

Do the "Haves" Still Come Out Ahead in Canada?

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In the past thirty years, a number of Canadian interest groups have launched American-style strategic, public interest litigation campaigns (Brodie 2002). Three interests - official language minority groups, feminists and homosexual rights groups - have been particularly successful at pursuing their objectives through the courts (Morton and Allen 2001). All three of these interests consider themselves traditionally "disadvantaged" groups in Canadian society, and so their success is puzzling. It appears to contradict the long-standing socio-legal thesis that the "haves" tend to do better than the "have nots" in litigation. We suggest a solution to this puzzle. Their success confirms the Galanter thesis that the "haves" tend to do better in court. However, the agenda that the "haves" pursue and the resources they deploy are not the agendas and resources Galanter had in mind twenty-five years ago. We suggest that these changes have come about because of two complementary trends, the process of value change in Canada and the work of the embedded state. We also suggest that, in Canada, centre-periphery politics must be considered when applying the Galanter thesis. In effect, although these three successful interests consider themselves "disadvantaged", they are now part of the "have" classes.

Galanter's Socio-Legal Studies Thesis

Marc Galanter's "speculations" on why the "haves" in society come out ahead in

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litigation are well known. His 1974 article set off a vigorous debate about how litigation can deliver social and political change. That debate continues today in the broader socio-legal studies literature.² Galanter suggested that the "haves" come out ahead because they are more likely to be "repeat players" in the court system. They have ample resources and these resources let them take a long-term view of litigation and acquire legal expertise more readily. They are more likely to "play the odds" over time and more willing to fight court cases with the potential to change the rules of the game. They are more likely to have informal relations with decision-makers in the court system and the legitimacy that comes with such informal relations. They are also more likely to develop reputations for skill or perseverance in court. The "have nots" in society, by contrast, are more likely to be "one-shot" litigators. The stakes in each case is relatively more important to a one-shotter, so they are more likely to settle out of court than fight for a powerful precedent. One-shotters have less access to specialized legal expertise. Galanter was careful not to claim that all "haves" are repeat players, nor that all "have nots" are one-shotters. However, over time, he suggested, those with the resources to be repeat players will likely do better.

Galanter's article was written at a time of optimism about liberal law reform efforts. American governments were expanding citizen entitlements, beefing up legal aid services and creating new civil and consumer protection rights (Grossman, Kritzer and Macaulay 1999). Although Galanter was wary of the prevalent spirit of optimism, he concluded his article hopefully. He suggested the kinds of reforms that would make the judicial process more useful as a tool for social change: specific rule changes, more judicial resources and increased government legal aid services. He also suggested aggregating one-shot players into repeat players through class action lawsuits, interest group litigation, and government offices dedicated to representing "have nots".

Needless to say, times have changed since Galanter set out his speculations. Galanter's reform agenda has been largely implemented in the US and Canada. The

² See, for example, the papers in the special issue of the Law & Society Review dedicated to the Galanter article (Vol. 33, No.4, 1999).

creation of new law schools, the expansion of old law schools, the diversification of the law student population and the emergence of new categories of "quasi-lawyers" have all diffused legal knowledge in both countries (Epp 1999: 1093-1094). Access to legal expertise and legal knowledge has undoubtedly improved. Yet, some of these reforms have been cut back in recent years. Private organizations have responded to the new pressures they face as a result of the reforms. There is less optimism about liberal law reform efforts in the US and Canada. Public interest litigation is now well-established in both countries, but the haves-have-nots research agenda that Galanter set out in 1974 continues to animate socio-legal scholarship in both countries (McCormick 1993).

Legal Success in Canada

Canada has also seen an active and highly charged debate about the efficacy of litigation strategies for self-proclaimed "disadvantaged groups" over the past fifteen to twenty years. On the one hand, some argue that public interest litigation has changed Canadian politics and society in important ways. Morton and Knopff, for example, see self-styled "disadvantaged" groups winning important victories in court (2000). Smith argues that the Charter's equality rights have produced meaningful improvements for disadvantaged groups in Canadian society (1994). On the other hand, scholars looking for more far-reaching and deeper "social change" have criticized litigation as a political strategy. Mandel has repeatedly warned that Charter litigation offers only the illusion of gains for disadvantaged groups. The judiciary is dominated by the "have" classes and its decisions reflect their class interests (Mandel 1987: 50-51). Razack's sympathetic account of the early years of the Women's Legal Education and Action Fund (LEAF) warns that rights-oriented litigation might be antithetical to feminism (1991: 25-26). After an impressively broad analysis, Bogart concludes that the significant victories women and others have won in court run the risk of backlash, complacency and fragmentation (1994). A middle school holds that litigation campaigns can serve to mobilize support, set public agendas, and produce important social and political changes (Smith 1999; Herman 1997). Certainly a complete account of the recent impressive changes in legal status and public attitudes towards homosexual rights must

include various litigation efforts since 1982.

One recent study sheds empirical light on the question of comparative success rates in court (Morton and Allen 2001). It disaggregates the concept of "success" to look not only at who wins in particular court cases, but also how a particular case influences the policy status quo and whether it creates a favourable legal precedent for a group's work. Based on this more elaborate set of criteria, the study concludes that official language minority groups (OLMGs), feminists and the homosexual rights movement have enjoyed strong success before the appellate courts in recent years. These three interests have enjoyed greater success in court than the Canadian Civil Liberties Association and organized labour, for example, and much more success than socially conservative groups like REAL Women.

Much work remains to be done on the operationalization of litigation success, but these three interests are undoubtedly successful appellate litigators today. Yet, we return to the puzzle. They are all self-described "disadvantaged" interests. How is it that they have become so successful? Understanding their success requires an understanding of three factors that influence how the Galanter socio-legal thesis is applied in Canada. We turn next to elaborating these three concepts, and then show how they contributed to the success of the three designated groups of "have-nots" in their Charter litigation efforts since 1982.

Post-Industrial Value Change

There is now a substantial body of evidence that the political cultures of advanced industrial states have changed, and changed in generally similar ways, over the last fifty years. This is first factor to consider in applying Galanter's thesis today. Students of postindustrial value change, or new politics, have focused attention on the emergence of new political agendas in many advanced industrial states. These new agendas give prominence to identity politics, environmental protection, animal rights and quality of life issues. Lipset has described the new agendas as "a clean environment, a better culture, equal status for women and minorities, the quality of

education, international relations, greater democratization, and a more permissive morality, particularly as affecting familial and sexual issues" (Lipset 1987: 186). Inglehart describes this development as "postmaterialism" (1990). There is little question that these changes have taken place in Canada (Nevitte 1996, 1992; Brodie and Nevitte 1992). Lipset, Inglehart and others have observed that the most dynamic agent of this social change has not been the industrial proletariat. Instead a new "opponentist intelligentsia" drawn from and supported by the well educated, wealthier strata of society has been driving social change (Lipset 1987: 187).

Value change brings more than just a new issue agenda to the politics of advanced industrial democracies. It also brings new modes of participating in politics. There has been an increase in unconventional, less hierarchical, and more elite-directing channels of political action. "Outside" tactics like protests, sit-ins and boycotts have become more common (Barnes, et al. 1979). Value change has spawned new kinds of interest group promoting "an idea or cause" (Paltiel 1982; Walker 1983) rather than the material interests of a particular occupation or segment of the business community. While postindustrial groups are not organized on occupational lines, they do have a class character. Their concerns are most prevalent outside the working classes. Groups mobilizing around postindustrial concerns find their elites among the new "haves," the well-educated and well-informed knowledge workers of the economy.

Inglehart has long noted the link between value change and public interest litigation. In 1981, he wrote that postmaterialists form a minority in most nations, and are therefore "better equipped to attain their goals through bureaucratic institutions **or the courts** than through the electoral process" (1981: 893, emphasis added). As the postmaterialist cohorts aged, he wrote that postmaterialism "was no longer symbolized by the student with a protest placard, but by the public interest lawyer..." (1981: 894-5). Politics by litigation plays to the strengths of the postmaterialist cohorts. It places a premium on the skills of highly educated professionals like lawyers. When litigation is married to civil rights and other social reform issues, it taps the political agenda of value change using a new mode of political participation.

The contending explanations of value change are controversial (Clarke and Dutt 1991; Inglehart and Abramson 1994). Our aim here is not to explain why political cultures have changed. There is, however, strong evidence that post-industrial value change is occurring, and occurring in Canada. This value change helps explain the reshuffling of the political deck that has taken place since Galanter's speculations. The emergence of new political agendas is connected to the emergence of new modes of political participation. Affluent and powerful social elites no longer stand four square behind the social and political status quo. Over the past three decades, social reform and social justice have become a political agenda of the "haves." The political agenda of the "have nots" now resonates among social elites.

The Embedded State

As impressive as the scope of value change has been, value change alone cannot explain why self-styled disadvantaged groups have done so well in court. Post-industrial values are still held by a minority of citizens in Canada. To answer our puzzle, we must consider changes in the configurations and function of the state since Galanter's article appeared. Political scientists now have a rich understanding of the state's ability to shape its own political environment (Nordlinger 1981; Skocpol 1992). Institutionalists have shown how the state can act as an independent actor, pursuing policies independently of the preferences of citizens or social groups. In Canada, Alan Cairns has noted the fragmentation of state and society, and emergence of a fragmented state that is "embedded" in an equally fragmented society (1985). Various nodes of the state and their interested publics shape each other. Fragments of the state can act as independent political actors. Battles between state actors and their associated fragments of society may shape policy outputs more than battles between social actors. Demands on the state thus often reflect prior state action, and allies within the state are a potent resource for any interest or movement. This fragmentation is not politically neutral. The embedded state helps some interests and hurts others.

In Canada, the embedded state concept is particularly salient. Since the 1960s, successive federal governments have pursued a series of high-profile campaigns for social reform (Brimelow 1986). The Pearson and Trudeau governments forged a new Canadian identity by undermining existing national symbols considered “too British” to hold the allegiance of French Canadians and non-British immigrants. These symbols were replaced with new, “modern,” and “fully Canadian” ones. Policies such as bilingualism and multiculturalism redrew the contours of Canadian citizenship. In its early years, the Trudeau government pursued nationalist economic and cultural policies to reduce the American influence in Canadian society. The Pearson and Trudeau governments also quickly expanded the federal government’s social programs. A richer welfare state would, it was hoped, buttress national unity by forging direct links between citizens and the federal government. Trudeau labeled his wide-ranging set of social reform the “Just Society” program. More than just a catchall title for the Liberal Party’s election platforms, the “Just Society” has become the defining mythology of the Trudeau years (Trudeau and Axworthy 1990). Under the rubric of the Just Society, the federal government forged a new postindustrial Canadian identity and Canadian political culture.

Part of the Just Society program involved the federal government helping to create and funding networks of interest groups starting in the late-1960s. This funding continues to this day (Pal 1993; Bercuson and Cooper 1994). Several objectives drove this “citizenship” dimension to the Just Society: promoting “citizen participation” in political and community affairs; ensuring that disadvantaged groups could take on a fuller measure of power in Canadian society; and promoting the redrawing of Canadian political culture in areas like bilingualism and multiculturalism. In response to the national unity challenge, the federal Secretary of State’s Department began funding French-language minority groups. Later, when the Trudeau government announced its multiculturalism policy, it began funding a panoply of ethnic groups. Later still, when women’s concerns moved up the national policy agenda, it began funding feminist groups. Eventually, community organizations of every description were drawn into the

web of the Just Society. These programs were established and expanded as a result of deliberate cabinet decisions, but over time they carried on and evolved under pressure from the clientele each one created for itself and internal bureaucratic politics (Pal 1993).

The Just Society program also had a law-reform dimension (Sutherland 1983). As justice minister and then prime minister, Trudeau pursued a wide range of law reforms in areas like divorce, homosexuality, abortion, freedom of information and privacy, and legal aid. The Trudeau government also created two new federal agencies -- the Law Reform Commission of Canada and the Canadian Human Rights Commission -- which proved to be the intellectual seedbeds of the rights revolution that blossomed a decade later.

The 1982 constitutional reform effort was the jewel in the crown of Trudeau's social and legal reforms. Its centrepiece, the Charter of Rights, was not a response to grassroots demands for new constitutional limits on the state. In part, it was intended to entrench and extend Trudeau's earlier reforms. Its language provisions entrenched bilingualism in constitutional law. Consequently, language politics was moved into a judicial system staffed by federally appointed judges who proved to be sympathetic to bilingualism. Criminal law reformers, many of whom had worked for the Law Reform Commission, successfully influenced the wording of the legal rights sections of the Charter and provided interpretive footholds for future judicial expansion. "Equality seeking groups" strongly influenced the wording of the Charter's equality rights clause.

There were tory Canadians who raised objections to the Just Society's attempt to re-create identity and culture. Trudeau's allies successfully painted them as reactionaries, anglophiles, bigots and un-Canadian (Brimelow 1986). However, many Canadians embraced the Pearson-Trudeau reforms. Bilingualism, multiculturalism, the Charter and socialized medicare are now widely considered part of the Canadian identity, so much so that the Progressive Conservative government of Brian Mulroney could not attack these pillars of the Pearson-Trudeau legacy. Indeed, the Mulroney government further entrenched multiculturalism and official bilingualism, and made no

efforts to “de-fund” interest groups until its last year in power. The Just Society sank deep roots in Canadian politics.

Trudeau’s efforts to spawn a new interest in law reform and rights issues were wildly successful. In the years since the birth of the Just Society a “rights revolution” has swept Canadian politics. Charles Epp argues that in Canada and elsewhere interest groups can only create a rights revolution where there is a support structure for legal mobilization (SSLM) -- advocacy organizations to organize rights litigation, dependable financing for rights litigation, and a community of sympathetic lawyers to undertake rights litigation. But where did Canada’s SSLM come from? Epp traces each component of Canada’s SSLM to the same place: government action. Many Canadian rights advocacy organizations depend on government support. Their liberal/egalitarian approach to law reform partly reflects the federal government’s deliberate efforts to fund such groups. Canadian governments fund many kinds of rights litigation, especially through legal aid programs. Canada’s public law schools control entry to the Canadian legal profession, and the growing interest in rights litigation among Canadian lawyers is due in part to the efforts of the law schools. Organizations like human rights commissions and law reform commissions have been “institutional sites for liberal rights advocacy...” (Epp 1998: 186). There has been “a fluid interchange” of personnel, resources and ideas among these agencies, law schools and rights advocacy organizations. In fact, Canadian governments have been deeply implicated in creating Canada’s SSLM.

Canada's embedded state has been shaped by the Just Society and Trudeau's law reform agenda. Nodes of the state are embedded in fragments of society and use state resources to promote law reform ideas. Canada's support structure for legal mobilization has been developed in part using state resources. This has upset the have-have not dichotomy and given some interests the resources to be repeat players in litigation.

Centre-Periphery Dimension

One last factor explains the conceptual changes needed to understand recent Canadian developments through Galanter's thesis: the centre-periphery dimension of Canadian politics. Centre-periphery relations are a strong theme in Canadian political history (Smiley 1987). The interests of the Montreal-Toronto-Ottawa metropolis have dominated the country's settlement and economic development since 1867. Consequently, the country has faced persistent problems of regional discontent from the Maritime provinces and more recently the West. Since the late 1960s Quebec secessionism has also challenged Canada's heartland elites.

The Fathers of Confederation anticipated these problems. The 1867 constitution gave federal authorities the disallowance, reservation and declaratory powers (Mallory 1954), powers that early federal governments used to rein in provincial administrations. Over time these powers have fallen into disuse. In their place, federal governments found they could use the courts to strengthen their position at the expense of the provinces. The 1867 constitution gave Canada a unitary court system, and empowered the federal cabinet to appoint all superior court judges. This arrangement not only gave federal authorities a useful patronage lever with the legal profession, it ensured that Canada's judicial elite would be sympathetic to the concerns of the centre. When Parliament created the Canadian Supreme Court in 1875, it allowed the federal cabinet to ask the new Court for advisory opinions on abstract legal questions. Federal cabinets have often used this power to enlist the Court as an ally in supervising provincial legislation and administration (Smith 1983).

Shapiro (1981) has documented how the judiciary can serve as an efficient mechanism for removing contentious disputes from local government and transferring them to national, or central, authorities. The structure of appeals, he argues, is hard to explain except as a way of moving divisive issues out of local hands and into central hands. Judicial politics centralizes. As Shapiro notes, moving an issue into the courts plays to the advantage of central authorities. Central authorities benefit as courts take on more decision-making power. A corollary of Shapiro's thesis is that judicial politics

helps those interests that are strong at the centre and weak in the periphery. Such interests can use litigation to move issues out of local politics into national arenas. Thus, the structure of the judiciary is itself a political resource for both central authorities and some kinds of political interests.

Bzdera (1993) has persuasively applied Shapiro's analysis to Canada. There has been an active debate about whether the Supreme Court of Canada is "biased" in its federalism cases (Hogg 1979; Russell 1987; Cairns 1971) but Bzdera's is the first systematic survey of the Court's overall impact on the centre-periphery axis of Canadian politics. He concludes that in Canada, as in the United States, the European Union and six other federal systems, the "main function" of the high court is "to favour and legitimate the gradual expansion of central legislative jurisdiction" (Bzdera 1993: 19). In Canada, he argues, the centralizing effect of the Supreme Court is aided by the federal control of Supreme Court appointments, its budget and its establishment in the first place.

American interest groups have exploited the centre-periphery implications of the American judiciary for many years. During the "laissez faire" litigation campaigns of the 1890s and 1930s, business and financial interests used the federal courts to overcome periodic eruptions of anti-business or anti-finance populism in the American hinterland. By litigating, they moved their political battles out of hostile local arenas and into the more sympathetic national arena. The NAACP played judicial politics to a similar advantage from the 1930s to the 1960s. By litigating, they moved their political disputes out of local arenas where segregationist enjoyed the upper hand, and into the national arena. As black voters in northern cities became more important to the national Democratic Party, the NAACP enjoyed increasing success. Jack Peltason implicitly recognized the centre-periphery aspect of the NAACP's success as early as 1955.

The Just Society's legal dimension exploited the centralizing potential of the Canadian judiciary. Trudeau saw his legal reforms, especially the Charter, as potentially powerful nationalizing and unifying forces. He anticipated the Charter would

have a two-track effect. Rights-based judicial review would politicize non-regional issues like free speech, women's rights, and so forth. These issues would gradually push regionally divisive issues off the political agenda. Then, judicial review would transfer many political issues out of provincial politics and into the national judiciary (Knopff and Morton 1985). In the end, the most contentious of rights issues would be settled in Ottawa at the Canadian Supreme Court. As Peter Russell has noted, the Charter's purpose was not so much to create new rights, but to shift decision-making power about rights into a nationalizing institution (1983). The Supreme Court has found room for provincial autonomy within its Charter jurisprudence (Kelly 2001). Yet, the centralizing bias of judicial politics remains.

While federalism creates a matrix of centralizing and decentralizing political opportunities that groups can exploit, judicial politics tends to centralization. This is important when applying the have-have not thesis in federal state like Canada. Interests that are weak in the periphery can use litigation to transfer their disputes to the national level if that is a more advantageous forum for this. And this changes the way the have-have not dichotomy is applied.

To conclude, these three developments help to explain why self-described "have not" groups have come out ahead in the Canadian courts since 1982. First, the emergence of postmaterialist politics changed the agenda of the "haves" in advanced industrial states like Canada. Galanter assumed that minority rights and social reform would always be the agenda of the "have-nots" while majority rule and the social status quo would always be the agenda of the "haves." Today, the relatively wealthy, professionally trained and highly educated post-industrialist cohort pursues a new political agenda of social reform. These new elites have an affinity for channels of political participation like litigation. The emergence of the embedded state has also changed Galanter's original equation. State agencies are autonomous political actors and can direct their own campaigns of social reform. Once fragments of the state emerge as autonomous actors, interests that have allies in the state, or who can count

on the sympathies of state actors, have an important political resource. Finally, using the courts to settle political disputes has a centre-periphery effect. By transferring contentious disputes out of the local milieu and into national arena, judicial politics gives an advantage to interests that are stronger at the centre than in the periphery. Judicializing a political issue helps those interests that are politically vulnerable at the local level but valuable to governing national coalitions.

Official Language Minorities

The confederation of the British North American colonies in 1867 involved a complex set of trade-offs to protect the new colony's language and religious minorities. In Quebec, English-Canadians were a minority but they dominated the province's economy and the city of Montreal. Outside Quebec, most French Canadian communities were small and isolated. Federalism emerged from the Confederation debates as a way of protecting the autonomy of the new country's various communities. Yet, federalism alone could not accommodate the concerns of the new colony's elites. They included explicit guarantees for the colony's various minorities in the confederation constitution: bilingualism in Parliament and Quebec's legislature and courts and denominational schools in Ontario and Quebec. As new provinces were admitted to Confederation, Canada's heartland political elites imposed similar constitutional arrangements on Manitoba, Saskatchewan and Alberta.

English Canadians in Quebec were strong enough to see that their language guarantees were respected for a century. Outside Quebec, French-Canadian minorities quickly lost political influence. In the first twenty years of Manitoba's history, its governments tried several times to undo French language and Catholic schooling rights in the province (Wiseman 1992). In 1890, when the Manitoba legislature voted to abolish French language and Catholic schooling rights it upset the compromises that kept the centre's political elites together. The country was plunged into a deep national political crisis that realigned the Canadian political party system.

Manitoba's constitution seemed to provide a firm legal basis for these rights,

and the province's French Canadians launched a court challenge to the new language legislation (Wiseman 1992, Mandel 1989: 99). A lower court judge declared the legislation invalid, but higher courts offered no support to the minority. Successive Manitoba governments went on to operate almost entirely in English for almost a century after 1890. In the decades that followed, French Canadian minorities in the other western provinces did not fare much better. They were isolated, poor, and politically weak. Over time, western French-Canadians slowly assimilated into English-speaking society (McRoberts 1989). They illustrated the Galanter thesis well. They were "have nots" whose rights were not respected by provincial governments, and who were ignored by the courts.

Beginning in the 1960s, however, French-Canadians outside Quebec became strategically important to the national government, and their legal status quickly improved. During the 1960s, a new Quebec nationalism emerged and made a number of political demands. These included a reformed federalism giving the Quebec government special powers over education, language and economic development it could use to protect the French language. According to the new Quebec nationalism, Quebec was the primary home of French-speakers in North America. The decline of French-Canadian communities outside Quebec demonstrated that French could only be secure where French speakers formed a majority.

These political developments directly threatened Quebec's English-speaking minority. As the new Quebec nationalism gave rise to secessionist movements, it began to threaten the interests of the entire heartland. First under Pearson and then under Trudeau, the federal government acted to thwart the new Quebec nationalism. Trudeau had been pre-occupied with Quebec nationalism long before he entered national politics (Trudeau 1968). In his mind, the best response to nationalism was to make the country bilingual from coast to coast. Quebecers, he thought, would abandon the nationalist cause if they could be convinced they could be at home anywhere in Canada. By focusing their political attention on national rather than provincial politics, they could use Canada as a great "sounding box" to amplify their

influence in the world.

Trudeau's bilingualism program was electorally useful to the Liberal Party. According to Trudeau plan's, if the federal government made Canada bilingual and multi-national, Quebec nationalism would disappear and Canada would become a world example of how diverse people could live together (Brimelow 1986). This idea proved popular in the Montreal-Toronto-Ottawa heartland. His government could, and did, introduce bilingualism in the federal government. New bilingual government services were established. French Canadians were recruited into national politics and into the senior ranks of the federal civil service. English-speakers in the federal civil service went back to school to learn French. Bilingual signs were erected on federal property from coast to coast, and bilingual government services were established in most major centres.

Bilingualism was not uniformly popular across the country, however. It was much less popular in the parts of the country that had no significant French-speaking population (Pollard 1985). Trudeau realized that the fate of the tiny French-speaking communities in these parts of Canada would be the key test of bilingualism's ability to solve the national unity problem. To ensure the survival of these minorities, Ottawa established a policy to assist OLMGs. In 1969, the Trudeau government created a Social Action Branch in the Secretary of State's Department to "animate" French-Canadian minorities. Associations that represented French Canadian minorities began receiving federal funding. The Social Action Branch also dispatched professional organizers to mobilize these minorities to be more aggressive in demanding government services, especially French-language schooling. As OLMG policy developed, federal support created an extensive national network of associations representing French Canadian lawyers, journalists, youth, women, community groups and cultural organizations (Pal 1993).

But federal bilingualism and the OLMG policy were inherently limited. Most of the government services that OLMGs needed to have in French to guarantee their survival were in provincial hands (Mandel 1989). Trudeau could and did re-make the

federal government according to the imperatives of bilingualism, but social services, health, welfare and, most importantly, education were all provincial responsibilities. Most provinces saw no reason to adopt bilingualism voluntarily. Western Canadian voters in particular saw no reason to think that the country's national unity problems were the result of their unwillingness to provide French language services to their tiny French Canadian communities. After the 1976 Quebec election, the Parti Quebecois brought in Bill 101 to advance French-language unilingualism in the provincial government, the province's private sector, and Quebec's schools.

Trudeau had long realized that provincial governments would block national bilingualism. In 1965, before he entered national politics, he wrote that since few Canadians outside the heartland shared his analysis of the national unity problem, it "would not be very realistic to rely upon good will or purely political action" to secure bilingualism in provincial government services (Trudeau 1965: 49). The provinces would only extend bilingual services if the obligation were "incorporated into constitutional law." If the federal government could convert questions of language policy into questions of constitutional language rights, it could transfer the issue into the courts and out of the hostile arena of provincial politics.

The strategy for judicializing language policy came in two parts. First, the federal government encouraged OLMGs to exploit the limited bilingualism guaranteed in some provincial constitutions like Manitoba's. It expanded the support structure for OLMG legal mobilization by creating the Court Challenges Program (CCP). Under the CCP, the federal government funded the legal costs of OLMGs that sued their provincial governments (Brodie 2001). Secondly, Trudeau ensured that the 1982 Charter of Rights included several new language guarantees. He insisted that the Charter guarantee minority-language public schooling to the language minorities of all provinces. When eight provincial premiers demanded the power to exempt provincial statutes from judicial review under the Charter, Trudeau conceded, but on the condition that this new "legislative override" could not apply to language rights. Once the Charter was in place, Ottawa expanded the Court Challenges Program to ensure a steady

stream of OLMG challenges to provincial school policies (Brodie 1992). This maneuver neatly transferred the question of language and education out of provincial jurisdiction and into the courts. A stream of litigation ensued over the extent of minority language schooling required by the Charter's section 23 (Manfredi 1993).

Trudeau's judicialization strategy was a remarkable success for the government and for the OLMGs. In Manitoba, French Canadians took renewed interest in the language rights guaranteed by their provincial constitution. Local plebiscites showed how unpopular bilingualism was in Manitoba, but the Supreme Court of Canada eventually overturned the province's 1890 law that made the provincial government unilingual. It then went on to strike down all the legislation Manitoba had adopted since 1890. OLMGs used CCP money to take similar cases to the Supreme Court under Saskatchewan and Alberta's constitution, and in turn, the Court upheld the OLMG's claims. The Supreme Court also declared most of the PQ government's language legislation unconstitutional, precipitating a series of political uproars in that province. Finally, the Court ordered the nine English-speaking provinces to create French-language public school boards under the control of French-Canadian parents wherever there were enough students to warrant such boards (Manfredi 1993).

Over the past two decades, the Supreme Court has vigorously enforced minority language rights in Manitoba, Saskatchewan, and Alberta. Since the French-Canadian communities in these provinces were isolated, poor, and powerless, does the Court's track record represent a triumph of the have-nots? Perhaps it does. And yet, until the 1960s, the courts stood by while provincial governments repealed the rights of French Canadian minorities. Ottawa only took an interest in beleaguered western francophone communities when the new Quebec nationalism threatened the heartland's political interests. The Liberals' national bilingualism policy served as the centrepiece of their campaign to forge a new, more modern, Canadian identity, and it served to justify Ottawa's intervention in provincial jurisdiction. Judicial solicitude for OLMGs "rights" followed these political initiatives. In effect, the federal government enlisted the Supreme Court in its campaign to centralize power over language by encouraging the

Court to resurrect guarantees of language rights in provincial constitutions. When Trudeau brought in the Charter of Rights, he ensured the Charter would limit provincial discretion and expand judicial discretion over language and education. The Court Challenges Program, a fragment of the state, ensured that legal costs would not be an obstacle to access to the courts. The recent litigation successes of the OLMGs must be understood in the context of Canada's embedded state and its centre-periphery politics.

Feminists

No interest has used Charter litigation more than organized feminists have. Until 1982, Canadian feminists had a history of failed litigation campaigns. Feminist public interest litigation began in earnest in the 1970s. It drew its inspiration from American civil rights litigation and the success American feminists had had in court, especially in Roe v. Wade. On issue after issue, though, the Canadian courts dealt feminists a string of losses (Atcheson, Eberts and Symes 1984). The courts refused follow Roe and strike down Canada's criminal law on abortion. They refused to treat discrimination based on pregnancy as discrimination based on sex. They refused women equal access to Indian status and therefore to federal Indian benefits. However, since the mid-1980s Canadian feminists have had a complete reversal of fortunes in the courts (Smith 1994). In only a decade, they have won important litigation victories on issues like abortion, social services, pay equity, pornography, and discrimination based on pregnancy (Morton 1992). What accounts for the rapid change in litigation success?

Value change has contributed to a growing concern about the status of women in advanced industrial states. Postindustrial values favour more egalitarian relations between the sexes, and this has changed ideas about the family, marriage, work and politics (Inglehart 1990; Nevitte 1996). In the 1960s, new ideas about the place of women gave rise to a new feminist, or women's, movement in Canada and other countries. In 1967, in response to the emergence of the Canadian feminist movement, the Pearson government established a Royal Commission on the Status of Women.

The Commission's report was the catalyst for recruiting feminists to the Just Society program. It contained a list of prescriptions for changing the status of women in almost all sectors of Canadian society. It also recommended federal funding for feminist groups. Ottawa stepped in to support the National Advisory Committee on the Status of Women (NAC) in 1971, and in 1974 the new "Women's Bureau" in the Secretary of State's Department. The Secretary of State later spawned the Canadian Advisory Council on the Status of Women (CACSW) in 1973; the National Association of Women and the Law (NAWL) in 1974; the Canadian Congress for Learning Opportunities for Women in 1979; and the Canadian Day Care Advocacy Association in 1983 (Pal 1993). Value change and state action reinforced each other.

When the Trudeau government announced its plans for the Charter in 1980, feminists saw an opportunity to undo the Supreme Court's decisions of the 1970s. They lobbied the Trudeau government to ensure women's rights were featured prominently in the Charter's text. During the hearings of the parliamentary committee on the proposed Charter, the federal government sought support for its efforts by bringing some interest groups, including feminists, into the drafting process. A series of battles between feminists and the Trudeau government produced a "generously worded documents with significant interpretive flexibility" that favoured feminist concerns (Manfredi 2000: 21). Feminists were especially successful in redrafting the Charter's "equality rights" section (Manfredi 2000, Brodie 1996, Kome 1983). This provision guaranteed equality "before and under the law" and "equal benefit and equal protection of the law" without discrimination based on, among other things, sex. Women in the federally funded network of feminist organizations created LEAF to take advantage of the new litigation opportunities the Charter provided. In 1984, the CACSW released a study that called for the formation of "a legal action fund to concentrate on issues of sex-based discrimination." With the adoption of the Charter two years earlier, the study declared, it was "an opportune moment to stress litigation as a vehicle for social change" (Atcheson, Eberts and Symes 1984: 163). The feminist movement was already tied to the Secretary of State's Department, so LEAF's

organizing committee was able to tap government grants to support its activities. The Court Challenges Program, which had previously funded OLMG litigation, was extended to include groups like LEAF's and LEAF soon became a top recipient of CCP funding (Brodie 2001). LEAF deliberately followed the strategies of American rights-advocacy organization, with the objective of using "test cases" to pursue "systematic litigation" strategies.

Fragments of the Canadian state have contributed to a support structure for feminist legal mobilization in other ways. Various state offices -- human rights commissions, legal departments, law reform commissions, law schools and judicial education programs -- form a web of bureaucratic nodes for initiating, funding, legitimating and implementing the claims of rights advocacy organizations. Canada's public universities recruit, train and pay the salaries of many intellectuals whose ideas drive the feminist movement. Law school academics have been active on both sides of the debate about the efficacy of social reform by litigation. Yet, law schools now produce a steady stream of "rights experts" to staff the interest groups, bureaucracies, interest groups and courts that pursue the politics of rights.

Advocacy scholarship was a calculated component of feminist strategy to maximize the political utility of Charter litigation. The same 1984 report that led to the creation of LEAF declared that "a critical component of this [systematic litigation] strategy [is] to build a theory of equality which is accepted by academics, lawyers and the judiciary. Legal writings in respected law journals, presentations of papers at legal seminars, and participation in judges' training sessions are all means of disseminating and legitimating such theories of equality" (Atcheson, Eberts and Symes 1984: 172). Once LEAF was established, it adopted a self-styled campaign of "influencing the influencers" that included fostering supportive legal scholarship (Razack 1991: 37). NAWL's sponsorship of the Canadian Journal of Women and the Law represents part of the implementation of this strategy.

The litigation track record of Canadian feminists, while not as successful as that of the OLMGs, has been impressive (Morton and Allen 2001). This success is not

simply a matter of the triumph of the “have nots.” As in other Western societies, feminism in Canada draws its strength from post-industrialist cohorts characterized by higher socio-economic status. Other feminists have noted that the activists behind LEAF are largely white, wealthy, high-educated and professional women, used to exercising considerable economic and social power (Razack 1991). LEAF, like the rest of the Canadian feminist movement, has been able to bring postmaterialist politics and state resources together to win in court.

Homosexual Rights

Canadian feminists set the standard for successfully judicializing the politics of gender, but homosexual rights activists and the interest group EGALE (Equality for Gays and Lesbians Everywhere) have learned the lessons of LEAF’s litigation. The dramatic litigation advances of the Canadian homosexual rights movement in the past ten years illustrate the combined effect of postmaterialist politics and state autonomy. Canadian homosexuals were early beneficiaries of Trudeau’s personal commitment to social and legal reform. Since then, Canada, like most advanced industrial states, has experienced the secular loosening of sexual mores associated with postmaterialism, and this has given gay rights issues good political currency.

Although Canadian homosexual rights activists demanded constitutional protection in the early 1970s (Williams 1985), they were not nearly as successful in influencing the drafting of the Charter as Canadian feminists. Backbenchers tried to include sexual orientation as a prohibited ground of governmental discrimination under the Charter’s equality rights section when the Charter was being drafted. The Trudeau government rebuffed these efforts, but Trudeau effectively gave judges the opportunity to extend the Charter’s protection to new groups by making the list of prohibited grounds of discrimination open-ended (Brodie 1996). Once the Charter was in place, homosexual rights activists planned litigation to persuade judges to extend equality rights protection to Canadian homosexuals. They expected protracted litigation on the issue, and this was not an unreasonable expectation. Trudeau had opposed putting

sexual orientation in the Charter's text, and the Mulroney Progressive Conservatives soon replaced Trudeau's Liberals. Few provincial governments showed any enthusiasm for homosexual rights. To pave the way for their litigation, these activists started their own campaign of "influencing the influencers." Allies the legal academy published law journal articles to establish the legitimacy of the various legal arguments for extending Charter protection to homosexuals. Yet, when the first cases went to court, activists were surprised to find that getting equality rights protection for homosexuals "was a non-issue" (Herman 1997: 203). In 1986, the federal Justice Department issued a policy paper arguing that homosexuals should have equality rights protection under the Charter. Then, in 1990, when one of the first test cases on the issue went to appeal, it received funding from the Court Challenges Program and federal lawyers conceded that homosexuals should have equality rights protection. In 1997, the Supreme Court endorsed the proposition that homosexuals were a "protected" group under the equality rights.

No Canadian episode illustrates the new importance of having allies in state institutions than the litigation campaign to have homosexual rights recognized in federal human rights legislation. In 1986, the Mulroney government announced its intention to expand the Canadian Human Rights Act (CHRA) to outlaw discrimination against homosexuals in areas of federal action. The issue deeply divided Mulroney's caucus and the government was unable to produce legislation during its first mandate. Nonetheless, homosexual rights activists were buoyed by the willingness of the Justice Department to concede that homosexuals should have equality rights protection, and the courts' willingness to accept this concession. They sued the federal government and asked the courts to extend the CHRA to cover discrimination based on sexual orientation. Their test case, financed by the Court Challenges Program, ended up at the Ontario Court of Appeal in 1992 (Haig 1992). At the same time, the new Canadian Minister of Justice, Kim Campbell, made it clear that she intended to get the CHRA amended. Federal lawyers opted to pursue a weak defence of the CHRA on appeal, and in August 1992, the Ontario Court of Appeal extended the CHRA's protection to

homosexuals. The Justice Department decided not to appeal to the Supreme Court of Canada. In November of 1992, Justice Minister Campbell announced that the government no longer needed Parliament to amend the CHRA because the courts had done so already. As in the case of bilingualism, federal government officials circumvented a hostile political environment for their policy objectives by enlisting the courts as allies. The government essentially allied itself with the courts to by-pass the divided Conservative caucus and insert sexual orientation into the federal human rights code.

This homosexual rights litigation follows the pattern set by Canadian OLMG and feminist litigation. Homosexuals at first glance appear to be the kind of “have nots” that Galanter thought would do poorly in court, but as it turns out they have done quite well through litigation. A proper understanding of the new context of the Galanter theory shows why this is so: homosexual rights, like feminism, is a postmaterialist issue. The homosexual rights movement enjoys support among the wealthy, well-educated professionals of the postmaterialist classes. Homosexual rights activists also have strong allies in government, the legal academy and the national media. Litigation allows them to transfer contentious policy issues into the courts and away from institutions where their cause is less likely to succeed.

Conclusion

Not all the public interest litigation in Canada is by self-described “disadvantaged” groups. Some conservative groups have been active in the Canadian courts. Socially conservative groups like the Evangelical Fellowship of Canada, REAL Women and Focus on the Family Canada appeared at the Supreme Court during the 1990s to defend pro-life and traditional legal approaches to the family, but both of these efforts have largely failed. The National Citizens Coalition (NCC), a leading conservative political action group, has successfully used litigation to ensure free

political speech during election campaigns (Hiebert 1989-90).³ Yet, a closer look reveals how much the NCC has depended on adept forum-shopping to win. It launches cases in Alberta and tries to avoid appeals beyond the Alberta courts. When the Supreme Court heard the issue of campaign-time free speech, it sent a strong signal that it disapproves of the NCC precedents (Libman 1997).

Galanter's theory that the "haves come out ahead" in litigation is thus confirmed by Canada's experience under the Charter of Rights, but only when understood in light of certain changes to the wider political context. Value change has meant that a new agenda of social justice and quality of life issues now enjoys the sympathy of wealthier, more educated professional people. The greatest challenges to the socio-political status quo now come from the "have" classes. This has helped both the feminist and homosexual rights movements in Canada, whose activists and supporters are both characterized by higher socio-economic profiles. The success of the OLMGs is in part attributable to the role bilingualism was intended to play in the new post-industrial Canadian nationalism.

The Canadian state's autonomy is the second political change that has contributed to the success of some interest group litigation under the Charter. All three of the interest groups studied have benefited from alliances with state actors. The Trudeau government supported the OLMGs as part of its national unity initiatives. The Secretary of State provided core funding for both OLMGs and feminists, while the Court Challenges Program has been a funding source for the litigation efforts of all three groups. Access to decision-makers and support in the various rights bureaucracies—federal and provincial justice departments, human rights commissions, the law schools, and appeal court clerks—have been important resources for all three groups.

Finally, the centre-periphery dynamic of Charter litigation has contributed to the success of OLMGs and gay rights activists. All three groups have been able to win

³ See National Citizens Coalition 1984; Somerville 1996. The NCC's litigation against Bill C-2 is pending before the Alberta courts at the time of writing.

policy concessions in the Supreme Court that they never would have achieved in provincial legislatures. The Canadian judiciary delivers the most controversial court cases to Ottawa where they can be decided by judges appointed by the Prime Minister sitting in a Supreme Court that is funded by the federal government.

In other words, these self-described "disadvantaged" groups win because under the new conditions they are now among the "haves". And being among the "haves" has given them the resources required to become repeat players and succeed in judicial politics. Galanter recommended many of the legal reforms that Canada has adopted to help "have not" groups do better in the courts: universal legal aid, state support for litigation and expanded law schools. With respect to Galanter, there is a certain paradox in his prescription for reform of the judiciary. If he really thought that the "haves" come out ahead in the courts, then why not keep as much policy as possible out of the courts? This was the prescription of the first generation of judicial progressives—the Holmes, Brandeis, and Frankfurter tradition. That Galanter did not choose this solution suggests that he was actually an early member of the second generation of judicial progressives, those who believed that an activist judiciary was not only consistent with but could even advance progressive politics and policy. As Silverstein (1994) has pointed out, the courts became more important to American progressives as the New Deal coalition splintered. In 1974, Galanter was a self-proclaimed progressive writing at the beginning of the end of Democratic Party's forty-year domination of American politics. In retrospect, Galanter's prescription may be understood as a program to empower the progressive elements of the faltering New Deal coalition.

In Canada, however, the progressive coalition was not faltering. On the contrary, under the banner of the Just Society program the Trudeau government was the driving force behind the adoption of many of the legal reforms prescribed by Galanter. In the end, Galanter's reform proposals could only be implemented by a governing national coalition that included the "have not groups" as either members or strategic allies.

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