THE BC COURT OF APPEAL AND CIVIL LIBERTIES

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INTRODUCTION

EXAMINING CIVIL LIBERTIES over a long period of time is like taking aim at a moving target, for the meaning of the term is protean and contested. As the eminent legal scholar Walter Tarnopolsky has written, "The [Canadian] statesmen of 1867 would probably have defined their civil liberties as including the freedoms of speech, press, religion, assembly, and association, the rights to habeas corpus, to a fair and public trial, and perhaps also such freedoms as freedom of contract and such rights as that to property." Yet, as the constitutional expert Peter Hogg argues, contemporary "[c]ivil liberties encompass a broad range of values that support the freedom and dignity of the individual and that are given recognition in various ways by Canadian law."[2]

This shift was the result of at least three developments. First, it became increasingly accepted that the right to participate in political activity should be considered a civil liberty and that it should not, along with other civil liberties, be limited to property-owning white males. In other words, there was a greater commitment to formal egalitarian rights.[3] Second, there was an ideological move from classical liberalism's emphasis on "negative liberties" to reform liberalism's supplementary

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[2] W.S. Tarnopolsky, "Discrimination in Canada: Our History and Our Legacy" (Canadian Institute of Administration of Justice, 1989), 11, available at http://www.ciaj-icaj.ca/english/publications/TARNOPOL.pdf (viewed 16 July 2009); Peter Hogg, *Constitutional Law of Canada*, student edition (Toronto: Thomson Carswell, 2005), 528, 695-6. See also Bora Laskin, "Our Civil Liberties: The Role of the Supreme Court," *Queen's Quarterly* 61 (Winter, 1954-55): 455-72.

[3] For a brief discussion of this shift, leading to a broad democratic franchise, see Ross Lambertson, "Domination and Dissent – Equality Rights before World War II" and "Suppression and Subversion: Libertarian and Egalitarian Rights up to 1960," in *A History of Human Rights in Canada: Essential Issues*, ed. Janet Miron (Canadian Scholars' Press, 2009).

emphasis on "positive liberties." While classical liberalism assumed that individual freedom was of paramount importance, and that the state should not normally interfere with such freedom (especially in the economic sphere), reform liberalism accepts that many citizens cannot enjoy full individual freedom unless the state intervenes to provide such things as basic education, minimal standards of health, and a wide variety of other policies that together make up the modern welfare state. In other words, notions of social equality were added to traditional ideas about individual freedom.[4]

Third, the term "civil liberties" has to some degree been replaced by the term "human rights" so that the boundary between these two terms is often unclear and contested. Tarnopolsky used the terms interchangeably in his book on the Canadian Bill of Rights, but some contemporary rights groups distinguish between the two. For example, the British Columbia Civil Liberties Association (BCCLA) stresses libertarian and negative liberties, or "first generation rights" (although accepting the principle of anti-discrimination legislation), while the British Columbia Human Rights Coalition places more emphasis on egalitarian and positive liberties, or "second generation rights."[5]

This article, which is an examination of the way the British Columbia Court of Appeal (BCCA) has dealt with civil liberties since 1910, must therefore pick its way through a body of material the boundaries of which are open to dispute. Moreover, Canada's original constitution, the *British North America Act* (*BNA Act*) of 1867, contained no explicit reference to civil liberties. True, the document specifically allocated "property and civil rights" to the provinces rather than to Ottawa, but this provided no special protection for civil liberties.[6] At most, the *BNA Act* contained some specific guarantees for certain linguistic and denominational

[4] R. Brian Howe and David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 1999) chap. 1; Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937–82* (Toronto: University of Toronto Press, 1977) 4-5.

[5] Walter Surma Tarnopolsky, *The Canadian Bill of Rights*, 2d ed. (Toronto: McClelland and Stewart) 2; Jeremy Patrick, "Civil Liberties Advocacy Organizations in Canada: A Survey and Critique," *Oklahoma City University Law Review* 32 (2007): 187-213; http://www.bchrcoalition.org/ and http://www.bccla.org/ (viewed 16 July 2009). For the distinction between different "generations" of rights, see Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004) 3-4.

[6] The term "property and civil rights" in the Canadian constitutional sense was intended to be "a compendious description of the entire body of private law which governs the relationships between subject and subject, as opposed to the law which governs the relationships between the subject and the institutions of government … [so as to] comprise primarily proprietary, contractual, or tortious rights" (Hogg, *Constitutional Law of Canada*, 526-27, 528).

school rights as well as safeguards for the judicial independence of superior court judges.

Yet the preamble of the *BNA Act* did say that Canada was to have a "Constitution similar in principle to that of the United Kingdom," implying that common law rights were to be as constitutionally secure as those in the mother country. Frequently referred to in Canada as "British liberties," these were rooted in the principle of the rule of law: for citizens, anything was permitted if it was not specifically forbidden by law, but for the government nothing was permitted unless specifically justified by law.[7]

It is useful to see these British liberties as falling into three analytical categories: (1) libertarian rights, including freedom of speech, freedom of religion, freedom of assembly, and freedom of property ownership; (2) egalitarian rights, including the right to have the law applied equally, without discrimination; and (3) procedural rights, including the right to legal counsel, the right not to be incarcerated indefinitely without trial, the right to be presumed innocent until proven guilty, and so on.[8]

Examining the way the BCCA dealt with the changing nature of civil liberties law is a daunting task when the focus is on the first hundred years. In order to narrow the focus, this article touches primarily upon cases that have been important to the general public (as indicated by newspaper articles), historians, or legal scholars.[9]

In addition, this article looks at the BCCA from the perspective of political science, examining the court as a political actor within a changing social context.[10] In doing so, it attempts to answer five questions. First, what were the judicial "tools" available to the BCCA for protecting civil liberties, and how did they change over time? Second, how did these changes reflect shifts in the values of society? Third, how did these changing social patterns also affect the values and decisions of the

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[7] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1962) at 193, 202-03; Ross Lambertson, *Repression and Resistance: Canadian Human Rights Activists, 1930-1960* (Toronto: University of Toronto Press, 2005).

[8] Hogg slices the package somewhat differently, referring to political, legal, and egalitarian civil liberties as well as the uniquely Canadian linguistic and educational rights (*Constitutional Law of Canada*, 695).

[9] Because of space limitations, and because other authors in this special issue are writing about labour, Aboriginal, and criminal law, this is not a complete survey of all the important civil liberties cases coming before the BCCA.

[10] For the political science approach to the study of courts, see: Peter McCormick and Ian Greene, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: Lorimer, 1990); Peter McCormick, *Canada's Courts* (Toronto: Lorimer, 1994); Ian Greene, Carl Baar, Peter McCormick, George Szablowski, Martin Thomas, *Final Appeal: Decision Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998).

judges? Fourth, to what extent was the civil libertarian workload of the BCCA the result of advocacy group activity?[11] Fifth, how did institutional and social factors funnel cases into the court system and the BCCA? (As has often been pointed out, judges are not "self-starters"; they must wait for cases to come before them. Consequently, the civil libertarian workload of the BCCA was largely determined by circumstances beyond its control.)

TRADITIONAL LEGAL PROTECTIONS, 1910-60

By twenty-first century Canadian standards, most early twentieth-century British Columbians were profoundly racist. Most whites accepted ideas about the superiority of people of British or European extraction but feared that they could be swamped by too many Asian immigrants, who were seen as inassimilable and as economic threats to both workers and small businesspeople. Consequently, although the province could not control the flow of immigration, and Ottawa refused to bar the gates completely, local laws attempted to make life in British Columbia difficult for Asians by denying them the right to vote and impeding their access to certain jobs and professions.[12]

Litigation was one way of resisting this discrimination as the state did not block access to the courts for any specific minority group. To that extent, British Columbia was a liberal society.[13] Yet access to the courts

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[11] Young and Everitt prefer the term "advocacy group" rather than the more common term "interest group" because the former clearly incorporates both self-interested and altruistic organizations. They define an advocacy group as "any organization that seeks to influence government policy, but not to govern." See Lisa Young and Joanna Everitt, *Advocacy Groups* (Vancouver: UBC Press, 2004) 5.

[12] For more on this, consult the text and notes of Patricia E. Roy's trilogy: *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants, 1858-1914* (Vancouver: UBC Press, 1989); *The Oriental Question: Consolidating a White Man's Province, 1914-41* (Vancouver: UBC Press, 2003); and *The Triumph of Citizenship: The Japanese and Chinese in Canada, 1941-67* (Vancouver: UBC Press, 2007). For legal references, including an impressive list of cases involving anti-Asian discrimination, some of which went to the BCCA, see Constance Backhouse, "Legal Discrimination against the Chinese in Canada: The Historical Framework," in David Dyzenhaus and Mayo Moran, eds., *Calling Power to Account: Law, Reparations, and the Chinese Canadian Head Tax Case* (Toronto: University of Toronto Press, 2005) 24-59.

[13] However, there were some barriers: people of Asian and Aboriginal origin were prevented from becoming lawyers (and therefore judges) in British Columbia until after the Second World War; and from 1927 to 1951 the federal *Indian Act* prohibited the raising of money for court claims to Aboriginal title. See Joan Brockman, "Exclusionary Tactics: The History of Women and Visible Minorities in the Legal Profession in British Columbia," in Hamar Foster and John McLaren, eds., *Essays in the History of Canadian Law*, vol. 6: *British Columbia and the Yukon* (Toronto: Osgoode Society for Canadian Legal History, 1995) 508-61; Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1949-1989* (Vancouver: UBC Press, 1990) 82-88, 111.

does not necessarily produce justice. Peter Russell once wrote that, "from the lawyer's perspective, the struggle for civil liberty has been portrayed in terms of a sagacious judiciary, periodically prodded by some liberal counsel, restraining the overreaching programme of the demos,"[14] but from the historian's perspective the struggle was often against a racially prejudiced judiciary willing to condone discriminatory legislation.

True, some early BC judges did use the rule of law to strike down anti-Asian legislation, but, in 1899, the Judicial Committee of the Privy Council (Canada's highest appellate court in constitutional and civil cases until 1949) made it clear that this was unacceptable; instead, the courts were limited to what has been called the "jurisdictional" technique of protecting civil liberties – determining that, because a law-making body has no legal right to create a particular law, that law is ultra vires and therefore void.[15] This meant that, henceforth, Canadian judges could not explicitly strike down a law because they considered it to be a violation of the right to racial equality; however, there did remain the unstated possibility that those judges who had predilections towards equality might interpret ambiguous laws or precedents in ways that promoted egalitarian rights.

On the other hand, conventional wisdom maintained that judges were simply "law finders" who normally had no business making new law. This conception of the judicial role did not absolutely prevent judges from creative interpretations of the law. After all, the complete elimination of judicial discretion is impossible. It did, however, make it unlikely that anything more than a minority of judges over time would engage in what today would be called liberal judicial activism – creating new interpretations of the law to improve the protection of individual rights.[16]

Moreover, ideas about the proper role of the judiciary created barriers to legal challenges. For example, not only was it necessary, until 1974, to obtain the consent of the Crown before one could sue the government, it was often difficult to obtain "standing," the legal term acknowledging that there exists a real dispute amenable to judicial resolution. No court would grant standing to individuals or groups simply because they had

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[14] Peter Russell, "A Democratic Approach to Civil Liberties," *University of Toronto Law Journal* 19 (1969): 109-131 at 131.

[15] John McLaren, "The Head Tax Case and the Rule of Law: The Historical Thread of Judicial Resistance to 'Legalized' Discrimination," in Dyzenhaus and Moran, *Calling Power to Account*. The case was *Union Colliery v. Bryden*, [1899] AC 583. The term "jurisdictional technique" comes from Paul Weiler's *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974) 193-95.

[16] For the debate on judicial activism, see Chapter 6 of Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

a public interest in challenging a law. Also, the courts seldom permitted individuals or groups to become peripherally involved as "interveners" – non-litigants asking for the right to present arguments in favour of one side of a legal dispute.[17]

Another barrier to judicial redress for those fighting for their civil liberties was the value system of the average judge. The early judges of the BCCA reflected the "common sense" belief in the superiority of white society over minority ethnic groups, such as Asians.[18] Although BC voters could be divided, roughly, into two categories – the exclusionists (often found in the ranks of organized labour), who wanted to keep Asians out of the province or at least out of certain fields of employment, and the exploiters (consisting of many but not all businesspeople), who saw Asians as a source of cheap labour) – the consensus was that these immigrants and their offspring could never really be full-fledged members of BC society.[19]

Finally, the logistical problems of raising money and getting legal counsel created indirect barriers to litigation. Asians and other marginalized individuals and groups may often have had more difficulty in pursuing their claims than the financially powerful and well-heeled elite, especially because there were no legal aid programs, government core funding for advocacy groups, court challenge programs, or human rights commissions to ameliorate these financial imbalances.

Despite these problems, Asians in British Columbia were not "hapless victims" of racial prejudice, and they frequently resorted to the courts to fight for what they considered to be their rights.[20] For example, in the early twentieth century a Japanese Canadian, supported by his community, challenged the provincial law denying Asians the vote.[21] The law was upheld, but the Japanese Canadian community nevertheless enjoyed a strategic advantage as Japan was an important ally of Britain, and its

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17 *Crown Proceedings Act*, S.B.C. 1974, c. 24; Heather MacIvor, *Canadian Politics and Government in the Charter Era* (Toronto: Nelson, 2006) chap. 6.

18 For racism as "common sense" in the first half of the twentieth century, see Chapter 1 of James W.St.G. Walker, *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Toronto: Osgoode Society for Canadian Legal History, 1997).

19 Alan Grove and Ross Lambertson, "Pawns of the Powerful: The Politics of Litigation in the *Union Colliery* Case," *BC Studies* 103 (Autumn 1994): 3-31.

20 For criticism of the "hapless victims" approach to historiography, see Wing Chung Ng, *The Chinese in Vancouver, 1945-80: The Pursuit of Identity and Power* (Vancouver: UBC Press, 1999) 6.

21 The challenge to the voting law was in *Cunningham v. Tomey Homma*, [1902] AC 151 (P.C. Can.). For examples of some earlier cases involving Chinese, some of which may have resulted from individual resistance, see McLaren, "The Head Tax Case."

complaints could not easily be ignored.[22] In 1920, in response to protests made by the Japanese consul in Vancouver, and an advocacy group called the Canadian Japanese Association, the provincial government asked the BCCA to determine whether or not the provincial cabinet had been legally justified in passing a 1902 provincial order-in-council demanding that, "in all contracts, leases and concessions of whatsoever kind entered into, issued, or made by the government, or on behalf of the government, provision be made that no Chinese or Japanese shall be employed in connection therewith."

In this case, known as *The Japanese Treaty Act* case, the BCCA held that the provincial government had no legal right to authorize this form of racial discrimination, but there is no evidence that the judges were egalitarian.[23] The court used the "jurisdictional" technique in two different ways. First, it decided that the order-in-council violated the terms of a British treaty with Japan prohibiting certain forms of discrimination against Japanese immigrants.[24] The judges also held that it was invalid because it violated the federal-provincial division of powers. The precedents on this latter point were difficult to reconcile because, in 1899, the Privy Council had struck down a provincial statute prohibiting the employment of Chinese underground in coal mines;[25] however, in 1902, it had upheld the legislation disenfranchising Asians in British Columbia.[26] Trying to make sense of these apparently contradictory precedents, the BCCA unanimously held that, although the province could interfere with "political rights," it had no right to deprive people of what the Privy Council had called the "ordinary rights" of BC residents, such as the right to earn their living in the province. Recognizing that Asians

[22] On several occasions the British government persuaded Ottawa to disallow BC legislation discriminating against Asians in that province. See Ross Lambertson, "After *Union Colliery*: Law, Race, and Class in the Coal Mines of British Columbia," in Foster and McLaren, eds., *Essays in the History of Canadian Law,* 386-422.

[23] *In re the Japanese Treaty Act, 1913*, [1920] 3 W.W.R. 937 (B.C.C.A.). Given space limitations, it is not possible to say much in this article about the role of lawyers as "gatekeepers." In this case, however, it is worth noting that the Japanese Canadians were represented by the eminent Sir Charles Hibbert Tupper, Q.C.

[24] In 1911, the Imperial government's "Treaty of Commerce and Navigation between the United Kingdom of Great Britain and Ireland and Japan" prohibited discrimination against Japanese immigrants when they sought employment or tried to purchase property. Ottawa then utilized s. 132 of the *BNA Act* to pass the *Japanese Treaty Act, 1913*, making the Anglo-Japanese treaty binding upon all of Canada.

[25] *Union Colliery v. Bryden*, [1899] AC 583 (P.C. Can).

[26] *Cunningham v. Tomey Homma*, [1902] AC 151 (P.C. Can).

were an important source of cheap labour, the classical liberal BCCA put the needs of the economy before considerations of provincial rights.[27]

Meanwhile, state discrimination was paralleled by private discrimination; many people refused to hire Asians or to provide hotel or restaurant services to them. Yet, other groups were also victimized, and the leading BCCA case on racial discrimination by a business (*Rogers v. Clarence Hotel*), involved the small Vancouver black community. It came about because, in 1938, a black man, Edward T. Rogers, sued the beer parlour of Vancouver's Clarence Hotel for refusing to serve him.[28]

As it happened, the Supreme Court of Canada (SCC) had just decided a similar case involving a discriminatory refusal of service by a tavern in the Montreal Forum.[29] This decision was relevant to the *Rogers* case for three reasons. First, the SCC came down on the side of "complete freedom of commerce," including the right to refuse service, rather than the principle of racial equality. The classical liberal emphasis on property rights, in other words, trumped egalitarian rights. Second, although the court based its decision on the civil law of Quebec, its reference to several common law cases suggested that the decision also applied to the other provinces in Canada. Third, a spirited dissent by Justice Henry Davis argued that, because taverns were subject to state control, the principle of freedom of commerce did not fully apply. Davis's line of reasoning was followed in the *Rogers* case by Mr. Justice D.A. McDonald of the British Columbia Supreme Court, who awarded damages to the plaintiff.[30]

The three-judge panel of the BCCA overturned the decision. The majority concluded that the principle of "freedom of commerce" was not just confined to Quebec, and it completely rejected the approach

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[27] Bruce Ryder argues that "the needs of the labour market" motivated both Ottawa and the BC judges when it came to the treatment of anti-Asian legislation. See "Racism and the Constitution: the Constitutional Fate of British Columbia Anti-Asian Legislation, 1872-1923" (unpublished manuscript on file at Osgoode Hall Law School law library) 122. For information about the legal and political aftermath of *The Japanese Treaty Act*, see Roy, *The Oriental Question*, 93-96.

[28] [1940] 2 W.W.R. 545 (B.C.C.A.). Rogers was probably acting alone. This case has been researched by both James Walker in "*Race," Rights and the Law,* at 173-76, and Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: The Osgoode Society, 1999) at 254-55. Neither author mentions any advocacy group support. Indeed, there does not seem to have been a strong tradition of black political activism in Vancouver. The nascent provincial liberties organization was focused on libertarian rights, and there were no inter-ethnic human rights groups in existence until after the Second World War. See Lambertson, *Repression and Resistance*, 56-57, 279, 291-92, and 'The Black, Brown, White and Red Blues: The Beating of Clarence Clemons," *Canadian Historical Review* 85, 4 (2004): 755-76.

[29] *Christie v. York Corporation*, [1940] S.C.R. 139.

[30] "Judge Wipes Out Colour Line," *Vancouver News-Herald*, 23 February 1940.

taken by Justice Davis of the SCC. Mr. Justice O'Halloran dissented, however, in part because "it is contrary to the common law to refuse to serve a person solely because of his color or race," adding that "all British subjects have the same rights and privileges under the common law – it makes no difference whether white or colored; or of what class, race or religion."

Had more judges in Canada adhered to O'Halloran's values, Canadian law might well have placed significant restraints on racial discrimination as early as the 1940s.[31] But the majority decision of the BCCA, based as it was on an authoritative decision of the SCC, made it clear that there would be no egalitarian redress through litigation. Consequently, some Canadians – including O'Halloran himself – began to call for legislative protection of fundamental rights and liberties.[32]

Of course, disputes about egalitarian rights were not the only cases to come before the BCCA during these early years. Political radicals, especially left-wing trade unionists and communists, were regarded as serious threats to society, and the *War Measures Act* gave Ottawa the power to impose draconian limits on fundamental freedoms during the First World War.[33] But while the Alberta Supreme Court took a strong civil libertarian stance during this period,[34] the BCCA does not appear to have been presented with any opportunities for judicial liberalism. In any event, given its decisions a few years later, its approach would probably have been decidedly authoritarian – a reflection more of Edmund Burke than of John Stuart Mill.[35]

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[31] It is true that discriminatory restrictive covenants in Ontario were struck down by the courts in 1945 in *Re Drummond Wren* and 1950 in *Noble and Wolf v. Alley*. But these decisions could be interpreted as supporting the libertarian right of freedom of contract for the vendors and purchasers of property. This may be the reason why the chief justice of British Columbia declared discriminatory restrictive covenants unenforceable as early as 1911. See Lambertson, *Repression and Resistance*, chap. 5. Note also that, years later, O'Halloran's dissent inspired the Ontario Court of Appeal in *Bhaduria v. Seneca College* (1979), 27 D.L.R. (2d) 143 (Ont. CA) (although the decision was overturned on appeal by the Supreme Court of Canada). See McLaren, "The Head Tax Case," 106.

[32] Lambertson, *Repression and Resistance,* 206; O'Halloran, "Inherent Rights," *Obiter Dicta* 22 (1947): 1-3 (arguing in favour of a national bill of rights).

[33] Although the free speech demonstrations of the anarcho-syndicalist Industrial Workers of the World (IWW), popularly known as the "Wobblies," resulted in about 250 arrests in 1912, none of the trials seems to have produced reported appeals. See A. Ross McCormack, *Reformers, Rebels, and Revolutionaries: The Western Canadian Radical Movement, 1899-1919* (Toronto: University of Toronto Press, 1977) 109; *Western Weekly Reports*, 1912-14.

[34] Louis A. Knafla, "The Supreme Court of Alberta: The Formative Years, 1905-1921," 27-68 at 52-53, and Dale Gibson, "The Supreme Court of Alberta Meets the Supreme Law of Canada," 99-131 at 100-3, in Jonathan Swainger, *The Alberta Supreme Court at 100: History and Authority* (Toronto: The Osgoode Society and the University of Alberta Press, 2007).

[35] See Peter Russell, "The Political Role of the Supreme Court of Canada in its First Century," *Canadian Bar Review* 53 (1975): 576-93.

For example, consider *Rex v. Evans*,[36] involving s. 98 of the *Criminal Code*, ss. 8 of which forbade "in any manner to teach, advocate, or advise or defend the use, without authority of law, of force … as a means of effecting any governmental, industrial, or economic change." In the early 1930s, Arthur H. (Slim) Evans was arrested because of public statements he made during an impending strike of coal miners in the town of Princeton. Evans was the BC organizer for the National Unemployed Workers Association,[37] and, although he said he was not a member of the Communist Party, he nevertheless praised it in public. He also suggested that force rather than voting was the only means of achieving real political change, and he added that the workers should not be afraid to fight for their rights. On the basis of such remarks he was found guilty of violating the *Criminal Code*'s s. 98.[38]

There was no doubt that Ottawa had the constitutional right to create criminal law, no matter how harsh. As a result, Evans's lawyer asked the BCCA to look at whether his common law procedural rights had been violated. Justice Archer Martin agreed that there had been "a certain amount of misdirection by the learned Judge below in his charge to the jury" and that the trial had been "conducted by both the prisoner and his counsel, by the special permission of the presiding Judge in an unusual manner." This apparently consisted of the accused conducting most of his own defence, albeit with the advice of his lawyer. The trial judge had allowed "the greatest latitude" to the accused, who seemed to have been as interested in making political hay as in defending himself, and "unproved statements were made, both of fact and law relating to communism in general, and otherwise, that were foreign to the issue, and should have been excluded, particularly in a case of this rare political nature."[39]

Despite what Justice Martin called the "unusual" nature of the trial procedure, however, neither he nor the other four appellate judges concluded that the judge had been unfair to the prisoner. But Justice Malcolm A. McDonald did consider the appellant's argument on a matter of law – that the s. 98 prohibition against advocacy of force should be interpreted narrowly so as not to include Evans's speeches. It was (and still is) a principle of the common law that judges should protect civil liberties by interpreting ambiguous statutes in favour of the citizens

[36] *Rex v. Evans*, [1934] 2 W.W.R. 326 (B.C.C.A.).

[37] Evans later became the chief organizer of the Relief Camp Workers Union and the main leader of the 1935 On-to-Ottawa Trek. See Lorne Brown, *When Freedom Was Lost: The Unemployed, the Agitator, and the State* (Montreal: Black Rose Books, 1987) 87-88.

[38] *Rex v. Evans*, 326-27.

[39] Ibid. at 328.

rather than the state. This is known as the "restrictive interpretation" or "clear statement" technique for protecting civil liberties.[40]

In this case, however, Justice McDonald did not interpret s. 98 so as to favour the appellant's right to freedom of speech. Weighing Evans's language, which was clearly intemperate although not self-evidently seditious, McDonald concluded: "[T]here is to my mind no doubt that the accused taught and advocated the use of force as a means of attaining the changes referred to in the section of the *Criminal Code* … Even indirect language carefully selected in the hope of avoiding a breach of the Act may on their [sic] fair interpretation be regarded as an advocacy of force."[41] Along with the rest of the BCCA, he ruled against the appeal and ensured that Arthur Evans would go to prison.

The *Evans* case was the only one of its kind to reach the BCCA; there were only three s. 98 reported cases in Canadian history, and the federal government repealed the law in 1936.[42] But the court did address several libertarian rights cases in the 1940s, after Ottawa invoked the *War Measures Act* and subsequently created the Defence of Canada Regulations (DOCR), a set of rules that Canadian historian and civil libertarian Arthur Lower later called a "revolver pointed at the heart of liberty."[43] Under the DOCR thousands of people were interned, not all of them an obvious danger to Canada, and a number of groups, including the Communist Party of Canada and the Jehovah's Witnesses, were declared illegal organizations.

Although no cases involving the civil liberties of political radicals seem to have reached the BCCA during the war,[44] the court did have several opportunities to protect the rights of other citizens. It was not inclined to do so. As Chief Justice D. A. Macdonald wrote in *Rex v. Bonny*, with regard to a woman convicted for simply possessing a pencil drawing of an internment camp: "It is of paramount importance to protect the state, not merely from positive danger but from the likelihood of it."[45]

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[40] W.S. Tarnopolsky, "The Canadian Bill of Rights from Diefenbaker to Drybones," *McGill Law Journal* 17 (1971): 437-75. See also Weiler, *In the Last Resort*, 192.

[41] Ibid. at 335. Compare this to the later well-known case in which the Supreme Court of Canada gave a narrow interpretation of the law of sedition, which led to the acquittal of the accused: *Boucher v. R.*, [1951] S.C.R. 265.

[42] D.A. Schmeiser, *Civil Liberties in Canada* (London: Oxford University Press, 1964) 218.

[43] A.R.M. Lower, *My First Seventy-Five Years* (Toronto: Macmillan, 1967) 309.

[44] There was at least one major wartime free-speech case involving communists, but it was never appealed to the BCCA. See *Rex v. Ravenor*, [1941] 1 W.W.R. 191 (B.C.S.C.).

[45] [1940] 3 W.W.R. 422 (B.C.C.A.). See also DOCR cases *Rex v. Pantelides*, [1943] 1 W.W.R. 58 (B.C.C.A.); *Rex v. Paul*, [1943] 3 W.W.R. 561 (B.C.C.A.).

Authoritarian values also prevailed in the case of *Rex v. Sutton (no. 2)*, where the Crown appealed an SCC quashing of a magistrate's conviction of a person charged with being a member of an illegal organization – the Jehovah's Witnesses – contrary to regulation 39C of the DOCR. The argument of the Witness's lawyer had been that the *Criminal Code* granted magistrates jurisdiction to try only those summary conviction offences "over which the Parliament of Canada has legislative authority" and that this did not include the DOCR because they had been created not by Parliament but by the governor-in-council (i.e., the federal cabinet). The appellate court quickly allowed the Crown's appeal, however, stressing that "[t]he legislative authority of Parliament is not abandoned by the limited delegation of its powers to the executive Government. The subject-matter is still within the strong hand of Parliament."[46]

After 1945, new fears about subversion generated new civil liberties issues. For example, the "Red Scare" in the late 1940s and 1950s resulted in many communists being excluded or purged from both public and private organizations.[47] When the BCCA was asked, in *Martin v. Law Society of BC*, to rule on the refusal of the local law society to admit a member of the communist Labour Progressive Party to the provincial bar, it came to the conclusion that public security was more important than freedom of political association. This case is discussed in some detail in another article in this issue, but it is worth pointing out that, although Martin was backed by the Labour Progressive Party, the provincial civil liberties association initially supported him but then dropped the case. This was typical; in British Columbia and in the rest of the country there was very little litigation sponsored by civil liberties organizations until at least the 1960s.[48]

The province was also threatened by the activities of the Sons of Freedom sect of the Doukhobors, especially from the mid-1940s to the 1960s. A dialectical dance between these anti-state religious zealots and ham-fisted federal and provincial governments created a tumultuous

[46] [1942] 1 W.W.R. 41 (B.C.C.A.) at 42. Individual "free spirits" could find their rights threatened by other things than the DOCR. For example, in a long-forgotten case hidden in the dusty attic of legal reports, *Rex v. Sutherland*, [1944] 1 W.W.W. 529, a person who made his living by playing the bagpipes on the streets of Vancouver was convicted of obstructing a peace officer because he refused to "move on" when ordered to do so by a local constable. On appeal, Chief Justice McDonald asked the police officer, "What is your opinion of the music you heard? Perhaps I had better not ask." And he went on to quash the conviction on the grounds that there was no evidence the appellant had obstructed traffic.

[47] Reg Whitaker and Gary Marcuse, *Cold War Canada: The Making of a National Insecurity State, 1945-1957* (Toronto: University of Toronto Press, 1994).

[48] *Martin v. Law Society of British Columbia*, [1950] 3 D.L.R. 173. Lambertson, *Repression and Resistance*, 253 and passim; Clément, *Canada's Rights Revolution*, 4-5.

situation in which the Freedomites' protests included house burnings, nude marches, and the bombing of public facilities in southeastern British Columbia. Some of these acts were, or were perceived to be, acts of "terrorism."

John Lebedoff claimed (along with several rivals) to be the leader of the Sons of Freedom. With four other Doukhobors, three of whom were alleged to be his wives, he was charged with seditious conspiracy under the *Criminal Code* for signing a document "exhorting all Doukhobors to refuse to obey many of the laws of Canada, of which one instance is emphatic exhortation to refuse to register births, deaths and marriages under provincial law." He was found guilty and sentenced to two years' imprisonment. He then appealed, arguing that the *Code* explicitly permitted a citizen "to excite his Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the state." Mr. Justice O'Halloran, speaking for the court, dismissed the appeal, concluding that this "good faith" clause did not apply because the appellant had clearly advocated behaviour that was unlawful.[49]

Another governmental response to radical Doukhobor resistance was an attempt to resocialize the Sons of Freedom children by plucking them from their families and incarcerating them in the town of New Denver. In the mid-1950s, the children of a Mr. and Mrs. Perepolkin were seized and held by the child welfare authorities because the parents had refused to send them to school. The Perepolkins took their case twice to the BCCA, partly on the grounds that the division of powers in the *BNA Act* prohibited provinces from interfering with religious freedom.[50] (There was some uncertainty during this period as to whether religion fell under federal or provincial jurisdiction.) In the second case, *Perepolkin v. Superintendent of Child Welfare*, the BCCA ruled that religious freedom was a federal matter but adopted a very narrow and illiberal conception of religious freedom, maintaining that only if the impugned legislation (in this case, s. 39 of British Columbia's *Protection of the Child Act*) was clearly intended to limit religious freedom would it be unconstitutional. Since the statute only limited religious freedom incidentally (for its primary purposes were child protection and education), it was held to

[49] *Rex v. Lebedoff*, [1950] 2 W.W.R. 899, at 899 (B.C.C.A.).

[50] *Perepolkin v. Superintendent of Child Welfare*, [1957] 21 W.W.R. 625 and 23 W.W.R. 592 (B.C.C.A.). See also John McLaren, "The State, Child Snatching and the Law: The Seizure and Indoctrination of Sons of Freedom Children in British Columbia, 1950-1960" in John McLaren, Robert Menzies, and Dorothy E. Chunn, eds., *Regulating Lives: Historical Essays on the State, Society, the Individual and the Law* (Vancouver: UBC Press, 2002) 259-93 at 273-77.

be constitutional, and the Perepolkins were unable to pry their children loose from the iron grip of the state.

Nevertheless, attitudes about minorities were beginning to change as Canada's "rights revolution" developed in the 1940s and 1950s.[51] Increasingly cognizant of the horrors of Nazi racial policies, influenced also by the development of international human rights law, and in some instances embarrassed at Canada's wartime authoritarian policies as well as by its shameful treatment of Japanese Canadians, people started to talk less about "British liberties" and more about racial or religious equality.[52]

Canadians were also affected by underlying demographic and economic shifts that produced a more urban, well-educated, and financially secure population. Industrialized societies that provide a lengthy period of economic growth and stability become increasingly attracted to "post-materialist values" such as democracy, feminism, environmentalism, and human rights. At the same time, moreover, Canadian values were shifting from classical liberalism to reform liberalism – less emphasis on property rights and negative freedom, more emphasis on human rights and positive freedom. The country was developing into a welfare state, and administrative law was becoming increasingly important. [53]

These value shifts were gradually changing British Columbia's legislative landscape. The state began not only to maximize citizens' freedom by refraining from racial discrimination but also provided some protection from both state and public prejudices. By the late 1940s, British Columbia had eliminated its legal restrictions on the rights of its Asians (as well as enfranchising its First Nations population).[54] It then passed its first anti-discrimination legislation in the 1950s, thereby significantly expanding the scope of civil liberties.[55]

The first of these changes reduced the chance of any further Asian egalitarian rights cases coming before the BCCA. The second change

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[51] Michael Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000). Lambertson, *Repression and Resistance*, "Conclusion."

[52] Lambertson, *Repression and Resistance*, 16, 376.

[53] Ronald Inglehart, *Culture Shift in Advanced Industrial Society* (Princeton: Princeton University Press, 1990). For an application of this approach to Canada, analyzing the years 1981 to 1990, see Neil Nevitte, *The Decline of Deference; Canadian Value Change in Cross-Cultural Perspective* (Peterborough: Broadview Press, 1996).

[54] Carol F. Lee, "The Road to Enfranchisement: Chinese and Japanese in British Columbia," *BC Studies* 30 (Summer 1976): 44-76.

[55] British Columbia's *Fair Employment Practices Act* was S.B.C. 1956, c. 16, its equal pay legislation was S.B.C. 1953 (2d Sess.), c. 6, and its *Public Accommodation Practices Act* was S.B.C. 1961, c. 50. See Walter Surma Tarnopolsky, *Discrimination and the Law in Canada* (Toronto: Richard De Boo, 1982), chap. 2; Donald George Anderson, "The Development of Human Rights Protection in British Columbia," (MA thesis, University of Victoria, 1986), 4-6.

meant that, in the long run, there would be a completely new set of legal issues to resolve. As the concept of "civil liberties" broadened, future cases would involve not just disputes between citizens and the state but also disputes between citizens themselves.

THE BILL OF RIGHTS ERA (1960-82)

The years between 1960 and 1982 were quite different from the earlier period as Canadians were increasingly drawn to postmaterialist values, including human rights. This was reinforced by the example of the American Civil Rights Movement in the 1950s and early 1960s.[56] As a result, the province moved incrementally from limited anti-discrimination statutes to a comprehensive *Human Rights Act*.[57]

Ottawa also made some important changes to the *Criminal Code*. In 1969, the government of Pierre Trudeau not only liberalized the abortion law (although the new law was far from being a "pro-choice" statute) but also decriminalized homosexual behaviour, a reflection of his famous civil libertarian statement that the state has no business in the bedrooms of the nation.

Also, beginning in the 1960s, there emerged a host of "new social movements," including "second generation" civil libertarian organizations and egalitarian human rights groups.[58] These included the BC Civil Liberties Association, which became the most significant rights organization in the province, focusing primarily upon traditional civil liberties but also accepting anti-discrimination legislation. New egalitarian rights groups soon included the BC Human Rights Coalition as well as certain national organizations such as COPOH (fighting for the rights of the physically disabled), LEAF (a feminist organization specializing in legal issues), and EGALE (at first promoting the rights of gays and lesbians and now in addition other forms of sex/gender identification). Over time, these groups and others helped to bring a variety of cases before the BCCA.[59]

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[56] Clément, *Canada's Rights Revolution*, 4-5; Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (Toronto: University of Toronto Press, 1977) 45-49.

[57] *Human Rights Act,* S.B.C. 1969, c. 10.

[58] For discussions of "new social movements" and civil liberties see Clément, *Canada's Rights Revolution*; Smith, *Lesbian and Gay Rights in Canada*.

[59] COPOH stands for the Coalition of Provincial Organizations of the Handicapped; LEAF is the Women's Legal Education and Action Fund; EGALE originally stood for Equality for Gays and Lesbians Everywhere. For a discussion of these early years, see Clément, *Canada's Rights Revolution*, and "Rights in the Age of Protest: A History of the Human Rights and Civil Liberties Movement in Canada, 1962-1983" (PhD. diss., Memorial University, Newfoundland,

A number of cases in the 1960s and early 1970s reflected the political activism of the new social movements as well as the tension between new and traditional social values. For example, the BC Civil Liberties Association, originally formed primarily in response to the province's treatment of Doukhobors, took aim at local authorities who were appalled by the new ethos of sex, drugs, and rock and roll. One case involved a *Criminal Code* charge of obscenity directed at a play called *The Beard* (which portrayed simulated cunnilingus); the BCCA directed that there should be a new trial, concluding that the lower court judge had erred by holding that a play was a "publication" in the sense meant by the *Criminal Code* obscenity provisions.[60]

The winds of sexual freedom, moreover, were stirring more than heterosexual libidos. In the early 1970s, an organization called Gay Alliance towards Equality (GATE) attempted to have the provincial human rights law amended to protect gays and lesbians. The NDP government refused but did ensure that the revised legislation prohibited discrimination for "no reasonable cause." GATE then proceeded to test this by submitting to the *Vancouver Sun* newspaper a classified advertisement offering subscriptions to *Gay Tide*, a "gay lib paper." The *Sun* refused and the result was a legal challenge.[61] However, Justice Angelo Branca, one of the more colourful judges of the BCCA, who was normally considered to be a liberal but also had some socially conservative values, concluded for the majority of the BCCA that such discrimination was perfectly reasonable, given the *Sun*'s policy on "decency" and the widespread belief that homosexuality was immoral.[62]

The year 1960 is also a convenient demarcation point because Parliament at that time passed a *Bill of Rights* intended to limit the federal government's power to abridge fundamental civil liberties. The first BCCA

2005). See also Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: UBC Press, 2004).

[60] *Regina v. Small* et al. [1973] 4 W.W.W. 563. See also *Regina v. McLeod and Georgia Straight Publishing Ltd.* [1970] 75 W.W.W. 161, involving an appeal by the editor of the *Georgia Straight*, a controversial "hippie" Vancouver newspaper. He had published an article called "Plant Your Seeds," about the growing of marijuana, and was convicted of counselling the commission of an indictable offence. The BCCA ruled that the evidence was not sufficient to convict. See Chapter 5 of Clément, *Canada's Rights Revolution*, for the background of these cases.

[61] *The Vancouver Sun v. Gay Alliance Toward Equality*, [1977] 5 W.W.R. 198 (B.C.C.A.). Smith discusses the GATE case at 53-55 of *Lesbian and Gay Rights in Canada*. The Supreme Court of Canada ruled on appeal that the *Sun* could refuse to print the advertisement because of the principle of press freedom; *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435.

[62] As is the case with lawyers, space considerations preclude much discussion of individual judges. But it is worth noting that Branca was a staunch member of the Catholic Italian-Canadian community in Vancouver. See Vincent Moore, *Angelo Branca: "Gladiator of the Courts"* (Vancouver: Douglas and McIntyre, 1981).

case touching on the *Bill of Rights* was *Koss v. Konn*, decided in 1961.[63] This dispute involved a building contractor who had been picketed by a trade unionist carrying a sign saying "non-union men working here." On the basis of the BC *Trade Union Act*, which set out the conditions of picketing, the plaintiff obtained an interim injunction against what seemed to be an illegal picket. This case is discussed elsewhere in this issue for its significance in industrial relations law, but it is worth noting here that one of the key points of the case was whether or not the legislative prohibition against picketing was an ultra vires restriction on free speech. The majority ruled that it was not, but the minority decision of Mr. Justice Norris utilized not only the 1960 *Bill of Rights* but also the so-called "implied bill of rights" argument.

The crux of the matter for Norris was that the *Trade Union Act* prohibited protest by a trade union "or other person." He argued that, because this latter phrase limited not only trade union activists but also the general public, the prohibition was ultra vires the province. To reach this conclusion he relied, first, upon an argument in favour of free speech that had been suggested by two SCC judges in the 1930s (although never accepted by a majority of the court).[64] This "implied bill of rights" argument claimed that, because the *BNA Act* refers to "a Constitution similar in principle to that of the United Kingdom," freedom of speech is to some degree constitutionally protected because without free speech no British-style parliamentary body can operate. In addition, Norris argued that the 1960 *Bill of Rights* (notwithstanding that it only constrains the federal government) "recognizes, as fundamental throughout Canada, the freedom which, in my opinion, would be destroyed on the interpretation [of the BC legislation] for which counsel for the attorney-general contends."[65] In short, unlike his fellow judges, Norris was sufficiently committed to free speech values to engage in some creative liberal judicial policy making.

The major BCCA case involving the 1960 *Bill of Rights* was *Regina v. Gonzales*, in which a Native person appealed his conviction under the federal *Indian Act* for "being unlawfully in possession of an intoxicant off an Indian reserve." Despite the best efforts of his neophyte lawyer, Thomas R. Berger, the BCCA unanimously dismissed the appeal in 1962, with Justice Tysoe pointing out that equality before the law (guaranteed in the *Bill of Rights*) meant only that a law should be "applied equally and

[63] [1961] 36 W.W.R. 100 (B.C.C.A.).
[64] *Reference re Alberta Legislation*, [1938] S.C.R. 100, at 132-5 and 145-6.
[65] *Koss v. Konn*, 116.

without fear or favour to all persons to whom it relates or extends."[66] The BCCA assumed that "equality" was more a procedural than a substantive concept.

This narrow reading was overturned in 1970 when the SCC invalidated the same portion of the *Indian Act* in the *Drybones* case. However, in 1973, the Supreme Court retreated from this judicial activism, signalling that the *Bill of Rights* should not be used to invalidate legislation.[67] The document now provided only limited scope for the judicial protection of civil liberties. For example, the BCCA could still "construe and apply" a statute so that it did not conflict with the *Bill of Rights*, as when, in one early case, it decided that the vagrancy law against prostitutes did not constitute sex discrimination. The court could also strike down or nullify administrative policies or decisions, or overrule decisions of trial judges (such as a case in which a judge had not given the accused a realistic opportunity to obtain a new lawyer after his original counsel had withdrawn).[68]

Apart from the *Bill of Rights*, the BCCA dealt with a number of other legal matters involving civil liberties. For example, in the early 1960s, British Columbia had far more cases resulting in "preventive detention" than any other province. The law, a 1947 amendment to the *Criminal Code* that lasted thirty years before it was repealed, essentially permitted the state to ask that the courts condemn to life in prison any person who had been found a habitual criminal. A number of appeals then ended up before the BCCA. These cases illustrate an important point – that the workload of the courts is determined not just by the resistance of those believing themselves to be oppressed but also (when the criminal law is involved) by the exercise of prosecutorial discretion. Moreover, civil libertarian lawyers can also act as "gatekeepers." The plethora of "preventive detention" cases at the trial level was the result of the zealous efforts of Vancouver city prosecutor Stewart McMorran, but some of the BCCA appeals would not have taken place without the efforts of local lawyer Tom Berger, who maintained that the law was "a startling departure from established concepts of criminal justice."[69]

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[66] *Regina v. Gonzales*, [1962] 37 W.W.R. 257 (B.C.C.A.) at 264. For information about Berger's career as a civil libertarian lawyer, including his role in the *Gonzalez* case, see his autobiography, *One Man's Justice: A Life in the Law* (Vancouver: Douglas and McIntyre, 2002).

[67] *R. v. Drybones*, [1970] S.C.R. 282; *Attorney General for Canada v. Lavell, Isaac et al. v. Bedard*, (1973) D.L.R. (3rd) 481 (S.C.C.).

[68] *Regina v. Lavoie*, [1971] 5 W.W.R. 472 (B.C.C.A.); *Regina v. Johnson*, [1973] 3 W.W.R. 513 (B.C.C.A.).

[69] Berger, *One Man's Justice,* Chapter 1, quotation at 14.

Much better known is the case of *Vander Zalm v. Bierman*, which involved judicial interpretation of the common law in a private law defamation suit. This raised an important freedom of expression issue because a provincial minister of human resources, Bill Vander Zalm, was suing both a local cartoonist, Bob Bierman, and the Victoria *Daily Times* newspaper, for a cartoon that showed Vander Zalm, known for his insensitivity towards people on welfare and Native people, picking the wings off flies. Writing for the majority, Chief Justice Nathan Nemetz, a former civil libertarian remembered as "a tolerant and generous judge," ruled that the cartoon was either not defamatory or, if so, well within the boundaries of fair comment. Vander Zalm declined to appeal, and political cartoonists as well as newspaper editors across Canada breathed a little more easily.[70]

The division of powers question also resurfaced from time to time. In the *Schneider* case, a challenge to a BC statute that would have permitted the involuntary treatment of heroin addicts, the BC Civil Liberties Association persuaded the Supreme Court of British Columbia in 1979 that the legislation was unconstitutional because it interfered with federal jurisdiction over criminal law. The BCCA, however, unanimously reversed the decision and was upheld by the SCC. When it came to heroin addicts, there was no legal protection of personal freedom.[71]

Finally, the "clear statement" technique still provided opportunities for the protection of civil liberties. In 1976, in *Regina v. Hutt,* the BCCA was asked to decide whether or not a prostitute had been "soliciting" in a public place and was therefore in violation of the *Criminal Code*. At the time, the case law was clear that "soliciting" had to involve not just words or gestures that indicated an offer of sexual commerce but also "something-in-addition." A broad interpretation of what the latter might mean would have included behaviour that was not necessarily a nuisance, such as a woman identifying herself as a prostitute and/or answering questions about what acts she was willing to perform. A narrower interpretation would have prohibited only behaviour that was more likely to constitute a public nuisance. The BCCA upheld Hutt's con-

[70] *Vander Zalm v. Times Publishers (B.C.)*, [1980] 4 W.W.R. 259 (B.C.C.A.); Lambertson, *Repression and Resistance*, 97; Jack Batten, *Judges* (Toronto: Macmillan, 1986), 212, 215.

[71] *Schneider v. The Queen* (B.C.), [1979] 49 C.C.C. (2d) 129 (B.C.S.C.); *Schneider v. The Queen* (B.C.), [1980] 52 C.C.C. (2d) 321 (B.C.C.A.); *Schneider v. The Queen*, [1982] 68 C.C.C. (2d) 449 (S.C.C.). See Clément, *Canada's Rights Revolution*, 79-85. The BC government, however, never implemented its controversial legislation.

viction, leaning towards the broad interpretation of the term "soliciting" and thereby favouring social order over individual freedom.[72]

THE CHARTER ERA (1982 ONWARDS)

The year 1982 is a watershed for civil liberties in Canada largely because of the *Charter of Rights and Freedoms*, which not only lists our most important civil liberties but also is part of a constitutional package that provides a green light for judges to strike down legislation violating basic rights. At the same time, however, it protects these rights in terms that are sometimes extremely vague – "limp balloons" into which the judges must blow air. This has granted enormous policy-making powers to the Canadian judiciary as well as providing an invitation to judicial activism. As the political scientist Peter Russell predicted, the *Charter* has tended "to judicialize politics and politicize the judiciary."[73]

Of course, the notion that judges are not simply "law finders" but also to some degree "policy makers" – political actors who inevitably make policy choices, and who must often choose between judicial activism and judicial restraint – did not burst forth full-blown from the brow of Pierre Trudeau in 1982. The transformation began much earlier when Canadian legal scholars studying in the United States were exposed to "legal realism" and liberal judicial activism.[74]

A number of significant government policies also changed the judiciary. In the 1970s, Ottawa gave the SCC almost complete control over which cases it would hear and then initiated the Court Challenges Program to offer financial support for groups challenging restrictive provincial language legislation (and, in 1985, challenging violations of the *Charter*'s equality provisions). While the program was in effect (it was later cut by the Conservatives, reintroduced by the Liberals, and then eliminated again by Stephen Harper's Conservatives), it assisted a number of advocacy groups and, in conjunction with government core

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[72] *Regina v. Hutt*, [1976] 4 W.W.R. 690; *Hutt v. The Queen*, [1978] 2 W.W.R. 247. A more liberal Supreme Court of Canada overturned the decision two years later, maintaining that a conviction for soliciting could be upheld only if the prostitute's behaviour was "pressing and persistent" and contributed to public inconvenience. This decision was considered by some to be a major cause of the subsequent explosion of public prostitution in Canada.

[73] Peter H. Russell, "Canada's Charter of Rights and Freedoms: A Political Report," *Public Law* (Autumn 1988), 395, and "The Political Purposes of the Canadian Charter of Rights and Freedoms," (1983) 61 *Canadian Bar Review*, 30-54, at 51-52.

[74] Peter H. Russell, "Overcoming Legal Formalism: The Treatment of the Constitution, the Courts and Judicial Behavior in Canadian Political Science," *Canadian Journal of Law and Society* 1 (1986): 5-33, at 11; Morton, *Law, Politics*, Chapter 2; Greene, et al., *Final Appeal*, "Introduction," and 181.

funding for certain groups, expanded the number of civil liberties cases coming before the Canadian judicial system.[75]

Greater social diversity in the appointment of judges no doubt also affected judicial decision making; a more heterogeneous court is likely to be more liberal, at least where egalitarian civil liberties are concerned.[76] For the BCCA, a small crack in the fortress of Anglo-Celtic membership took place in 1966 with the appointment of an Italian-Canadian, Angelo Branca, and a much larger fissure opened up with the appointment in 1968 of the court's first Jewish justice, Nathan Nemetz. It was only in 1985, however, that Ottawa began appointing women to the court, beginning with Madam Justice Beverley McLachlin, now Canada's chief justice. The first "visible ethnic minority" justice, Wally Oppal, was appointed it 2003.[77]

The SCC itself facilitated the transformation from judicial law-finding to policy making. In the 1970s, the court expanded the concept of standing, thereby making it easier for public issues to be brought before the courts.[78] In addition, it made it easier for organizations to seek intervener status, which indicated to advocacy groups that "lobbying" the judiciary could be a useful alternative to traditional political activities. All this expanded the civil libertarian workload of the courts in general, including that of the BCCA.[79]

Of course, there were other reasons for the post-1982 increase in civil liberties cases. First, the evolution of the welfare state produced many new statutory protections for civil liberties in the province of British

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[75] F.L. Morton, Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: The Broadview Press, 2000), Chapter 4; Ian Brodie, "Interest Group Litigation and the Embedded State: Canada's Court Challenges Program," *Canadian Journal of Political Science* 34 (2001): 357-76. For a discussion of the importance of federal core funding for advocacy group litigation, see Smith, *Lesbian and Gay Rights in Canada*, 87, 145.

[76] Evidence on the impact of ethnic diversity in appellate courts is scanty, however. See Greene, et al., *Final Appeal*, 33.

[77] Allan McEachern, "The Court of Appeal for British Columbia: Appeal Judges I have Known, 1951-2006," 31, 46.

[78] Morton, *Law, Politics*, Chapter 6. According to David Beatty, in *Talking Heads and the Supremes* (Toronto: Carswell, 1990), Canada's standing rules are "very liberal" and "amongst the most accommodating in the world" (277). Prior to the *Schneider* case, the BC Civil Liberties Association attempted on three different occasions to challenge the BC heroin treatment law. Because of the restrictions on standing the BCCLA president was unable to launch a case under his name, and therefore had to engage in a subterfuge, finding an addicted person (Brenda Schneider) in whose name the case could be taken. See James Dybikowski [BCCLA President], "Statement of Claim" in the Supreme Court of British Columbia, *Dybikowski v. The Queen (B.C.),* 18 October 1978 [BCCLA files].

[79] Morton, *Law, Politics*, Chapters 6 and 7. The BCCA ruled that the courts of the province "should welcome" interveners in Charter cases. *Canadian Labour Congress v. Bhindi and London* (1985) 61 B.C.L.R. 85 at 97.

Columbia. The *Police Act*, with its provisions for civilian complaints, is one example; another is the provincial *Privacy Act*, and yet another is the *Ombudsman Act*.[80]

Second, the *Charter* did not replace most of the earlier protections but, rather, simply added a new layer of protection – albeit a much stronger one. It is true that, except for the guarantee of property rights and the right to a fair hearing (both of which go further than the protections of the *Charter*), the 1960 *Bill of Rights* has been largely rendered redundant. Also, the "implied bill of rights" argument, which never managed to inflame the passions of a majority of judges on the SCC, has by now been rendered largely moribund. With these exceptions, most of the earlier pre-*Charter* "tools" for the protection of civil liberties still exist.

For example, it is still possible to challenge any governmental decision on the grounds that the decision-maker acted outside its jurisdiction. Thus, in 1998, the BCCA used administrative law to determine that the BC College of Teachers had no jurisdiction to refuse accreditation to a Christian university education program that allegedly might produce anti-gay teachers.[81] Similarly, in 2000, the BCCA held that a school board had no right under the *School Act* to refuse approval of supplementary kindergarten and Grade 1 learning resources depicting families with same-sex parents.[82] Then, in 2005, the BCCA ruled that a panel of the BC College of Teachers had not made an error of procedural unfairness in determining that a teaching certificate should be temporarily suspended because of a teacher's public anti-gay comments.[83]

Of course, the courts can still use the "division of powers technique" to strike down laws abridging civil liberties. In 2000 the BCCA had the option of snuffing out the federal marijuana law but instead ruled that it was constitutional, a matter of criminal law rather than health, and therefore falling under federal jurisdiction.[84]

Nor did the *Charter* replace anti-discrimination legislation; the former imposes constitutional limitations on governments, while the

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[80] *Police Act*, R.S.B.C. 1996, Chapter 367; *Privacy Act,* R.S.B.C. 1996, Chapter 373; *Ombudsman Act*, R.S.B.C. 1996, Chapter 340. Pertinent cases include: *Berg v. Police Complaint Commissioner,* [2006] BCCA 225; *Fahlman, by his guardian ad litem Fiona Gow v. Community Living British Columbia et al.* [2007] BCCA 15; *R. v. Donato,* [2007] BCCA 564.

[81] *Trinity Western University v. B.C. College of Teachers,* [1999] 7 W.W.R. 71 (B.C.C.A.).

[82] *Chamberlain v. Surrey School District,* [2000] 10 W.W.R. 393 (B.C.C.A.). Chamberlain was represented by the ubiquitous civil libertarian lawyer Joseph Arvay, who has taken part in at least eight of the cases mentioned in this essay. For information on Arvay's achievements, see http://www.arvayfinlay.com/lawyers/j-arvay.htm (viewed 16 July 2009).

[83] *Kempling v. British Columbia College of Teachers*, [2005] BCCA 327.

[84] *R. v. Malmo-Levine*, [2000] BCCA 335.

latter places restraints on both governments and private citizens.[85] Consequently, since 1982 the BCCA has decided a number of cases dealing with the province's anti-discrimination statute (the name of which has changed several times as the government of the province shifted back and forth between left and right). Some of these cases involved jurisdictional administrative law issues rather than substantive rights. In 2001, for example, the court held that a human rights tribunal could make a decision as to the constitutionality of a section of the BC *Human Rights Code* that prohibited speech likely to expose a person or group of persons to hatred, and, in 2007, it ruled that a tribunal did not have jurisdiction to hear a case involving discrimination against women in a golf club.[86] Most cases, however, result from ambiguities in the statute's substantive protections. For example, in 2005, the BCCA determined that a person harassed in school for being a "fag" had suffered discrimination on the basis of sexual orientation even though he was heterosexual.[87]

Such cases often reflect the divisive moral problems of our times, usually involving sex or gender rather than race. Partly because the particular details are relatively new, there are many aspects of the law open to interpretation and more likely to reach the appellate level. But they are also controversial because they are new and, therefore, garner more interest than "ordinary" cases of racial discrimination. Consider, for example, the case where a post-operative male-to-female transsexual wanted to work as a volunteer in a woman's transition house. The BCCA decided that a refusal to allow her to do so did not constitute discrimination under the provincial legislation.[88]

Since 1982, however, most civil liberties cases have involved the *Charter*. Because they are so recent, and much has been written about many of them, the rest of this discussion simply touches upon some of the most important BCCA rulings.

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[85] The Supreme Court of Canada has ruled that anti-discrimination statutes have quasi-constitutional status and must conform to the equality provisions of the Charter. See, for example: *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 and *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

[86] *Collins v. Abrams*, [2001] BCCA 22; *Marine Drive Golf Club v. Buntain et al. and B.C. Human Rights Tribunal,* [2007] BCCA 17. (The legislation does not apply to "private" organizations, and the BCCA ruled that the golf club fell into this category.) Note also the controversial case involving "BDSM lifestyle" (bondage and discipline, domination and submission, sadism and masochism), in which the BCCA had to rule on the procedure followed by the human rights tribunal: *Barker v. Hayes*, [2008] BCCA 148.

[87] *School District No. 44 (North Vancouver) v. Jubran,* [2005] BCCA 201.

[88] *Vancouver Rape Relief Society v. Nixon*, [2005] BCCA 601. On 1 February, 2007, the SCC denied leave to appeal the case.

The BCCA has dealt with a number of procedural *Charter* issues. For example, the court determined that excessive delay in processing a sexual harassment complaint under the provincial anti-discrimination statute improperly violated a person's right to "life, liberty and security of the person" in s. 7 of the Charter."[89] It also held, in what can be seen as an example of liberal judicial activism, that an "absolute liability" section of the BC *Motor Vehicle Act* was an unjustifiable violation of a driver's s. 7 rights.[90]

On other s. 7 cases, however, the court has been relatively restrained. For example, in 1993, it concluded that a terminally ill patient had no right under the *Charter* to "physician-assisted" suicide, despite s. 7, and it refused, in 2000, to strike down the criminal law on marijuana, ruling that it did not unreasonably violate s. 7.[91]

The BCCA has perhaps been most liberal when it comes to freedom of speech. In 1999 the court ruled that part of the criminal law provisions prohibiting child pornography constituted an unreasonable violation of the s. 2 right of free expression, and in 2006 it struck down a Vancouver transit policy that prohibited political or controversial advertising. Then, in the spring of 2009, just before the provincial election, it refused the attorney general's request to stay a lower court order that had found a law limiting election expenses to be contrary to the *Charter* right of freedom of expression. It also supported free speech that same year in a case involving a Vancouver lawyer who had been arrested and strip-searched by the police because he had been involved in a public protest against the prime minister of Canada; the BCCA upheld a lower court ruling that the lawyer was entitled to damages on the grounds that the police had infringed his s. 8 *Charter* right of security against unreasonable searches.[92] On the other hand, in 1998, it held that the Canada Customs anti-obscenity policy being applied to a gay and lesbian bookstore was

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[89] *Blencoe v. British Columbia (Human Rights Commission)*, [1998] 9 W.W.R. 457 (B.C.C.A.).

[90] *Reference Re s. 94(2) of Motor Vehicle Act*, [1983] 42 B.C.L.R. 364 (C.A.). The statute had determined that a person would be guilty of driving without a valid licence, and therefore subject to a mandatory term of imprisonment, even if he had never received notification of his suspension.

[91] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 W.W.R. 553 (B.C.C.A.); *R. v. Malmo-Levine*, [2000] BCCA 335.

[92] *R. v. Sharpe*, [1999] BCCA 416; *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, [2006] BCCA 529; *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2009 BCCA 156; *Ward v. British Columbia*, [2009] BCCA 23. According to the BCCLA, which had intervened in this case, "This is the first appellate-level ruling that a person whose constitutional rights are violated by the state can be awarded monetary damages even if the government did not intentionally or willfully violate the person's rights." http://www.bccla.org/pressreleases/09Ward.pdf (viewed 16 July 2009).

not an unreasonable limit of freedom of expression, and it also limited freedom of expression in 2008, when, in a groundbreaking decision, it upheld the validity of the so-called "bubble zone" legislation prohibiting protests in the areas surrounding abortion clinics.[93]

When it comes to trade unions, the BCCA has been more than parsimonious in its treatment of libertarian rights. For example, it has held that neither secondary picketing nor picketing a court house is protected under the s. 2 *Charter* rights to freedom of expression and association.[94] It also ruled that, when the province cancelled the collective agreements of health care workers, although the law affected the union's collective bargaining strength, it did not violate its *Charter* right to freedom of association.[95]

As for the s. 15 equality rights of the *Charter*, the BCCA has not been very activist. True, an early ruling held that a refusal to admit a person to the provincial bar because he was not a citizen unreasonably violated the *Charter*, but when the SCC upheld this decision it was on the basis of a far more progressive "substantive equality" interpretation of s. 15.[96] Moreover, in another early ruling the BCCA upheld a section of the BC *Child Support and Paternity Act* that compelled fathers, but not mothers, to pay for child maintenance;[97] and, in a much later case involving the above-mentioned Canada Customs anti-obscenity policy, it ruled that the government censorship was not an unreasonable violation of the equality rights of gays and lesbians.

The BCCA has also been reluctant to use s. 15 as a lever to pry open the coffers of the provincial government for the disabled; it refused to strike down both a BC health plan denying deaf persons access to paid interpreters and a provincial social policy denying special education as-

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[93] *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [1998] 54 B.C.L.R. (3d) 306 (C.A.); *R. v. Spratt,* [2008] BCCA 340. Interestingly, the BCCLA intervened to support the bubble zone rather than the principle of freedom of speech. It was opposed by a number of free speech interveners, such as Canadian Nurses for Life, and the Canadian Religious Freedom Alliance, which saw this as a human rights "right to life" case.

[94] *Dolphin Delivery*, [1984] 3 W.W.R. 481 (B.C.C.A.); *Re British Columbia Government Employees' Union*, [1985] 5 W.W.R. 421 (B.C.C.A.).

[95] *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2004] 30 B.C.L.R. (4th) 219 (C.A.). This is also known as the Bill 29 case.

[96] *Andrews v. Law Soc. of B.C.*, [1986] 4 W.W.R. 242. See MacIvor, *Canadian Politics and Government*, 342-44.

[97] *Shewchuk v. Richard*, [1985] W.W.W. 6, 427. This was a case in which LEAF intervened; the organization was pleased that the law was upheld, but disappointed that the court did not extend the obligations of the statute to women as a way of eroding traditional attitudes about male and female roles. See Sherene Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991), 87-89.

sistance to autistic disabled children.[98] On the other hand, in 2003, it was the first provincial appellate court in Canada to decide that the common law rule limiting marriage to opposite-sex couples was an unreasonable violation of s. 15; in 2008, it held that a federal program giving three Aboriginal bands a special right to fish and sell their catch was not an unjustifiable violation of the racial equality protection of the *Charter*; and, in 2009, it decided that Ottawa must respect the equality rights of certain Aboriginal women who had married non-Aboriginal men.[99]

Charter policy making has not just turned an academic spotlight on the court but has also made it subject to increased public scrutiny. Furthermore, this has not always been positive. For example, in the *Sharpe* case, involving the child pornography provisions of the *Criminal Code*, the BC Supreme Court first, and then the BCCA, took a principled civil libertarian stand in favour of freedom of expression under the *Charter*, ruling that, although it was generally permissible to prohibit child pornography, the federal government had gone too far when it criminalized certain behaviour that most people would find deviant but was nevertheless not dangerous to society. This approach pleased the BC Civil Liberties Association, but it horrified many Canadians. In handing down the decision, Madam Justice Southin of the BCCA felt compelled to deplore media commentators who "conjured up in their minds … the spectre of a judge giving judicial approval to the sexual exploitation of the prepubescent."[100]

Indeed, the *Sharpe* case highlights a larger debate. Some academics, especially the political scientists F.L. Morton and Rainer Knopff, argue that the courts (especially the SCC) have succumbed to the blandishments of an informal collection of revolutionary left-wing advocacy groups, lawyers, and law professors who use the *Charter* to move Canada further and further towards postmaterialist values.[101] The right-wing press saw the BCCA's *Sharpe* decision as a classic example of this deplorable judicial activism, suggesting in one instance that judicial "revolutionaries" were once again helping to change Canadian sexual morality "whereby yes-

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[98] *Eldridge v. British Columbia (Attorney General)*, [1995] 7 B.C.L.R. (3d) 156 (C.A.); *Auton v. British Columbia (Attorney General)*, [2002] BCCA 538.

[99] *Barbeau v. British Columbia (Attorney General)*, [2003] BCCA 251; *R. v. Kapp*, [2006] BCCA 277; *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, [2009] BCCA 153.

[100] *Sharpe*, paragraph 5.

[101] Morton and Knopff, *The Charter Revolution*, 78-80. See also Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Toronto: Oxford University Press, 2001).

terday's abomination becomes today's lifestyle and tomorrow's hallowed and legally safeguarded idiosyncrasy."[102]

Yet others, on the left, suggest that, for a number of reasons, *Charter* litigation frequently does not produce social justice. Law professor Joel Bakan, for example, admits that "Charter litigation can get results … where social injustice is congruent with the liberal form of rights (where it involves discrete state acts of oppression or discrimination)," but he maintains that "the processes that produce unequal patterns of power among people in the first place are beyond its grasp."[103]

On the other hand, the political scientist Ian Greene suggests that: "The fact that academics from the right and the left are critical of the judiciary for failing to adopt their particular perspectives may be an indication that the judiciary is doing a good job of steering a middle course."[104] Moreover, another political scientist, Miriam Smith, launched an impressive attack on the so-called Court Party thesis of Morton and Knopff, arguing, among other things, that our courts are probably reflecting a slow social transformation towards postmaterialism rather than acting as the vanguard of a revolution.[105] The role of the BCCA in *Sharpe*, while clearly shocking to some people, can easily be understood in these terms – a little ahead of the wave but not so far as to lose touch with it.[106]

CONCLUSION

As mentioned earlier, this article attempts to answer five questions involving the civil libertarian history of the BCCA. First, what were the judicial "tools" available for protecting civil liberties and how did they change over time? Initially, there were almost no specifically-mentioned constitutional rights, and common law liberties were often swamped

[102] Ted Byfield, "Anatomy of a Revolution," *Alberta Report*, 12 July 1999, 52.

[103] Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), 143. See also Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thompson, 1989).

[104] Greene, *The Courts*, 110.

[105] Miriam Smith, "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science," *Canadian Journal of Political Science* 35 (2002): 3-29, at 16. See also the counter-arguments of Knopff and Morton, and Smith's response, in the same issue, at 31-42 and 43-48.

[106] Admittedly, the SCC allowed the appeal in *Sharpe*, and ordered a new trial. However, its conclusion that certain forms of child pornography are permissible cannot be seen as a complete repudiation of the BCCA decision. In fact, on several occasions the Supreme Court has proven to be more liberal or progressive than the BCCA. See, for example, the *Bill 29* case [2007] 2 S.C.R. 391, and *Eldridge v. British Columbia (Attorney General)*, [1995] 7 B.C.L.R. (3d) 156 (C.A).

by the principle of parliamentary supremacy. Today, by contrast, the court now can employ the not entirely superseded 1960 *Bill of Rights*, provincial and federal anti-discrimination laws, specific statutes such as the provincial *Police Act*, *Privacy Act*, or *Ombudsman Act*, and, of course, the paradigm-shifting *Charter of Rights and Freedoms*.

Second, how did these changes reflect changes in the values of society? In the early years, racism was "common sense" and a commitment to "British liberties" was often overwhelmed by fears of radicalism; however, more recently, Canadians have become far more tolerant of ethnic diversity and political dissent. This is partly reflected in the passage of anti-discrimination legislation that goes much further than anything envisaged in the 1950s when reform liberal ideas started to take hold. For example, protection for gays and lesbians, transgendered individuals, and different disabilities are today generally accepted by most citizens. True, events like 11 September 2001 have generated new sets of fears, but Canadians' anxiety levels remain relatively low, both in British Columbia and outside the province, and their commitment to the *Charter* is strong.[107]

Third, how did these changing social patterns also affect the values of the BCCA? Initially, when the early judges were faced with discretionary choices in interpreting the law, they were usually – with some exceptions – as racist and authoritarian as most Canadians. They were also relatively restrained when it came to making new law. Today, although they occasionally warm the cockles of civil libertarian activists' hearts, they are still far from being the source of revolutionary new ideas. Like most Canadians, the BCCA is moderately liberal but certainly not radical. In short, it rides the wave of postmaterialist values that continues to change Canadian society.

Fourth, to what extent was the civil libertarian workload of the BCCA the result of advocacy group activity? Some of the earliest cases involved individuals acting alone, while in other instances the litigation took place because of group support. Over time, several changes in Canadian political culture and political institutions made it easier for advocacy groups (often helped by civil libertarian lawyers) to resist perceived injustice through litigation. Most of the later cases were therefore not just the product of some historical evolutionary process but, rather, were directly the result of collective struggles – necessitating large financial

[107] Don Butler, "Charter a Hit with Most Canadians: Poll," *Victoria Times Colonist*, 15 April 2007.

outlays, considerable organization, a fair amount of research and planning, as well as a high degree of either optimism or desperation.

Fifth, how did institutional and social factors funnel cases into the court system and the BCCA? Anyone familiar with the history of British Columbia will realize that there are many civil libertarian issues not touched in this article. There must have been innumerable private violations that, years ago, never became public issues let alone court cases. The 1933 decision by the BC government to engage in a policy of involuntary sterilization of the "feeble minded" is one obvious example. Another is the criminalization of homosexual behaviour, a policy that ruined many people's lives but that, for most of the twentieth century, was not widely seen as a civil liberties issue.

In addition, even when financial considerations and standing issues did not constitute barriers, and individuals or groups were able to take their cases to court, or were forced to appear because of prosecution, the trial courts often had the last word. Still, demographic changes, alterations in social values, new legal "tools" for courts and litigants, and increased "judicial lobbying" by new generations of activists have combined to send many more civil liberties cases to the BCCA.

Of course, as the mountain of case law and SCC precedents increases over the years, the policy-making role of the BCCA will diminish. But given the nature of law and the judicial process, with new issues creating new ambiguities, competing precedents, and the ever-present possibility of distinguishing or even overturning precedents, opportunities for the BCCA to engage in judicial policy making will never be reduced to zero. Overall, Canada and British Columbia are far more litigious now than they were in the past – and not just in the field of civil liberties. In addition, the social values of today will no doubt give way to new opinions about justice and rights. The BCCA will therefore continue to struggle with a large case load, including new and often ingenious questions about the meaning of civil liberties in a changing society.