Chapter 1

Introduction

Law, with its language of justice, fairness and equity, seems well suited to advancing claims for social justice. It is not surprising, therefore, that social movements frequently employ strategies and tactics centred around the concept of rights. This was as true of workers' movements in nineteenth-century England as it is of the gay and lesbian movement of today. At the same time, law seems to be a somewhat dangerous ally for social movements seeking to promote social transformation. The institutions of law are fundamentally conservative, slow to change and frequently operate to preserve and protect the rights and privileges of the powerful. In this sense, law operates as a force for social control, not for social change.[1] At that same time, those who hold power cannot completely ignore law's claims to fairness and equality without undermining the legitimacy of their own positions of influence and privilege.[2] In other words, the operation of law in society is highly contradictory. Law can be both empowering and constraining for social action groups promoting social and political change. The objective of this book is to explore this contradiction and to assist movements and movement activists in navigating the difficult terrain that is the legal landscape.[3]

In 1974 Marc Galanter wrote "Why the Haves Come Out Ahead," examining why we expect those with power and resources to do better before the courts than those without.[4] Litigants fall into two basic categories. "Repeat players," such as corporations, governments, prosecutors, and other large organizations, tend to be well-resourced and appear before the courts on a fairly regular basis. Repeat players can utilize resources to achieve beneficial results over the long term, even at the cost of sacrificing outcomes in specific individual cases. They also, because of their continued engagement with law, develop close ties and professional relationships with their lawyers. "One-shotters," by contrast, have fewer resources and appear before the court less frequently. One-shot litigants tend to have more at stake in any individual case, and because of the infrequency of their litigation, cannot build up the expertise and know-how to play for long-term benefits. Typical one-shotters include individuals, the criminally accused, persons contesting the terms of divorce,

and so on. The horizon of the one-shot litigant is fixed firmly on the outcome of a particular case.

Although Galanter was not specifically concerned with the question of political activism his analysis is helpful. First, he quite rightly points to the importance of resources. Most social action groups will appear before the courts infrequently. Indeed, most social movements lack the financial resources to situate courts and law at the heart of their political strategy. Going to court is expensive. However, when social action groups do find themselves in court, they invariably confront opposing parties who, within Galanter's framework, constitute repeat players. Most notably, social action groups encounter corporate interests or the state when they venture into the legal realm. Examples come readily to mind: an environmental group seeking to halt a development project, a student group challenging restrictions on its right to demonstrate on campus, an anti-poverty or welfare rights group challenging cuts to social services. Even when social action groups do constitute repeat players before the courts, as sometimes happens, there may still be considerable resource differences between the groups and their opponents.

While Galanter felt that it was unlikely that the courts could be used to advance significant social change, he did argue that the "have nots" of the legal world might be able to organize themselves and develop resources to increase their effectiveness. One option is to develop legal expertise within the movement This route has been followed in the United States, with the development of specialized public interest law centres. The National Association for the Advancement of Colored People (NAACP), for example, has developed a coterie of legal experts in their fight to end discrimination against African-Americans. In Canada, the Women's Legal Education and Action Fund has pursued a similar strategy.[5] The result of this approach, however, is a tendency to favour law and legal strategies for achieving social change over and above other forms of political activism.

Galanter's work has led to an emphasis on the courts as the locus for the expression and articulation of law. Galanter was primarily concerned with explaining why groups with resources could generally be expected to fare better before the courts. This focus on courts has dominated many of the discussions of the utility and desirability of social action groups using the law as part of their political strategy. Gerald Rosenberg, in *The Hollow Hope,* even defines social change in terms of policy changes of a national scope that result directly from a judicial decision.[6] With such a narrow focus, it is hardly surprising that Rosenberg concludes that going to court

will rarely produce social change. While it is true that courts and law will likely not produce social change, it is important to explore the extent to which they can be utilized to secure or advance claims of equality and justice. This is a much broader consideration and one that doesn't necessarily require us to focus on courts and their decisions as the sole instruments of political change.

The emphasis on courts is an enduring legacy of Galanter's work and has dominated the field of study. In both the United States and Canada, this is reflected in a concern with the successes and failures of public interest litigation. The measure of activism's success is the number of victories in the courts and whether those victories have "made a difference."[7] Perceptions about law and activism have been dominated by an approach that starts and ends with courts, and in particular, with the decisions of courts. Social movements are simply parties before the courts, rather than the central focus. Consequently, there has been little attempt to question the law from the perspective of the social action group.

Rather than beginning with judicial outcomes, we should set our sights on the tactical and strategic questions that law raises for social movements. Such an approach encourages us to consider the broader objectives of social movements but also to view law in a more varied and pluralistic fashion. Law is articulated not only by the courts, but by legislatures, prisons, welfare bureaucracies, administrative boards and tribunals and a host of other state structures.

Moreover, confronting law is not always a matter of choice for social action groups. We live in a world that is dominated by law and legal structures, and it may be that any strategy of political change will have to confront the law. A protest, which is far removed from a deliberate strategy of "going to court," will nevertheless involve engagements with legal structures. A permit may be required for a demonstration or a march. The police may intervene and arrest protesters. In 1997, demonstrations at the University of British Columbia against a meeting of the Asia–Pacific Economic Cooperation (APEC) resulted in a formal administrative hearing into police misconduct and brutality. Undoubtedly the activists who organized the anti-APEC demonstrations had no idea that their political point would be made through the Royal Canadian Mounted Police (RCMP) Public Complaints Commission. Nevertheless, this became the vehicle by which the activists could keep pressure on the government and raise awareness of their cause. In other instances, government or corporate interests may utilize the courts to deter activists by seeking either an injunction to prohibit their activities or damage awards that might

financially cripple the group. The cost of defending the litigation may achieve this objective, regardless of the outcome of the specific case. These techniques have been used to prevent demonstrators from blockading logging roads or to financially attack those who organize consumer boycotts of a corporation's product. In all of these instances, the choice of engaging with law is not the social action group's to make but rather is forced upon them.

The tendency to focus on the courts when discussing the relationship between law and activism has been reflected in the Canadian debate around the *Canadian Charter of Rights and Freedoms*. This debate has focused on the implications of "going to court" for both social movements and for the broader political system. For those who are critical of the courts—"rights debunkers" as Didi Herman has termed them[8]—the primary concern is the anti-democratic and non-participatory implications of going to court. For those on the left of the political spectrum, law is understood as a demobilizing force that operates to limit the radicalism and participatory nature of social movement politics. Social movements, if they engage in legal activism, will lose control of their agenda to lawyers and judges who will transform their political issues into a narrow set of legal issues, thereby distorting and nullifying the transformative potential of the movement[9] The strategy of utilizing law and courts is disparagingly referred to as a form of "legalized" or "judicialized" politics. Courts, it is argued, should be shunned in favour of more democratic and participatory avenues of political activism. Unfortunately, the nature of these more "genuine" forms of political expression are rarely spelled out.

There are also critics of judicialized politics on the right of the political spectrum. Here the concern is not so much with the legalization of social movement politics but with the politicization of law by social movements. Morton and Knopff, for example, have argued that a "court party" of women's groups, gay and lesbian groups, Aboriginal people and other equity-seeking groups have used the courts to make political gains that could not be achieved through legislatures.[10] This, they argue, is undemocratic and represents a dangerous erosion of our parliamentary traditions. It shifts power away from elected officials and political parties to an unelected and unaccountable judiciary. For Morton and Knopff, social movements have used the courts to do an "end run" around the institutions of Canadian democracy. Ironically, Morton and Knopff do not see the primary role of courts as a constraint on social movements, but rather see judges as radicals and activists facilitating social movement agendas.

There is some truth in both the left and the right critiques of judicialized politics. Social movements do make use of the courts and do achieve important victories in that forum. Those victories often involve changes that are forced on reluctant and frequently hostile legislatures. Antonio Lamer, former chief justice of the Supreme Court of Canada, responded to criticisms that the court had become too activist by arguing that if Parliament acted to remedy injustices and inequalities, the court would not be forced to do so.[11] At the same time, it is also undoubtedly true that the reliance on courts may do little to foster real social change and may in fact blunt the edge of social movement activism. It has been forcefully argued, for example, that an over-reliance on judicial politics by the American women's movement has left it ill-equipped to fight against the state-led erosion of abortion rights. Similarly, three decades of civil rights litigation has, arguably, not substantially improved the conditions of the majority of African-Americans in the United States.[12]

Both these approaches conceptualize the relationship between law and activism from the perspective of the courts. They assume that activism around law and rights will take place in courts. They also assume both an idealized legislature and an idealized court, in that parliaments and legislatures are understood to be inherently democratic and participatory while courts are seen as inherently undemocratic and non-participatory. Legislatures, therefore, are the appropriate location for politics, while courts are the appropriate location for the practice of an idealized and non-political form of law. The broader structures of the state, and most particularly the undemocratic influence of the bureaucracy, is rarely considered in this framework.[13]

These approaches conceptualize politics and law in an "either/or" fashion: social action groups either engage in a genuine and democratic form of politics or they engage in an illegitimate and depoliticized form of judicialized politics. This position, ironically from both the left and the right critiques, however, is rarely based on solid empirical study of social movement practice. Rarely do social movements make this sort of stark choice. Rather, they employ a diversity of tactics and strategies, depending on the structure of political opportunities and the nature of the constraints and obstacles that they face at any particular moment[14] Approaches that focus on courtroom procedures fail to capture the dynamic nature of social movement practice, and consequently employ an understanding of law and activism that is far too static and limited.

In this book I approach the question of law and political activism from the point of view of the social movement. Tarrow has defined social

movements as collective challenges, based on common purposes and social solidarities, to the power of elites and state authorities.[15] Legal structures and institutions can be one vehicle by which these challenges are expressed. However, social movements are also frequently characterized by a wide variety of social networks and may take a large number of organizational forms. For the purposes of this book, therefore, I will concentrate on social movement organizations rather than social movements in the broadest sense of the term. My concern is with the social action group that might confront law in the midst of a broader political campaign.

In considering law from the perspective of the social action group, it is necessary to take up Galanter's first premise—namely that the key to successfully engaging with law depends on the nature of the resources a group has available. Galanter's "repeat players" will likely always have an edge in terms of resource capacity. However, this does not mean social action groups lack the resources to incorporate law into their political strategies without the legal process overwhelming them.

One difficulty that any social action group faces when engaging with law is lack of expertise. As Carol Smart has argued, the power of law rests in its unique language and structure of thought, which permits it to "speak the truth" in a fashion that is difficult to challenge.[16] The law has the capacity to transform contentious political positions into rules supported by the legal system. While all of us have a sense of what the law is about, largely gleaned from the mass media, very few of us have the technical expertise to develop sophisticated legal arguments or represent ourselves in court. This is the near-exclusive preserve of the lawyer and the judge, carefully guarded by professional associations and the exclusive admission policies of law schools, which contribute to the mystique of law.[17]

The implications of pursuing a strategy of legal activism are therefore difficult to assess for social action groups. I once asked a group of third-year politics students in a human rights course to imagine a case in which university officials had discriminated against a group of students by banning them from forming an activist group on campus. I asked what steps they might take to try to force the administration to reverse its decision. Immediately the students came up with a number of ideas: a petition, a protest demonstration, the lobbying of faculty and university administrators, a sit-in. In the language of social movements, these are part of the "repertoire" of political action with which we are familiar. Even those who are not politically active can imagine these possibilities and begin mobilizing to realize them. I then asked the students what they

would do if all of these tactics failed. After much prompting, someone suggested litigation and a human rights challenge. Despite their rights-based discourse on the issues on which their political campaign would be built, litigation was the students' choice of last resort. What would be the first step in pursuing a legal challenge, I asked? How would they go about it? The only suggestion was to hire a lawyer, although the students did not have a good idea of the process involved. Beyond simply contacting a lawyer, the world of judicialized politics was a mystery to them. This was a repertoire of political action with which the students were unfamiliar.

This example highlights several important points. First, most people will not immediately consider pursuing a court challenge. Most of us know that this is expensive, time consuming and the costs of failure potentially steep. Social action groups understand that litigation will take valuable resources away from their other activities and so, in most instances, it is a step taken only reluctantly and as a last resort. Social action groups will tend to prefer repertoires of political action with which they are familiar. New tactics of political activism will develop of course, but the group is unlikely to adopt a strategy for which its members lack expertise and capacity.

Second, the example points to the centrality of lawyers and legal expertise. One cannot contemplate complex political action on legal issues without engaging with the legal profession. This raises important issues about the structure of the legal profession and the nature of legal representation. It may be difficult to hold lawyers accountable to movement goals and objectives. Much will depend on the individual lawyer, but also on the nature of the group and what it hopes to achieve, as well as the type of case and the nature of the legal issues (which may not always be the same as the political issues) it raises.

Third, concepts of rights and justice are important "frames" through which social movements articulate their political program to a broader audience. These are shared understandings that allow us to articulate grievances and injustices in terms that mobilize political action. My students recognized this when they chose to discuss the university's actions in terms of rights, even though they were not contemplating litigation. Use of this discourse does not necessarily involve going to court. At the same time, taking an action to court may give the group a profile and a media presence that might otherwise be difficult to achieve. The legal action may provide a unique and important opportunity to develop a case that goes beyond the court to the broader public.

This book, then, explores the contradictory nature of law and political

activism and attempts to shed some light on the tactical and strategic questions that social action groups face upon engaging with law. In this regard, I hope to go beyond "either/or" tendencies and develop a better understanding of social action group goals and objectives when confronting law. This should permit a better appreciation of both the opportunities and constraints presented by a strategy of legal activism.

At the same time, this book is also intended as a resource for activists and social action groups engaged with law. I certainly don't seek to turn activists into lawyers, but rather to provide them with sufficient information to weigh the pros and cons of going to court and understand how law intersects with other dimensions of their political struggles. In a sense, this book is to help break down the lawyer's monopoly on expertise and assist social action groups in their dealings with the legal profession.

To that end, Chapter 2 elaborates on the themes developed above and examines theoretical perspectives on law and political activism. In particular, it expands on the notion that law is both a potential resource for social movements and also a potential constraint. Central to this thesis is the belief that the power of law, as a means of social control and as a depoliticizing force, rests in the exclusivity of legal expertise. I examine the nature of legal reasoning and the conceptions of legal representation to shed light on how lawyers control clients and limit the potential of utilizing law as a tool of political change. The development of alternative sources of legal expertise, such as community-based legal clinics or "people's law schools," as well as the restructuring of legal professionalism, are considered as vehicles for breaking down the law's monopoly on expertise.

Chapter 3 begins an examination of law intersecting with social movement politics through the control and regulation of protest and dissent. To a certain extent this chapter is intended to demonstrate that social movements cannot escape law, in that legal regulation is one of the state's main vehicles for controlling dissent. I examine the implications of criminal law powers on protest, the capacity of police forces to regulate and disrupt protests, the implications of recent anti-terrorist measures and the capacity of municipalities to regulate demonstrations, parades, strikes and other types of protest gatherings. It is also true, however, that the state is not the only power that can invoke the law to control dissent This chapter also examines how corporations use courts and law in a pre-emptive manner against activists through SLAPPs (strategic litigation against public participation). The chapter concludes by considering the civil liberties implications raised by these questions.

Chapter 4 continues where Chapter 3 leaves off, providing a more comprehensive examination of civil liberties and human rights issues. Rights provide a powerful discourse that is frequently utilized by social movements to frame issues, mobilize members and communicate to the broader public. This chapter examines how the protection of rights in formal constitutional documents, such as the *Canadian Charter of Rights and Freedoms* or the American *Bill of Rights*, provides an important resource for social action groups, but also a potential limit on their activities. This chapter examines how certain types of rights claims may be more valuable to social action groups than others.

Chapter 5 examines the difficult decisions involved in going to court, provides an overview of the court system structure and considers the tactical and strategic questions activists might wish to address before going to court. This includes what to expect when dealing with a lawyer, how to choose a lawyer, and the costs of judicial action. This chapter also includes several case studies of social action groups going before the courts to highlight these issues.

Chapter 6 continues by examining the significance of the administrative state. Courts are only one forum in which "judicial" decision-making takes place. Labour boards, welfare appeal boards, workers compensation tribunals, environmental assessment boards and other similar state regulatory agencies may be appropriate legal venues for activists. This chapter discusses these institutions, how they operate, the advantages and disadvantages of appearing before them and the opportunities for appealing administrative decisions to the courts.

The examples in this book are primarily Canadian, although I also refer to movements and cases from elsewhere, particularly the United States and Britain. I do this in part because I am most familiar with Canada. I also do it because the tactical choices for any social action group confronting the law depend very much on the particular legal system with which they must deal. Rules of standing, the powers of administrative tribunals, police powers to arrest demonstrators and the scope of constitutional rights will all vary from country to country. This book would have been written very differently prior to Canada's adoption of the *Canadian Charter of Rights and Freedoms* (or more likely would not have been written at all). To do justice to the myriad of differences between complex legal systems would have defeated one of the primary objectives of the book, namely to provide an accessible and useful resource to activists and students. The broad themes discussed in the book, however, are applicable and relevant to almost any jurisdiction.

The book is also a guide to on-line legal resources. Appendix 1 includes links to the texts of important rights documents, including the *Canadian Charter of Rights and Freedoms*, the American *Bill of Rights* and the *European Convention on Human Rights*. It also provides an extensive list of legal resources that might prove useful to activists and those who lack formal legal training. Included are links to public legal information centres, community legal clinics and other sources of advice and assistance. Many of these sources share a political commitment to social justice. Social action groups need access to these organizations and their expertise if they are to bring law into the movement without allowing it to colonize their objectives and aspirations.

Notes

1. For an interesting discussion of the relationship between law and order, see Wade Mansell, Belinda Meteyard and Alan Thomson, *A Critical Introduction to Law* (London: Cavendish Publishing Ltd., 1995), ch. 2.
2. C.B. MacPherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977) discusses how the expansion of democratic political rights flowed from the contradictory logic of equality embedded in liberal economic thought.
3. The contradiction at the heart of the law/activism question has been the subject of much inquiry. Some have argued that law offers, at best, only a limited potential for advancing progressive political objectives. Victories in court, it is argued, will frequently prove to be pyrrhic in nature: won at too great a cost to the victor. See Judy Fudge and Harry Glasbeek, "The Politics of Rights: A Politics with Little Class," *Social and Legal Studies* 1 (1992), p. 45–70. Others, while not unaware of the limits of law, have accepted more readily the importance and utility of law for political activism. See, for example, Michael McCann, "Legal Mobilization and Social Reform Movements: Notes on Theory and Its Applications," *Studies in Law, Politics and Society* 11 (1991), p. 225–54; Didi Herman, "Beyond the Rights Debate," *Social and Legal Studies* 2 (1993), p. 25–43; Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality Seeking 1971–1995* (Toronto: University of Toronto Press, 1999).
4. Marc Galanter, "Why the Haves Come out Ahead, Speculations on the Limits of Social Change," *Law and Society Review* 9 (1974), p. 95–160. Galanter's work has been the subject of much commentary, including a symposium that appeared in the *Law and Society Review* 33 (1999) to mark the 25th anniversary of its publication. Some of the papers in that symposium include: Patricia Ewick and Susan Silbey, "Common Knowledge and Ideological Critique: The Significance of Knowing that the 'Haves' Come Out Ahead"; Richard Lempert, "A Classic at 25: Reflections on Galanter's 'Haves' Article and Work It Has Inspired"; Joel Grossman, Herbert Kritzer

and Stewart Macaulay, "Do the 'Haves' Still Come Out Ahead?"; Charles Epp, "The Two Motifs of 'Why the 'Haves' Come out Ahead' and its Heirs."

5. 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).
6. Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 1991).
7. Judy Fudge and Harry Glasbeek, "The Politics of Rights," supra. note 3. For a criticism of this approach see Didi Herman, "Beyond the Rights Debate," supra. note 3.
8. Didi Herman, "The Good, the Bad, and the Smugly: Sexual Orientation and Perspectives on the Charter," in David Schneiderman and Kate Sutherland (eds.), *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997).
9. See, for example, Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1994); Allen Hutchinson and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter," *University of Toronto Law Journal* 38 (1988), p. 178.
10. F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000). For an excellent critique of the position, see Wayne McKay, "The Legislature, the Executive and the Courts: The Delicate Balance of Power or Who is Running This Country Anyway?" *Dalhousie Law Journal* 24(2) (2001), p. 39–74.
11. Kirk Makin, "We are not Gunslingers," *Globe and Mail*, Tues. April 9, 2002, p. A4. Reg Whitaker has also argued that judicial review by courts is valuable because the intensely political nature of certain issues makes elected officials unwilling to deal with them. See Reg Whitaker, "Rights in a Free and Democratic Society: Abortion," in David Shugarman and Reg Whitaker (eds.), *Federalism and Political Community* (Peterborough: Broadview Press, 1989).
12. See, for example, Alan Freeman, "Anti-discrimination Law: The View from 1989," in David Kairys, *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1990).
13. I have made this point elsewhere. See B. Sheldrick, "Law, Representation and Political Activism: Community-based Practice and the Mobilization of Legal Resources," *Canadian Journal of Law and Society Community Legal Practice* 10 (1995), p. 155–84.
14. See Sydney Tarrow, *Power in Movement: Social Movements and Contentious Politics* (2nd ed). (Cambridge: Cambridge University Press, 1998), ch. 5.
15. Ibid, p. 2.
16. Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).
17. Jamie Cassels and Maureen Maloney, "Critical Legal Education: Paralysis with a Purpose," *Canadian Journal of Law and Society* 4 (1990), p. 99.