

Civil Liberties Advocacy Organizations in Canada: A Survey and Critique

By Jeremy Patrick*

“Canadians are not rabble-rousers by reputation. Our independence was gained peacefully and not through armed conflict, and we have never had to fight as hard as others have for entrenched rights. We do not take our rights and freedoms as seriously as certainly our friends to the south do.”

--Ken Mandzuik, then-President, Manitoba Association of Rights and Liberties¹

I. INTRODUCTION

It seems that hardly a day can go by in the United States and Canada without news of another major civil liberty issue being decided. As I write these words in June of 2006, the U.S. Supreme Court has just ruled military tribunals at Guantanamo Bay unconstitutional,² while several days ago the Supreme Court of Canada was entertaining arguments on whether a special detention process for immigrants suspected of being dangerous on national security grounds is consonant with the Charter of Rights and Freedoms.³

* Assistant Professor, University of Detroit Mercy School of Law. Feedback is welcome at jhaeman@hotmail.com. An article of this sort is difficult for both the writer and the reader because it is two parts scholarship and one part impassioned argument. As Samuel Walker, quoting C. Wright Mills, notes in his history of the ACLU: “I have tried to be objective, I cannot claim to be detached.” Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (2d. ed.) (Carbondale, Ill: Southern Illinois University Press, 1999) at xxx. Given my long interest in civil liberties issues and participation in the advocacy efforts of both American and Canadian organizations, I share a similar sentiment.

¹ “Letter From the President”, (2005) 10:1 Rights and Liberties: The Newsletter of the Manitoba Association for Rights and Liberties. It’s not clear in context when Mandzuik is speaking of “friends to the south” whether he is referring to the United States or to South America (also mentioned previously in the article), or to both. While I acknowledge the risk of quoting him out of context, the quotation does seem to embody the different ways American and Canadian civil liberties activists view themselves.

² See *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

³ See *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, SCC File No. 30762 (2006).

Indeed, the past several months have seen U.S. courts decide major cases on capital punishment,⁴ equal representation in voting,⁵ and police searches,⁶ while Canadian courts have decided whether Bible passages can be construed as hate speech,⁷ whether a young Sikh boy can carry his religious dagger to school,⁸ and whether a town can sue one of its own residents for defamation.⁹ The similarities (and occasional glaring difference) between the American Bill of Rights and Canadian Charter have not gone unnoticed by commentators, and there is a wealth of comparative scholarship on the constitutional documents that made all of these cases possible.

There is another similarity among all of these cases that has received far less scholarly attention: each of them included the active participation of a civil liberties advocacy organization. Civil liberties advocacy organizations are non-profit, non-governmental organizations that work through a variety of means to ensure that the government does not encroach on individual rights and liberties. These are generalist groups that do not confine themselves to specific issues or interests, as is the case with GLBT or women's rights organizations.

In the United States, the primary civil liberties advocacy organization is the well-known American Civil Liberties Union (ACLU), with over 500,000 members,¹⁰ staffed affiliates in every state,¹¹ involvement in over 6,000 cases a year,¹² a commitment to directly representing

⁴ See *Kansas v. Marsh*, 126 S.Ct. 2516 (2006) (holding that it is constitutional to inflict capital punishment where mitigating and aggravating factors are in equipoise).

⁵ See *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594 (2006) (upholding most of a mid-decade electoral redistricting plan).

⁶ See *Hudson v. Michigan*, 126 S.Ct. 2159 (2006) (holding that police violation of "knock-and-announce" rule does not necessarily require exclusion of evidence obtained during the ensuing search).

⁷ See *Hellquist v. Owens*, 2006 SKCA 41.

⁸ See *Singh-Multani c. Marguerite-Bourgeois* (Commission scolaire), 2006 SCC 6.

⁹ See *Montague (Township) v. Page*, 2006 CarswellOnt 451 (Ont. Sup. Ct. Just.).

¹⁰ See "About Us", ACLU Website, <http://www.aclu.org/about/index.html> This represents almost a doubling in membership in the last decade. See Walker, *supra* note *, at xxii (noting approximately 275,000 ACLU members in late 1990s).

¹¹ See "Affiliates", ACLU Website, <http://www.aclu.org/affiliates/index.html> According to Walker, the affiliates handle about 80% of the ACLU's caseload. See Walker, *supra* note *, at 4.

¹² See "About Us", *supra* note 10.

clients,¹³ and more appearances before the Supreme Court than any other institution or organization except the Justice Department.¹⁴ In contrast, Canada has a very different model. Instead of a robust, national civil liberties organization with affiliates, Canada has a patchwork collection of small, independent groups that focus mostly on education, formal submissions before legislatures, and third-party involvement in appellate cases.

The purpose of this article is to describe and evaluate the current Canadian model. The ACLU (created in 1920) is the subject of an excellent and thorough history by Samuel Walker,¹⁵ while some other Canadian special interest organizations such as the Women's Legal Education and Action Fund have received extensive scholarly attention.¹⁶ Recently, the origin and development of human rights and civil liberties advocacy groups in Canada has become the subject of study.¹⁷ The present article is intended to complement such work by providing an overview and commentary on currently active organizations.

¹³ The ACLU originally focused its litigation efforts on filing friend-of-the-court briefs, but by the late 1960s one Board member claimed that 90% of the organization's litigation efforts involved directly representing clients. See Walker, *supra* note *, at 285.

¹⁴ See ACLU Position Paper, *Freedom is Why We're Here* at 4, available at http://www.nhclu.org/publications/Freedom_Is_Why.htm. Although the ACLU is by far the largest and most well-known, there are other groups that play an important role in civil liberties advocacy in the United States, such as People for the American Way and the Brennan Center for Justice. There are also several specialty organizations that often become involved in specific facets of civil liberties advocacy, such as Americans United for the Separation of Church and State. Finally, there are important conservative-oriented groups that can be involved in either side of a civil liberties case such as the American Center for Law and Justice and the Beckett Fund for Religious Liberty.

¹⁵ Walker, *supra*, note *.

¹⁶ The leading book is Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: UBC Press, 2004). Other books include Sherene Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1993) and Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989). Articles include F.L. Morton & Avril Allen, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada", (2001) 34:1 Can. J. Pol. Sci. 55.

¹⁷ Perhaps the best place to start is Dominique Clément, "An Exercise in Futility: Regionalism, State Funding, and Ideology as Obstacles to the Formation of a National Social Movement Organization in Canada", (2005) 146 B.C. Studies 5, which discusses the Canadian Civil Liberties Association and the British Columbia Civil Liberties Association and their failure to create a stable national organization. See also, *id.* at 7 n.5 (citing sources on the history of rights activism in Canada). A look at rights activism in Canada before the rise of modern civil liberties advocacy organizations can be found in Ross Lambertson, *Repression and Resistance: Canadian Human Rights Activists, 1930-1960* (Toronto: University of Toronto Press, 2005).

The extensive literature on special interest groups in both the United States¹⁸ and Canada¹⁹ provides context for this study. Recent commentary in Canada has focused on the provocative thesis by Morton & Knopff that a “Court Party” of special interest groups, academics, and others have “captured” the Supreme Court of Canada and leveraged their influence to gain favourable judgments on *Charter* issues.²⁰ Civil liberties advocacy organizations are named as influential members of the Court Party and special mention is made of their frequent intervention before the Supreme Court.²¹ This article takes no position on whether the controversial Court Party thesis is valid, but it does aim to provide background on civil liberties advocacy groups in Canada so that a more complete evaluation will be possible.

The following section describes the general principles that civil liberties advocacy organizations in the United States and Canada have in common, while subsequent sections describe each of the individual Canadian groups and their roles in the political process. After describing the groups, I move on to an evaluation of their success and make several recommendations for improvement. As this article can only be an initial survey of civil liberties advocacy groups, the conclusion contains suggestions for further research.

II. COMMON FEATURES

Civil liberties advocacy organizations in the United States and Canada have several general principles in common. Although there is not complete adherence to these principles

¹⁸ See, e.g., Paul S. Herrnson, et al. (ed.), *The Interest Group Connection: Electioneering, Lobbying, and Policymaking in Washington* (Washington, D.C.: CQ Press, 2005) (2d. ed.).

¹⁹ See, e.g., F. Leslie Seidle (ed.), *Equity & Community: The Charter, Interest Advocacy and Representation* (Montreal: Institute for Research on Public Policy, 1993).

²⁰ See F.L. Morton & Rainer Knopff, *The Charter Revolution & the Court Party* (Peterborough, Ont.: Broadview Press, 2000). See also, Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: SUNY Press, 2002). Commentary, some of it critical, can be found in Robin Eliot, “The Charter Revolution and the Court Party’: Sound Critical Analysis or Blinkered Political Polemic?”, (2002) 35 U.B.C. L. Rev. 271 and Thomas M.J. Bateman, “Crashing the Party: A Review of F.L. Morton and Rainer Knopff’s *The Charter Revolution and the Court Party*”, (2000) 33 U.B.C. L. Rev. 859.

²¹ See Morton & Knopff, *supra* note 20, at 66; Brodie, *supra* note 20, at 38.

(especially among some of the smaller Canadian groups), these common characteristics set civil liberties advocacy organizations apart from many other special interest groups.

First, civil liberties advocacy organizations are almost exclusively focused on so-called “negative rights,” the rights that carve out a sphere of freedom or autonomy from government abuse.²² Examples include freedom of speech from government censorship, freedom of religion instead of a mandatory state religion, and the due process protections accorded in the criminal justice system. The negative rights model is in direct contrast to what scholars call “positive rights”, which are entitlements that some commentators believe the government is *obliged* to provide, such as universal health care, welfare benefits, a guaranteed minimum wage, or environmental protections.²³ The reason that civil liberties advocacy organizations generally exclude positive rights is that doing so keeps the focus on freedom and helps organizations avoid becoming bogged down in a morass of issues or becoming just another generic “social justice” group.²⁴ As Isaiah Berlin once wrote, “Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience.”²⁵ The negative rights model is also the model embraced by both the American Bill of Rights and Canadian Charter of

²² See Clément, *supra* note 17, at 12 (“Civil libertarians defined rights as negative rights: limiting government activity and ensuring that the state treated all individuals equally”).

²³ See Howard Tolley, Jr., “Interest Group Litigation to Enforce Human Rights” (1990-1991) 105 *Pol. Sci. Q.* 617 at 624 (“Several other human rights groups go considerably beyond procedural claims by arguing that international law also creates enforceable substantive rights not previously recognized under the U.S. Constitution—rights to education, social security, food, housing, and a job”); Shannon Ishiyama Smithey, “Cooperation and Conflict: Group Action in *R. v. Keegstra*” in Patrick James, et al. (eds.), *The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada* (Montreal & Kingston: McGill-Queen’s Univ. Press, 2002) at 191 (“The liberal view is based on fear of state power. Liberal groups argue for Charter interpretations that promote individual freedom by limiting the state. In contrast, post-liberal groups espouse an egalitarian argument. They contend that state action is often essential to counteract social inequality”).

²⁴ For example, one scholar describes a study of agricultural special interest groups indicating that “groups create ‘issue niches’ such that their demands are narrow and do not overlap. This is due, at least in part, to organizations’ needs to clarify their expertise and purpose to retain credibility in the eyes of decision makers and to maintain the support of group members.” Marie Hojnacki, “Interest Groups’ Decisions to Join Alliances or Work Alone” (1997) 41 *Amer. J. Pol. Sci.* 61 at 63. Walker describes the so-far unsuccessful push by a “progressive” faction of the ACLU to include economic issues as civil liberties issues. See Walker, *supra* note *, at ix.

²⁵ Isaiah Berlin, “Two Concepts of Liberty” in *Liberty* (Henry Hardy ed.) (Oxford: Oxford Univ. Press, 2002) at 172.

Rights and Freedoms, so focusing on negative rights provides civil liberties advocacy organizations with a promising avenue of enforcement should the government encroach upon those rights. The major wrinkle with this principle is that if the government has chosen to create an entitlement or provide benefits, civil liberties advocacy groups will happily intervene to ensure that the benefits are provided on a non-discriminatory basis.

A second, related principle is that civil liberties advocacy organizations confine their activities to situations where the government is involved. Situations often occur between private individuals or businesses that implicate values that civil libertarians strongly advocate, such as due process or freedom of speech, but these cases are generally seen as falling outside the scope of the civil liberties advocacy organization's mandate.²⁶ For example, a business' decision to require criminal background checks for employees would implicate privacy concerns, just as a private college's decision to fire a tenured professor might raise academic freedom concerns, but each lacks the government action necessary for intervention. This distinction between public and private, which some commentators view as problematic,²⁷ is traditionally justified by the view that the state is the primary threat to individual liberty, whereas disputes between private actors

²⁶ As with each of these principles, there are exceptions. For example, the Canadian Civil Liberties Association was involved in litigation to stop employee drug-testing by private businesses and intervened to support the ability of labour unions to use member dues for political purposes. See *Entrop v. Imperial Oil*, (2000) 189 D.L.R. 4th (Ont. C.A.) (drug testing); *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211 (union dues). Of course, when a civil liberties advocacy organization deviates from these principles it opens itself up to the type of criticism the CCLA received after it became involved in the employee drug-testing cases. See Karen Selick, "Taking Liberties with 'Civil Liberties'" (Nov./Dec. 1998) *Canadian Lawyer* 54 ("For instance, [CCLA] seems not to have noticed that neither [business doing the drug testing] is the *government*. These are not cases of the state telling people, 'Pee in this bottle or go to jail.' Neither company has the power to deprive anyone of life, liberty or property."). It seems likely that in each case, CCLA intervened because of its institutional ties with organization labour. CCLA and the Canadian Auto Workers Public Review Board share administration, office expenses, and staff (for several years now, CCLA's General Counsel has been Chair of the CAW-PRB, while another CCLA staff member has been the CAW-PRB's Secretary). See also, Morton & Knopff, *supra* note 20, at 73 ("The CCLA has early and enduring ties to the labour union movement in Canada"). Another exception is that, as Clément notes, *supra* note 17, at 12, "by the 1950s most civil liberties activists also opposed discrimination in the public and private realm."

²⁷ See, e.g., Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard Univ. Press, 1987) at 100.

can be settled with recourse to a variety of methods such as ending the business relationship, using boycotts and strikes to exert pressure, or even litigation through tort and contract law.

Of course, like many civil libertarian principles, the state action requirement arose in a very different era and it can be difficult to apply this principle in modern Canadian and American society where extensive government subsidization and regulation creates strong relationships between the state and “private” institutions. State action is also a requirement for action under the Charter and the Bill of Rights, and the courts in each country have had to wrestle with this requirement as well, sometimes with different answers to the same question.²⁸

Third, civil liberties advocacy organizations are primarily focused on domestic issues. In other words, civil liberties are not necessarily equivalent to “human rights”, and civil liberties advocacy organizations have very different agendas than internationally-focused organizations like Amnesty International or Human Rights Watch. Just as the ACLU or a Canadian civil liberties advocacy organization wouldn’t argue for a higher minimum wage or get involved in a landlord-tenant dispute, it also wouldn’t speak out about genocide in Rwanda or the poor treatment of political prisoners in North Korea.²⁹ This domestic restriction has become more difficult to apply in recent years. If the CIA is conducting “extraordinary rendition” of terrorist suspects in foreign countries, should the ACLU become involved because the CIA is part of the American government or only if an American resident or citizen is involved? If a Canadian citizen like Maher Arar is tortured by the Syrian government, is it appropriate for a Canadian civil liberties advocacy organization to press the Canadian government to do more to secure his

²⁸ Compare *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (finding that universities are generally not state actors under the Charter) with *Grutter v. Bolinger*, 539 U.S. 306 (2003) (applying general rule that Constitution applies to public universities).

²⁹ See Walker, *supra* note *, at 87, 116, and 169 (citing three occasions where the ACLU Board of Directors rebuffed calls to become involved in international issues); Tolley, *supra* note 23, at 623 (“The national board however has resisted proposals that the ACLU become more actively opposed to U.S. foreign policies that violate human rights abroad”).

release? These are hard questions that inevitably require the application of general principles to fact situations that were difficult or impossible to predict when the principle was adopted.

Interestingly, in 2004 the ACLU created a special project to use international human rights law to achieve goals consistent with its focus on American civil liberties issues.³⁰

Another long-standing and widely-shared principle is that civil liberties advocacy groups should be ideologically independent and non-partisan. Ideological independence means that groups are willing to defend the civil liberties of groups often found repugnant, such as in the famous case of the successful ACLU defense of the rights of Nazis to march through Skokie, Illinois,³¹ or the freedom of speech defense of Holocaust-denier Ernst Zundel by a Canadian civil liberties group.³² Analogously, the fact that civil liberties advocacy organizations seek some of the same goals as organizations they are sympathetic to does not mean that the civil liberties group will defend everything those organizations do. For example, there is the well-known split between women's groups and civil liberties groups over the issue of pornography,³³ with the former often supporting government censorship and the latter opposed. The non-partisan aspect obviously keeps civil liberties groups from endorsing candidates or becoming closely allied with a particular political party. The ACLU has, however, gone on the record as opposing some nominees for the Supreme Court based upon the nominee's record on civil liberties issues.³⁴

³⁰ See ACLU, Press Release, "Citing Growing Abuses, ACLU Intensifies International Human Rights Advocacy in the United States" (December 6, 2004), available at <http://www.aclu.org/intlhumanrights/gen/13802prs20041206.html>

³¹ In fact, the Nazis never actually marched through Skokie and instead voluntarily decided to hold their parade in another town. See Walker, *supra* note *, at 327.

³² *R. v. Zundel*, [1992] 2 S.C.R. 731

³³ See, e.g., Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Don Mills, ON: Oxford Univ. Press, 2001) (2d ed.) at 121 (noting Canadian Civil Liberties Association consistent opposition to Women's Legal Education and Action Fund on freedom of expression issues). A prime example is *R. v. Butler*, [1992] 1 S.C.R. 452.

³⁴ The ACLU has opposed three nominees in its history: Samuel Alito, William Rehnquist, and Robert Bork. See ACLU, Press Release, "ACLU Announces Opposition to Alito Nomination", (January 9, 2006) available at <http://www.aclu.org/scotus/2005/23417prs20060109.html>

A final common feature is financial independence from the government, at least to some degree. Both the ACLU and Canada's largest civil liberties advocacy organization are supported principally from donations from members and other non-governmental donors.³⁵ History makes it clear that organizations which make it their primary mission to criticize government shouldn't be surprised when the government cuts off that funding. Many non-profit groups had a much harder time when a Conservative government in Canada ended the Court Challenges Program, which had funded many of the groups' litigation activities (the Program was eventually reinstated by a later government).³⁶ Similarly, British Columbia's civil liberties organization suffered a series of set-backs and staff layoffs by relying too much for funding on unreliable government grants.³⁷

These principles (negative rights, state action, domestic focus, and ideological/financial independence) are generally shared by civil liberties advocacy organizations in the U.S. and Canada. In the next section, I take a more detailed look at the Canadian groups.

III. ORGANIZATION PROFILES

Describing the various civil liberties advocacy organizations in Canada is a difficult project insofar as there is little scholarship that is directly relevant. The following descriptions, which rely primarily on Internet research, the organizations' own materials, and interviews with staff, are therefore necessarily impressionistic and intended to sketch the outer contours of each organization's history.

³⁵ See "About Us", supra note 10; Canadian Civil Liberties Association, "CCLA History", <http://www.ccla.org/his>

³⁶ See Brodie, supra note 20, at 111-113 (describing cancellation and reinstatement of Court Challenges Program).

³⁷ See infra section III.C. See also, A. Alan Borovoy, "Civil Liberties in the Imminent Hereafter" (1973) 51 Can. Bar. Rev. 93 at 104-05 (describing how a Hamilton, Ontario, welfare rights organization had a government grant cancelled after political protesting, and noting that "The cancellation of a grant anywhere threatens the security of grants everywhere. . . . To whatever extent a group is financially dependent on government, cancellation, of course, means the suppression of its activities"); Clément, supra note 17, at 29 (noting how the Canadian Federation of Civil Liberties and Human Rights Associations folded in the late 1980s when it lost core funding from the Department of the Secretary of State).

A. ALBERTA

Civil liberties activists in Alberta have two main outlets for their endeavors: the Alberta Civil Liberties Research Centre and the Alberta Civil Liberties Association. The first organization focuses primarily on research and education, while the second engages in traditional advocacy. Unlike some other groups which maintain a nominal “separation” between education and advocacy activities for tax purposes, the two organizations in Alberta have truly separate leadership, administration, and funding.

The Alberta Civil Liberties Research Centre was created in 1982 as an organization “dedicated to promoting awareness among Albertans about civil liberties and human rights[.]”³⁸ Supported primarily through a grant with the Alberta Law Foundation,³⁹ the Centre became affiliated with the University of Calgary in 1997.⁴⁰ It currently has four full-time staff members (three legally trained and one for education activities), along with a part-time administrator, two articling students, and a varying number of volunteers.⁴¹ The Centre holds occasional conferences, publishes a newsletter, and maintains a lending library of materials on civil liberties and human rights.⁴²

The Centre’s two primary activities are publication and education. Most of the publications are designed for classroom use and are marketed to teachers. With topics such as *Discrimination, Human Rights and You*, *The Rights Angle: Human Rights Education Using the*

³⁸ Linda McKay-Panos, *Civil Liberties Research Centre Now Affiliated with the U of C*, (Winter 1998) MootHill Newsletter, available at http://ucalgary.ca/news/Moothill/mh_winter1998.htm#civil%20Liberties

³⁹ Alberta Civil Liberties Research Centre, 6:2 Centrepiece (Newsletter).

⁴⁰ See McKay-Panos, *supra* note 38.

⁴¹ See Letter from Linda McKay-Panos, July 19, 2006 (on file with the author).

⁴² Alberta Civil Liberties Research Centre, <http://www.aclrc.com/index.html>. Each issue of the Centre’s newsletter, the *Centrepiece*, usually contains an opinion piece. For example, past issues have included articles titled “Alberta’s Child Prostitution Legislation”, “Seniors and Personal Directives”, and “Putting the Anti-Terrorist Legislation in Perspective”. See Kristen Reed, *Alberta’s Child Prostitution Legislation*, (2001) 7:1 Centrepiece; Anna S. Pellatt, *Seniors and Personal Directives*, (2000) 6:2 Centrepiece; Patricia Hughes, *Putting the Anti-Terrorist Legislation in Perspective*, (2002) 8:1 Centrepiece.

Newspaper, and *Sexual Harassment in School: Your Rights and Responsibilities*, the Centre is a pedagogical resource rather than a think-tank conducting original research on civil liberties problems.⁴³ The Centre's Human Rights Education Project creates classroom materials and conducts workshops for high school students on topics such as the Charter, provincial human rights codes, and international human rights law.⁴⁴ A more recent special project is aimed at secondary school students and is titled *Privacy, Autonomy and Technology in a Networked World*.⁴⁵ The Centre is loosely affiliated with the Alberta Civil Liberties Association⁴⁶ and acts as a conduit point for persons attempting to contact the Association.⁴⁷

The Association, unlike the Centre, does engage in advocacy activities and has spoken out in the media on issues such as police whistleblowing⁴⁸ and forced treatment of drug addicted youth.⁴⁹ Litigation activities are rare, but included intervention in the famous *Vriend* case that required Alberta to add sexual orientation as a prohibited ground of discrimination in its human rights legislation.⁵⁰ The Association also succeeded in intervening in a case concerning the right of Sikh RCMP officers to wear turbans⁵¹ and a case considering the relationship between electoral boundaries and the *Charter*,⁵² but was turned away from a case adjudicating whether a

⁴³ There are exceptions, however. The Centre released a report on access to information that contained dozens of law reform recommendations. See McKay-Panos Letter, supra note 41.

⁴⁴ <http://www.aclrc.com/resources/hre.html>

⁴⁵ See McKay-Panos Letter, supra note 41.

⁴⁶ See McKay-Panos, supra note 38.

⁴⁷ See McKay-Panos Letter, supra note 41.

⁴⁸ Suzanne Wilton, "Policy to Shield Police Who Tell" (March 17, 2006) Calgary Herald.

⁴⁹ CTV News Staff, "Alberta Bill Allows Parents Force [sic] Kids Into Detox" (April 17, 2005) available at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050417/alberta_detox_050416/20050417/

⁵⁰ See *Vriend v. Alberta*, [1998] 1 S.C.R. 493. The Alberta Civil Liberties Association was the only civil liberties advocacy organization in Canada to take part in *Vriend*, which may be in part due to the case's controversial use of the negative-rights oriented *Charter* to add a ground of prohibited discrimination to human rights legislation that primarily regulates the interaction of private individuals and businesses. See, e.g., Timothy Macklem, Comment, "*Vriend v. Alberta*: Making the Private Public", (1999) 44 McGill L.J. 197.

⁵¹ See *Grant v. Canada (AG)*, 125 D.L.R. (4th) 556 (F.C.A. 1995).

⁵² See Reference re Electoral Divisions Statute Amendment Act, (1994) 119 D.L.R. (4th) 1 (Alta. C.A.).

convicted criminal should be sentenced as a dangerous offender.⁵³ Interestingly, each of these cases was decided between 1994 and 1998, and the Association does not appear to have become involved in litigation since. On at least one occasion, the Association made submissions before a Parliamentary committee.⁵⁴ Of the civil liberties advocacy organizations discussed in this article, the Alberta Civil Liberties Association is clearly the least institutional in nature. It maintains no offices, has no paid staff, and has no website. Its current President and frequent spokesman is a Calgary lawyer in private practice.

B. MANITOBA

Founded in 1978,⁵⁵ the Manitoba Association for Rights and Liberties [“MARL”] is the most stable of the small provincial civil liberties advocacy organizations. It receives significant funding from the United Way⁵⁶ and currently has a few paid staff members. Its primary activity is education, including a workshop for high school students titled “Hate—What Have I Got to Do With It?”⁵⁷ Until a recent loss of funding, MARL also sponsored a special Human Rights and Holocaust Education Program for high school students.⁵⁸ The organization has a special *Charter* review committee to examine pending legislation in Manitoba, and has submitted five legislative briefs since 1996.⁵⁹ MARL has been involved in a handful of court cases in its almost thirty-year history, including interventions in cases on obscenity⁶⁰ and reproductive rights,⁶¹ and direct

⁵³ See *R. v. N.*, (1996) 108 C.C.C. (3d) 126 (Alta. C.A.).

⁵⁴ House of Commons, Standing Committee on Human Rights and the Status of Persons with Disabilities, 35th Parl., 2nd Sess., http://www.parl.gc.ca/35/Archives/committees352/huso/evidence/35_97-03-11/huso-35-cover-e.html

⁵⁵ Manitoba Association for Rights and Liberties Website, <http://www.marl.mb.ca/>

⁵⁶ See *id.* under “President’s Report 2003” (“The United Way continues to show its support . . . with its generous funding of our program. It is not overstating anything to say without its generosity, there would be no MARL”).

⁵⁷ See *id.* under “Activities”.

⁵⁸ See Valerie Price, “Executive Director Report”, (Fall 2005) 10:2 Rights and Liberties: The Newsletter of the Manitoba Association for Rights and Liberties.

⁵⁹ See MARL Website, *supra* note 55, under “Briefs and Submissions.” The submissions list includes one on legal aid, three on access and privacy legislation, and one on whether convicted felons can profit from accounts of their crimes.

⁶⁰ See *R. v. Butler*, [1992] 1 S.C.R. 452. MARL intervened jointly with the Canadian Civil Liberties Association.

sponsorship of a successful challenge to religious education in Manitoba public schools.⁶² Other activities include lobbying for same-sex marriage,⁶³ a survey on assisted suicide,⁶⁴ and publishing a handbook on the rights of teenagers.⁶⁵ Citing low visibility⁶⁶ and an aging (and presumably dwindling) membership,⁶⁷ in 2005 MARL held a special session to plan a strategy for the organization's future.⁶⁸

C. BRITISH COLUMBIA

The oldest civil liberties group that is still active in Canada,⁶⁹ the British Columbia Civil Liberties Association [“BCCLA”], is also the most willing to take controversial positions on emerging issues. In recent years, the organization has supported the legalization of polygamy,⁷⁰ advocated for marijuana decriminalization,⁷¹ argued that practitioners of bondage and sadomasochism should be free from government discrimination,⁷² took a stand against mandatory retirement,⁷³ and supported the right of private swingers' clubs to operate.⁷⁴ Its name might imply a purely provincial focus, but the group is, in the words of a past President, able to “punch

⁶¹ See *Winnipeg Child & Family Services v. G.(D.F.)*, [1997] 3 S.C.R. 925. In contrast to *Butler*, MARL and the Canadian Civil Liberties Association intervened separately.

⁶² See *Manitoba Assn. for Rights & Liberties v. Manitoba*, (1992) 94 D.L.R. (4th) 678 (Man. Q.B.).

⁶³ See Ken Mandzuick, “President’s Message” (Fall 2003) 9:1 *Rights & Liberties: The Newsletter of the Manitoba Association for Rights and Liberties*.

⁶⁴ Cited in *R. v. Latimer*, (1995) 99 C.C.C. (3d) 481 (Sask. C.A.) at Para. 172 (per Bayda, C.J.S., dissenting in part).

⁶⁵ See MARL Website, *supra* note 55, under “Executive Director’s Report 2005”.

⁶⁶ See *id.* (“the board also recognized the need to focus on increasing the membership and the visibility of the organization”).

⁶⁷ See Mandzuick, *supra* note 1 (“MARL’s valued membership is aging”).

⁶⁸ See *id.*

⁶⁹ The BCCLA was founded in 1962. See Clément, *supra* note 17, at 10.

⁷⁰ See British Columbia Civil Liberties Association, *Annual Report 2001* (2002) at 9.

⁷¹ See Factum of the Intervener British Columbia Civil Liberties Association, *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571.

⁷² See British Columbia Civil Liberties Association, Position Paper, *Sexuality and Civil Rights: Freedom from Government Reprisal* (2006), available at <http://www.bccla.org/othercontent/06BDSM.pdf>

⁷³ British Columbia Civil Liberties Association, *Annual Report 2005* (2006) at 11.

⁷⁴ See *id.* at 18. The Supreme Court ruled in favor of the clubs in *R. c. Labaye*, [2005] 3 S.C.R. 728.

... far above its weight”⁷⁵ by handling a variety of Federal and national issues. Examples include making submissions on the Review of the Anti-Terrorism Act,⁷⁶ pushing for an Inquiry into the Canadian government’s role in the American deportation and Syrian torture of Maher Arar,⁷⁷ publishing an early study on AIDS discrimination,⁷⁸ and regularly intervening in the Supreme Court.⁷⁹ Today the organization maintains an office in Vancouver with five staff members,⁸⁰ has a fairly active litigation program (intervening in 3-4 cases per year),⁸¹ a legislative lobbying program (making 3-7 submissions per year),⁸² and a public education program.⁸³ Like most civil liberties advocacy organizations in Canada, the BCCLA offers limited complaint assistance to members of the public by making referrals, but it does not provide legal advice or representation.⁸⁴

The BCCLA formed in 1962 after a group of activists successfully campaigned to have the provincial government drop charges against members of a religious sect accused of intimidating the legislature.⁸⁵ In the words of historian Dominique Clément, the BCCLA “proved to be one of the most dynamic rights associations in the country” over the next two decades.⁸⁶ It fought a long-running battle against censorship in Vancouver,⁸⁷ litigated an

⁷⁵ John Russell, “President’s Report” in British Columbia Civil Liberties Association, *Annual Report 2003* (2004) at 4.

⁷⁶ See *Annual Report 2005*, supra note 73, at 6.

⁷⁷ See *Annual Report 2003*, supra note 75, at 7.

⁷⁸ British Columbia Civil Liberties Association, *AIDS Discrimination in Canada: A Study of the Scope and Extent of Unfair Discrimination in Canada Against Persons with AIDS, and Those Known or Feared to be HIV Positive* (Vancouver, 1989).

⁷⁹ See “Legal Arguments”, BCCLA Website, <http://www.bccla.org/05legalarguments.htm>

⁸⁰ See *Annual Report 2005*, supra note 73, at 2.

⁸¹ See “Legal Arguments”, supra note 79.

⁸² See “Submissions”, BCCLA Website, <http://www.bccla.org/05submissions.htm>

⁸³ See *Annual Report 2005*, supra note 73, at 5.

⁸⁴ See *id.* As will be discussed in Section IV, this differs from the ACLU model which often represents clients directly.

⁸⁵ See Clément, supra note 17, at 10.

⁸⁶ *Id.* at 11.

⁸⁷ See *id.*

important case about whether heroin addicts could be forced into treatment,⁸⁸ and defended protestors against police brutality.⁸⁹ However, the group has had frequent periods of financial insecurity: “in the mid-eighties we lost a substantial operating grant and were close to closing our doors.”⁹⁰ Similarly, the group suffered a large, unexpected cutback to a different grant in 2002 which caused a substantial deficit.⁹¹ In the words of one former President, the organization’s finances are “notoriously fragile”.⁹²

The reason for the financial problem is clear: “While members . . . supported the association financially, it has always depended heavily on provincial and federal grants.”⁹³ Although the organization has been on more stable financial footing in recent years, it still receives approximately half of its funding from two different grants.⁹⁴ As we shall see in Section IV, this continued reliance on government funding was one of two obstacles that stood in the way of the formation of a national civil liberties organization in Canada.

D. ONTARIO

If the British Columbia Civil Liberties Association tackles far more issues than its name would imply, the Toronto-based Canadian Civil Liberties Association [“CCLA”] tackles far less. Although nominally a national organization, the CCLA has no offices outside of Toronto,⁹⁵ rarely

⁸⁸ See *Schneider v. R.*, [1982] 2 S.C.R. 112.

⁸⁹ See *id.*

⁹⁰ British Columbia Civil Liberties Association, *Annual Report 1998* (1999) at 5.

⁹¹ See British Columbia Civil Liberties Association, *Annual Report 2002* (2003) at 19.

⁹² See Craig Jones, “President’s Message, in British Columbia Civil Liberties Association, *Annual Report 2000* (2001) at 4.

⁹³ Clément, *supra* note 17, at 11.

⁹⁴ See *See Annual Report 2005*, *supra* note 73, at 21. One grant was from B.C.’s Gaming Policy & Enforcement Branch, a provincial government body that regulates various types of gaming in the province and distributes grants to various community groups. The other grant was from the quasi-governmental Law Foundation of British Columbia, a special statutorily created body that collects and distributes the interest on the funds in lawyers’ trust accounts.

⁹⁵ See “CCLA History,” *supra* note 35.

becomes involved in litigation outside of Ontario courts or the Supreme Court of Canada,⁹⁶ has never made submissions before a provincial legislature other than Ontario's,⁹⁷ and does not provide guest speakers to high school classrooms outside of Ontario.⁹⁸ This failure to provide geographical coverage while at the same time claiming the title (and actively fund-raising in other provinces) as a national organization has been a "continuous source of tension" in the "tumultuous relationship" between the CCLA and the BCCLA.⁹⁹

CCLA has scored some notable victories, however. It was responsible for significant revisions to the *Charter's* legal rights sections,¹⁰⁰ helped convince the Supreme Court of Canada to allow more interventions from public interest groups,¹⁰¹ and succeeded in a campaign to remove religious exercises from Ontario's public schools.¹⁰² In terms of topical focus, the CCLA has a long and distinguished history in two main areas: freedom of speech and law enforcement/national security. This focus can be traced in part to the fact that CCLA has had the same leadership in General Counsel Alan Borovoy since 1966.¹⁰³

The organization has been involved as an intervener in most of the major Supreme Court of Canada cases concerning topics such as censorship,¹⁰⁴ hate speech,¹⁰⁵ postering,¹⁰⁶ and

⁹⁶ See "CCLA Master List of Interventions" (2006) (on file with the author). Exceptions include *Hellquist v. Owens*, 2006 SKCA 41 and *Ross v. New Brunswick Teachers' Association*, (2001) 201 D.L.R. (4th) 75 (N.B. C.A.).

⁹⁷ See "A Bibliography of Briefs Presented by the Canadian Civil Liberties Association" (February 6, 2006) (on file with the author).

⁹⁸ Technically, education services are provided by the Canadian Civil Liberties Education Trust ["CCLET"], an organization with charitable status supported recently with grants from the Law Foundation of Ontario. The CCLA and CCLET are functionally the same, however, as they "share" office space, staff, and administration.

⁹⁹ Clément, *supra* note 17, at 26.

¹⁰⁰ See Brodie, *supra* note 20, at 31 ("When the government released the January 1981 version of the Charter, it became apparent that the CCLA had won a stronger version of the 'reasonable limits' section, a host of expanded legal rights, and an explicit authorization of judicial remedies for Charter violations").

¹⁰¹ See Brodie, *supra* note 20, at 32-36.

¹⁰² See *Zylberberg v. Sudbury Board of Education (Director)* (1988) 65 O.R. (2d) 641 (C.A.).

¹⁰³ See "CCLA History", *supra* note 35.

¹⁰⁴ See, e.g., *Nova Scotia (Board of Censors) v. McNeil*, [1978] 2 S.C.R. 662; *R. v. Butler*, [1992] 1 S.C.R. 452; *Little Sisters Book and Art Emporium v. Canada (Attorney General)*, [2000] 2 S.C.R. 1120.

¹⁰⁵ See, e.g., *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Zundel*, [1992] 2 S.C.R. 731.

¹⁰⁶ *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084.

defamation.¹⁰⁷ Each time, it has taken a strong and classical civil libertarian defence of freedom of speech.¹⁰⁸ In this area, CCLA has not shied away from controversy. It was the only one of the ten interveners in *R. v. Keegstra*¹⁰⁹ to argue that Canada's prohibition on hate speech should be declared unconstitutional.¹¹⁰ Similarly, much like the ACLU's defence of the Nazis in the Skokie case, CCLA risked the wrath of many of its supporters by successfully arguing that a provision of the Criminal Code used against famed Holocaust-denier Ernest Zundel should be struck down under the *Charter's* guarantee of freedom of expression.¹¹¹ More recently it stepped into the glare of controversy by arguing that the child pornography laws used to prosecute Robert Sharpe were excessively overbroad and unconstitutional.¹¹²

CCLA's interest in law enforcement and national security go back to its founding in 1964, when a group of Toronto citizens gathered together to successfully oppose Ontario Bill 99 which would have given law enforcement special powers to detain and interrogate persons suspected of involvement in organized crime.¹¹³ In 1968 CCLA received a major grant from the Ford Foundation to study due process in trial courts across Canada, and in 1970 it was one of the few organizations to oppose the Federal government's invocation of the War Measures Act.¹¹⁴ Over the 1970s, CCLA made several legislative submissions to reform police practices, and building a better system for handling citizen complaints against the police in Ontario remains a major focus of the organization today.¹¹⁵ Well before the terrorist attacks of September 11, 2001, CCLA was one of the few rights groups to recognize the importance of oversight and accountability for

¹⁰⁷ *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *R. v. Lucas*, [1998] 1 S.C.R. 439.

¹⁰⁸ Most CCLA facts are available on the organization's website at <http://www.ccla.org/pos/legal>

¹⁰⁹ *R. v. Keegstra*, [1990] 3 S.C.R. 697.

¹¹⁰ *See* Smithey, *supra* note 23, at 194-95.

¹¹¹ *R. v. Zundel*, [1992] 2 S.C.R. 731.

¹¹² *See* *R. v. Sharpe*, [2001] 1 S.C.R. 45.

¹¹³ *See* Clément, *supra* note 17, at 16-17.

¹¹⁴ *See id.* at 18.

¹¹⁵ *See* "A Bibliography of Briefs Presented", *supra* note 97. Many of CCLA's recent legislative submissions are available on its website at <http://www.ccla.org/pos/briefs>

intelligence and law enforcement agencies charged with ensuring national security.¹¹⁶ CCLA made important submissions in 1979 on the Official Secrets Act, in 1980 on the activities of the RCMP, in 1982 on the Report of the MacDonald Commission that investigated Canada's national security apparatus, in 1990 on the five-year review of the Canadian Security Intelligence Service, and more.¹¹⁷ The organization has remained active in this area in the last few years, with substantial briefs on C-36,¹¹⁸ involvement in the Arar Inquiry,¹¹⁹ and intervention in cases to determine the constitutionality of the "security certificates" used to detain and deport suspected terrorists.¹²⁰

Apart from freedom of speech and law enforcement/national security, CCLA has a decidedly mixed record in addressing other civil liberties issues. For example, the organization rarely if ever becomes involved in issues such as physical disability (including HIV/AIDS discrimination),¹²¹ mental health,¹²² corrections,¹²³ gay and lesbian equality,¹²⁴ and more. No

¹¹⁶ *See id.*

¹¹⁷ *See id.*

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ *See* Charkaoui v. Canada (Minister of Citizenship and Immigration), SCC File No. 30762 (2006).

¹²¹ *See generally*, Sarah Armstrong, "Disability Advocacy in the Charter Era" (2003) 2 J.L. & Equality 33. In CCLA's list of legislative and litigation activity, there are no reported instances of activity in this area.

¹²² *See generally*, H. Archibald Kaiser, "Restraint and Seclusion in Canadian Mental Health Facilities: Assessing the Prospects for Improved Access to Justice, (2001) 19 Windsor Y.B. Access to Just. 391. Since 1990, it appears that the only action CCLA has taken in the area of mental health was a two-page letter to a legislative committee in 2004 regarding periodic reviews for persons found not criminally responsible on mental health grounds. *See* Letter from A. Alan Borovoy to Paul DeVillers, December 13, 2004, available at <http://www.ccla.org/pos/letters/>

¹²³ CCLA's last substantive activity in this area was a 1977 brief to a House of Commons committee on maximum security prisons. *See* "A Bibliography of Briefs Presented", supra note 97. For example, CCLA did not participate in the landmark Arbour Inquiry, Supreme Court litigation on whether prisoners have the right to vote, or the on-going controversy over jail overcrowding in Ontario. *See* Report, Commission of Inquiry Into Certain Events at the Prison for Women in Kingston (Ottawa: Canada Communications Group, 1996) (recommending significant reforms to improve civil liberties in prisons); *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519 (holding that statutory prohibition on inmate voting in Federal elections violated the Charter); Juliet O'Neill, "Corrections Ministry, Jail System Go on Trial", (October 30, 2004) Ottawa Citizen (discussing litigation over chronic overcrowding in Ontario jails).

¹²⁴ *See generally*, Robert Wintemute, "Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits" (2004) 49 McGill L.J. 1143. After furious internal lobbying, by staff, CCLA did write a two-page letter in support of same-sex marriage in April of 2003 and intervene in the Supreme Court's same-sex marriage reference case. *See* Letter from A. Alan Borovoy to Andy Scott (April 25, 2003), available at <http://www.ccla.org/pos/letters/>; *Reference Re: Same-Sex Marriage*, [2004] 3 S.C.R. 698. It's clear, however, that

doubt the idiosyncratic focus reflects the iron hand with which CCLA's General Counsel leads the organization. In 1995 the organization invited an external review, which surveyed Board members, staff, and donors.¹²⁵ It concluded that “there is also a very real concern that ‘there is no organization’—just Alan Borovoy and his interests, his point of view. One survey respondent wrote that CCLA seems to be ‘a platform for the views of Alan Borovoy and not a real organization.’”¹²⁶ Although the report is now over a decade old, its findings still appear to be relevant.

The above survey of civil liberties advocacy organizations in Canada does not exhaust the field of rights activism, of course. Canada contains a wealth of single-issue groups that advocate on behalf of specific classes of individuals, such as young people,¹²⁷ inmates,¹²⁸ and refugees.¹²⁹ Churches, bar associations, and unions are also important advocates in the field. Finally, there are a handful of domestic Canadian organizations that collapse the traditional distinction between civil liberties and human rights such as the Newfoundland-Labrador Human Rights Association,¹³⁰ the Montreal-based Ligue des droits et libertés (“League of Rights and

the “heavy lifting” for same-sex marriage was performed by organizations such as Egale Canada, a GLBT-focused advocacy group. Similarly, CCLA was not involved in important GLBT rights cases that led to the marriage decisions, such as *Egan v. Canada*, [1995] 2 S.C.R. 513 (holding that sexual orientation was an analogous ground under the Charter's equality guarantee); *Canada (AG) v. Mossop*, [1993] 1 S.C.R. 554 (refusing to find that sexual orientation discrimination was discrimination on the basis of “family status” under the Canadian Human Rights Act); and *M. v. H.*, [1999] 2 S.C.R. 3 (holding that Ontario law limiting definition of “spouse” to opposite sex couples violated the Charter). Each of these cases is discussed in Wintemute, *supra*.

¹²⁵ EYE Inc., *Building a New Public Face for the Canadian Civil Liberties Association* (1995) (on file with the author).

¹²⁶ *Id.* at 6.

¹²⁷ See, e.g., Justice for Children and Youth, <http://www.jfcy.org/>

¹²⁸ See, e.g., John Howard Society of Canada, <http://www.johnhoward.ca/>

¹²⁹ See, e.g., Canadian Council for Refugees, <http://www.web.net/~ccr/fronteng.htm>

¹³⁰ See Dominique Clément, “Searching for Rights in the Age of Activism: The Newfoundland-Labrador Human Rights Association, 1968-1982” (2003) 19:2 *Newfoundland Stud.* 347 at 348 (noting how “[a]s one of the few surviving human rights associations in the country, an analysis of the NLHRA helps to explain the historical divisions among civil liberties and human rights organizations”). See also, Newfoundland-Labrador Human Rights Association Website, <http://www.nlhra.org/>

Liberties”),¹³¹ and the University of Ottawa’s Human Rights Research and Education Centre.¹³²

Although outside the scope of this article, these organizations can and do play a vital role in civil liberties advocacy in Canada.

IV. COMMENTARY

Even a cursory examination of civil liberties advocacy groups in Canada puts into stark relief just how very different rights activism is in Canada when compared to the American model and the role played by the ACLU. Whereas the ACLU has over 500,000 members,¹³³ all of the civil liberties advocacy organizations in Canada would be lucky to come up with 9,000 members between them¹³⁴—a far disproportionate number, even factoring in the almost ten to one population disparity between the two countries.¹³⁵ Whereas the ACLU has an affiliate in every state,¹³⁶ Canada lacks civil liberties advocacy organizations in provinces such as Saskatchewan, Prince Edward Island, and New Brunswick.¹³⁷ Those groups that do exist are either unwilling or unable to directly litigate test cases and cover the full spectrum of civil liberties concerns.¹³⁸

While mindful of the fact that some rights advocacy is better than none, and that there exist important differences in temperament and culture between the United States and Canada, it seems fair to say that civil liberties advocacy in Canada operates at a rudimentary level when compared to like-minded American groups. Part of the blame for this situation can be attributed

¹³¹ See Ligue des droits et libertés Website, <http://www.liguedesdroits.ca/> Translation mine.

¹³² See University of Ottawa Human Rights Research and Education Centre Website, http://www.cdp-hrc.uottawa.ca/index_e.html

¹³³ See *supra* note 10.

¹³⁴ This figure includes the 6,000 reported by CCLA, the 937 reported by the BCCLA, and an almost certainly over-generous combined amount of 1,500 for the smaller groups in Manitoba and Alberta. See CCLA Website, <http://www.ccla.org/more/index.shtml> and BCCLA 2005 Annual Report, *supra* note 72, at 22.

¹³⁵ Statistics Canada estimates a Canadian population of 32 million in 2005. See Statistics Canada, “Population by Year, by Province and Territory”, <http://www40.statcan.ca/l01/cst01/demo02.htm?sdi=population> The United States Census Bureau estimates an American population of 293 million in 2004. See U.S. Census Bureau, “USA Statistics in Brief – Population by Sex, Age, and Region”, <http://www.census.gov/compendia/statab/files/pop.html>

¹³⁶ See *supra* note 11.

¹³⁷ See *supra* Section III.

¹³⁸ See *id.*

to the failure of the CCLA and BCCLA to agree on the structure of a national civil liberties organization. The groups entertained serious discussions on the topic in the 1970s,¹³⁹ but were unable to come to agreement because of the BCCLA's insistence on retaining government funding¹⁴⁰ and the CCLA's insistence that its current leadership should assume control of the new organization.¹⁴¹ The BCCLA attempted to create a national organization with other rights groups, but without CCLA's participation the new umbrella organization proved largely ineffectual and it was disbanded in the early 1990s.¹⁴²

Even today, the relationship between civil liberties advocacy groups in Canada ranges from “distant but polite” to “icy”.¹⁴³ Scholar Marie Hojnacki has written about the considerations interest groups must take into account when deciding whether or not to join coalitions.¹⁴⁴ She notes that the key factor is contextual: are the groups secure enough in their roles that the obvious benefits of cooperation make a coalition attractive, or are the groups “in a crowded environment, [where] competition for resources, support, and access to decision makers is greater”?¹⁴⁵ In the latter situation, Hojnacki notes that “organizations may avoid alliances with other groups in order to enhance their own reputations as advocates and to distinguish themselves from other organizations representing similar interests.”¹⁴⁶

¹³⁹ See Clément, *supra* note 17.

¹⁴⁰ See *id.* at 27.

¹⁴¹ See *id.* at 23, 30.

¹⁴² See *id.* at 28 (noting how “the Federation accomplished little in its eighteen-year history”).

¹⁴³ An apt description of CCLA's attitude is found in EYE Inc., *supra* note 125, at 6 (“Somewhat consistent with this theme was the view that CCLA has also become more isolationist—that it does not seek or nurture alliances with kindred organizations—and that this weakens both the organization's impact and ability to attract new support”).

¹⁴⁴ See Hojnacki, *supra* note 24.

¹⁴⁵ *Id.* at 62.

¹⁴⁶ *Id.* A model of interest groups in the same field working together to promote a common cause can be found in the disability rights sector. Sarah Armstrong reports that: “Another positive effect of the Charter . . . is that it has fostered the building of alliances among groups within the disability community. Both because of resource constraints and a desire to put forth a common front, disability advocacy groups have routinely formed coalitions when intervening at the appellate level. This collaboration has fostered greater communication within the disability community, and it has facilitated the exchange of ideas and strategies for change.” See Armstrong, *supra* note 121, at ¶ 101.

This is the situation that appears to be inhibiting increased cooperation between the CCLA and the BCCLA. CCLA continues to draw membership from British Columbia, raising the BCCLA's ire.¹⁴⁷ The BCCLA, in turn, has become an increasingly prominent voice on the national stage, threatening to displace CCLA's view of itself as the only national civil liberties organization.¹⁴⁸ Finally, there is the difficulty in harmonizing the more progressive BCCLA's views on any given issue with those of the more conservative CCLA. Given these difficulties, the creation of a national organization through the merging of present civil liberties groups in Canada is simply not on the horizon.¹⁴⁹ There still remain a myriad of ways, of course, that the groups could cooperate short of formal coalitions: everything from sharing research to holding informal strategy sessions. Progress along these lines would require a change in institutional culture, especially at the CCLA.¹⁵⁰

The Canadian groups' reluctance to directly sponsor test cases presents an interesting contrast with the American model. The national ACLU and most ACLU affiliates have robust litigation departments, representing clients with a combination of internal staff lawyers and cooperating pro bono counsel.¹⁵¹ Even small affiliates with two or three paid staff members are able to handle surprisingly heavy caseloads.

The primary advantage of direct representation is that it allows advocacy groups to precisely sculpt the legal issues the court will determine by crafting the initial pleadings and

¹⁴⁷ *See id.* at 26.

¹⁴⁸ *See supra* Section III. *See also*, Hojnacki, *supra* note 24, at 69 (“Groups facing greater competition for members and resources are expected to be more concerned about maintaining a unique institutional identity, and, therefore, less likely to join advocacy coalitions”).

¹⁴⁹ In some ways, the ACLU had an easier time become national, as it largely filled a vacuum through the steady expansion of state affiliates.

¹⁵⁰ *See supra* note 143.

¹⁵¹ *See supra* note 13.

choosing plaintiffs who can present the most favourable factual circumstances.¹⁵² In addition, it allows groups to be proactive instead of simply waiting for issues to come along. As W.A. Bogart notes, “Litigation can force responses from stubborn governments or bureaucracies, which is one of its strengths, particularly on behalf of those who are otherwise excluded.”¹⁵³ Finally, and perhaps most importantly, interest groups are likely to seek remedies for an injured plaintiff that go far beyond mere compensation. For example, in the late 1990s, the ACLU’s Pittsburgh affiliate won a lawsuit against the police with the following outcome:

The resulting consent decree ordered a sweeping series of reforms in the Pittsburgh police department, including a completely new personnel data system, an ‘early warning’ system to identify officers with multiple complaints, and a requirement that the department document the race and ethnicity of persons stopped for traffic violations. The decree also included a court-appointed monitor to oversee implementation.¹⁵⁴

Permanent injunctions of this type, along with a commitment to continual monitoring, are necessary in order to change the practices and culture of large-scale institutions like police departments, prisons, and mental health facilities.¹⁵⁵

In contrast, the Canadian model favors intervening in cases that have already reached the appellate level. Intervention has the advantage of allowing advocacy groups to take a position on rights issues without risking the resources involved in direct litigation.¹⁵⁶ Indeed, the resource issue is the most frequently cited rationale for why Canadian groups shun the use of test cases—

¹⁵² See Manfredi, *supra* note 33, at 19 (noting how direct sponsorship “has the advantage of maximizing an interest group’s control of litigation”).

¹⁵³ W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994).

¹⁵⁴ Walker, *supra* note *, at xviii.

¹⁵⁵ The reason for continual pressure is that simply winning a case is rarely sufficient to cause actual change in the day-to-day practices of institutions. The influential views of American scholar Gerald Rosenberg on the difficulties of gaining permanent change through litigation are discussed in two Canadian books: Bogart, *supra* note 153, at 51 and Manfredi, *supra* note 33, at 167-68.

¹⁵⁶ See Gregory Hein, “Interest Group Litigation and Canadian Democracy” (2000) 6:2 Choices 3 at 11 (“Intervenors cannot file motions, submit evidence, cross-examine or appeal decisions. . . . Not confined to a specific set of facts, intervenors are free to develop bold claims that dissect complicated social problems”). Intervention in Canada allows parties to file written submissions and take part in oral arguments, as opposed to *amicus curiae* status in the United States which only allows written submissions.

both because the litigation itself can be expensive, but also because failure might mean paying the government's legal bills. As Kent Roach notes, "Canada has retained the British rule that a party that loses a case is generally responsible for paying a substantial portion of the costs of the winning side. . . . [This] can be contrasted with the American rule in which a losing party is responsible only for its own costs."¹⁵⁷ Recent research shows that the government ultimately wins about two-thirds of Charter cases,¹⁵⁸ so the threat of paying costs in a losing case is certainly a serious one.

However, to some degree this risk is overstated. Canadian courts have developed a doctrine allowing public interest litigants to avoid paying (or even receive) costs after participating in unsuccessful litigation.¹⁵⁹ The cases often apply the definition of "public interest" litigant developed in *Reese v. Alberta*¹⁶⁰ or the criteria for determining public interest status listed by the Ontario Law Reform Commission's 1989 Report on the Law of Standing.¹⁶¹ Each method clearly encompasses civil liberties advocacy organizations bringing test cases so long as the financial compensation sought is minimal. If this strategy is adopted, it may be possible for rights groups to seek an interlocutory ruling on their public interest status early in the

¹⁵⁷ Kent Roach, "The Role of Litigation and the Charter in Interest Advocacy", in Seidle, *supra* note 19, at 173.

¹⁵⁸ See Sujit Choudhry & Claire E. Hunter, "Mounting Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*" (2003) 48 McGill L.J. 525 at ¶ 44.

¹⁵⁹ Examples of cases where this doctrine has been considered include *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (denying public interest litigant status to plaintiff with significant pecuniary stake in outcome of litigation); *Harris v. R.*, [2002] 2 F.C. 484 (T.D.) (awarding costs to unsuccessful public interest taxpayer litigant); *MacDonald v. University of British Columbia*, 26 B.C.L.R. 4th 190 (B.C. Sup. Ct.) (denying public interest litigant status to student suing university over student fees).

¹⁶⁰ (1992) 2 C.P.C. (3d) 323 (Alta. Q.B.) at ¶ 2 ("What is meant here by a "public interest group" is an organization which has no personal, proprietary or pecuniary interest in the outcome of the proceeding, and which has as its object the taking of public or litigious initiatives seeking to affect public policy in respect to matters in which the group is interested . . . and to enforce constitutional, statutory or common law rights in regards to such matters.").

¹⁶¹ Ontario Law Reform Commission, Report on the Law of Standing (1989) at ¶ 222 (quoted in *MacDonald*, *supra* note 159, at ¶ 13) (determining whether costs should be assessed on the basis of whether "(a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved. (b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically. (c) The issues have not been previously determined by a court in a proceeding against the same defendant. (d) The defendant has a clearly superior capacity to bear the costs of the proceeding. (e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.").

litigation, before proceeding further and risking adverse cost awards. Interestingly, courts have even begun to award public interest litigants advance costs before the litigation is even completed on the theory that the groups are doing a public service simply by bringing the issue up for judicial resolution.¹⁶² Although each doctrine is still in its infancy, an aggressive litigation program would put any of the Canadian civil liberties advocacy organizations at the forefront of rights activism.

V. CONCLUSION

This article has attempted to provide an initial survey of current civil liberties advocacy groups in Canada. There are several areas in the field worthy of further research. For example, a comprehensive study of the success rates of the various groups' appellate intervention and legislative lobbying activities would be extremely useful, perhaps using a model similar to that applied by scholars to feminist interest groups.¹⁶³ Another barometer of group influence and prestige would be a study measuring appellate judges' and MPs' awareness and attitudes towards the different civil liberties advocacy organizations. On a different tack, an evaluation of whether the traditional distinction between "civil liberties" and "human rights" is still relevant and meaningful among Canadian rights activists could help shed light on whether a national rights organization is feasible.

When I think about the real differences between civil liberties advocacy in the United States and Canada, I often think about a t-shirt I was given as a law clerk for an ACLU affiliate. On the shirt was a fist wearing a set of brass knuckles; on each finger of the brass knuckles was a letter: "A", "C", "L", "U". Below, the shirt said "ACLU: We Fight For Your Rights". The

¹⁶² See generally, Chris Tollefson, "Costs and the Public Interest Litigant: *Okanagan Indian Band* and Beyond" (2006) 19 Can. J. Admin. L. Prac. 39.

¹⁶³ See Manfredi, supra note 16; Morton & Allen, supra note 16.

Canadian equivalent, I've told friends jokingly, would have a very different motto: "Canadian Civil Liberties: In a few years, we may seek a reasonable balance between your rights and the legitimate interests raised by the government." In other words, what I find missing in the Canadian rights groups is passion: the passion that comes from working with real people that have real problems, instead of solely doing policy work. This is the passion that leads not to rashness and eventual marginalization, but the kind of passion that leads to a fierce and determined push for simple fairness. In his history of the ACLU, Samuel Walker notes how "[t]he sheer excitement of being on the frontier of social change, combating intolerance, fighting for ideals, and eventually creating new law was one of the keys to the ACLU's longevity and its ability to attract new talent with each passing generation."¹⁶⁴ The stagnant and aging membership of Canada's civil liberties advocacy organizations is sad proof that this excitement—this *passion*—is sorely lacking.

¹⁶⁴ Walker, *supra* note *, at 67.