cases to oppose any legal benefits for homosexuals, the EFC did not appear in the first case where the courts declared sexuality a protected ground under s. 15 of the Charter. Released in the same year the Evangelical Fellowship began litigating, the Federal Court of Appeal in *Douglas v. Canada* declared the ban on homosexuals serving openly in the military to be unconstitutional, and read sexuality into s. 15.³⁶ The resulting decision by the Canadian military to not appeal the Federal Court of Appeal's decision resulted in no such declaration by the Supreme Court. The Supreme Court, by virtue of being the highest and final court of appeal in Canada may have very well disagreed with the decision to read in and reversed it. One of the cases in which the EFC did involve themselves during their first year as intervenors, *Mossop*, was a case involving homosexuality. This case, heard before the Supreme Court of Canada, did not involve the Charter. It is, however, the first case in which we see the EFC's legal agenda regarding homosexuals.

Mossop involved the complaint of Brian Mossop, a federal employee cohabitating with his male partner. After taking a day off work to mourn the passing of his partner's father and subsequently claiming it as a day of bereavement, Mossop was informed that he was ineligible because of the exclusion of same-sex couples in the phrase "family status" in the collective agreement. The Court found that, absent a Charter challenge, the courts and administrative tribunals were bound to do nothing more than apply the law as it was written.³⁷ Clarke, however, notes that while the Court did not speculate about the outcome had the case included a Charter challenge, the majority was careful to note the decision *might* have been different had there been one.³⁸

The Evangelical Fellowship's factum argument in this case rests on a number of different factors. First, the EFC claimed that the lower courts and tribunals had erred in applying a functionalist approach during trial.³⁹ Here, the functionalist approach included the court's willingness to extend the legislative meaning of "family status" to family-like relationships. The difference, as the EFC pointed out, is in the difference between status and relationship, and the statutory meaning of the term "family." A relationship, they argued, does not necessarily imply a status as the two represent distinct concepts. Instead, "the term 'status' refers to a person's legal social relation and condition, or the legal position of an individual, in or with regard to the rest of the community."⁴⁰ While a government-conferred status necessarily implies some kind of relationship, the converse cannot be said to be true; a relationship between individuals does not necessarily involve any kind of status being affixed.

The crux of the Evangelical Fellowship's argument in this case rested on law and society's common understanding of what a family is and who is able to define it. The EFC submitted that it is initially the state and only the state that can alter or abrogate status it has conferred upon a group. However, the dictionary definition of a family,

³⁶ *Douglas v. Canada*, [1993] 1 F.C. 264

³⁷ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554

³⁸ Clarke, "Social Conservatives in Court," 52-53.

³⁹ W.I.C. Binnie and Jenny P. Stephenson, Focus on the Family, the Salvation Army, REAL Women, the Evangelical Fellowship of Canada, and the Pentecostal Assemblies of Canada factum in *Canada (Attorney General) v. Mossop*. Supreme Court of Canada File No. 22145, at page 4.

⁴⁰ *Ibid.*, 4.

which in the grammatical sense has never included cohabitating gays or lesbians, essentially precludes government from making this change. Some indicator would need to be used in a situation in which gays and lesbians were ever to be included in this,⁴¹ essentially differentiating between the traditional family and this new type of family.

This definitional defense of relationships defined by status continued in *Egan*. Unlike the *Mossop* case, *Egan* involved a s. 15 challenge on the exclusion of same-sex couples in the term “spouse” in s.2 of the *Old Age Security Act*. Again, the EFC⁴² argued the formal difference of status between “spouses” and another relationship, “couples.” The status conferred upon spouses is, once again, only something that can be done by government.⁴³ Furthermore, the intervenor offered not only a religiously-based defense of the impugned legislation that focuses on the biological compatibility of men and women and the unique ability of opposite-sex couples to reproduce,⁴⁴ they also employed a feminist argument in defense of the legislation. They noted that the original purpose of the legislation was to “confer a benefit on a particularly vulnerable group, which [was] distinguished by the economic disadvantage of heterosexual spouses uniquely biologically capable of procreating children, and who [were] usually required to incur the economic disadvantages associated with child rearing.”⁴⁵ As this policy represents and potentially perpetuates what might be considered the optimal family structure espoused by proponents of new natural law theory, it was defended vigorously by the EFC.

Egan is at once both a great success and an even greater failure for conservative Christian groups. While the majority of the Supreme Court accepted that there is no economic disadvantage suffered by gays and lesbians because of their exclusion from the OAS’s spousal supplement,⁴⁶ a position which the EFC advocated,⁴⁷ they did not adopt the group’s firmly held position that the extension of s. 15 to protect sexual minorities is incorrect. The resulting nine-judge decision declaring sexual orientation an analogously protected ground under s. 15(1) of the Charter,⁴⁸ while representing only one of the three dimensions of success, ultimately proved to be the most important for future gay rights cases. This declaration went far beyond the proposed remedy sought by the EFC, who offered three suggestions for remedy: “(i) redefining spouse with the broad and very significant ramifications discussed herein; (ii) creating another non-spousal benefit

⁴¹ *Ibid.*, 15.

⁴² The Evangelical Fellowship actually participated in this case as a part of a coalition, which included numerous other faith groups.

⁴³ Jervis and Benson, *factum* in *Egan v. Canada*, 2-3.

⁴⁴ *Ibid.*, 14-18.

⁴⁵ *Ibid.*, 12.

⁴⁶ Gay and lesbian couples were, according to Justice Sopinka, actually better off because they are not eligible for the spousal supplement. Traditionally, the spousal supplement, which was lower, was meant to supplement the partner who had sacrificed employment in favour of staying home and rearing children. This was, typically, the wife. In a homosexual relationship, this gendered family dynamic disappears, as neither is entirely reliant on the other. Because homosexuals were excluded from the term “spouse” and forced to both apply for Old Age Security, both would be eligible for the full benefit. Economically, they were thus better off than a heterosexual couple that would see one individual receiving Old Age Security and the other receiving a lower supplement.

⁴⁷ *Ibid.*, 12-13.

⁴⁸ *Egan v. Canada*, [1995] 2 S.C.R. 513

category; or, (iii) by making a declaration of unconstitutionality with a temporary suspension to permit Parliament to redraft the legislation.”⁴⁹

Vriend and *M. v. H.* followed shortly after, with Supreme Court justices making use of the *Egan* precedent in both. In *Vriend*, a homosexual man was dismissed from his job at a Christian college after revealing his homosexuality shortly after a policy on homosexual conduct was adopted. He attempted to lodge a complaint with the Alberta Human Rights Tribunal, only to find out that the *Individual’s Rights Protection Act* did not include protections for gays and lesbians.⁵⁰ The EFC, along with numerous other third parties, were granted leave to intervene. In defense of the Alberta government, the Evangelical Fellowship argued the precedent set in *Egan* – however, the group did not argue that gays and lesbians had been granted Charter protection. Instead, they put forth the argument that there are instances in which it is both rational and legitimate for a government to extend legal status to some groups while simultaneously denying them to others.⁵¹ The Evangelical Fellowship further argued the deleterious effect of the Court ultimately making the decision to include gays and lesbians in the *IRPA* rests solely with the elected government; any intervention by the Court serves only to diminish the role of the citizenry in policy-making decisions.⁵²

M. v. H. [1999], a case brought about by two lesbian women who were formerly in a relationship together, challenged the constitutionality of the definition of “spouse” in s. 29 of Ontario’s *Family Law Act*.⁵³ Similar to the circumstances in *Egan*, the *Act* specified an opposite-sex relationship as the only type of relationship qualifying for state-conferred benefits, in this case, for spousal support upon dissolution of the relationship. The EFC, as part of the Interfaith Coalition, again differentiated between “spouses” and “coupleness” for the purposes of state support.⁵⁴ The EFC argued that the purpose of the law, similar to that in *Egan*, was to provide compensation, primarily for women, who traditionally sacrifice occupation and earnings in favor of child-rearing duties. The focus on the unique biological ability to procreate among most heterosexuals ignores the nature of parenthood for many Canadians. Numerous options, such as adoption, in vitro fertilization, and simply cohabitating without adopting, exist for both the traditional heterosexual couple and the non-traditional couple who opt for non-traditional forms of becoming parents. In terms of precedent to be set, the group again argued for deference to the legislature. If the Court was so inclined to declare the under-inclusiveness of the statute unconstitutional, the EFC proposed what they deemed to be the appropriate remedy: to temporarily suspend the decision to allow the legislature “to permit other non-spousal couples, who are not analogous to heterosexual spouses, to be considered for this benefit.”⁵⁵

Halpern and *Barbeau* are two of the cases initially brought forth by gays and lesbians to overturn the traditional, heterosexual common law definition of marriage.

⁴⁹ Jervis and Benson, factum in *Egan v. Canada*, 20.

⁵⁰ *Vriend v. Alberta*, [1998] 1 S.C.R. 493

⁵¹ Milnert Fenerty, Gerald D. Chipeur, Heather L. Treacy, and Andrea E. Manning, the Evangelical Christian Fellowship factum in *Vriend v. Alberta*. Supreme Court File No. 25285, page 5.

⁵² *Ibid.*, 8.

⁵³ *M. v. H.*, [1999] 2 S.C.R. 3

⁵⁴ Peter R. Jervis, Michael Meredith, and Danielle Shaw, the Interfaith Coalition factum in *M. v. H.* Supreme Court File No. 25838, page 16.

⁵⁵ *Ibid.*, 18.

Both cases involved gay or lesbian couples that had attempted, on their own or through their church, to be legally married and were denied marriage certification by the governments of their respective provinces.⁵⁶ The EFC, along with numerous other groups, were granted leave to intervene. In both cases, the intervenors focused on four key issues: the status of marriage as not being a product of law; the lack of discrimination present; the protection of religious objection; and the role of Parliament in the recognition (if any) of same-sex relationships for the purposes of benefits. Each factum begins with a simple statement regarding the nature of marriage: it is not a legal construct.⁵⁷ Instead, it is an institution, which, though recently recognized by legislation, “is a pre-existing societal, and, primarily, religious institution which has existed for millennia.”⁵⁸ As a concept which has existed pre-government, it is held as being untouchable simply because it is.

After illustrating the positions of various faith groups and declaring that all major religions recognize marriage only between man and woman, and building on the argument that the heterosexual definition of marriage is not discriminatory, the EFC argued that the definition itself cannot be found to be discriminatory to those not already within its parameters.⁵⁹ They argued that instead of drawing a formal distinction, marriage and the law recognizing it confer distinct status. Consequently, it is the legal regime, shaped by elected representatives, which grants or denies benefits based on status that is responsible for differentiating.⁶⁰ Thus, according to the EFC, there is no discrimination, merely distinction.

The protection of religions and their more conservative adherents is of paramount importance for the EFC and the other groups forming the Interfaith Coalitions. In proposing remedies, counsel for the Interfaith Coalitions cautioned the courts against imposing policies on the Canadian public that would elicit an objectionable obligation on religious minorities. The Interfaith Coalitions did not argue that there should be no state recognition of relationships between gay and lesbian couples, but rather that it simply cannot be considered marriage and it cannot force religious persons to “abandon the public manifestation of their views regarding the true nature of marriage and sexual morality.”⁶¹ Optimally, the groups sought to have the courts uphold the traditional definition of marriage but in the event that they found a rights violation, they requested the decision be suspended and deferred to Parliament “to establish an alternative legislative scheme for the recognition of same-sex partnerships.”⁶² Here, as with earlier cases, we do not see the EFC lobbying to have no recognition of same-sex relationships, but simply advocating that if there is to be any, it must be done by legislative means, and preferably not as “marriage” per se.

The final EFC intervention dealing solely with issues of homosexuality is the case of *A.A. v. B.B.* [2007], colloquially known as the “three parents case.” Here, a lesbian

⁵⁶ *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251 and *Halpern v. Canada (Attorney General)*, 2003 26403 (ON C.A.)

⁵⁷ Benson, factum in *Barbeau v. British Columbia*, 1 and Jervis, Akbarali, and Miller, factum in *Halpern v. Canada*, Court of Appeal File No. CA029048, page 1.

⁵⁸ Jervis, Akbarali, and Miller, factum in *Halpern v. Canada*, 1.

⁵⁹ *Ibid.*, 16.

⁶⁰ Benson, factum in *Barbeau v. British Columbia*, 20.

⁶¹ Jervis, Akbarali, and Miller, factum in *Halpern v. Canada*, 26.

⁶² *Ibid.*, 26.

woman (A.A.) sought a declaration from the courts that she was a legally recognized parent of the biological child (D.D.) of her partner (C.C.) and the biological father (B.B.). This would grant A.A. all of the legal rights entitled to parents under the *Children's Law Reform Act* (CLRA) while simultaneously preserving the legal rights of D.D.'s biological parents.⁶³ At trial, A.A. merely sought declaratory relief but was denied this as the application judge found that he did not have the jurisdiction to make such a declaration under the *CLRA* or through the court's *parens patriae* jurisdiction. The case was appealed, and the applicant felt the need to include a Charter argument based on sections 7 and 15 but did not raise this argument in her notice to appeal.⁶⁴ The Interfaith Coalition put forth three main arguments in their factum: first, it argued that new Charter arguments were inadmissible, with which the court agreed; second, that the use of the *parens patriae* doctrine cannot be used to fill legislative gaps when legislative intent is clear; and finally, the inclusion of a third, legally recognized parent would cause harm to the child and society, and would create confusion in other legal and social arenas in which only two parents are specified.

Homosexuality and Collision with "Other" Rights: Expression and Religion

While the courts have heard cases specifically on the issue of homosexuality and the extension of rights to gays and lesbians, there have been relatively few cases heard at the appellate court level involving a concrete collision of rights. In previous cases, the courts have acknowledged multiple Charter rights claims, but typically addressed only s. 15 arguments.⁶⁵ This is, in part, because the various rights are brought up by the claimants, meaning it is not a collision of rights but is instead multiple rights being violated by the same government action. The three cases that will be described here are cases in which the exercise of one right is challenged as a violation of another.

In *Trinity Western v. British Columbia College of Teachers* [2001], the British Columbia College of Teachers (BCCT) denied Trinity Western University's (TWU) application to assume complete control of their teacher-training program for the purposes of ensuring their teachers entered the profession with a Christian worldview.⁶⁶ The BCCT refused to approve the application because of the university's stance on homosexuality, which it considered a "biblically condemned" activity. As it was, those enrolled in the teaching program at TWU were forced to take an additional year at Simon Fraser University (SFU) where they were made to sign agreements stating that they would refrain entirely from expressing these beliefs, believing it would result in discriminatory practices once in the profession.⁶⁷ While there is no collision of Charter rights per se, the Court and the intervenors both identify differences in what they identify as the "public interest" protected by the BCCT, and the religious freedom of a private institution. The damage to the public interest, the EFC argued, is in suppressing viewpoints which encourage debate, and in assuming that an individual with a particular view of sexual

⁶³ *A.A. v. B.B.*, 2007 ONCA 2

⁶⁴ Robert W. Staley and Ranjan K. Agarwal, Alliance for Marriage and Family factum in *A.A. v. B.B.*, Court of Appeal File No. C39998, page 6.

⁶⁵ See, for example, *Barbeau v. British Columbia*. Appellants in this case argued that the common law bar to same-sex marriage violated their rights under sections 2, 6, 7, 15, and 28, but only a s. 15 claim was addressed by the court.

⁶⁶ *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772

⁶⁷ *Ibid.*

morality would automatically be detrimental to the public education system simply because they hold that particular view.

In *Chamberlain v. Surrey School District No. 36* [2002] the Evangelical Fellowship once again intervened in a case regarding homosexuality, religion, and the education system. A K-1 teacher⁶⁸ sought to have three books approved by the Surrey School Board of Trustees, who are given the authority to approve additional resource material.⁶⁹ The books depicted various same-sex parent families, which the school board declined to approve so as not to provoke controversy amongst the parents of the children attending, as many would have religious and moral objections to the material. Their decision was challenged in the courts “because members of the Board who had voted in favour of the resolution were significantly influenced by religious considerations.”⁷⁰ This, the appellate claimed, violated the secular nature of the *Public School Act*. In their submission, the EFC, along with the Archdiocese of Vancouver, the Catholic Civil Rights League, and the Canadian Alliance for Social Justice and Family Values Association, focused on the definition of secularism. The BC Court of Appeal, in their decision, had overturned the decision of the board, finding the term “secular” to mean explicitly non-religious. The coalition put forth an alternative conception of the term, that rather than excluding religious belief, “secularism” includes many beliefs – in essence, pluralism.⁷¹ Secularism, they stated, must necessarily include the opinions and beliefs of both the religious and non-religious. So defined, the term becomes analogous to non-sectarian, rather than non-religious.

Owens v. Saskatchewan (Human Rights Commission) [2005] involved an appeal from the Saskatchewan Human Rights Tribunal regarding a decision on a hate speech complaint. Owens, a devout Christian, had expressed his objection to an upcoming gay pride parade by taking out an advertisement in a local newspaper. In this advertisement, Mr. Owens included multiple passages from the Bible that he believed condemned homosexuality. Three individuals lodged a complaint with the Human Rights Tribunal, alleging the advertisements were offensive and exposed them to hatred, which is prohibited under s. 14(1)(b) of *The Saskatchewan Human Rights Code*.⁷² He was found liable during the initial Tribunal hearing, and this was upheld at the Court of Queen’s Bench. The EFC, as a part of the Canadian Religious Freedom Alliance, intervened to argue the dangers of equating biblical messages with hate speech.⁷³ Additionally, the coalition proposed that the court treat rights protecting homosexuals as they would other rights: subject to reasonable limits. In doing so, they sought to ensure that rights are not treated hierarchically.⁷⁴

⁶⁸ A kindergarten – grade one split class teacher.

⁶⁹ *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710

⁷⁰ *Ibid.*

⁷¹ D. Geoffrey Cowper and Cindy Silver, the Evangelical Fellowship of Canada, the Archdiocese of Vancouver, the Catholic Civil Rights League, and the Canadian Alliance for Social Justice and Family Values Association factum in *Chamberlain v. Surrey School District No. 36*, Court File No. 28654, page 3-4.

⁷² *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41

⁷³ Thomas A. Schuck, The Canadian Religious Freedom Alliance factum in *Owens v. Saskatchewan (Human Rights Commission)*, Court of Appeal File No. 678 of 2005, page 1.

⁷⁴ *Ibid.*, 5-6.

Freedom of Religion

Of the six cases involving freedom of religion, the EFC has intervened in two that do not specifically involve Christian appellants, *Syndicat Northcrest v. Amselem* [2004] and *Adler v. Ontario* [1996].⁷⁵ In *Adler*, there were two groups of appellants. The “Adler appellants” sought to obtain public funding for Jewish schools in Ontario, stating that their non-funding was unconstitutional, while the “Elgersma appellants” sought to have the non-funding of independent Christian schools declared unconstitutional.⁷⁶ The Multi-Faith Coalition supported the positions of these appellants and proposed that the section 15 violation “does not arise from the distinction between the funding of Roman Catholic schools juxtaposed to other minority faith communities. Rather, the invidious distinction arises from the fact that certain minority religious groups, as opposed to the majority, cannot benefit from the public secular school system because of their beliefs.”⁷⁷ It is not the preference of one religious group over another they objected to, but rather, the imposition of secularism on (non-Catholic) religious groups.

Amselem involved a claim made by individuals of another faith. In *Amselem*, four Jewish co-owners of a luxury unit set up succahs on their balcony “for the purposes of fulfilling the biblically mandated obligation of dwelling in such small enclosed temporary huts during the annual nine-day Jewish religious festival of Succot.”⁷⁸ Syndicat Northcrest, as owner of the property, requested the removal of the succahs as a violation of the contractual by-laws, which prohibited decorations and any physical alterations to the balconies. Syndicat offered an alternative location for the succahs, which was refused by the occupants of the unit.⁷⁹ In their factum, the Evangelical Fellowship and the Seventh-Day Adventist Church sided with the four Jewish co-owners, but did so in such a way that advocated for religious freedom in a much more general fashion. They first argued that religious freedom, which is protected under the *Quebec Charter*, includes all religious manifestations and cannot be restricted.⁸⁰ These two groups went on to show that the history of persecution suffered by the Jewish people in Quebec is a reason why state inquiry into religious practices and determination of the validity of religious practices should be avoided.⁸¹ Religious practices, logically, must then be accommodated up until the point that they begin to cause undue hardships on other individuals within the community.

The duty to accommodate religious practices is again argued in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine* [2004], a case in which the Village of Lafontaine refused, multiple times after an initial justified rejection, to justify their refusal to rezone land purchased for the purpose of building a place of religious

⁷⁵ I include *Adler* in this list despite the fact that it involves two different claims, one of them being very much brought forth by Christians. The “Adler appellants” themselves were Jewish.

⁷⁶ *Adler v. Ontario*, [1996] 3 S.C.R. 609

⁷⁷ Peter R. Jervis, the Ontario Multi-Faith Coalition for Equity in Education factum in *Adler v. Ontario*, Court File No. 24347, page 3.

⁷⁸ *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551

⁷⁹ *Ibid.*

⁸⁰ Gerald D. Chipeur and Dale Wm. Fedorchuk, The Evangelical Fellowship in Canada and The Seventh-Day Adventist Church in Canada factum in *Syndicat Northcrest*, Court File No. 29252, page 3-5.

⁸¹ *Ibid.*, 5-6.

worship by a private group of Jehovah's Witnesses.⁸² The Congr gation appealed to the courts, challenging the fairness of the decision and claiming a violation of their s. 2(a) Charter rights.⁸³ The EFC and the Seventh-Day Adventist Church submitted factum arguments focusing on the duty to accommodate and the impact of the municipality's decision on the Congr gation's ability to worship as a de facto violation of their freedom of religion.⁸⁴ The municipality's justification for the initial refusal for rezoning was also challenged. The groups advocated for a mandatory rezoning, despite any tax burdens that may arise from the construction of a place of worship in an area that previously had no such structure.⁸⁵

The most recent freedom of religion case intervened in by the EFC is *Alberta v. Hutterian Brethren of Wilson Colony* [2009], in which the Hutterian Wilson Colony decided to challenge the constitutional validity of the government of Alberta's decision to require photos on all driver's licenses. The government had previously made allowances for individuals to obtain photo-less licenses for reasons of religious objection but instituted a new universal photo requirement.⁸⁶ The sect, whose religious beliefs prohibited them from having their picture taken, launched a s. 2(a) Charter challenge against the law, which was supported by various Canadian religious groups. In their factum, the EFC and the Christian Legal Fellowship (CLF) focused on the communal impact of the rights violation. While the government of Alberta conceded that the universal photo requirement infringed upon the rights of those Wilson Colony members who sought to drive, but contended that it was a reasonable infringement,⁸⁷ the intervenors put forth the following argument:

It is apparent that the Wilson Members each individually have the right to freedom of religion due principally to the very existence of the Hutterian Brethren of Wilson Colony as a group. If there is no Wilson Colony, then there can be no Wilson Member. Therefore, in order for the Wilson members to exercise their freedom of religion, they must do it in community because the community is the means by which they can exercise their s. 2(a) rights.⁸⁸

Because of the purportedly communal nature of religious freedom, the EFC and CLF posit that the legislation cannot meet the minimal impairment portion of the reasonable limits test, as the photo requirement violates the religious rights of *all* Wilson Colony members.⁸⁹ To violate the right of an individual in a religion that must be practiced communally, therefore, is to violate the rights of the entire religious community.

⁸² The first application for rezoning was denied on the grounds that it would result in an increase in the tax burden for ratepayers. Subsequent rejections were unjustified.

⁸³ *Congr gation des t moins de J hovah de St-J r me-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650

⁸⁴ Gerald D. Chipeur and Dale Wm. Fedorchuk, the Evangelical Fellowship in Canada and the Seventh Day Adventist Church in Canada factum in *Congr gation des t moins de J hovah de St-J r me-Lafontaine v. Lafontaine (Village)*, Court File No. 29507, page 15-17.

⁸⁵ *Ibid.*, 17.

⁸⁶ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567

⁸⁷ *Ibid.*

⁸⁸ Charles M. Gibson and Albertos Polizogopoulos, the Evangelical Fellowship of Canada and the Christian Legal Fellowship factum in *Alberta v. Hutterian Brethren of Wilson Colony*, page 8.

⁸⁹ *Ibid.*, 9-10.

Fetal Rights

The Evangelical Fellowship of Canada is very active and engaged in political issues involving the life, health, and dignity of human beings from the moment of conception⁹⁰ to the last, life-supporting natural breath.⁹¹ This is no different before the courts. However, there are two very different types of cases encompassing these issues: first, the prevention of life-ending procedures prior to birth and the importance of establishing the definition of life as being from the moment of conception; and second, the preservation of God-given life and its inherent dignity. I begin first by examining cases involving fetal rights in which the EFC was granted leave to intervene.

Borowski v. Canada [1989] was an early case in Charter jurisprudence involving abortion rights. Pro-life activist Joe Borowski attacked the validity of 251(4), (5), and (6) of the *Criminal Code* – which permitted abortions in some cases – as a violation of sections 7’s ‘right to life’ and 15 of the Charter.⁹² The Interfaith Coalition on the Rights and Wellbeing of Women and Children (of which the EFC was part), in their submission, supported the position of Borowski and argued the supremacy of God and the implications of that recognition in the preamble of the Charter. Because God is recognized in the Charter and the coalition members’ religious beliefs included the belief that life is life regardless of level of development, they argued that sections 7 and 15 must logically be extended to protect unborn children.⁹³

In *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, a superior court justice ordered a pregnant, glue sniffing addict be placed in the custody of Child and Family services until the birth of her child, as her addiction had resulted in permanent disabilities for two of her previous children.⁹⁴ This order was overturned by an appellate court, and proceeded to the Supreme Court where the EFC and the Christian Medical and Dental Society (CMDS) attempted to influence the outcome of the case. They argued the physical proximity of the unborn fetus to the mother surpasses the relationship between mere neighbors, which ensures that a *prima facie* duty of care arises.⁹⁵ They argue that this duty of care, which the mother sought to relieve herself of, cannot be negated when “her unborn child has ‘done nothing wrong’.”⁹⁶ Finally, they address the question of whether or not the courts have jurisdiction to order the detention. Citing the broadness of the *parens patriae* jurisdiction, the groups posit that there is a necessity to exercise this kind of decision despite there never having been a case involving the confinement of a parent to protect an unborn child.⁹⁷ The unborn, as they see it, is no different than a child who has been born and it is therefore logical that the jurisdiction is extended. The argumentation employed in this case is similar to that employed by the EFC, the

⁹⁰ The Evangelical Fellowship of Canada, “Abortion/Fetal Rights,” The EFC, <http://www.evangelicalfellowship.ca/netcommunity/page.aspx?pid=365>

⁹¹ The Evangelical Fellowship of Canada, “Euthanasia & Assisted Suicide,” The EFC, <http://www.evangelicalfellowship.ca/netcommunity/page.aspx?pid=521>

⁹² *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342

⁹³ Claude R. Thomson and Robert W. Staley, the Interfaith Coalition on the Rights and Wellbeing of Women and Children factum in *Borowski v. Canada*, Court File No. 20411, page 8.

⁹⁴ *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925

⁹⁵ David M. Brown, the Evangelical Christian Fellowship and the Christian Medical and Dental Society factum in *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, Court File No. 25508, page 6.

⁹⁶ *Ibid.*, 6-7.

⁹⁷ *Ibid.*, 19-20.

Canadian Abortion Rights Action League (CARAL), and the Catholic Group for Health, Justice and Life (CGHJL) in *Dobson (Litigation Guardian of) v. Dobson*, a case in which Gerald M. Price, the litigation guardian of Ryan Dobson, attempted to bring suit against his biological mother after her negligent driving resulted in injuries he received while *in utero*.⁹⁸ There is a close, spatial proximity between mother and child, not a unity, according to the EFC, and as such, the legal rights of born individuals should extend to the fetus in instances where negligence results in acquired harm because they are living individuals.⁹⁹

Abortion and Other Rights: Expression

R. v. Spratt is technically a s. 2(b) freedom of expression case, but it is included here because it arose from a dispute involving abortion clinic protestors and the *Access to Abortion Services Act*. The Canadian Religious Freedom Alliance (CRFA), consisting of the CLF, the EFC, and the Catholic Civil Rights League (CCRL), was granted leave to intervene in the case brought about by Donald Spratt and Gordon Watson, who were charged with engaging in sidewalk interference inside the access zone surrounding an abortion clinic.¹⁰⁰ In their factum, the CRFA took issue with the sheer size of the access zone and the actions prohibited by the Act as, together, infringing on the right to express an opinion by precluding “the opportunity for interpersonal contact between protesters and women attending at the Clinic.”¹⁰¹ Restricting anti-abortion advocates’ messages, according to the CRFA, is not “respecting a women’s dignity and ability to think for themselves and be informed about important decisions they are making. Women seeking or considering abortion services have [the] constitutional freedom of thought, belief, opinion, and expression, too.”¹⁰²

Other Sanctity of Life Cases

The other “life” cases the EFC involves itself in are, as mentioned above, those involving the sanctity of life once born. Two of these cases involve euthanasia, one regarding assisted suicide and the other ‘mercy killing.’ In *Rodriguez v. British Columbia*, a woman suffering from degenerative amyotrophic lateral sclerosis sought to have s. 241(b) of the *Criminal Code*, which prohibits assisted suicide, overturned as a violation of her s. 7, 12, and 15 Charter rights. It was Sue Rodriguez’s wish that she would be able to enjoy the rest of her life up until the point she was no longer able to, at which point she sought to have a physician assist her with committing suicide.¹⁰³ The Catholic Conference of Catholic Bishops (CCCB) and the EFC argued the life-affirming

⁹⁸ *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753

⁹⁹ David M. Brown, the Evangelical Fellowship of Canada factum in *Dobson (Litigation Guardian of) v. Dobson*, Court File No. 26152, page 4.

¹⁰⁰ *R. v. Spratt*, 2008 BCCA 340. The “access zone” is the area around is defined as the specific area around any structure that the Lieutenant Governor in Council may establish, by regulation. “Sidewalk interference” is considered a) advising or persuading, or attempting to advise or persuade, a person to refrain from making use of abortion services, or b) informing or attempting to inform a person concerning issues related to abortion services by any means, including, without limitation, graphic, verbal or written means.

¹⁰¹ Julie L. Owen, the Canadian Religious Freedom Alliance factum in *R. v. Spratt*, Court of Appeal File No. CA29830, page 4-5.

¹⁰² *Ibid.*, 10.

¹⁰³ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519

principles of the Charter. The supremacy of God, which is recognized in the preamble of the Charter, was argued to have significant weight when justices consider any Charter dispute. As the biblical commandments condemn murder, the EFC and the CCCB posit that the criminal prohibition on assisting an individual with suicide must necessarily stay in place, as “physician-assisted suicide is a euphemism for a killing arranged by a physician so that the act will be accorded an element of societal approval.”¹⁰⁴ They further argued that as we are created in the image of God and are “‘the objects of [His] concern,’ it is not open to any one of us to take away the life of another.”¹⁰⁵ The same reasoning regarding the supremacy of God and the inherent wrongness of taking a life is brought up in *R. v. Latimer*, in which a 12 year old girl with cerebral palsy was killed by her father on, what he considered, compassionate grounds.¹⁰⁶ Mr. Latimer appealed his conviction, and the EFC, the CMDS, and the Physicians for Life intervened in an attempt to ensure that the dignity of a disabled person is not treated as lesser than that of a non-disabled person.

The last of the “life” cases intervened in, *Harvard College v. Canada (Commissioner of Patents)*, is not a case involving euthanasia or assisted suicide but is nonetheless a case involving the sanctity and dignity of life. Harvard College applied for a patent for what are termed “oncomice,” genetically altered mice implanted with oncogenes while still at the one-cell stage for the purposes of cancer research.¹⁰⁷ In their submission, the EFC and the Canadian Council of Churches cautioned the courts against establishing a precedent that could eventually lead to the patenting of human beings. The College had attempted to reduce the oncomice and the process for creating them to simple chemical and genetic code. Under this classification, the oncomice could be considered “compositions of matter”¹⁰⁸ and inventions and would be subject to the *Patent Act*.¹⁰⁹ The Evangelical Fellowship argued that to grant ownership over an altered, higher life form divorces the patent holder from any moral responsibility to care for the life form, which could lead to objectification and a morally “problematic shift in humans’ perception of the natural world” which had been entrusted to them by God.¹¹⁰

Expression: Obscenity

R. v. Sharpe is, from these authors’ point of view, the most creative of the EFC’s interventions. Sharpe was charged with multiple counts of possession of child pornography, a criminal activity under s. 163.1(4) of the *Criminal Code*. The Crown conceded that the provision infringed s. 2(b) of the Charter, as the material conveyed meaning and was thus considered to be expression.¹¹¹ In their submission, the EFC and

¹⁰⁴ Robert M. Nelson, the Canadian Conference of Catholic Bishops and the Evangelical Fellowship of Canada factum in *Rodriguez v. British Columbia (Attorney General)*, Court of Appeal File No. 23476, page 5, 8.

¹⁰⁵ David M. Brown and Adrian C. Lang, the Evangelical Fellowship of Canada, Christian Medical and Dental Society and Physicians for Life factum in *R. v. Latimer*, Court File No. 26980, page 5.

¹⁰⁶ *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3

¹⁰⁷ *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R. 45

¹⁰⁸ William J. Sammon, the Canadian Council of Churches and the Evangelical Fellowship of Canada factum in *Harvard College v. Canada (Commissioner of Patents)*, Court File No. 28155, page 6.

¹⁰⁹ *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R. 45

¹¹⁰ Sammon, factum in *Harvard College v. Canada*, 9.

¹¹¹ *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45

Focus on the Family Canada disagreed with the government, drawing on American jurisprudence to demonstrate that the harmful nature of pornography depicting children was not protected, nor was it even considered under the term “expression.”¹¹² They then proceeded to argue the importance of the preamble’s recognition of the supremacy of God. As all major religions regard children as “treasures, or as sacred trusts”¹¹³ and because “the social goal of protecting children in Canadian society has developed from the principles and beliefs of the religions that have shaped Canadian society,”¹¹⁴ the law cannot be considered to be a violation of the Charter and justices must expressly recognize and apply the Preamble when shaping rights jurisprudence.¹¹⁵

The Evangelical Fellowship and the Court Party Thesis

In his work on social conservative interest group litigation and the courts, Clarke concludes, noting the previous lack of quantifiable conservative successes, that his study supports the anecdotal claims of liberal judicial bias in Morton and Knopff’s “Court Party” thesis.¹¹⁶ While he is correct in stating that the Canadian high court has embraced a more liberal position on issues of rights than that which is preferred by socially conservative groups, issues arise with the cohesiveness of the Court Party thesis in light of the updated evidence presented by this study. One of the groups included in Clarke’s study is the Evangelical Fellowship that, at the time, had participated in only ten cases.¹¹⁷ This updated analysis finds that their intervention has increased to a total of 24 cases, providing us with a much better opportunity to examine success rate and purposes for intervening. It is in their purposes that we can begin to examine how and why the Court Party thesis does apply to this group and those that are ideologically similar.

The Court Party thesis is, primarily, premised on groups winning before the courts and achieving social and political change through a non-traditional institutional actor. Morton and Knopff, as well as other scholars writing in the Court Party tradition such as Brodie and Manfredi, are therefore critical of judges, and those who have a tendency to “win” before them. To win, however, one must first participate. A simple examination of many appeal court judgments reveals that groups of many ideological stripes are participating in a variety of cases. The members of the Court Party, according to Morton and Knopff, are what have been described earlier in this research as proactive judicial democrats. However, groups such as LEAF are somewhat exceptional in this manner. Morton and Allen’s research indicates that while LEAF and other feminist organizations typically intervene in an attempt to challenge the existing PSQ, 18 of the 47 were cases in which feminists were positioned defensively.¹¹⁸

¹¹² Robert W. Staley and Meredith Hayward, the Evangelical Fellowship of Canada and Focus on the Family (Canada) Association factum in *R. v. Sharpe*, Court File No. 27376, page 3-6.

¹¹³ *Ibid.*, 8.

¹¹⁴ *Ibid.*, 8.

¹¹⁵ *Ibid.*, 7.

¹¹⁶ Clarke, “Social Conservatives in Court,” 116-117.

¹¹⁷ It should be noted here that Clarke, through no fault of his own, did not include the Evangelical Fellowship’s participation in *Borowski*. The group filed a factum with the court in conjunction with the Interfaith Coalition on the Rights and Wellbeing of Women and Children, but is not listed anywhere in the text of the Supreme Court judgment as having participated. He also does not include *Adler v. Ontario* among their interventions, as again, their intervention was in the form of a coalition.

¹¹⁸ Morton and Allen, “Feminists and the Courts,” 70-71.

Aside from the obvious, glaring difference in rates of intervention and ideology, differences between the Evangelical Fellowship and groups such as LEAF are actually minimal. The primary difference, after these, is the groups' positions relative to the policy status quo, which changes a group's status as either a proactive or reactive judicial democrat. Because of their willingness to engage in policy battles before the courts, the EFC can and rightly should be considered as a judicial democrat. That they typically, but not always, intervene in defense of the existing policy status quo indicates that they are primarily reactive judicial democrats. However, they do occasionally intervene offensively, and, since Clarke's study was conducted, have been successful in some of these interventions. In both *Amselem* and *Owens*, the positions taken by the courts reflected the wishes of this group. Regardless of the courts' penchant for making liberal decisions since the adoption of the Charter, the EFC and other social and religious conservative groups have actively encouraged the courts to partake in the policymaking role that was once the primary domain of elected parliamentarians.

The five categories comprising Morton and Knopff's Court Party can actually easily include the EFC now that we have more information about the arguments they put forward in their *facta*. In a number of cases, many involving issues of homosexuality, the Evangelical Fellowship puts forth arguments reminiscent of an equality-seeking group. In both *Barbeau* and *Halpern*, they argue the importance of marriage to religious groups and of *not* handing down a judgment that would negatively infringe upon the rights of faithful adherents. While it would likely not be considered a liberal rights-seeking line of argumentation, the rights of religious adherents to practice their religion, to participate in policy debates and have their policy positions considered equally along with other rights-seeking groups certainly qualifies as a type of equality seeking. More plausibly, the Evangelical Fellowship and many of the groups they ally with before the courts can be considered under the "social engineers" category. The correct outcome, as they argue in many cases, is one predicated on the affirmation of God and biblical principles. As a primarily reactive group, they do not typically seek to reshape "defective social institutions and systems."¹¹⁹ Rather, the preservation of existing societal institutions or the imposition of religious values they deem necessary for the maintenance of proper and ultimately morally responsible society is their goal before the courts. It is certainly a far cry from the more liberal social engineers who seek to overturn existing institutions, but to superimpose a theological meaning on top of pre-existing ones is qualitatively no different. While the group appears predominantly to react defensively to challenges against existing legislation, they act offensively in *Adler*, *Amselem*, *Borowski*, *Hutterian Brethren*, *Lafontaine*, *Owens*, *Spratt*, and *Winnipeg CFS* in an attempt to persuade the courts to adopt policies they deem favorable. To engage with the courts as policymakers is to empower them within the arena of policymaking, regardless of the ideological orientation of the argument put before them. Though the EFC routinely calls for deference to the legislature in their *facta*, it is only after advocating their own positions, as a last effort to have the courts not make decisions with which they would ultimately disagree.

Conclusion

¹¹⁹ Morton and Knopff, *The Charter Revolution*, 74.

There were a number of goals set forth when this project was first started. First and foremost, the project sought to add empirical data to the study of conservative interest group litigants in Canada. Groups on the ideological right have been and continue to be understudied in light of their presence in various policy battles before the courts. This habit of focusing solely on those who win or those groups popularly targeted for study, if it is continued, can only serve to diminish the field to such a point that it becomes a battle of ideologies rather than one based on demonstrable empirical evidence. Second, it sought to uncover a more thorough understanding of the Evangelical Fellowship of Canada's full legal agenda, which, as the most active conservative Christian litigating group, assists us in understanding the broader legal goals of conservative Christian denominations. In doing this, the paper acts as an implicit test of the Court Party thesis. The data actually adds support to Morton and Knopff's thesis, but also highlights problems with its composition, namely the unwarranted exclusion of ideologically conservative groups from the theoretical framework. While ideologically liberal and left-leaning groups have certainly empowered and given legitimacy to the Canadian courts' exercise of judicial review as a form of policymaking, so too have conservative groups opted to make use of the courts to further their own agendas, a third of the time to challenge existing policies. Additional research should be done on other ideologically conservative groups to further develop Morton and Knopff's thesis and provide further empirical data to the study of interest group litigation in Canada.

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