Expert Witnesses:
Why the Evangelical Fellowship of Canada Selects Legal Mobilization

by

Joel David Nikkel

B.A., University of Alberta, 2008
B.A., Taylor University College, 2003

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

in

The Faculty of Graduate Studies

(Political Science)

THE UNIVERSITY OF BRITISH COLUMBIA

(Vancouver)

August, 2010

Abstract

Two recent areas of controversy include the "legalization" and the "evangelical-ization" of Canadian politics. The paper connects these two areas of controversy by examining why Canada's largest evangelical interest group, the Evangelical Fellowship of Canada (EFC), has emerged as a frequent intervener in Canada's courts. In order to answer this question, the paper combines an analysis of the interveners at the Supreme Court 1985-2009 with a descriptive analysis of the EFC's selection of legal mobilization that relies upon elite interviews, EFC publications, and public documents. The paper then tests the dominant explanations for interest group legal engagement (articulated as four hypotheses) against the EFC's experience. The paper shows that the EFC's selection of judicial engagement is not determined by their legal resources, the opening of political opportunities, or normative commitments to judicial review; but rather, by an "awakening" to the increased salience of the courts as a policy arena. Because of the EFC's ambivalence regarding the normative place of the judiciary in Canadian political life, I term their attitude "judicial realism". As a result of this perception, the EFC adds legal engagement to their other lobbying strategies. In order to be where important decisions are made, the EFC mobilizes in the courts. Because of this attitude towards judicial power, the evidence suggests that the EFC will continue to select legal engagement regardless of any advantages they may accrue in other lobbying arenas.

Preface

The interviews used in Chapters 4, 5 and 6 were undertaken with the approval of the University of British Columbia Behavioural Research Ethics Board, certificate number H10-01447.

Table of Contents

List of Tables

List of Figures

Acknowledgements

I first of all would like to thank Dr. Gerald Baier, my thesis supervisor, for his generous guidance and consultation throughout the project.

I would also like to thank Dr. John G. Stackhouse (Regent College, Vancouver), and Dr. Jonathon Malloy (Carleton University, Ottawa), for their willingness to discuss the project with me in an informal way while my thesis was coming together. The integrity with which you witness to the truth inspires me.

I thank my fellow graduate students in the UBC Political Science Department. I especially thank Michael Cohen for advice on 'puzzles and methodologies'.

I thank the participants of the study for donating their time and experiences.

I thank my parents and my family for supporting me and cheering for me.

I thank Lisa Joy, my wife, for her patience, kindness, and companionship throughout these educational years. Thanks for sharing the journey with me. Your presence in my life can only be described as love.

Finally, I want to thank the God and Father of our Lord Jesus Christ, from whom, through the Holy Spirit, we receive more than we can ask or imagine.

To Lisa, my partner in this adventure

1 Introduction

Two apparently unrelated developments have generated significant amounts of controversy and debate in Canadian politics in recent years: the "legalization" and the "evangelical-ization" of Canadian politics. The "legalization" of politics (Mandel, 1994) describe the changes that have arisen in concert with the Canadian Charter of Rights and Freedoms. Where some have described the entrenchment of the Charter and the changes it has signalled as a laudable democratic development (Hein, 2001; Wienrib, 1999), others have denounced it as representing an elitist agenda that undermines Canada's democratic tradition (Morton & Knopff, 2000). In particular, both sides of the debate have recognized the role of progressively motivated interest group mobilization as an important part of the social change (or lack thereof) brought on by the Charter (e.g. Brodie, 2002; Mandel, 1994; Manfredi, 2004; Smith, 2005b).

At the same time, another issue has been as controversial, even though it lacks a similar breadth of literature: the emergence of evangelicals as visible actors in Canadian political life. Journalists and activists have speculated about the so-called theocratic goals of this constituency (McDonald, 2010; Warner, 2010). However little scholarly effort has sought to explain this emerging constituency (see Malloy, 2010; Stackhouse, 2000).

This paper elects to connect these two areas of controversy by examining a little recognized development in Canadian interest group politics: the emergence of the Evangelical Fellowship of Canada (EFC), Canada's largest evangelical interest group, as a frequent intervener in the courts. Thus, I begin to address two gaps in the literature: the gap concerning the character, aims, and motivations of Canada's evangelical community, and second, the gap

concerning socially conservative interest groups who select legal mobilization. In order to address these gaps, I seek to answer an interesting puzzle: why does the EFC select legal engagement as an interest group strategy?

This paper will suggest that the EFC selects legal engagement because of their attitude towards judicial power: they believe the courts make important decisions that affect their interests. Because of the EFC's ambivalence regarding the normative place of the judiciary in Canadian political life, I term their attitude "judicial realism". I will show that their selection of judicial engagement is not determined by their legal resources, the opening of political opportunities, or normative commitments to judicial review; but rather, by an “awakening” to the increased salience of the courts as a policy arena. I build a model around the term judicial realism that points to a critical link in the EFC's selection of legal engagement: the institutional uncertainties apparent in Canada's institutional design. Because of the uncertainties surrounding whether the courts or legislatures will ultimately make the final decision in a given policy area, the EFC selects legal engagement in addition to their other lobbying activities.

The paper begins with an examination of the literature concerning legal mobilization and the Charter. I then marshal two types of data: an analysis of Canada's interest group interveners in the Supreme Court from 1985-2009; and an in-depth analysis of the form and content of the EFC's litigation project. In Chapter 3, I analyze Canada's interest group interveners as a whole to show that the EFC has emerged as a one of Canada's most active interest group interveners. In Chapter 4, I use qualitative data including elite interviews, EFC publications, and secondary sources, to describe the form and content of the EFC's legal engagement. In Chapter 5, I draw on this data to test the EFC’s experience against the conventional wisdom (articulated as four

hypotheses) of why groups mobilize legally. Chapter 6 draws on these findings by building a model around the term "judicial realism".

2 Literature Review

The introduction of the Charter to the Canadian constitutional order has provoked vibrant debates about the role of the courts in Canadian society. The literature has wrestled with the legitimacy of judicial review (Morton & Knopff, 2000; Smith, 2002), the impact of "rights-talk" for Canadian identities (Russell, 1994; Cairns, 1995), the interaction between courts and legislatures (Hogg & Bushell, 1997; Hiebert, 2002), and the effectiveness of the court as a catalyst for social change (Mandel, 1994). One particular area of interest has been the dramatic increase of interest group interveners in the courts (Brodie, 2002; Manfredi, 2004; Riddell, 2004; Smith, 2005b; Vanhala, 2009). Whether or not the courts are a "legitimate" or "effective" site for politics, interest groups of all ideological stripes have and are selecting the courts as arenas to pursue their interests (Hein, 2001). In the following, I examine the Canadian literature on why interest groups select “legal mobilization”. I first describe the background of the concept of “legal mobilization” arising from scholarship focused on the United States. I then outline the Canadian literature to describe three things: the debates over the “ends” of legal mobilization, the conventional wisdom of “political disadvantage”, and the gap in the literature concerning “social conservative” interest groups.

Charles Epp’s work on the role of the Charter in Canadian society well summarizes the changes Canada has experienced under the Charter:

> The Canadian Supreme Court’s agenda indeed has been transformed in the last several decades. The Court is now a major constitutional policymaker, focuses much of its attention on civil rights and liberties, increasingly decides cases brought by individuals who are supported by interest groups..., increasingly entertains requests to strike down laws, and increasingly does strike down laws. (1996, p. 775).

Epp suggests that these changes are not due to the Charter itself, but rather to what he calls a "support structure for legal mobilization". The support structure, made up of rights-advocacy organizations, government sources of financing, and developments in the legal profession, provides the necessary resources for litigants to pursue rights claims in the court. He shows that the transformation in the courts began prior to the Charter's entrenchment: the development of the support structure helps explain the origins of the rights revolution in the 1970s, the passage of the Charter, and the strength of the rights revolution in the 1980s. "Bill of Rights matter, but only if civil societies have the capacity to support and develop them" (Epp, 1996, p. 777).

Epp can be seen as building on Zemans's (1983) influential analysis of the role of the law in society. This view builds on the intuitive insight that the legal system functions as an entrepreneurial market. That is, the development of the law is affected by individuals' decisions to mobilize the law. Thus, Zemans suggests that by invoking legal norms, the citizenry engages in a form of political activity which mobilizes public authority on its own behalf. He termed this process "legal mobilization".

By all accounts, the Charter has signalled a dramatic increase of legal mobilization in Canadian society. This can be seen in a number of ways, including the "legalization of the political process" (Mandel, 1994), the transformation of the basis of Canadian citizenship (Cairns, 1995), and the impact of the Charter on interest group lobbying of federal legislation (Pal, 1993). Some of the most heated debates have concerned the increase of interest group activity within the court (Manfredi, 2004; Smith, 2002). Because the "explosion" (Epp, 1996, p. 769) of rights advocacy organizations is an important feature of the "support structure for legal mobilization", the role of interest group organizations who select the courts as a site of politics

can be understood as a critical link in explaining the character of Canada's rights revolution. The emergence of advocacy groups who select litigation therefore has relevance for both explaining changes in Canadian civil society as well as the ongoing struggle over the shape of Canadian public policy. Because the emergence of groups who select litigation describes the interaction between citizens and the state, it can properly be understood as an important developing feature of Canadian democracy.

Of course, interest group advocacy in the courts is not a uniquely Charter-inspired activity (Roach, 1993). At various times throughout Canadian history, minority groups went to the court to pursue their interests. For instance, Franco-Manitobans sought to protect their language rights against hostile governments through the court, women lobbied in the courts to be recognized as persons and Aboriginals mounted land claims litigation in the pre-Charter era (Roach, 1993, pp. 160-165; Smith, 2005, pp. 149-157).

However, the Charter has signalled some important changes in interest group advocacy in the courts. A greater variety of groups are selecting the courts as a venue to pursue their interests (Hein, 2001). Some studies have also suggested that there has been a change in the strategies of groups. In the pre-Charter period groups engaged in ad-hoc litigation when "they were faced with prejudice and exclusion in the legislative process" (Roach, 1993, p. 165). The Charter period has seen the development of "systematic, planned litigation campaigns by groups organized to wage long term battles in the Court" (Brodie, 2002, p. xiv). Thus, observers of Canadian politics have therefore asked a number of questions: why groups turn to litigation; what strategies they use to lobby the Court; what resources they employ; and whether they achieve their objectives (Epstein, 1983, p. 9). In so doing, the Canadian literature draws on an

fairly well established literature describing legal mobilization in the United States, which I now briefly summarize.

Although the historic roots of legal mobilization can be found in the early twentieth century, legal mobilization entered the cultural and scholarly purview during the American Civil Rights movement. Credit for the development of systematic public interest litigation usually goes to two groups: the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP) (Rabin, 1976). Although both groups were pioneer legal mobilizers, the NAACP initially adopted a more programmatic approach by "adopting a strategic plan for cumulative litigation efforts aimed at achieving specified social objectives" (Rabin, 1976, p. 216). These efforts culminated in the U.S. Supreme Court's famous decision in *Brown v. Board of Education* (1954) that declared segregation in schools unconstitutional. These efforts seemed to highlight the potential of legal mobilization as an avenue of social change.

In works like Vose (1958) and Cortner (1968), the social science literature provided a sympathetic analysis of legal mobilization. This literature described legal mobilization as an effective tool for "disadvantaged groups". Thus, this literature developed what came to be known as the "political disadvantage theory". In this view, some groups are "temporarily, or even permanently, disadvantaged in terms of their abilities to attain successfully their goals in the electoral process, within elected political institutions or in the bureaucracy. If they are to succeed at all in the pursuit of their goals, they are almost compelled to resort to litigation" (Cortner, 1968, p. 287). Groups who are disadvantaged by the majoritarian politics of the electoral process can use the courts to pursue their goals.

By the 1970s, scholars were criticizing the optimism of the earlier proponents of the "disadvantage theory". Marc Galanter's (1974) widely cited article suggested that only repeat player litigants were likely to be able to achieve long term objectives in the court. In contrast to one-shot litigants, repeat players have expert knowledge, long-term objectives and credibility that give them a competitive advantage against other groups. Repeat players can play to change the rules as well as for immediate gains. For example, in *Andrews v. Law Society of British Columbia* (1989), the Charter's first equality rights case, repeat player litigants such as the Women's Legal Education and Action Fund (LEAF) sought an interpretation of section 15 of the Charter that both promoted substantive equality of disadvantaged groups while simultaneously upholding legislation and policy that sought to improve the condition of the disadvantaged (Manfredi, 2004, p. 50). They offered no comment on the facts of the case. The ruling of the court regarding section 15, which was favourable from LEAF's perspective, became a valuable commodity for future legal engagements. Because of the high costs of litigation, actors with large resources are more likely to become repeat players and therefore gain the competitive advantages associated with repeat playing. These observations suggest that legal mobilization, far from being the purview of outsiders, was actually the realm of political insiders. Effectiveness in the courts will be partially determined by the type of legal resources accrued by different groups. Repeat players, in Galanter's (1974) view, are therefore "advantaged" in the court.

Epstein's (1983) under-recognized work on conservatives in the American courts also criticized the "disadvantage theory". In his analysis of the rise of conservative interest group litigation, he finds that early (pre-1960s) conservative litigation fit well into the disadvantage

theory: they went to the courts when they could not accomplish their goals in the legislative sphere. However, later groups began to resort to litigation because they began to view themselves as disadvantaged in the *judicial* arena (Epstein, 1983, p. 147). "Besides recognizing their judicial disadvantage, they recognized the growing role of the courts, particularly the Supreme Court, in society. The courts in conservative eyes have become 'policy makers' that were closely allied with liberal interests" (Epstein, 1983, p. 148). From the perspective of conservative groups, the disadvantage theory needed to be reversed: these groups selected litigation because they were disadvantaged in the a salient policy arena in which their opponents were entrenched. Unfortunately, the literature has not broadly applied Epstein's insight (but see Hoover & den Dulk, 2004, Teles, 2008).

Olson (1990) suggests modifying the disadvantage theory by comparing the political and legal resources of competing groups. Unlike lobbying legislatures, litigation is inherently adversarial. As such, groups not only look to their own mix of resources, they also look to their opponent's mix of resources. In the first case, groups will tend to litigate if their legal resources outweigh their political resources. If their legal resources are large, or if their political resources are small, groups will seek to move their conflicts into the courts. More specifically, she suggests that over and above the absolute value of a group's ratio, groups will be more likely to litigate if their ratio of political to legal resources is smaller than their opponents (Olson, 1990, p. 862). This theory can explain the selection of litigation by politically strong groups, as they likely also have large legal resources and therefore a small ratio. It can also explain the traditional "underdog" litigant of the political disadvantage theory: because these litigants' political resources are close to zero, their ratio is also small. Olson's theory also suggests that

litigation should be understood as one strategy among many available to active and aggressive interests.

Presently, with the risk of oversimplifying the literature for the sake of parsimony, the American literature has fixed on the conventional wisdom that can be called the “policy success explanation” (Solberg & Waltenburg, 2006, p. 561; see also Hansford, 2004; Holyoke, 2003; Schlozman & Tierney, 1983). The dominant theme of this explanation is that groups choose to act “in the institutional setting most likely to produce favourable results” (Schlozman & Tierney, 1986, p. 160). The determination of expected success depends most importantly on the resources available to groups and how those resources are suited to one policy arena or another. For instance, some resources, such as in-house legal staff and legal experience (Galanter, 1974) are more well suited to lobbying in the courts. Other factors that could determine a group’s calculation of expected success include the presence of alliances and competition (Holoyoke, 2003). Recent works have sought to introduce the demands related to recruiting and maintaining members as an important corollary to the policy success model (Hansford, 2004; Solberg & Waltenburg, 2006). As such, the literature has drawn heavily on Olson (1990), and has left Epstein's (1983) insights regarding conservative interest groups largely un-mined (but see Hoover & den Dulk, 2004; Teles, 2008).

2.1 Canadian Perspectives

The high visibility of interest group litigation under the Charter has provided for a flurry of literature on interest group activity in the Canadian context. However, I suggest that the literature has focused on “progressive groups” to the detriment of other types of groups. Because of this gap, the literature has relied upon variants of the “disadvantage theory” to

explain why interest groups select litigation. The conventional explanations of why groups select litigation have not been tested against socially conservative interest group litigation.

A first category of Canadian explanations rest upon what can be called a "social movement analysis". This group suggests that the courts are more permeable for “discreet minorities” than majoritarian legislatures. Miriam Smith's respected work on both Canadian civil society generally (2005a; 2008) and the Canadian queer social movement specifically (1999; 2005b) is paradigmatic and influential in the social movement explanations (see also Riddell, 2004; Vanhala, 2009). In her argument, the entrenchment of the Charter created new opportunities for groups previously submerged under the weight of oppressive majorities. Drawing on Sydney Tarrow's (1998) work, she describes the "political opportunity structure" available to group actors in Canadian political life as the "ways that political institutions provide points of access to social movements or block them" (2008, p. 26). For the lesbian and gay social movement, the entrenchment of the Charter was a change in the political opportunity structure: “the political and legal opportunities afforded by the Charter have provided an opening for lesbian and gay organizations... to use the courts to force public policy changes on reluctant governments” (2008, p. 198). Resource mobilization theory, which describes mobilization as conditioned by the availability of resources, and the emergence of a gay and lesbian "politicized identity" also play a role in her explanation. However, the opportunities created by the Charter carry the most explanatory weight.

The social movement perspective, as epitomized by Smith, provides an important foundation for work on Canadian collective actors. The emphasis on the interaction between the institutions of the state (i.e. political opportunity structures) and group choices is compelling for

the groups she describes. However, what is missing from this group of explanations is study that examines "conservative groups".[1] Studies arising from a social movement perspective tend to focus on groups that are political minorities who use the courts as a venue to ameliorate a historic disadvantage. Social movement explanations of legal mobilization have not been tested against or applied to “socially conservative” groups, that is, groups whose identities are grounded in more traditional worldviews. These groups do not seek change, but rather, they seek institutional guarantees that will limit changes. Although it is clear that such groups choose to intervene in litigation (Hein, 2001), whether social movement explanations can be applied to "socially conservative" legal mobilizers has yet to be established.

A second widely cited analysis of the impact of the Charter on Canadian society is what is commonly called the "court party thesis". This perspective describes the increase of so-called “judicial activism” as a result of the decisions of certain political actors (judges) supported by a certain constituency (the “court party") (Morton & Knopff, 2000). Ian Brodie's (2002) work highlights the role of interveners as a core component of the constituency that legitimizes judicial activism. He describes how the court changed its strategy with respect to interveners as a sign that the courts are engaging in "politics" without proper accountability. He describes a "marriage of interests" between power-hungry judges and so-called "special interest groups". The court uses the rhetoric of "disadvantaged groups" to legitimize its "illegitimate" foray into the political sphere. An elite group of interveners, including the Womens’ Legal Education and Action Fund (LEAF) and the Canadian Civil Liberties Association (CCLA), are an important

1 Of course, the definition of “conservative groups” could be contested. The groups who represent Canadians who are disabled that Vanhala (2009) analyzes have what could be described as a "conservative" position on pre-natal genetic screening. Egale, the legal advocacy group who who looms large in Smith’s (2005b) analysis, could be described as representing the “conservative” wing of the queer social movement.

component of the constituency that the Court uses to legitimize its increasing political role in Canadian society. Interveners, in Brodie's (2002) characterization, are "special interests" who lack political resources, and thereby democratic legitimacy, in other arenas.

Though Morton and Knopff are the most visible of the scholars in this perspective, Christopher Manfredi's (2000; 2004) work on feminist legal mobilization most succinctly expressed the court party logic of legal mobilization. Manfredi (2000) uses an institutional model to describe the logic of legal mobilization at work in the court party perspective. The approach is underscored by two propositions: first, constitutional rules are valuable legal resources that society-based actors compete for to serve broader political and policy objectives; second, modification is not self-generating, it is generated by strategic action. He describes two arenas within which groups strategically pursue constitutional reform. Where "macro-constitutional politics" describes the strategies surrounding the process of formal amendment, "micro-constitutional politics" describes the process by which policy preferences are institutionalized without the bargaining constraints imposed by the formal process of amendment (Manfredi, 2000, p. 17). Micro-constitutional politics is constitutional rule making through litigation: "the participants in micro-constitutional politics are systematic rather than ad-hoc litigants, and their principle interest is in developing legal and political rules over the long-term, not in resolving specific disputes through litigation" (Manfredi, 2000, p. 17).

Manfredi's model of interest group behaviour makes an important contribution to the literature: he shows how constitutional rules are valuable to collective actors and thus one reason why groups may select legal mobilization. However, if all constitutional rules are valuable to all actors in the same way, what explains the variation between groups in both the

timing and scope of their mobilization? Manfredi does not seek to explain this variation. Second, because he examines the judiciary in isolation, he fails to account for other venues (besides courts) in which actors can pursue constitutional politics. Macro-constitutional politics clearly must be pursued outside of courts. Micro-constitutional politics are also negotiated between governments and courts: Although courts have the constitutionally defined role of judicial review, governments have the ability to respond to these rulings in a number of ways (Hiebert, 2002). As such, “micro-constitutional” politics must be understood in the interaction between the institutions of government, not in the courts in isolation. Manfredi’s model therefore fails to explain why groups select the courts as the venue to pursue “micro-constitutional” politics.

Morton and Knopff (2000), and Brodie (2002) are far more explicit about why they think groups select the courts: as "special interests" they are unable to find purchase in the "democratic" institutions of government. To draw these implications together and present them in a more sympathetic light, I summarize the court party thesis in this way: legal mobilization is a response to the desire of certain valuable commodities (the interpretation of rights) which can be provided by the state. As groups seek policy concessions from the state, they select the policy arena in which they can legitimately expect to win. Groups select legal mobilization when they have resources in the courts and they have few resources in legislatures. Thus, groups follow a path of least resistance when seeking policy concessions from the state.

The court party thesis is easily made into a straw man, and is rarely given its due in the literature. As primarily a neo-pluralist explanation of interest group activity, it provides an important perspective to the literature. However, this explanation can not explain the ubiquitous

presence of conservative groups in the court. Why do groups who fail to conform to the "marriage of interests" mobilize in the court? Ironically, the court party thesis and the social movement explanations described above share the same myopia: they focus on "progressive" groups to the detriment of other groups who are active in the court. As such, their explanations have not been tested against socially conservative groups who select legal engagement.

Gregory Hein's (2001) survey of the groups who litigate in Canada's federal courts provides the best data to date about the plurality of interests that surround the courts. His analysis places identity related characteristics at the centre of the explanation. Three stable resources increase groups propensity to litigate: legal resources, “identities bolstered by rights, and normative visions that demand judicial activism” (Hein, 2001, p. 232). Structural explanations provide the “changing circumstances” that may make legal action attractive to those groups who lack the stable characteristics to litigate. These include interpretive opportunities created by uncertainty over precedent; countering immediate threats; and diminished political resources in other policy arenas (Hein, 2001, p. 241-243). His data suggests that Charter Canadians, civil libertarians, new left activists, and social conservatives usually participate as interveners because they seek “public” benefits; those seeking “private” benefits (Corporations, professionals, unions, Aboriginal peoples, and victims) usually participate as parties (Hein, 2001, p. 225). Whereas changing circumstances can lead to intermittent activity in the court, “judicial democrats”, made up of civil libertarians, Charter Canadians, new left activists, and Aboriginals, are the most likely to sustain their activity in the court.

This perspective provides an important variable to the analysis: the centrality of internal norms to shaping the strategic considerations of groups. Intuitively, groups who are normatively

committed to judicial activism are more likely to litigate. However, Hein's (2001) explanation does not explain well the emergence of "social conservatives" as repeat players. Where he rightly suggests that "social conservatives" have a high propensity to intervene (rather than participate as parties) along with other judicial democrats, they lack the "stable characteristics" of other rights-based groups. Hein therefore suggests that "social conservatives...mobilize the law sporadically" (2001, p. 244). However, as I will demonstrate below the EFC has emerged as a frequent intervener in the court. Thus, we need an explanation that captures this development.

Hoover and den Dulk (2004) compare American and Canadian Christian conservatives in court as a test of "American exceptionalism" in levels of litigation. They describe the erosion of American exceptionalism in Christian conservative legal mobilization. While Christian groups are still more active in the United States, the Canadian Christian Right has evidenced a "substantial" increase in legal mobilization (Hoover and den Dulk, 2004, p. 27). They characterize Christian legal mobilization as two-pronged: Christians positively mobilize the law to expand their rights, and they counter-mobilize the law to seek public sanction for limits on the rights of others. This is one of the few works that picks up Epstein's important insights into conservative litigants (Hoover and den Dulk, 2004, p. 18, see also Epstein, 1985, p. 79).

Hoover and den Dulk's explanation focuses on political opportunity structures, resources and Christian politicized identities. Variations in Christian identities are the critical factor that explains variation in the timing of legal mobilization: evangelicals, in both countries, were slow starters due to the lack of theological and institutional resources as compared to Catholics. They explain the evangelical "conversion" to political activism: "a philosophical argument among evangelicalism's elites began to be won by those who wished to re-evaluate and criticize their

tradition's sectarian inheritance. Ignoring opportunities to participate in the public arena (including the legal arena) was no longer seen as a virtue, but as an abdication of Christian duty" (Hoover and den Dulk, 2004, p. 25). Of note for the present study is that they describe the EFC as instrumental in pioneering this change in the Canadian context (Hoover and den Dulk, 2004, p. 26).

Hoover and den Dulk (2004) provide a convincing description of the erosion of American litigious exceptionalism. However, their explanation, which focuses on changes in evangelical identities, can only explain an increase in political activism, not the selection of legal mobilization. Second, because their research question is testing American exceptionalism, their analysis does not account for the subtle but enduring cultural differences between Canadian and American evangelicals which are well documented in the literature (Bean et. al., 2008; Hoover et. al, 2002; Reimer, 2003; Stackhouse, 1993). Nevertheless, through highlighting the EFC as a critical actor in the Canadian context, Hoover and den Dulk set the stage for a more fine-grained analysis of the EFC's litigation activities. As such, I look more closely at the EFC to explain their “conversion” to legal engagement, over and above simply an increased commitment to political engagement generally.

Despite the apparent methodological and normative distance between the works reviewed, I suggest that Canadian literature has agreed upon a conventional wisdom: interest groups select the arena in which they are most likely to succeed. Critical in this calculation is the comparison of “advantages” between courts and legislatures. In developing and testing this hypothesis, the literature has almost exclusively focused on “progressive” groups in the court. Because of the gap in the literature concerning “socially conservative” groups, the conventional

explanation may be ill suited to explain the selection of legal mobilization by these groups.

In the remainder of this paper, I begin to fill this gap by offering an in-depth treatment of one socially conservative group: the Evangelical Fellowship of Canada. Relying on elite interviews, an analysis of EFC factums and publications, as well as secondary sources, I seek to explain why this group has dramatically increased their litigation project in recent years. In order to answer this puzzle, I draw on two different sets of data outlined in Chapters 3 and 4. In Chapter 3, I provide an analysis of the landscape of Canadian interest group interveners at the Supreme Court from 1985-2009. I thus situate the EFC's activities in the broader developments at the Court. This section also updates the literature on Canadian interest group interveners, which, to this point, only has data covering up until 1998.[2] Chapter 4 draws on qualitative data such as elite interviews, EFC publications, and secondary sources to provide an description of the form and content of the EFC's litigation project. This data will then provide the basis for the analysis that follows in Chapters 5 and 6.

Focusing the analysis on one group admittedly introduces limitations to the project. The findings will be limited to explaining the group under examination, or groups that are very similar. It can not describe large scale developments among interveners. I seek to mitigate this weakness by providing a up to date analysis of the types of interveners who participate in the court. The analysis of the EFC is thus situated within its context, showing how the actions of this one group converge and diverge from the broader developments among groups intervening at the Supreme Court of Canada.

The project also does not seek to examining a broader "social movement" by examining

2 However, see Alarie and Green's (2009) unpublished paper.

a collection of actors, the more common choice for examinations of Canadian interest group interveners (Riddell, 2004; Smith, 2005b; Vanhala, 2009). The strength of this method is to describe a broader "movement" or development in Canadian society. However, the weakness of this method, often overlooked, is that it glosses over the differences between groups within a movement; differences of constituency, strategies, resources and aims are ignored in favour of shared goals, constituency and resources.

Instead, this project chooses to provide in depth analysis of one particularly salient group, a method selected by Manfredi (2004) and called for by Caldiera and Wright (1990, p. 804).[3] The particular strengths of a single group study are insight into the subtleties of perception, strategy, and decision-making with reference to a particularized constituency, resources, and goals. Because of the unique position the EFC holds as the representative of evangelical individuals, churches, organizations, and educational institutions, the pressures and incentives that affect its strategic choices significantly vary from other socially conservative organizations.[4] Insights into broader movements are derived through the group's role as a key stakeholder in politically constructed coalitions and networks.

3 Although Caldiera and Wright's analysis is situated in the American context, it is also relevant in Canada

4 For example, REAL Women of Canada focuses on women's rights; Christian Legal Fellowship represents Christian lawyers; the Islamic Society of North America represents only Muslim individuals.

3 Interveners at the Court, 1985-2009

In order to analyze Canada's interest group interveners, I created a database that included all interest groups who participated in intervention from 1985-2009.[5] Because the aim of the study is to examine developments among civil society actors, a number of frequent actors in the court were left out, including Attorney Generals, government ministries, and individuals. The groups were then coded according to type, as described below.

By choosing to omit both certain strategies and certain groups, limitations are introduced into the study. This data describes only one strategy among many which could be described as legal mobilization. As such, those groups who favour other strategies are not captured. However, by narrowing the focus to intervention, I describe a specific way that groups engage with the state that is both salient and growing.

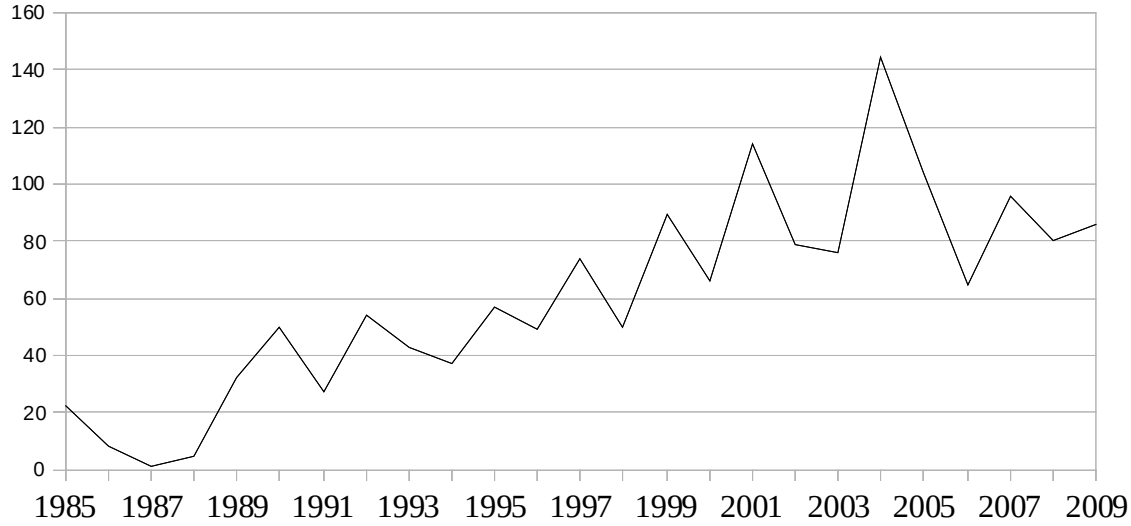
While why groups select intervention is up for debate, the process by which intervention occurs is well known. Intervention is one way, among a number, that groups can participate in court cases (Manfredi, 2000). In contrast to directly launching cases, either through "test cases" or filing suits in their own name, groups can "intervene" in someone else's case and make their own arguments over the legal points at issue (Brodie, 2002, p. 18). The Court has developed its own rules for determining whether intervention ought to be allowed. Generally speaking, (other than Attorney Generals in certain cases) interested groups have to seek leave to intervene. Once leave is granted, interveners are limited to a brief factum and an appearance at the hearing of the appeal.

---

5 The appeals were accessed through the University of Montreal Lexum site: http://scc.lexum.umontreal.ca/en/index.htm. Most of the data is directly verifiable from reference to the Supreme Court rulings. Some of the data is partially subjective and subject to the judgement of the coder, such as the "type" of group.

In the 1970s, under Justice Bora Laskin's leadership, the Court began to accept more interest group participation in the judicial process (Brodie, 2002, p. 17). However, in the early Charter period after 1982, the Court abruptly changed its rules regarding interventions and the Court's acceptance rate for applications from groups and individuals dropped remarkably (Brodie, 2002, p. 37). In 1985 the Court abruptly changed its rules again, this time to adopt a more permissive policy to interveners. From 1987 to 1999, the Court accepted an average of 89.6 percent of applications, with a high of 95 percent and a low of 79 percent (Brodie, 2002, p. 37). Over the period of 2000 to 2008, the acceptance rate has remained consistent at around 90 percent: an average of 89.8 percent of non-Attorney General interventions are granted leave to intervene (adapted from Alarie & Green, 2009, p. 14). The evidence thus suggests that the Court has maintained a stable, permissive attitude towards interveners after it changed its rules in 1985.

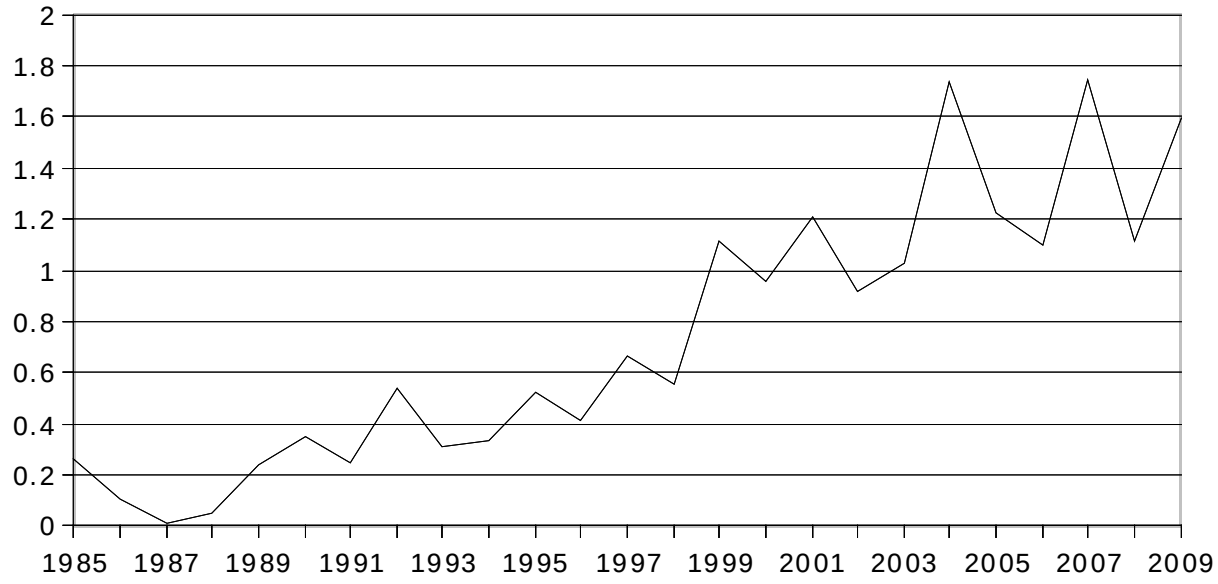
Figure 1: Number of Interveners at the Supreme Court, 1985-2009



Note. Dates refer to the year that cases came to judgement. Adapted from the University of Montreal Lexum site: http://scc.lexum.umontreal.ca/en/index.html.

In the context of an open door for intervention, the number of cases with interveners has increased over time. Figure one shows how the total number of interveners increases over the Charter period. Because the dates used reflect the year of judgement, the fluctuations reflect both differences in number of interveners, as well as the variation with regard to the number of cases that the Court decided in a given year. The overall slope of the graph shows an upward direction, with interventions peaking in 2004. After 2004, the total number of interventions has dropped, with a small increase in 2009. Figure two controls for the number of cases per year by dividing the number of interventions per year by the number of cases per year. The number of interventions per case increases dramatically. The data seems to stabilize in a pattern of oscillation between 1.1 and 1.7 interventions per case. The evidence suggests that in the context of the stable opportunity structure described above, the number of interventions have increased in the Canadian Supreme Court.

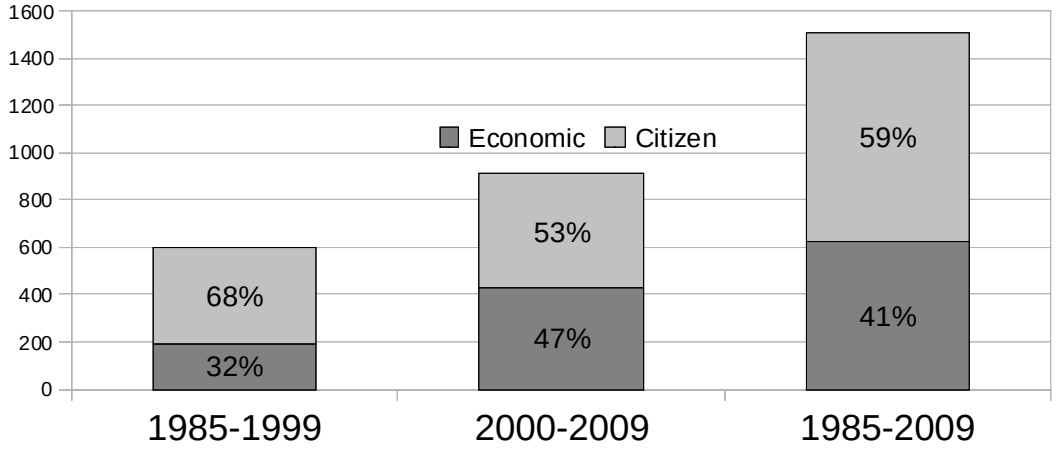
Figure 2: Interventions per Case at the Supreme Court, 1985-2009



Note. Dates refer to the year that the cases came to judgement. Data adapted from the University of Montreal Lexum site: http://scc.lexum.umontreal.ca/en/index.html.

Figure three divides interveners into two groups: "economic" and "citizen". Economic interests are those groups whose interests are defined by their relation to the means of production: corporate interests, labour interests, and professional groups. Citizen groups are groups who seek to mobilize latent interests in civil society. In both periods, citizen groups make up the majority of interveners. However, when I compare the breakdown between the first part of the Charter period (1985-1998) and the second part (1999-2009), economic interests are increasing their interventions at a larger rate, such that citizen groups only marginally outnumber them in the second period.

Figure 3: Economic vs. Citizen Interveners, 1985-2009



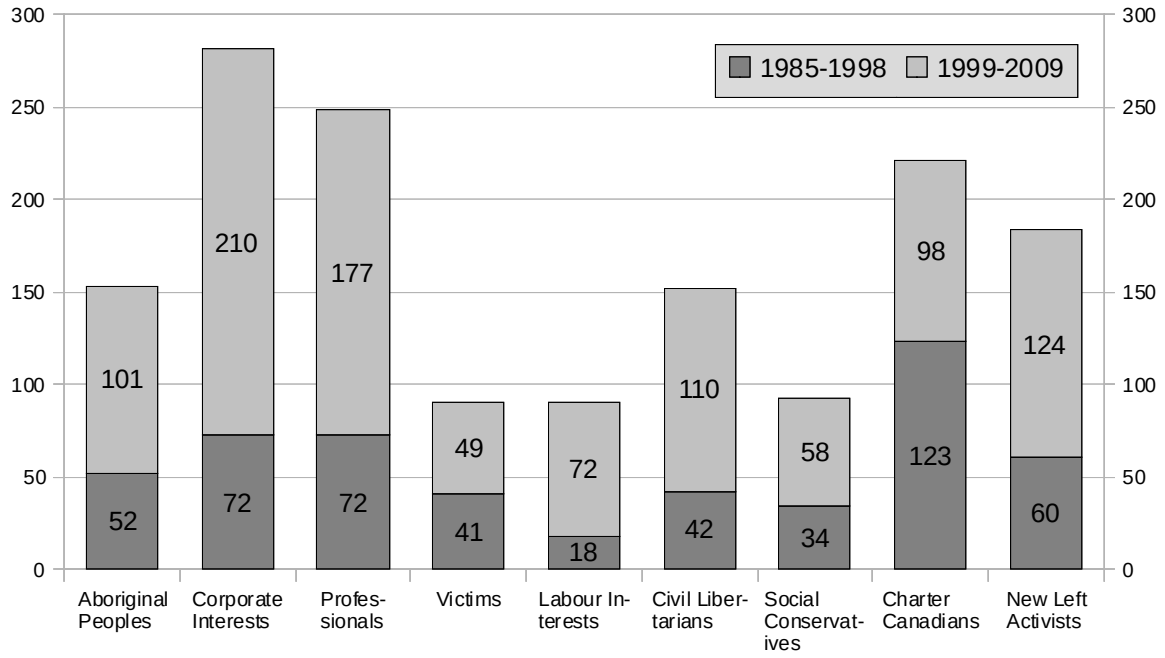
Note. Data adapted from the University of Montreal Lexum site: http://scc.lexum.umontreal.ca/en/index.html. The dates refer to the dates the cases came to judgement.

Figure four describes the diversity of groups who select intervention. The categories are assigned according to groups' individual characteristics and strategies in the court, and are based on Hein's (2001) categorization of litigants in Canada's federal courts.[6] Corporate interests and

6 There are some limits to categorizing groups in this way. Because the categories are descriptive rather than typological, there is some ambiguity around the borders of each category, and there is the potential that some

labour interests are groups who represent citizens who are organized around the means of production. Professionals are groups who represent citizens, and their respective professions, who have credentials to practice as doctors, lawyers, judges, engineers, etc. Charter Canadians and new left activists share a normative commitment to government intervention for solving social problems, however the former have embedded legal recognition in the 1982 Constitution where the latter do not. Social conservatives are differentiated from civil libertarians in that social conservatives derive their claims from traditional values embedded in faith and family, where civil libertarians seek to protect individual rights from state intervention. Groups who represent victims want to help individuals who have been impacted by cancer, intoxicated drivers, the transmission of infected blood and other tragedies. Aboriginal peoples have unique claims as the original inhabitants of what is now called North America.

Figure 4: Types of Interveners at the Supreme Court, 1985-2009



Note. Data adapted from the University of Montreal Lexum site: http://scc.lexum.umontreal.ca/en/index.html. The groups may arise that do not fit into any category here described.

interveners were then coded and placed into the “Supreme Court Interveners Database”, which is in the author’s possession. The years refer to the years that the cases came to judgement.

The data shows that corporate interests have become the most active group in Supreme Court intervention. Where in the period of 1985-1999, corporate interests were more active as parties (Hein, 2001, p. 226), I now suggest that they are also the most active group of third-party interveners. Professional groups are the second most active group. These two groups have become the two most active groups because their interventions in the second period increased almost three fold.

Over the whole period, Charter Canadians are the third most active category of groups. However, Charter Canadians actually decline in the second period. Groups representing Charter Canadians are still very active as interveners, however, their interventions are not following the general trend of increased activity in the court that is evidenced in all other categories. This could potentially be explained by two factors. First, cuts to and the outright cancellation of the Court Challenges Program, an important source of government financing for litigants and interveners, have reduced funding to Charter Canadian groups, decreasing their ability to litigate a large number of cases. Another factor could be that the key battles for some groups have already been fought and won: important precedents have already been set in areas of central concern. These “victories” could created the paradoxical effect of deflating the movement. Constituents, and therefore resources, could be flowing into new areas of concern where important rulings have yet to be made.

Other citizen groups are increasing their activity at a dynamic rate: civil libertarians are almost three times as active, Aboriginal groups and new left activists are twice as active. In terms of an overall count, new left activists were the most active "citizen" group in the second

period. This is perhaps not surprising, because these groups share important normative assumptions with Charter Canadians that increase these groups' propensity to litigate. However, unlike Charter Canadians, these groups lack the constitutional recognition that is explicitly designed to protect their interests (Hein, 2001, p. 220). As such, we can understand their increased activity in the court as an attempt to gain constitutional recognition via interpretation. Despite cuts to government financing, new left activists are increasing their activity at sharp rates.

Social conservatives were more active in intervening, albeit at a slightly slower rate than other citizens' groups. However, their rate of increase outpaces Charter Canadians (who decline), and victims groups, whose activity remains almost the same. Despite social conservatives smaller constituency in Canada, and thereby smaller resources, their activity in the court is still increasing.

In order to complete the characterization of interveners in the Supreme Court, I now examine individual groups. In his description of interest groups and the Supreme Court between 1985-1998, Brodie (2002) portrays an "elite club" of groups who could legitimately be called "repeat players" in the court. Table one outlines the activity of the most active citizen interveners between 1985-1998.

Table 1: Select Number of Interventions by Group, 1985-1998

Intervener	Type	# of Interventions
Women's Legal Education and Action Fund (LEAF)	Charter Canadians	29
Canadian Civil Liberties Association	Civil Libertarians	18
Canadian Jewish Congress	Charter Canadian	15
Canadian Labour Congress	Labour Interests	10
Canadian Bar Association	Professionals	10
Assembly of First Nations	Aboriginal Peoples	7
Seventh Day Adventist Church in Canada	Social Conservatives	7
Criminal Lawyers Association	Professionals	6
Charter Committee on Poverty Issues	New Left Activists	6

Note. Data adapted from the University of Montreal Lexum site: http://scc.lexum.umontreal.ca/en/index.html. Dates refer to the year cases came to judgement.

Brodie (2002) singles out the Women's Legal Education and Action Fund (LEAF) and the Canadian Civil Liberties Association (CCLA) as repeat players at the Supreme Court. His key piece of evidence is that the only groups granted leave to intervene more frequently in Charter cases were the Attorney General of Canada and Ontario (Brodie, 2002, p. 44). While not disputing the characterization of these groups as "repeat players", I build on Hein (2001) to suggest that there is a broader number of groups that may be called active interveners in the Supreme Court. These include other Charter Canadian groups, economic groups like the Canadian Labour Congress and the Canadian Bar Association, as well as other citizen groups including Aboriginal peoples, new left activists and social conservatives. Although many of these groups are certainly not as active as LEAF, they nevertheless provide evidence that a number of interests from a broad range of ideological positions select intervention. As I will show, the "mosaic" of active interveners grows rather than narrows in the second period of Charter litigation.

Table 2: Select Number of Interventions by Group, 1999-2009

Intervener	Type	# of Interventions
Canadian Civil Liberties Association	Civil Libertarians	43
Criminal Lawyers' Association (Ontario)	Professionals	42
Canadian Bar Association	Professionals	30
The Canadian Foundation for Children, Youth and the Law	Civil Libertarians	19
British Columbia Civil Liberties Association	Civil Libertarians	18
Women's Legal Education and Action Fund (LEAF)	Charter Canadians	16
Federation of Law Societies of Canada	Professionals	16
Canadian Labour Congress	Labour Interests	13
The Evangelical Fellowship of Canada	Social Conservatives	12
Assembly of First Nations	Aboriginal Peoples	9
Council of Canadians with Disabilities	Charter Canadians	9
Aboriginal Legal Services of Toronto	Charter Canadians	8
Amnesty International	New Left Activists	7
African Canadian Legal Clinic	Charter Canadians	7
Equality for Gays and Lesbians Everywhere (EGALE)	New Left Activists	7
Sierra Club of Canada	New Left Activists	6
Charter Committee on Poverty Issues	New Left Activists	6
Canadian Association for Community Living	Charter Canadians	6
Canadian Jewish Congress	Charter Canadians	5

Note. Data adapted from the University of Montreal Lexum site: http://scc.lexum.umontreal.ca/en/index.html. Dates refer to the year cases came to judgement.

Table two identifies the most active interveners between 1999-2009. In this period, the most active individual groups are predominantly civil libertarians and professionals. These categories are dominated by a small number of groups that undertake the majority of interventions. Among citizen groups, the Canadian Civil Liberties Association has overtaken

LEAF as the single most active group in the Supreme Court. However, it is professional groups who evidence some of the largest increases in intervention. In the professional category, it should not be surprising to see legal groups as the dominant litigators. Legal groups conform to Hein's (2001) characterization of groups who have a high propensity to be active in the court: legal groups have unparalleled legal resources, professional identities energized by rights, and a normative commitment to litigation as a legitimate form of citizen engagement.

A number of groups fall into what might be called a "second tier" of repeat players, including LEAF, the Canadian Labour Congress, the EFC, and the Assembly of First Nations. Each of these groups leads their category and is very active, though not nearly to the extent of groups like the Canadian Civil Liberties Association. I call these groups repeat players because they each evidence at least one case coming to judgement per year.

Although "new left activists" as a category is increasing its activity rapidly, the individual groups that make up the category are not exceptionally active. This speaks to the fragmentation that exists within the multiple interests that seek progressive change in Canadian society. Even around well-defined and highly visible issues such as the environment, there are numerous groups who intervene a limited number of times before the court. Finally, though corporate interests are the most active category, no individual corporation has significant repeat interventions. As such, corporate interveners at the Canadian Supreme Court, contrary to Galanter's (1974) prediction, intervene as one-shot litigants rather than repeat players.

In sum, this data suggests that Canada is evidencing a growing number of groups who select intervention as a strategy. Most types of groups are increasing their interventionary activity, with the significant exception of Charter Canadians. When I examine individual groups,

the data shows that some categories are dominated by a small group of frequent interveners. Thus, the increase of interventions at the Supreme Court is derived both from new groups choosing intervention, as well as some groups choosing to intervene more frequently. The data shows a small collection of interest groups who are very active in the court. The EFC is one of these frequent interveners. Contributing to the increase of socially conservative interveners in the court, as well as the overall increase of interveners, the EFC has emerged in the second period as a frequent intervener. The EFC falls within a "second tier" of interest group interveners which includes LEAF, the Assembly of First Nations, and the Canadian Labour Congress.

In order to give greater empirical and qualitative clarity to the EFC's selection of legal mobilization, I now focus the analysis on the EFC. Relying on elite interviews, EFC publications, and secondary sources, I turn to a description of the form and content of the EFC's legal engagement.

4 Looking Closer: The EFC's Litigation Project

The story of the Evangelical Fellowship of Canada is, in many ways, one of the growth of a successful civil society group. The Evangelical Fellowship of Canada describes itself as "the national association of evangelical Christians, gathered together for influence, impact and identity in ministry and public witness" ("Home Page," n.d.). Founded in 1964, the EFC was patterned after the National Association of Evangelicals in the U.S.. Operating as a small network of evangelicals for approximately two decades, the EFC has grown to be the second largest evangelical association in the world. The EFC has an interdenominational constituency of forty-one denominations, approximately 125 other organizations and colleges, and over one thousand individual churches ("Current Affiliates," n.d.). There are approximately 3.6 million Protestant Evangelicals in Canada, of which approximately 1.5 million are members or adherents of EFC affiliated ministries (Sammon et al,, 2009, p. 1).

The EFC was not founded with the articulated goal of influencing either public policy or social norms. Initially, their goal was to promote understanding and fellowship among like-minded churches. The EFC sought to connect evangelical churches, denominations, and organizations in order to partner together for ministry. This goal was in accordance with the trend towards a greater "evangelical" self-consciousness apart from mainline churches that was apparent at the time (Stackhouse, 1993, p. 165). The EFC was instrumental in responding to and facilitating the development of a pan-Canadian evangelical identity.

In the early 1980s, the Fellowship began to adopt a wider vision under their first president, Brian Stiller. Stiller sought to mobilize evangelicals to engage the public and the government. In his words: "What became obvious to me was that evangelicals were looking for

a voice: a voice to government and a voice to media" (quoted in Fieguth, 2004). Stiller thus began to build relationships on Parliament Hill. In response to the Supreme Court's decisions to declare Canada's abortion regulations in the 1980s, the EFC lobbied the Mulroney government in support of the amended abortion laws in 1988. Of note, Stiller lobbied for a compromise position, even as other anti-abortion groups were vehemently opposed to any legal abortions in Canada (Stiller, 1997, p. 201-202). This pragmatic position is an important indication of the ethos of the EFC, and is a strategy that they exhibit even past the end of the Stiller's tenure. Despite Stiller's attempt at compromise, the abortion bill failed in Parliament, which Stiller called "one of the worst moments in my whole fourteen years" at the EFC (quoted in Fieguth, 2004).

Interviews suggest that the "failures" during the abortion debates were the critical incident for the EFC's litigation project (J. Epp-Buckingham,[7] Interview, July 20, 2010). The Supreme Court's decision to strike down Canada's abortion regulation caused an "awakening" to the increased importance of the Court in Canadian political life (J. Epp-Buckingham, Interview, July 20, 2010). In the years following the abortion debates, the EFC began to broaden its political action to include both legislative lobbying and legal interventions.

In 1996 the EFC opened an office in Ottawa: the Centre for Faith and Public Life. Through the Centre, the EFC seeks to promote an "evangelical Christian understanding on matters of law and public policy... It intervenes before Government and the courts on issues of concern to Evangelicals, seeking to uphold care for the vulnerable, religious freedom, sanctity of human life, marriage and family, and freedom of conscience" ("Social Issues," n.d.). The EFC

7 Dr. Janet Epp-Buckingham was legal counsel for the EFC from 1999-2003 and Director, Law and Public Policy from 2003-2006.

outlines its strategy: “The EFC fosters dialogue on the application of biblical principles to contemporary issues through study guides, background and position papers, fact sheets, government submissions and court interventions” (“Social Issues,” n.d.). The Centre thus symbolizes and facilitates the EFC’s development as an interest group whose aim is to influence public policy according to their interests (see Pross, 1992).

The EFC's strategy for engaging the court can be described as "reactive" (J. Epp-Buckingham, Interview, July 20, 2010; D. Hutchinson, Confidential Interview, August 1, 2010). Rather than actively seeking parties to underwrite, the EFC intervenes in cases initiated by other parties. The only exception is a copyright case in which the EFC participated as a respondent in the Federal Court of Appeal along with a number of other religious organizations.[8] Intervention is the strategy that the EFC selects to engage the courts.

The EFC lists nineteen social issues that they are interested in: Abortion/Fetal Rights, Abuse, Age of Consent, Education, Environment, Euthanasia, Gambling, Global Poverty, Human Trafficking, Marriage and Family, Media Regulation, Pornography, Poverty, Prostitution, Refugees, Religious Freedom (Canada), Religious Freedom (International), Reproductive and Genetic Technologies, and Sexual Orientation (“Social Issues,” n.d.). The EFC's religiously motivated concerns dictate their interest in a number of public policy areas: thus, the length and breadth of the list.

The majority of the EFC's litigation activity falls under two themes: religious freedom and marriage and family (see Appendix A). Religious freedom and Marriage and Family each make up about one third of the EFC's interventions. The final third of their intervention is made

8 *Avs Technologies v. Canadian Mechanical Reproduction Rights Agency*, 2000 CanLII 15571 (F.C.A), 7 C.P.R. (4th) 68

up of issues relating to education, sexual orientation, pornography, fetal rights, media regulation, and euthanasia, many of which have distinct moral or religious freedom vectors.

In these areas, the EFC adopts a strategy of “micro-constitutional” politics characteristic of legal mobilizers: they “play for the rules”. Rather than seeking to resolve specific disputes through litigation, they instead seek to develop political and legal rules over the long term. In “playing for the rules”, the EFC seeks judicial precedent as a valuable commodity to pursue their ends. Rights are not a end in themselves, but rather a means to ends that are defined by "biblical values". For example, in the cases of religious freedom, the EFC seeks to protect and expand that space in Canadian society for religious people and institutions to practice their beliefs in the way they see fit. Judicial rulings are valuable insofar as they define the limits to the freedom of religion in Canadian society as well as the constitutionally defined burden that governments must uphold with relation to religious people and institutions. They seek judicial rulings as tools to influence the state to uphold religious accommodation in policy areas such as education, zoning, and expression.

In presenting arguments before the court, the EFC adopts a number of strategic goals. The freedom of religion cases show how the EFC seeks to draw the court's attention to areas of the law which the court has not recognized: one of the EFC’s strategies is to consistently include arguments related to the Charter preamble and international law (J. Epp-Buckingham, Interview, July, 2010). These arguments include the idea that the preamble of the Charter, in recognizing the "sovereignty of God" as one of the foundational principles of the Canadian polity, provides purchase for a broad, public interpretation of religious freedom (e.g. Brown & Lang, 2000, para. 9; Gibson & Polizogopoulos, 2008, para. 11). By introducing international law arguments, the

EFC seeks to point the courts attention to the fact that international law affords stronger protection for the public profession and practice of religion than Canadian jurisprudence to the present (e.g. Brown & Lang, 2000, para 12-13; Gibson & Polizogopoulos, 2008, para. 11). By seeking to draw the courts attention to these unrecognized areas of the law, they seek to build a stronger case in the present and for the future: if the court would comment on the meaning of the preamble, for example, the EFC could use those comments to buttress their arguments in future cases. Up to the present, the court has mostly been unresponsive to either arguments arising from the preamble and international law. Under new leadership, there is evidence that the EFC is moving away from this strategy and is seeking "fresh ways" to present their arguments (D. Hutchinson, Interview, August 1, 2010).

In the marriage and family cases, the EFC adopts a different strategy. Rather than trying to point the courts attention to new areas of the law, they instead seek to influence the court's contextual analysis of section 15. They build on the court's emphasis in *Andrews* (1989) and *Egan v. Canada* (1995) (among others) that there is a need to "contextualize" their discrimination analysis. That is, as Wilson J. summarizes in *R. v. Turpin* (1989): "It is only by examining the larger context that a Court can determine whether deferential treatment results in inequality or whether, contrawise, it would be identical treatment which would *in the particular context* result in inequality or foster disadvantage" (pp. 1331-1332; quoted in Jervis, Meredith & Shaw, 1999, para. 13). Of course, the EFC seeks to operationalize a "contextual" reading of s. 15 that pays particular attention to the religious context of the historical definition of marriage. In this way, they sought to convince the court that upholding a heterosexual definition of "spouse" is a distinction legitimated by its historical, legal, philosophical and *religious* context.

Thus, this is an example of the EFC seeking to influence judicial doctrine by suggesting that the religious context should play a larger role in the court's contextual analysis of s.15.

In many cases, the EFC demonstrates the definition of success familiar to repeat players: the EFC not as concerned with the outcome of the specific cases, but rather the interpretation of the Charter. As such, the EFC is able to transform apparent "losses" into "wins". In the recent case *Alberta v. Hutterian Brethren of Wilson Colony* (2009), the Wilson Colony residents could only have been devastated by the Court's judgement. A divided court in which the full court did not sit (4-3) determined that the legislative intent of the Alberta government's driver's license legislation was justified under s. 1. Although the beliefs of the members of Wilson Colony forbid them from being intentionally photographed, the Court determined that the government was under no obligation to accommodate this belief by providing for alternative licenses. The colony's ability to collectively practice their beliefs will be severely hampered as they will be unable to do farm related activities that require licenses. However, from the EFC's perspective, this case was "good news" as the court collectively affirmed a collective dimension to the freedom of religion under the Charter. In a public newsletter they suggest "this will be invaluable to us as we appear before the courts in future cases that challenge the ability of churches and religious organizations to self define and maintain a distinctive Christian character and ethos" (Clemenger, 2009). This case epitomizes the incentive structure of legal mobilizers: rather than seeking to resolve disputes in the courts, they seek constitutional resources as valuable tools for future policy battles and social projects.

The EFC actively pursues, develops, and capitalizes on formal and informal relationships to aid their litigation strategy. The EFC regularly interveners in formal partnership with other

organizations: Of their sixteen cases in which they have intervened in the Supreme Court, they have only intervened alone two times.[9] This is a remarkable and unique aspect of their intervention. The EFC partners with a diverse group of other, less active litigants. They partner with other evangelical groups including Focus on the Family (Canada), an evangelical membership group, and the Seventh-day Adventist Church of Canada, an evangelical denomination. The EFC also partners with Christian professional societies: the Christian Medical and Dental Society, Christian Legal Fellowship, and Physicians for Life. Evangelical "lobby" groups are also partners: REAL Women of Canada, and the Canadian Alliance for Social Justice and Family Values Association. The common ground between these groups and the EFC make these partnerships natural.

Casting the net more broadly, the EFC partners with Christian groups who are not evangelical: the Archdiocese of Vancouver, the Catholic Civil Rights League, the Canadian Conference of Catholic Bishops, and the Canadian Council of Churches. Finally, the EFC intervenes in formal partnership with groups of other faiths: Ontario Council of Sikhs, and the Islamic Society of North America. Throughout the marriage cases of the early 2000s, the Islamic Society of North America, the Catholic Civil Rights League, and the EFC entered into a formal partnership called the "Interfaith Coalition on Marriage and Family". These groups' common concern for a traditional definition of marriage provides the ground for partnership. These partnerships can be understood as a strategic choice to present a "united front" before the court. Where the EFC on its own represents a diverse set of organizations, by partnering with other socially conservative groups, it claims to represent a broader cross-section of Canadian society

9 *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772

and thus seeks to strengthen its appeal before the court.

Finally, a comment about the future developments in the EFC's legal mobilization. The sheer volume of marriage and family cases are the vestiges of the same-sex marriage debates of the early 2000s (D. Hutchinson, Interview, August 1, 2010). The marriage and family cases of the early 2000s is an example of the EFC engaging in strategic, intense, and resource-demanding lobbying in the court; this is an example of the EFC bringing out their "big guns". The EFC participated in all levels of the process in all three jurisdictions where the laws were challenged (Quebec, Ontario, and British Columbia), starting at the trial courts, through the provincial appellate courts, and finally into the Supreme Court. In a sense, the EFC's large amount of activity in this area was determined by the somewhat unique confluence of events that generated a flurry of activity in the courts over a single issue.

However, the reference case in 2004 may signal a detente in the marriage and family cases. Much like the abortion cases of the eighties, the same-sex marriage cases have largely been decided. There are issues to be decided in the future, as the "Three Parents Case" demonstrated (*A.A. v. B.B.*, 2007*)*, but these cases should not create the same levels of activity. Although the resolution of the issue from the EFC's perspective creates "a profound sense of loss- the loss of the shared societal understanding of marriage" ("Marriage and Family," n.d.), the issue may not generate similar levels of litigation in the future.

However, the EFC see a number of issues that would certainly provoke them to intervene in the future. Legislation and practices related to embryonic stem cells, euthanasia and assisted suicide, the continuing re-defining of marriage, and poverty policy are all possible issues that may necessitate intervention in the future (D. Hutchinson, Interview, August 1, 2010). Perhaps

most importantly, the EFC sees the issues of religious freedom as both pressing and largely undetermined by the courts (J. Epp-Buckingham, Interview, July 20, 2010). In short, the EFC remains committed to continuing its interventionary activities. It also evidences an openness to expanding the types of cases that it participates in as issues arise. In short, the EFC intends to maintain its status as a “repeat player” in the court.

Having sufficiently examined the "what" of the EFC's legal engagement, I now to to the research question: why does the the EFC select legal mobilization?

5 Explaining Legal Mobilization

As outlined in my literature review above, there are a number of hypotheses which have been suggested to explain why groups select legal engagement. However, these hypotheses have not been tested against socially conservative groups. In order to address this gap, I draw four hypotheses from the literature and test them against the EFC. In each section, I use a combination of "stand-in variables", interview data, and EFC publications to test each hypotheses.

The four hypotheses can be summarized as follows: “Resource mobilization” suggests that groups select the courts based on the availability of co-optable resources. Thus, groups with material or legal resources will be more likely to select legal engagement (Hoover and den Dulk, 2004). “Membership management” suggests that groups appeal to members by offering selective purposive incentives, that is, that they are "making a difference". I divide this hypothesis into two ways that intervening in the courts could appeal to members in this way: by showing members that they are opposing "ideological competitors" (Holoyoke, 2003, p. 327) and by selecting "easy victories" (Hansford, 2004, p. 222). The “political opportunity” hypothesis suggests that groups exploit institutional venues which are most favourable (Smith, 2005b). Finally attitudes towards judicial power are tested as a hypothesis. Here, I test two endogenous factors relating to “identity”, culture, and beliefs about the appropriate role for judicial decision making in contemporary democracy. I test whether the EFC conforms to the characterization “judicial democrat” (Hein, 2001), or “judicial realist”, an alternate judicial identity not articulated in the literature. After outlining each hypothesis, I use a combination of stand-in variables and interview data to test the hypothesis's applicability to the EFC.

5.1 Resource Mobilization

Resource mobilization theory suggests that social movement activity is predicated upon the ability of groups to co-opt important resources (McCarthey, 1987). In this view, endogenous factors like culture, identities and motivations, are relatively stable and therefore theoretically marginal (Hoover and den Dulk, 2004, p. 12). Thus, the focus shifts to exogenous factors such as the availability of resources. Therefore, this perspective predicts that changes in the availability of resources can predict changes in the selection of interest group activities.

Litigation is a strategy that is resource-demanding: it requires a number of resources if it is going to be pursued with consistency and success. I look at two measures of the EFC's resources in order to examine whether changes in co-optable resources explains their selection of legal mobilization. The first is organizational strength, of which budget size is an adequate indicator. The high costs associated with litigation suggest that only those groups who are well endowed will be able to select legal mobilization. I look to see if the growth of the EFC's budget coincides with their litigation choices.

The critical juncture of the EFC's growth came in the wake of Brian Stiller becoming president. Under his leadership, the EFC's income increased from just over $60,000 in 1983 to over $1,200,000 in 1988, and to over $2,000,000 by 1990 (Stackhouse, 1993, p. 171). From 2001 to 2009 the EFC entered another period of growth, as their budget increased from $2.8 million to $4.2 million ("Annual Report," 2010). I compare the EFC's budget with two critical junctures in the EFC's litigation activity. The first is their selection of intervention in the first place in 1989, when their interventions increased from zero to one. The second is the marked increase in 2001-2004, when their interventions coming to judgement jumped from an average

of two per year to five per year.

This data indicates that the EFC acquired the material resources necessary for legal engagement *prior to* their selection of intervention in 1989. Second, the data suggests that the increase of intervention activity from 2001-2004 was facilitated by an increase in resources. However, the continuing increase of resources past 2004 did not create continued increases in the EFC's interventions. Quite the contrary, the number of interventions has slowed since 2005. Two conclusions can be drawn: material resources are a necessary condition for legal activity, and thus the increase of resources may increase the possibility of legal activity. However, material resources are not a sufficient condition to explain the selection of litigation; that is, they can not explain the timing or type of lobbying activity that groups select. Other factors are needed.

Money is not everything; legal expertise is perhaps an even more valuable and necessary resource for legal mobilization. Expertise is more difficult to quantify. The presence of legal staff, however, can give insight into the institutional ability to retain legal experience, and is the generally accepted way of quantifying legal expertise (e.g. Hoover & den Dulk, 2004; Solberg & Waltenburg, 2006, p. 562). The presence of in-house legal staff indicates an institutional framework that accrues expertise and reduces transaction costs in selecting strategies of legal mobilization. Thus, this hypothesis suggests that groups with higher levels of legal staff will be more likely to move their conflicts into the courts.

The EFC is not a network of lawyers and legally-savvy people. Throughout its history, the EFC has had few connections into Canada’s legal community. The EFC has not had a president who is a lawyer. Typically, the top positions in the EFC are held by people with

theological and religious expertise rather than legal training. The EFC evidences a low level of legal staff. Since 2000, they oscillate between one and two legal counsel on staff at any one time. Dr. Janet Epp-Buckingham was the first general legal counsel that the EFC brought on staff in 1999. They hired a second in 2005 and have since generally have had two legal counsel on staff (D. Hutchinson, Interview, August 1, 2010).

The evidence suggests that EFC selects intervention before they acquire significant legal resources: the EFC begins its litigation project fully a decade before bringing legal counsel on staff. Although current levels of litigation activity are consistent with their level of employed legal counsel, their selection of intervention in the first place can not be connected to the acquisition of legal expertise through staffing. In addition, their selection of the high levels of litigation from 2001-2004 also do not correlate with the increase from one staff to two, which occurred in 2005. Instead, the EFC seems to bring on legal staff after it selects legal engagement, rather than legal staff as representing an incentive to litigate.

A third kind of resource that could exogenously influence the EFC's propensity to litigate is potential allies. Because of the substantial amount that the EFC relies upon, and situates itself within networks, we would expect the presence of allies to be significant factor in affecting the EFC's propensity to litigate. Alliance can draw groups into the courts by lowering the costs of litigation, providing expertise, and improving a group's standing before the court by increasing the seeming size of the constituency one represents. Thus, the hypothesis suggests that when alliances are present in cases, the EFC will be more likely to litigate.

In order to test the hypothesis, we first select three groups that are allies of the EFC: Focus on the Family Canada, the Seventh-day Adventist Church, and REAL Women of Canada.

Each of these groups shares with the EFC a number of salient values, norms, and perspective on the way that the law ought to be interpreted. The EFC has intervened in partnership with each group more than once. I test the impact of alliances on the EFC by comparing the EFC's selection of cases at the Supreme Court with their allies.[10] Are there cases in which these groups intervene without the EFC, that is, the EFC selected not to intervene even though these potential allies were already committed to intervention? The weakness of this method is that it measures presence/absence in a simple binary and therefore implies that the presence of alliances causes the EFC to intervene. As such, the observations that follow will be augmented with interview data.

Focus on the Family Canada intervenes five times; four times with the EFC. Only in *Canadian Foundation for Children, Youth and the Law v. Canada* (2004) does Focus intervene without the EFC. The Seventh-day Adventist Church is in the Court in ten cases, four of those with the EFC.[11] Most importantly, the Seventh-day Adventist church's participation in the early Charter cases dealing with s. 2(a) (*Big M Drug Mart*, 1985; *R v. Edwards Books and Art Ltd*, 1986) did not draw the EFC into the courts. Third, REAL Women of Canada intervenes seven times, three times with the EFC. Again, the presence of an ally in an early Charter case does not influence the EFC's involvement: REAL Women's presence in *Tremblay v. Daigle* (1989) is not sufficient to draw the EFC into participation.

Interviews suggest that the EFC participates in a significant amount of communication

10 The data is drawn from the University of Montreal Lexum site: http://scc.lexum.umontreal.ca. I limit the analysis to the Supreme Court because it is both the most important, and requires the lowest level if commitment, as there is not possibility of being drawn into an appeal process.

11 *Reference Re: Same Sex Marriage* (2004); *Trinity Western v. British Columbia College of Teachers* (2001); *Syndicat Northcrest v. Amselem* (2004); *Congregation des temoins de Jehovah de St-Jerome-Lafontaine v. Lafontaine (Village)*, (2004)

with other social conservative interest groups before the selection of cases to intervene in (J. Epp-Buckingham, Interview, July, 2010). As a case is coming up through the provincial courts, the EFC and other potential allies engage in conversations about what arguments can be made before the courts and the extent that groups share common cause. This helps explain why there is a high level of partnership among socially conservative litigators, as well as a high propensity for the EFC to litigate when "allies" are present in the court. This evidence suggests that the presence of potential allies may increase the EFC's ability to intervene. However, potential alliances were not sufficient to draw the EFC into the courts in the first place. Despite the participation of potential allies in cases relating to abortion and s.2(a) in the early Charter years, the EFC did not intervene. Now established as an intervener, alliances can play a role in expanding the EFC's ability to undertake a number of cases. However, they are neither a necessary nor sufficient condition to predict the EFC's participation.

In sum, material resources are a necessary but insufficient condition for legal mobilization. The EFC requires a certain level of resources in order to intervene, but material resources alone can not explain either the selection of litigation in the first place, nor variation in levels of litigation. Legal resources were not crucial to their selection of the courts. The presence of alliances may marginally effect their propensity to litigate certain cases. None of these variables was sufficient to explain the timing of the EFC's move into legal intervention. Even though two conditions were present in early Charter cases, material resources and allies, the EFC did not select intervention.

5.2 Membership Management

Membership groups, in addition to pursuing their interests, must consider how interest

group activities will impact their ability to recruit and retain members. Groups who are unable to recruit and retain members will not be able to continue to pursue lobbying goals. The hypothesis associated with membership management is predicated on the fact that groups recruit and maintain members through selective incentives. In addition to material incentives, groups rely on purposive incentives to overcome collective action problems (Walker, 1991). To provide purposive incentives, groups need to offer members the sense that they are actively pursuing organizational goals and achieving policy outcomes (Hansford, 2004, p. 222). I test two hypotheses drawn from the literature with regard to membership management: the EFC litigates to be seen to be opposing ideological opponents (Holoyoke, 2003, p. 327) and the EFC is more likely to litigate in cases in which their interest is likely to emerge victorious on the merits, regardless of any interest group involvement (Hansford, 2004, p. 222).

In the hypothesis of ideological competitors, the EFC may appeal to members by opposing certain groups. Intuitively, the presence of "entrenched" competitors would decrease the propensity of an interest group to select an arena. However, an alternate perspective is articulated in the literature: "To be seen not to be lobbying might be taken as a sign of weakness, damaging the group's reputation as a force to be taken seriously and encouraging members to look elsewhere for representation" (Holyoke, 2003, p. 327). This hypothesis therefore suggests the presence of competition should increase the propensity of a group to lobby in a given venue.

In order to test the hypothesis, I select a group that is an ideological opponent of the EFC and compare their activity in the Court with the EFC.[12] I define ideological opponents as groups whose preferences are in direct opposition to the EFC's preferences. As such, there are very few

12 The data is drawn from the University of Montreal Lexum site: http://scc.lexum.umontreal.ca I limit the analysis to the Supreme Court because of its importance.

groups who could be considered competitors for the EFC. Many groups are competitors on some issues, but allies on others. Examples of this are the Canadian Civil Liberties Association, Women's Legal Education and Action Fund, and the Sierra Club of Canada. Equality for Gays and Lesbians Everywhere (Egale) could be described as an ideological competitor in cases related to sexual orientation and the definition of marriage.[13]

Observing Egale's participation in the Court suggests mixed results. Their presence as interveners does not guarantee the EFC's intervention: of Egale's ten cases, the EFC intervenes in six. However, there is a strong correlation between Egale and the EFC's presence. If Egale is in the court, there is a good chance that the EFC is also intervening. Interviews suggest, that the coincidence of Egale and the EFC's participation has more to do with their shared concerns rather than a strategic calculation based on the other's presence (J. Epp-Buckingham, Interview, July 20, 2010). There is no indication from EFC published materials that they make reference to opposing ideological competitors as a way of appealing to members.

The second hypothesis relating to membership management suggests that membership groups will litigate cases in which their interest is likely to win on the merits. The group is then able to appeal to members by presenting themselves as successfully satisfying the organizational purpose: members will thus feel like they are "making a difference". On the one hand, the EFC does seem to frame itself as an effective voice for evangelicals in the courts. One particular strategy already outlined is by transforming losses into wins: the EFC actively seeks to communicate to members that their activities are generating significant results. They also do intervene in cases in which they expect their arguments to be successful (D. Hutchinson,

13 However, this characterization should be understood within the context of the apparent cordial relationship that exists between these two groups (J. Epp-Buckingham, Interview, July, 2010). The characterization as "ideological competitors" is simply that: ideological and personal.

Interview, August 1, 2010).

On the other hand, however, one would be hard pressed to suggest that the EFC selects cases that are “easy victories”. The same sex marriage cases of the early 2000s are an example of the EFC engaging in highly visible, resource demanding lobbying in the courts. However, these were cases in which lower court had sent signals that it would find an exclusively heterosexual definition of marriage to contravene the Charter (Hiebert, 2002, p. 171). Arguments that the maintenance of a heterosexual definition of marriage was justifiable under section 1 of the Charter were not impossible to conceive of, but the EFC’s position had little chance of winning on the merits. The EFC’s decision to participate as deeply and visibly as they did could not be considered a decision to select easy victories to attract members. In fact, most of the “socially conservative” cases that the EFC undertakes, cases relating to sexual orientation, abortion, and euthanasia, are highly divisive and could not be considered guaranteed wins. The religious freedom cases may offer more purchase for these kinds of strategic calculations. However, there is little indication that the EFC selects “easy victories” as a strategy to attract members. In fact, what drew them to the court was not the appeal of easy wins, but rather, the impact of significant losses. The evidence suggests that the EFC does not select legal engagement based on a strategic calculation of appeal to members by opposing ideological competitors nor by selecting winning cases.

5.3 Political Opportunities

The political opportunities theory broadly suggests that interest group activity will follow the path of least resistance or the path of greatest incentive, or both. I test this hypothesis with a "socially conservative" group. The Charter itself signals the most potent change in the

structure of legal opportunities available to groups. Significantly, interest groups, such as feminist and Aboriginal organizations, themselves lobbied for specific constitutionalized recognitions in order to further their interests. Less noted is the role that religious groups, including the EFC, played in lobbying for the recognition of the sovereignty of God in the preamble of the Constitution (Stackhouse, 1993, p. 170). As such, evangelicals have potentially potent legal resources embedded in the text of the constitution. Beyond the recognition of the sovereignty of God as a foundational principle of the Constitution, section 2(a) states the freedom of conscience and religion as the first of Canada's fundamental freedoms. The pride of place afforded by these statements implies a significant opportunity afforded by the Charter for evangelicals to utilize to their interest. Unlike other interest groups who lack expressed recognition in the text of the Charter, such as lesbian and gay activists, environmental groups, and anti-poverty activists, the EFC has access to what can only be called significant Charter resources.

However, a comparison between the dates of the Charter coming into effect and the EFC's selection of litigation show little correlation between the "opening" of legal opportunity and the EFC's attempt to capitalize upon it. In some of the first Charter cases, the court approached both issues and the Charter sections that were highly salient to the EFC. In *Big M Drug Mart* (1985) and *R. v. Edwards Book and Art* (1986), the Court first contemplated freedom of religion under the Charter. Although in these cases the court established its approach to s. 2(a), the EFC was not a participant in either of these cases. In the cases where the court debated abortion rights (*R. v. Prince* 1986; *R. v. Morgantaler* 1988; *Tremblay v. Daigle* 1989), the EFC was not present. The freedom of religion and abortion issues are central to the EFC's value

system. However, as these issues were debated in the courts, the EFC was absent. Other religious groups, including the Seventh-day Adventist church in Canada and REAL Women of Canada, were active in this time intervening an behalf of a socially conservative perspective. Thus, the opportunity existed for the EFC to participate, they simply decided not to participate. The evidence suggests that the opening of "political opportunities" is insufficient to explain the timing of the EFC's selection of litigation.

The political opportunity hypothesis can be broadened to include a rational calculation based on a number of policy arenas. This perspective can be articulated as follows: Groups lobby in the courts because they perceive that their chances of winning there outweigh their chances elsewhere. In this vein, Smith describes litigation as more readily available than lobbying for the lesbian and gay movement (2008, p. 192-193); Hein describes the erosion of political resources as a circumstance that can draw a group into the courts (2001, p. 242-243). In order to test this hypothesis, I compare the EFC's selection between the courts and the parliament. As such, I ignore potential lobbying at the bureaucratic level.

A comparison of the EFC's resources in the legislative and legal areas shows that over the period of the EFC's emergence as a regular intervener, their resources were growing in Parliament and declining in the court. There can be no doubt that the emergence of the Reform Party of Canada in the early 1990s was a catalytic and energizing moment for modern evangelicals in federal politics. Evangelicals have a history of participation in Canadian politics at the provincial level, most clearly evidenced in both Aberhart's and Manning's Social Credit party in Alberta and Tommy Douglas in Saskatchewan (Rawlyk, 1990). However, evangelicals have not been strongly affiliated with any national party (Hoover, 1997). Preston Manning's

evangelical heritage, conservative ideals, and underlying integration of faith and politics (Malloy, 2008) made him an appealing leader for evangelicals looking for a voice on the federal stage. In this way, Reform catalyzed a political movement that capitalized on a broader shift in evangelical identity: the changing place of evangelicals' beliefs about the public that Hoover and den Dulk (2004) adequately describe. Reform's "wave" of support emerged because it was the only political party to oppose Meech Lake (Flanagan, 1995, p. 66). Along with other groups such as women, aboriginals, and others, evangelicals were also a constituency that rejected elite politics in constitutional reform, a fact largely overlooked in the literature (Cairns, 1995, p. 270-274). What is unique about evangelicals is that their rejection of elite politics was articulated through a political party. At the same time as other interest groups were rejecting the traditional federal parties, evangelicals were finding a home in a federal party.

While evangelicals were gaining ground in federal politics, the court was shifting to the left. Epp describes how the court began to become more liberal in its orientation towards rights cases at the same time that the EFC began to increase its interventions (1996, p. 771). Judicial liberals gained a majority in the court only after 1985. Thus, the EFC's selection of legal mobilization in 1990 does not coincide with a change of the orientation of court favourable to the EFC's interests. Quite the opposite, the EFC selected intervention at the same time as the court was becoming more liberal in its orientation.

The EFC had already demonstrated both the means and motive to lobby parliament on issues it deemed significant: witness the Charter preamble and the abortion issue. While the EFC is a non-partisan group, and criticizes the Conservative government on a number of issues (e.g. "Short Census Question," 2010), there are a number of key issues in which the

Conservatives more closely align with the EFC's preferences. These include same-sex marriage, abortion, and euthanasia. Further, the presence of openly evangelical MPs, and the emerging solidarity with which evangelicals have shifted to the Conservative Party of Canada (Gidengil et. al., 2009) suggest that there are incentives for Conservative MPs to be seen to be on good terms with the EFC. The combination of the government's incentives to court the EFC and the ideological overlap between the two organizations suggests an increase to the lobbying advantages of the EFC in Parliament.

Along this line, there is some indication that the emergence of the Conservatives in government has coincided with a decline in the EFC's activity in the courts. The first period of the Charter was dominated by the Mulroney led Progressive Conservative government from 1984-1993. During this period, the EFC elected not to use litigation as a strategy. It is only at the very tail end of the Mulroney years that the EFC entered the courts as an intervener. For the thirteen years of Liberal governments under Chretien and Martin (1993-2006), the EFC had its most voracious participation in the courts. Between 1997 and 2004, the EFC had thirty-one cases come to a judgement, with twenty of those cases coming to judgement in the four years between 2001 and 2004. However, in the period between 2005 and the present, in coincidence with the Conservative Party coming back into power, the EFC's interventions have declined, with only six cases coming to judgement in that time in all levels of the courts (see Appendix A). There is some evidence that a Conservative government has decreased the intensity with which the EFC selects the courts as a venue to pursue its interests.

However, interviews suggest other reasons for this decline. The high level of cases in the early 2000s can be understood as a result of the exceptional number of marriage and family

cases during that short period. As Don Hutchinson describes it, during the early 2000s Canada engaged in a “public debate about the definition of marriage in the Courts” (Interview, August 1, 2010). What made this debate exceptional is that it occurred simultaneously in three jurisdictions: B.C., Ontario and Quebec. Assuming that this issue was adjudicated through one jurisdiction, the number of cases would have been more along typical levels. This would virtually eliminate the “drop” in the EFC’s interventions coinciding with the Conservatives gaining power.

Indeed, despite some declines in their intervention activity, the EFC remains highly committed to continuing their strategy of legal engagement (D. Hutchinson, Interview, August 1, 2010). There is no indication that the emergence of the Conservative government will decrease their intentions to continue to litigate around issues of concern to them. Of particular concern are issues of religious freedom, genetic technology and human reproduction, issues of media regulation, religious education, and the continuing re-definition of marriage. In short, they expect to continue to utilize the courts to pursue their interests.

In sum, the EFC selection of legal engagement neither coincides with the opening of political opportunities under the Charter, nor with the decline of political advantages in the legislative area. The evidence suggests that the "political opportunities" hypothesis, as conventionally articulated in the literature, is insufficient to explain the EFC’s selection of legal mobilization.

5.4 Attitudes towards Judicial Power

A final group of hypotheses relate to judicial identities. Hein suggests that "judicial democrats" will be more likely to select litigation. Two aspects of this commitment are

highlighted in his formulation: these groups evidence identities that are oriented around "rights" and they are normatively committed to judicial activism. I test this conception of identity against the EFC's conception of identity. Does the EFC have a "rights-based" identity that is normatively committed to judicial activism?

I first look to the published works of Brian Stiller, EFC president from 1983-1996. Although Stiller has moved on from the EFC, his strategy and worldview of Christian engagement in many ways established the ethos of the institution which endures to the present. As such, a brief analysis of his strategy of engagement provides valuable insights into the worldview that undergirds the EFC. Brian Stiller's work suggests that evangelicals are guided by "biblical values" instead of "rights". The Christian individual and organization, in Stiller's view, is normatively guided by values that are based upon a Christian worldview, one that is grounded in the tenants of the bible and Christian doctrine. "Rights", by contrast, are an integral part of the worldview of political liberalism, of which Stiller is critical (1997, p. 63-67). Stiller's criticism of liberalism is that it privileges individual human autonomy as the ultimate good, and, as such, represents a non-neutral perspective on the good life. Rights, insofar as they are undergirded by the assumption that individual autonomy is the ultimate good, are incompatible with Christian values.

However, Stiller also suggests that Christians need to "practice a language of public discourse" to engage as Christians in the public sphere (1997, p. viii). Biblical values can be translated into the language of rights as a way for evangelicals to communicate via a "public reason". For example, Stiller is supportive of religious liberty as expressed as a group right to religious education (1997, p. 53). However, to the extent that rights are equated with individual

autonomy without an important balance for the communal aspects of religion, Stiller is critical of the notion of rights. As such, I suggest that the evangelical commitment to rights only travels as far as the worldview undergirding the rights can be reconciled with biblical values. Thus, the EFC's litigation project is best understood as emerging from "biblical values", not from an "identity energized by rights". Indeed, from the EFC's perspective, only a small number of their concerns are related to rights. Instead, they prefer to frame their activity as the application of biblical values to public policy issues (D. Hutchinson, Interview, August 1, 2010).

Second, contrary to Hein's (2001) suggestion that groups who are normatively committed to judicial review will be most likely to litigate, the EFC is ambivalent about the role of the courts in Canadian society. The EFC elects to take no position on the appropriate role of the Courts in Canadian society (D. Hutchinson, Interview, August 1, 2010; J. Epp-Buckingham, Interview, July 20, 2010). Whereas other groups who select the courts may laud the courts, there is no indication that the EFC is normatively committed to judicial review as a positive development of democracy. The EFC's public position is to take no position. One potential reason for their reticence to comment on this issue is that if they publicly criticize the courts this would undermine their credibility as an actor in that policy arena (J. Epp-Buckingham, Interview, July 20, 2010). In any respect, the EFC does not conform to the characterization of "judicial democrats": they lack an identity energized by rights, and they evidence an ambivalence about the appropriate role of the court in Canadian society.

Having examined the extent that the conventional explanations can be applied to the EFC, I now turn to a novel explanation of why the EFC selects intervention as a strategy. I test a different attitude towards judicial power: judicial realism. This hypothesis builds upon Epstein

(1985) to suggest that groups select the courts because of the increased importance of this policy arena. Groups, in this view, respond to signals that the courts are making important policy decisions, and thus they select legal mobilization as a strategy.

The abortion debates were the critical incident in the germination of the EFC's litigation project (D. Hutchinson, Interview, August 1, 2010; J. Epp-Buckingham, Interview, July 20, 2010). Janet Epp-Buckingham describes it this way:

> The whole litigation issue came up in 1988 with the Morgentalor case. It really was an "awakening" for the evangelical community to understand that the courts were now going to be making decisions about some very important social policy issues. At that time there was sort of a great "aha" moment that Parliament was no longer supreme and the courts were willing to, under the Charter, make decisions that would limit the power of parliament to legislate in particular areas: [the courts] would strike down legislation. Therefore to engage in public policy now meant both being active in parliament and being active in the courts. And so, the EFC started to monitor cases that were coming up in the courts. (Interview, July 20, 2010)

The EFC selects intervention as a strategy because of this "aha" moment: the courts *are* taking a new role in Canadian society. These comments show how, from the EFC's perspective, the issue is not whether the courts are the most effective institution for their ends, nor whether their interests would be best served there, but rather that the courts have taken/been given a new role. The result of this realization is that "engaging on Parliament Hill with Biblical principles was not sufficient. Perhaps we would now need to engage in the courts on these same sorts of issues" (D. Hutchinson, Interview, August 1, 2010). These insights into the EFC's initial choice of legal engagement give evidence that supports a "judicial realist" conception of the EFC's attitude towards judicial power.

The EFC's litigation project, in its inception, was a reactive choice. In this case, the EFC

did not play to change the rules, but rather responds to endogenous signals that unbeknownst to them, the rules have changed.[14] Faced with changed circumstances, the EFC selected from a number of options. They could have exited, they could have sought to have the rules changed back in the form of denouncing "judicial activism", or they could choose play by the new rules. Based on the increased litigation activity I have outline above, I suggest that they selected the third option: they are playing by the new rules.

Why do they select “realism” over Charter denouncing? The critical incentive relates to the structure of Canadian institutional life under the Charter. The evidence suggests that from the EFC’s perspective, if they want to influence public policy, they feel they need to combine legislative lobbying with litigation. Don Hutchinson describes a “complementary” strategy that includes both Parliament and the courts (Interview, August 1, 2010). Because of the apparent willingness of the courts to strike down legislation, as well as the willingness of governments to delegate divisive issues to the courts, the EFC chooses to engage the courts because they believe that the courts will be a place in which relevant decisions will be made. It is therefore in their interests to develop a presence there.

In their own words, they describe their strategy as one of “constructive engagement” (J. Epp-Buckingham, Interview, July 20, 2010). This term is borrowed from foreign policy debates. It describes the strategy of non-isolation when dealing with rogue states. Rather than isolating these states, constructive engagement dictates that by engaging with these states, one can influence them. The EFC’s strategy is candidly and parsimoniously summarized as "we are going to be where-ever the decisions are going to be made... If [the courts are] where decisions

14 This is not to say that the EFC was not playing to change the rules in other venues. All groups seek to “bend the rules” to their advantage and therefore play for the rules simply by participating in politics. However, in this case, the EFC was not playing to change the rules in the way that they were changed.

are being made, then we are going to be there and try to make positive arguments from our perspectives and hope that we get good outcomes" (J. Epp-Buckingham, Interview, July 20, 2010). Drawing from these characterizations of the EFC's strategy, I suggest that “judicial realist” is an adequate characterization of the EFC’s attitude towards judicial power.

6 Drawing it Together: Implications of Judicial Realism

The findings so far can be summarized as such: Material resources have been shown to be a necessary but insufficient condition for legal mobilization, legal resources have little effect. Alliances may influence the amount of litigation, but not the choice to litigate itself. Competition was shown to have little effect on litigation choices. The opening of political opportunities were not decisive for the selection of litigation as a strategy; although the EFC capitalizes upon the political opportunities of the Charter, the "opening" of the opportunities was not a sufficient condition to draw the EFC into the courts. The EFC evidences a commitment to legal engagement irrespective of their political resources in legislatures. The EFC are not judicial democrats, as they lack both a right-energized identity and a normative commitment to judicial review. Instead, I characterize them as "judicial realists": they select the courts because of the perception that this is a salient policy arena in which decisions will be made that will effect their interests.

Drawing this evidence together, I suggest that the policy success model, with its preference for a calculation of advantages based on policy arena, is not adequate to capture the logic of the EFC's selection of legal engagement. Instead, I suggest a new model around the term "judicial realist". The model assumes a "pluralistic" conception of group activity: interest groups seek policy concessions from the state (Pross, 1992). Under this assumption, the logic of the model of "judicial realism" can be described as follows:

Material Resources	+	"Negative signals" + Indifference towards judicial power	+	Canada's institutional design	=	Legal Engagement

My evidence suggested that material resources were a necessary but insufficient

condition for the EFC's legal engagement. They appear first in the model to show that they are an important "precondition": they facilitate lobbying activities but they do not determine either the timing or the venue in which lobbying activities are pursued. Where material resources are an important precondition, the model is neutral towards legal resources. The evidence suggested that legal resources were not a factor in determining the EFC's selection of legal engagement.

"Negative signals" point to the critical incident in which the EFC was "awakened" to the increased salience of the courts. The court's decisions during the abortion cases of the 1980s emitted signals that the EFC picked up on. I call these decisions "signals" because they were the means by which the courts indicated their willingness to strike down legislation. These were certainly not the first cases in which the court indicated its willingness to exercise the power of judicial review, but the evidence suggests that they were the critical incident for the EFC. Thus, these findings build on the assumption that Constitutions require political actors in order for them to have effects (Epp, 1996). The mere existence of an entrenched Bill of Rights, or a Constitutional document that suggests that the courts exercise the power of judicial review, does not in and of itself change the nature and scope of the country's institutions. Further, the entrenchment of the Charter does not in and of itself signal to interest groups that the courts will exercise their powers. Rather, it is the decisions that political actors make to creatively enforce these documents that creates effects. These effects "signal" to civil society actors how the "rules of the game" evolve. However, informational asymmetries can create significant time lags in the ability of civil society actors to pick up on signals. For the EFC, they were "awakened" to the new rules through a "loud bang": a negative decision that was directly within their interests.

The Court's decision with regard to Canada's abortion legislation signalled two things to

the EFC. First, it showed the Court's willingness to strike down legislation (J. Epp-Buckingham, Interview, July 20, 2010). For the EFC, this was an "awakening" to the new rules of Canada's institutional design. Second, it signalled that the courts may begin to find against the EFC's interests. Whereas other civil society actors would regard these signals as positive, from the EFC's perspective, these decisions were in direct opposition to their preferences. Thus, these signals are termed "negative".

At this point, the policy success model suggests that the EFC would seek to bolster its efforts in the institution in which it could legitimately expect to succeed. Thus, based upon these negative signals, one might predict that the EFC would increase their lobbying in Parliament. In addition, one might expect them to begin to try to undermine the power of the courts through "Charter-denouncing" and lobbying for use of the legislative over-ride (section 33). However, the opposite is true: the EFC selects an increasingly aggressive strategy of legal engagement. The final two aspects of the model explain this unexpected outcome.

The evidence suggests that the EFC maintains an indifference towards judicial power. Unlike other conservative groups, the EFC elects not to take a position on the appropriate role of the courts in Canadian society. The lack of their normative commitment to either judicial review or (so-called) "judicial restraint" opens up the *possibility* of engaging the courts. However, why select this possibility?

I point to the final aspect of the model as the critical link: the uncertainty apparent in Canada's institutional design provides a unique incentive for groups who are indifferent towards judicial power to select legal engagement. Thus, I build on the insights offered by the literature that suggests that the interaction between legislatures and courts can be characterized as a

dialogue (Hiebert, 2002; Hogg and Bushell, 1997). Both Canada's legislatures and courts have constitutionally defined powers to interpret the Constitution and therefore shape public policy. This character of Canada's institutions creates a dynamic interaction between them: both institutions have opportunities to respond to the actions of the other. My contribution is to suggest that this creates a high level of uncertainty that is, at the present, part of Canada's institutional design. The ever present, and indeed likely reality that the "dialogue" could break down creates a level of uncertainty around which institution will make the final decision in any given policy area. Interest groups are especially vulnerable to this uncertainty because of the informational asymmetries (both intentional and unintentional)[15] between the institutions of the state and civil society. Thus, when the EFC suggests "we will be where-ever decisions will be made" (J. Epp-Buckingham, Interview, July 20, 2010), the implication is that there is a level of uncertainty around which institutional body will make the final decision.

The uncertainties apparent within Canada's institutional design create incentives for the EFC to mobilize in the courts while maintaining their activities elsewhere. In the context of the threat that the dialogue could break down, groups have incentives to cultivate a presence in both venues in order to avoid being left out of the venue in which the decision is ultimately made. This is especially true for the highly divisive issues that the EFC is often involved in. The signals that legislatures are sending concerning their willingness to delegate divisive policy issues to the courts only enhances the incentives for groups like the EFC to establish a presence in the courts regardless of their apparent advantages in the legislative arena. Assuming that the EFC seeks to influence state policy, that is, assuming that they act like a "pressure group"

15 "Intentional" informational asymmetries include the aspects of state activity that are kept confidential. "Unintentional" refers to those asymmetries that arise because of the sheer volume of information, and breakdowns in communication.

(Pross, 1992), they will select legal engagement because engaging in the courts is a necessary response to accomplish their goals.

Judicial realism thus introduces a new level of lobbying for interest groups: they now not only lobby for governments (or the courts) to make decisions in a certain way, they also lobby the government (or the courts) to make a decision at all! This is evidenced in the EFC's intervener factums wherein they argue that the courts should abstain from making policy decisions in certain areas (e.g. Sammon & Sammon, 2002). There are incentives for interest groups to lobby the institution in which they have the most influence (e.g. the government for the EFC) to increase its sphere of authority by participating more actively in the dialogue. That is, groups want the final decision to be made in the place where they have the most influence. But because courts and governments have constitutionally entrenched positions as dialogue partners, groups will have incentives to be “realistic” by continuing to lobby in both venues.

It may well be that many parties in the courts would more readily fit into a "judicial realist" category than a "judicial democrat" one.[16] Further research in this area could show how other groups respond to a similar group of conditions as I have described above. Two research directions seem apparent: research around the development of legal resources and the effect of institutional uncertainties apparent in Canada's institutional design.

From a judicial realist perspective, the incentives for organizations are shifted: legal resources move from being a permissive condition (Hein, 2001) to being a goal. As such, this perspective brings a unique contribution to resource mobilization theory. I showed above that the EFC’s lack of legal resources was not sufficient to prevent them from entering the courts. I

16 For instance, Herman's (1997) suggestion that lesbian and gay activists acted "pragmatically" seems to point to the potential for a broader application of the "judicial realist" concept.

explain this now by suggesting that because the EFC perceives the courts are an important policy arena, they have an incentive to build up legal resources. As such, a poverty of legal resources becomes something to remedy, rather than an incentive to switch policy arenas. Further research in this area could examine how networks of groups seek to build up resources to mitigate competitive disadvantages in the courts. In this way, the research direction proposed here would also build on Teles (2008) and his analysis of the development of legal resources by the conservative legal movement in the United States.

The second research direction to be drawn from this evidence is the ongoing incentives for groups to maintain activities in both Parliament and the courts. The evidence I have marshalled here suggests that some groups select the courts despite apparent "advantages" in legislatures. Building on this evidence, I suggest that the logic of "judicial realism" is the natural corollary of the dialogue thesis (Hogg and Bushell, 1997). Because of the uncertainty surrounding where decisions will be made in the dynamic and unpredictable interaction between the courts and parliament, there are incentives for groups to mobilize in both policy arenas. Further research could examine the effect of institutional uncertainties on interest group behaviour more generally, or on other types of groups.

7 Conclusion

The Charter is here to stay: it is unlikely that any government in the near future will (or could) marshal the political capital in order to pursue constitutional amendment. Although political philosophers, democratic theorists, and political scientists can debate the legitimacy of the court as a democratic institution, the present analysis shows that from the perspective of some political actors, these debates may be moot. Instead, I have described why an interest group that some might expect to become a Charter denouncer has instead elected to follow the adage: "if you can't beat 'em, join 'em". In order to explain the strategic selection of legal mobilization, the paper tested the conventional explanations of interest group legal engagement against a particular group: the Evangelical Fellowship of Canada. The critical factors were the EFC's indifference towards judicial power and the institutional uncertainties apparent in the so-called "dialogue" between Canada' s legislatures and courts. I call this model “judicial realism” because it accepts that courts will make some decisions and responds by selecting legal mobilization.

This paper has provided insights into the way Canada’s largest evangelical interest group is responding to the institutional changes under the Charter. Recent characterizations of Canadian evangelicals show them as an insular interest group bent on “infiltrating” and dominating Canadian institutions with a biblical worldview (McDonald, 2010; Warner, 2010). By contrast, I have suggested that the EFC has elected to "play by the rules". Although the EFC is ambivalent about the role of the courts in Canadian society, they nevertheless select legal engagement as a strategy to pursue their interests. Far from seeking to covertly infiltrate Canadian institutions, the EFC seeks to add their voice to the debate over public policy that now

occurs simultaneously in legislatures and Canadian courts. Thus, the inclusion of this voice in Canadian courts must be understood as a positive development in Canada's democracy.

References

A.A. v. B.B., 2007 ONCA 2

Abortion/Fetal Rights. (n.d.). In *Evangelical Fellowship of Canada website.* Retrieved from http://www.evangelicalfellowship.ca/Page.aspx?pid=365

Alarie, B. & Green, A. (2009). Interventions at the Supreme Court of Canada: Accuracy, affiliation, and acceptance. Unpublished Paper. Available at SSRN: http://ssrn.com/abstract=1498747

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

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Annual Report. (2010). In *Evangelical Fellowship of Canada website.* Retrieved from http://www.evangelicalfellowship.ca/NetCommunity/Page.aspx?pid=1231

Bean, L., Gonzalez, M. & Kaufman, J. (2008). Why doesn't Canada have an American-style Christian Right? A comparative framework for analysing the political effects of Evangelical subcultural identity. *Canadian Journal of Sociology 33*(4), 899-943.

Bogart, W. A. (1994). *Courts and country: The limits of litigation and the social and [olitical life of Canada.* Toronto: Oxford University Press.

Borrows, J. (1997). "Contemporary traditional equality: The effect of the Charter on First Nations politics." In Schneiderman D. and Sutherland, K. (Eds.), *Charting the consequences: The impact of Charter rights on Canadian law and politics* (pp. 169-199). Toronto: University of Toronto Press.

Brodie, I. (2002). *Friends of the court: the privileging of interest group litigants in Canada.* Albany: State University of New York Press.

Brown v. Board of Education, 347 U.S. 483 (1954).

Brown, David M. and Adrian Lang. (2001). Factum of the intervener, The Evangelical Fellowship of Canada. *The British Columbia College of Teachers v. Trinity Western University and Donna Gail Lindquist*. Court file No. 27168. Retrieved from http://files.efc-canada.net/si/Education/TWU.pdf

Cairns, Alan. (1995). *Reconfigurations: Canadian citizenship and constitutional change.* Williams, Douglas E. (Ed.). Toronto: McClelland and Stewart Inc.

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76.

Chivers, S. (2008). "Barrier by barrier: The Canadian disability movement and the fight for equality rights." In Smith, M. (Ed.), *Group politics and social movements in Canada* (pp. 307-328). Perterbourough: Broadview Press.

Clemenger, B. (2009). "Good news from the Supreme Court of Canada." *Evangelical Fellowship of Canada Website.* Retrieved July 2010: http://www.evangelicalfellowship.ca/NetCommunity/Page.aspx?pid=6896

Cortner, R. C. (1968). Strategies and tactics of litigants in Constitutional cases. *Journal of Public Law 17*, 287-307.

Current Affiliates. (n.d.). In *Evangelical Fellowship of Canada website.* Retrieved from http://www.evangelicalfellowship.ca/NetCommunity/Page.aspx?pid=384

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

Epp, C. R. (1998). *The rights revolution: Lawyers, activists, and supreme courts in comparative perspective.* Chicago: University of Chicago Press.

-----. (1996). Do bills of rights matter? The Canadian Charter of Rights and Freedoms. *The American Political Science Review 90*(4), 765-79.

Epstein, L.. (1985). *Conservatives in court.* Knoxville: The University of Tennessee Press.

Flemming, R.B. & Krutz, G.S. (2002). Repeat litigators and agenda setting on the Supreme Court of Canada. *Canadian Journal of Political Science 35*(4), 811-833.

Galanter, M. (1974). Why the “haves” come out ahead: speculations on the limits of legal change. *Law and Society Review 9*(1), 95-160.

Gibson, C. M. & Polizogopoulos, A. (2008). Factum for the interveners the Evangelical Fellowship of Canada and Christian Legal Fellowship, *Alberta v. Hutterian Brethren of Wilson Colony.* Retrieved from http://files.efc-canada.net/si/Religious%20Freedom%20in%20Canada/EFC/HutterianBrethren32186IntervenersEFCandCLFFactum.pdf

Gidengil, E., Fournier, P., Everitt, J., Nevitte, N. & Blais, A. (2009). *Anatomy of a Liberal defeat.* Paper prepared for the annual meeting of the *Canadian Political Science Association,* May, 2009.

Hansford, T. G. (2004). Information provision, organizational constraints, and the decision to submit an amicus curiae brief in a U.S. Supreme Court case. *Political Research Quarterly, 57*(2), 219-230.

Hein, G. (2001). "Interest group litigation and Canadian democracy."In Howe, P. & Russel, P. H. (Eds.), *Judicial power and Canadian democracy*. Montreal and Kingston: McGill University Press.

Herman, D. (1997). "The good, the bad, and the smugly: Sexual orientation and perspectives on

the Charter." In Schneiderman D. & Sutherland, K. (Eds.), *Charting the consequences: The impact of Charter rights on Canadian law and politics.* University of Toronto Press: pp. 200-217.

Hiebert, J. L. (2002). *Charter conflicts: What is Parliament's role?* Montreal and Kingston: McGill-Queen's University Press.

Hogg, P. W. & Bushell, A. A. (1997). The Charter dialogue between courts and legislatures (Or perhaps the Charter of Rights isn't such a bad thing after all). *Osgoode Hall Law Journal 35*: 75-124.

Holyoke, T. T. (2003). Choosing battlegrounds: Interest group lobbying across multiple venues *Political Research Quarterly* 56: 325-336.

Home Page. (n.d.). In *Evangelical Fellowship of Canada website.* Retrieved from http://www.evangelicalfellowship.ca.

Hoover, D. R. (1997). "Christian Right under old glory and the maple leaf." In Smidt, C. E. & Penning, J. M. (Eds.), *Sojourners in the wilderness: The Christian Right in comparative perspective*. New York: Rowman and Littlefield Publishers.

Hoover, D., Martinez, M. D., Reimer, S., & Wald, K. D. (2002). Evangelicalism meets the continental divide: Moral and economic conservatism in the United States and Canada. *Political Research Quarterly 55*(2), 351-374.

Jervis, P. R., Meredith, M. & Shaw, D. (1999). Factum for the intervener The Interfaith Coalition. *M. v. H.* Court File No. 25838. Retrieved April 2010 from: http://files.efc-canada.net/si/Sexual%20Orientation/MvH.pdf

Jervis, P. R. & Miller, B. W. (2004). Factum for the intervener the Interfaith Coalition on

Marriage and Family, *Reference re Same Sex Marriage.* Retrieved April 2010 from: http://files.efc-canada.net/si/Marriage%20and%20Family/Interfaith%20Coalition%202004May7.ppdf

Knopff, R. and Morton, F. L. (2002). Ghosts and straw men: A comment on Miriam Smith's "Ghosts of the judicial committee of the privy council". *Canadian Journal of Political Science 35*(1), 31-42.

Koch, J. (1990). Making room: New directions in third Party intervention. *University of Toronto Faculty of Law Review 48:* 151-67.

Leishman, R. (2006). *Against judicial activism.* Montreal and Kingston: McGill-Queens University Press.

Malloy, J. (2010). *The Relationship Between the Conservative Party of Canada and Evangelicals and Social Conservatives*. Unpublished Manuscript, Department of Political Science, Carleton University, Ottawa, Canada.

Mandel, M. (1994). *The Charter of Rights and the legalization of politics in Canada.* Toronto: Thompson Educational Publishing Inc.

Manfredi, C.P. (2004). *Feminist activism in the Supreme Court: Legal mobilization and the Women's Legal Education and Action Fund.* Vancouver: UBC Press.

Marriage and Family. (n.d.). In *Evangelical Fellowship of Canada website.* Retrieved from http://www.evangelicalfellowship.ca/NetCommunity/Page.aspx?pid=537

McCann, M. W. (1994). *Rights at work: Pay equity reform and the politics of legal mobilization.* Chicago and London: University of Chicago Press.

McCarthy, J. D. (1987). "Pro-life and pro-choice mobilization: Infrastructure deficits and new

technologies." In Zald, M. N. & McCarthy, J. D. (Eds.), *Social Movements and Organizational Society: Collected Essays.* New Jersey: Transaction Publishers.

McDonald, M. (2010). *The armageddon factor: The rise of Christian nationalism in Canada.* Random House Canada.

Morton, F.L. & Knopff, R. (2000). *The Charter revolution and the court party.* Peterbourough: Broadview.

Olson, S. M. (1990). Interest-group litigation in Federal District Court: Beyond the disadvantage theory. *Journal of Politics 52*(3), 854-882.

Pal, L. A. (1993). "Advocacy organizations and legislative politics: The effect of the Charter of Rights and Freedoms on interest group lobbying of federal legislation." In Seidle, F. L. (Ed.), *Equity and community: The Charter, interest advocacy, and representation* (pp. 119-158). Montreal: The Institute for Research on Public Policy.

Pross, A. P. (1992). *Group politics and public policy.* Toronto: Oxford University Press.

R. v. Big M. Drug Mart Ltd, [1985] 1 S.C.R. 295

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713

R. v. Morgentaler, [1993] 3 S.C.R. 463

R. v. Prince, [1986] 2 S.C.R. 480

R v. Turpin, [1989] 1 S.C.R. 1296

Rabin, R. L. (1976). Perspectives on public interest law. *Stanford Law Review 28*(2), 207-261.

Rawlyk, G. A. (1990). *Canadian Protestant experience, 1790 to 1990.* Burlington: Welch.

Reference Re: Same Sex Marriage, [2004] 3 S.C.R. 698.

Reimer, S. (2003). *Evangelicals and the continental divide: The conservative Protestant*

subculture in Canada and the United States. Montreal and Kingston: McGill-Queens University Press.

Roach, K. (1993). "The role of litigation and the Charter in interest advocacy." In Seidle, F. L. (Ed.), *Equity and community: The Charter, interest advocacy, and representation* (pp. 159-188). Montreal: The Institute for Research on Public Policy.

Rosenburg, G. N. (1991). *The hollow hope.* Chicago and London: University of Chicago Press.

Riddell, T. Q. (2004). The impact of legal mobilization and judicial decisions: The case of official minority-language education policy in Canada for Francophones outside Quebec. *Law and Society Review 38*(3), 583-610.

Riddell, T. Q. & Morton, F.L. (2004). Government use of strategic litigation: The Alberta exported gas tax reference. *American Review of Canadian Studies 34*(3), 485-509.

Russell, P. H. (1994). Canadian constraints on Judicialization from without. *International Political Science Review 15*(2), 165-175.

Sammon, B. & Sammon, W. J. (2002). Factum of the interveners, The Canadian Council of Churches and the Evangelical Fellowship of Canada. *The Commissioner of Patents v. The President and Fellows of Harvard College.* Court File No. 28155. Retrieved from http://files.efc-canada.net/si/Reproductive%20and%20Genet%20Technologies/Harvard_Mouse.pdf

Short census question: Will the government listen? (2010, August 11) *Globe and Mail.* Retrieved from www.theglobeandmail.com

Social Issues. (n.d.). In *Evangelical Fellowship of Canada website.* Retrieved from http://www.evangelicalfellowship.ca/NetCommunity/Page.aspx?pid=187.

Solberg, R. S. & Waltenburg, E. N. (2006). Why do interest groups engage the judicary? *Social Science Quarterly 87*, 558-72.

Smith, M. (1999). *Lesbian and gay rights in Canada: Social movements and equality-seeking, 1971-1995.* Toronto: University of Toronto Press.

-----. (2002). Ghosts of the Judicial Committee of the Privy Council: Group politics and Charter litigation in Canadian political science. *Canadian Journal of Political Science 35*(1), 3-29.

-----. (2005a). *A civil society? Collective actors in Canadian political life.* Perterbourough: Broadview.

-----. (2005b). Social movements and judicial empowerment: Courts, public policy, and lesbian and gay organizing in Canada. *Politics and Society 33*(2), 327-353.

Smith, M. (ed.) (2008). *Group politics and social movements in Canada.* Perterbourough: Broadview.

Stackhouse, J.G. (1992). *Canadian evangelicalism in the twentieth century: An introduction to its character.* Toronto: University of Toronto Press.

-----. (2000). Bearing witness: Christian groups engage in Canadian politics since the 1960s. In Lyon, D. & Van Die, M. (Eds.), *Rethinking church, state, and modernity: Canada between Europe and America.* Toronto: University of Toronto Press.

Stanley, R. W. & Hayward, M. (2000). Factum of the interveners Evangelical Fellowship Association and Focus on the Family (Canada) Association. *R v. Sharpe.* Court File No. 27376.

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

Tarrow, S. (1998). *Power in movement: Social movements, collective action, and politics.* 2nd edition. Cambridge: Cambridge University Press.

Teles, S. M. (2008). *The rise of the conservative legal movement: The battle for control of the law.* Princeton and Oxford: Princeton University Press.

Tremblay v. Daigle, [1989] 2 S.C.R. 530

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

Vanhala, Lisa. (2009). Disability rights activists in the Supreme Court of Canada: Legal mobilization theory and accommodating social movements. *Canadian Journal of Political Science 42*(4), 981-1002.

Warner, T. *Losing control: Canada's social conservatives in the age of rights.* Toronto: Between the Lines.

Wienrib, L. E. (1999). The activist constitution. *Policy Options* (April): 27-30.

Zemans, F. K. (1982). Framework for analysis of legal mobilization: A decision making model. *American Bar Foundation Research Journal*, 989-1071.

-----. (1983). Legal mobilization: The neglected role of the law in the political system. *American Political Science Review 77*, 690-703.

Appendix A: The EFC's Legal Engagement

Case	Year	Court	Theme	Result
Christian Horizons	2010	Ontario Division Court	Religious Freedom	Loss
Hutterian Brethren	2009	SCC	Religious Freedom-practice	Win
Spratt	2008	BC. Appeal	Religious Freedom-expression	Loss
Alliance for Marriage and Family v. A.A.	2007	SCC	Marriage and Family	Loss
A.A. v. B.B.	2007	Ont. Appeal	Marriage and Family	Loss
Owens	2006	Sask. Appeal	Religious Freedom-expression	Win
Kempling	2004	B.C. Appeal	Religious Freedom-expression	Loss
Re: Same Sex Marriage	2004	SCC	Marriage and Family	Loss
Amselem	2004	SCC	Religious Freedom-practice	Win
Lafontaine	2004	SCC	Religious Freedom-zoning	Win
Brillinger	2004	Ontario Appeal	Religious Freedom	Loss
Halpern	2003	Ontario Appeal	Marriage and Family	Loss
Barbeau (EGALE)	2003	B.C. Appeal	Marriage and Family	Loss
A. A. v. B. B.	2003	Ont. Superior Court	Marriage and Family	Win
Canada c. Hendricks	2003	Quebec Appeal	Marriage and Family	N/A
Halpern	2002	Ontario Divisional	Marriage and Family	Loss
Halpern	2002	Ont. Superior Court	Marriage and Family	Loss
Brillinger	2002	Ontario Divisional	Religious Freedom	Loss
Hendricks c. Quebec	2002	Quebec Superior	Marriage and Family	Loss
Chamberlain	2002	SCC	Education-sexual orientation	Loss
Harvard College	2002	SCC	Genetic Technology	Win
Trinity Western	2001	SCC	Religious Freedom-education	Win
Sharpe	2001	SCC	Pornography	Win
Latimer	2001	SCC	Euthanasia	Win
EGALE	2001	B.C. Supreme Court	Marriage and Family	Win
RE: The Marriage Act	2001	B.C Supreme Court	Marriage and Family	Loss
Chamberlain	2000	B.C. Appeal	Education-sexual orientation	Loss

Case	Year	Court	Theme	Result
Avs Technology	2000	Federal Appeal	Media Regulation: Copyright	Win
Dobson	1999	SCC	Fetal Rights	Loss
Sharpe	1999	B.C. Appeal	Pornography	Won
M. v. H.	1999	SCC	Marriage and Family	Loss
Rosenburg	1998	Ontario Appeal	Marriage and Family	Loss
Vriend	1998	SCC	Sexual Orientation	Loss
Mcrae	1997	Federal Appeal	Religious Freedom-Tax	Loss
Winnipeg	1997	SCC	Fetal Rights	Loss
Adler v. Ontario	1996	SCC	Religious freedom-education	Loss
Vriend et. al.	1996	Alberta Appeal	Sexual Orientation	Win
Egan	1995	SCC	Marriage and Family	Win
Rodrigez	1993	SCC	Euthanasia	Win
Mossop	1993	SCC	Marriage and Family	Mixed
Elgin County	1990	Ontario Appeal	Religious Freedom-education	Loss

Appendix B: UBC Behavioural Research Ethics Board Approval Certificate

The University of British Columbia
Office of Research Services
Behavioural Research Ethics Board
Suite 102, 6190 Agronomy Road, Vancouver, B.C. V6T 1Z3

CERTIFICATE OF APPROVAL - MINIMAL RISK

PRINCIPAL INVESTIGATOR:	INSTITUTION / DEPARTMENT:	UBC BREB NUMBER:
Gerald Baier	UBC/Arts/Political Science	H10-01447

INSTITUTION(S) WHERE RESEARCH WILL BE CARRIED OUT:

Institution	Site
N/A	N/A

Other locations where the research will be conducted:
Interviews will be conducted over the phone. If the subjects reside in Vancouver or surrounding area, based on availability and consent, interviews could be conducted in the subject's place of work.

CO-INVESTIGATOR(S):
Joel D. Nikkel

SPONSORING AGENCIES:
N/A

PROJECT TITLE:
The New Players of Canadian Judicial Politics: Explaining the Evangelical Fellowship's Use of Legal Mobilization

CERTIFICATE EXPIRY DATE: June 15, 2011

DOCUMENTS INCLUDED IN THIS APPROVAL: **DATE APPROVED: June 15, 2010**

Document Name	Version	Date
Protocol:		
EFC Legal Mobilization Research Proposal	N/A	May 30, 2010
Consent Forms:		
EFC Legal Mobilization Consent Form	N/A	June 7, 2010
Questionnaire, Questionnaire Cover Letter, Tests:		
EFC Legal Mobilization Questions	N/A	June 7, 2010
Letter of Initial Contact:		
EFC Legal Mobilization Initial Contact	N/A	June 7, 2010

The application for ethical review and the document(s) listed above have been reviewed and the procedures were found to be acceptable on ethical grounds for research involving human subjects.

Approval is issued on behalf of the Behavioural Research Ethics Board and signed electronically by one of the following:

Dr. M. Judith Lynam, Chair
Dr. Ken Craig, Chair
Dr. Jim Rupert, Associate Chair
Dr. Laurie Ford, Associate Chair
Dr. Anita Ho, Associate Chair

Appendix C: Participants in the Study

The participant's names and positions were used with consent.

Janet Epp-Buckingham. Interview, July 20, 2010. Dr. Janet Epp-Buckingham was legal counsel for the EFC from 1999-2003 and Director, Law and Public Policy from 2003-2006.

Don Hutchinson. Interview, August 1, 2010. Don Hutchinson was Vice President and Director, Centre for Faith and Public Life from 2006 to the present.