Citizen Participation in Policy-Making Through Litigation: Sometimes Democratic and Mobilizing

Ian Greene
School of Public Policy and Administration
York University

Litigation represents one kind of opportunity for citizen participation in reshaping public policy. Individuals or public interest groups may litigate to have a particular piece of federal or provincial legislation, or a civic by-law, struck down as a violation of the Charter of Rights and Freedoms, or as a violation of other legal rules. Citizens or public interest groups may participate either as litigants or interveners, as they did, for example, to challenge the Harper government's policy to discontinue health care coverage for certain kinds of refugee claimants,[1] or to question the appointment of Marc Nadon to the Supreme Court[2], or to promote the legalization of assisted dying,[3] or to have aboriginal land title recognized.[4]

This paper examines the advantages and disadvantages of the litigation approach for citizen involvement in changing public policy. Opportunities for citizen participation arise because the litigation process makes it possible for well-researched social science evidence and constitutional arguments to be carefully considered and adjudicated in a fashion that is as impartial as possible -- in contrast to the political process where impartial consideration is often secondary to political expediency. Barriers include costs, the possibility of the process being hijacked by lawyers, the nature of the legal system, and the lengthy litigation process. In certain circumstances, however, this form of public participation in policy-making, can be both democratic and mobilizing.

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[1] Canadian Doctors for Refugee Care et al. v. Canada, 2014, FC 651.
[2] Reference re *Supreme Court Act*, ss. 5 and 6, 2014 SCC 21.
[3] Carter *v.* Canada (Attorney General) 2015 SCC 5.
[4] For example, Tsilhqot'in Nation v. British Columbia, [2014] SCC 44.

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The paper will begin by commenting on citizen involvement in the four cases mentioned above. These cases have been selected because they provide examples of contrasting kinds of citizen involvement.

Canadian Doctors for Refugee Care et al. v. Canada

Up to 2012, Canadian refugee policy had for more than fifty years provided "comprehensive health insurance coverage for refugee claimants and others who have come to Canada seeking its protection through the Interim Federal Health Program."[5] In 2012, the majority Conservative cabinet passed two orders-in-council that cut off medical coverage to many refugee claimants, including failed refugee claimants who cannot be deported because of the dangerous conditions in their home countries, and refugee claimants from "deisignated countries" that are not considered by the Canadian government as refugee-producing countries. "The effect of these changes is to deny funding for life-saving medications such as insulin and cardiac drugs to impoverished refugee claimants from war-torn countries such as Afghanistan and Iraq. The effect of these changes is to deny funding for basic pre-natal, obstetrical and paediatric care to women and children seeking the protection of Canada from “Designated Countries of Origin” such as Mexico and Hungary. The effect of these changes is to deny funding for any medical care whatsoever to individuals seeking refuge in Canada who are only entitled to a Pre-removal Risk Assessment, even if they suffer from a health condition that poses a risk to the public health and safety of Canadians."[6] The purpose of these changes, according to Justice Mactavish of the Federal Court, was to discourage refugee claimants from seeking asylum in Canada, and to save costs.[7]

[5] Canadian Doctors for Refugee Care, op. cit., para. 1.
[6] Ibid., para. 2-4.
[7] Ibid., para. 587, 891 and 910.

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Canadians who saw these measures as draconian and mean-spirited, and who wanted to reverse these policies, had several choices. They could lobby their MPs and the government. They could wait until the 2015 election and work toward the defeat of the Harper government. Or they could litigate. Of course, these actions are not mutually exclusive, and some of the opponents of the 2012 refugee policy became engaged in all three strategies.

The litigants who applied for a declaration that the new orders-in-council constituted a violation of the Charter included three public interest groups, and two individuals. The organizations were:

1. Canadian Doctors for Refugee Care (CDRC): This association was quickly formed in April, 2012 in response to the orders-in-council and included doctors who had begun to provide either free or affordable medical care to refugee claimants denied the care after June, 2012.[8] It was spearheaded by five doctors in the Toronto area, with the support of 80 more physicians. Within a month, the association had the support of nine prominent health care associations across Canada, including the Canadian Medical Association, the Canadian Nurses Association, the Canadian Dental Association, the Canadian Pharmacists Association, and the Royal College of Physicians and Surgeons of Canada. By 2013, the CDRC was supported by 21 health care associations, many private citizens, and was organizing rallies in fifteen Canadian cities. The CDRC wrote letters to Conservative cabinet ministers and MPs, and attempted to set up meetings with them.

2. Canadian Association of Refugee Lawyers (CARL): CARL was formed in 2011 to provide a national forum for the various groups and associations of refugee lawyers and academics in the provinces. By

[8] See http://www.doctorsforrefugeecare.ca/further-reading-survey.html .

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2012, its national conference, which joined several cities by videoconference, attracted hundreds of participants.[9]

3. Justice for Children and Youth (JFCY): JFCY "is a non-profit legal aid clinic with a focus on the legal rights of children. It has expertise in protecting and promoting the legal rights of children, and has experience working with child refugees. JFCY is the operating name for the Canadian Foundation for Children, Youth and the Law."[10]

The two individual litigants were described as follows by Justice Mactavish:

1. Mr. Hanif Ayubi "is a diabetic and a failed refugee claimant from Afghanistan. He has been in Canada since 2001 and has not been removed because … the country's general conditions are such as to put the safety of the general population at risk. Until June 30, 2012, Mr. Ayubi had coverage … for his insulin and medical supplies, and for the medical care that he requires to manage his diabetes. After the changes to the IFHP came into effect, Mr. Ayubi no longer had health insurance coverage for any of his medical care or his medications as he is classified as a rejected refugee. Mr. Ayubi works as a dishwasher and is a low-income person. He says that he is unable to pay for the medications and the diabetic supplies that he needs to monitor his diabetes and its complications. Mr. Ayubi was eventually granted discretionary … coverage by the Minister which pays for his medical services such as doctors' appointments, but does not pay for his medication and diabetic supplies. Mr. Ayubi is currently being kept alive by free samples of insulin supplied to a Community Health Centre by a pharmaceutical company."[11]

[9] Justice for Children and Youth web page is at: http://jfcy.org/en/ .
[10] Canadian Doctors for Refugee Care, op. cit., para. 21.
[11] Ibid., para. 22-24.

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2. "Daniel Garcia Rodrigues and his wife came to Canada from Colombia in 2007. He claimed refugee protection based upon his fear of paramilitaries belonging to the Fuerzas Armadas Revolucionarias de Colombia (FARC). The Immigration and Refugee Board [refused] Mr. Garcia Rodrigues' refugee claim was refused, [but] his wife's claim was accepted. She subsequently applied for permanent residence in Canada as a protected person, including Mr. Garcia Rodrigues in her application. Mr. Garcia Rodrigues had [health insurance] coverage until the changes … came into effect on June 30, 2012. In July of 2012, he suffered a retinal detachment. Mr. Garcia Rodrigues was advised that he needed surgery, and that any delay in operating could put his vision at risk. He was scheduled for surgery in August of 2012, but the surgery was cancelled when it was determined that, as a failed refugee claimant, Mr. Garcia Rodrigues was ineligible for coverage …. Mr. Garcia Rodrigues could not afford to pay the $10,000 cost of the surgery himself. However, his doctor ultimately agreed to operate on him for a fraction of the normal cost, in light of the fact that any further delay could have resulted in the permanent loss of Mr. Garcia Rodrigues' vision." [12]

In this particular case, the three public interest groups that initiated the litigation were also involved in trying to influence the Conservative government's 2012 refugee policy through lobbying, letter-writing, and demonstrations, but this activity fell on deaf ears. The other strategy that they pursued was litigation. In order to strengthen their case, they joined with two failed refugee applicants who were severely negatively impacted by the policy change. It is clear that these two individuals would have had no success in pursuing policy change through the normal political process, and would not have had the funds to litigate without joining with the three public interest organizations. For the three organizations and two individuals, litigation was therefore likely to be the most successful means to be successful in changing the Harper government's 2012 policy regarding refugee health care. Unlike the political

[12] Ibidl, para. 25-28.

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process, the court system is designed to consider evidence impartially, and so the litigants were much more likely to obtain a fair hearing in the courts than in the offices of Conservative MPs and cabinet ministers.

In the end, the litigation succeeded before a trial judge in the Federal Court in July, 2014. The two orders-in-council were struck down as violations of s. 12 of the Charter (cruel and unusual punishment) and s. 15 of the Charter (equality), but the declaration of invalidity was suspended for four months to give the government a change to adjust. The government's adjustment was to appeal the decision, but the appeal was dropped by the Trudeau government after the 2015 election.

The public education campaigns and demonstrations organized by the three plaintiff organizations likely encouraged thousands of Canadians sympathetic to the goals of these organizations to get involved in supporting policy change. No doubt, this process had at least some influence in the 2015 election results.

The Nadon Case

In 2013 the Harper government appointed Marc Nadon, a semi-retired Federal Court of Appeal judge, to fill a Québec vacancy on the Supreme Court. This appointment was challenged in court as unconstitutional by Toronto lawyer Rocco Galati. Galati is a colourful Toronto lawyer[13] who does a fair amount of litigation in the Federal Court. Nadon was not regarded by the legal community as the kind of leading Québec jurist likely to be appointed to the Supreme Court, but during his Federal Court

[13] Alyshah Hasha, "Rocco Galati: the lawyer who lives to take on the government," Toronto Star, Oct. 29, 2013, accessed May 8, 2016 at: https://www.thestar.com/news/crime/2013/10/19/rocco_galati_the_lawyer_who_lives_to_take_on_the_government.html

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career, his decisions had tended to be restrained. Galati was curious about whether Nadon met the requirements for a Québec position on the Supreme Court, and Galati concluded that Nadon might not be eligible. This is because the *Supreme Court Act* requires that the three judges from Québec be appointed from the Québec Superior Court, the Québec Court of Appeal, or the Québec bar so that the five-judge panels that hear Quebec civil law appeals always have a majority of Quebec judges who are likely to be experts in this area. Although Nadon had at one time practiced civil law in Quebec, he had not done so during his two decades on the Federal Court, which deals primarily with federal administrative law issues. [14]

To clear the air, the government sent a reference question to the Supreme Court. In 2014, in a six to one decision that included the two remaining Quebec judges, the Court ruled that the appointment was indeed unconstitutional.[15] There were nine interveners in this case: the Attorney General of Canada, the Attorney General of Ontario, the Attorney General of Quebec, Rocco Galati, the Constitutional Rights Centre Inc. (an organization that Galati helped to found),[16] the Canadian Association of Provincial Court Judges, and three former Federal Court of Appeal judges: Robert Décary, Alice Desjardins and Gilles Létourneau.

This case illustrates the impact that a determined individual can have on public policy through litigation. Of course, it helps to be a lawyer with the means to finance your own litigation, and it helps to be an expert in the area you are litigating. As a result, such one-shot interventions in government policy decisions are unlikely to occur very often. It is obvious, however, that attempting to change the

[14] See Sean Fine, "The secret short list that provoked the rift between Chief Justice and PMO," May 23, 2014, accessed May 8, 2016 at: http://www.theglobeandmail.com/news/politics/the-secret-short-list-that-caused-a-rift-between-chief-justice-and-pmo/article18823392/?page=all .
[15] Reference re *Supreme Court Act*, ss. 5 and 6, 2014 SCC 21.
[16] See Alyshah Hasha, op. cit. The intervention in this case was the first project of the Centre.

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government's decision to appoint Nadon through lobbying, letter-writing or campaigning through the media would have had absolutely no impact. Litigation was the only alternative.

Assisted Dying

The litigation over the assisted dying issue illustrates yet another opportunity for citizen involvement in policy change through litigation. Whereas the *Canadian Doctors for Refugee Care* case illustrates how citizens can mobilize to try to reverse a new government policy initiative, the two assisted dying cases that ended up in the Supreme Court, the *Rodrigues* case of 1993,[17] and the *Carter* case of 2015,[18] show how public interest groups can persist over decades to bring about policy change, and also how diverse public interest groups can oppose each other throughout the process.

In 1993, Sue Rodriguez, a 42-year-old mother suffering from amyotrophic lateral sclerosis, made application to a superior court for a declaration that the sections of the Criminal Code that prohibit anyone from assisting with suicide be declared ultra vires ss. 7, 12 and 15 of the Charter. She was supported by two public interest groups that intervened in the case: Dying with Dignity, and the Right to Die Society of Canada. Seven groups intervened to oppose the Rodriguez application: the British Columbia Coalition of People with Disabilities, the Coalition of Provincial Organizations of the Handicapped, the Pro-Life Society of British Columbia, the Pacific Physicians for Life Society, the Canadian Conference of Catholic Bishops, the Evangelical Fellowship of Canada, and People in Equal Participation Inc. Rodriguez lost at the Supreme Court level in a five to four decision.

[17] [1993] 3 S.C.R. 519.
[18] Carter *v.* Canada (Attorney General) 2015 SCC 5.

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From the time of the Rodriguez loss to 2015, groups supporting dying with dignity continued to lobby the federal government to revise the Criminal Code to allow physician-assisted suicide in particular circumstances. Six private member's bills were introduced in the House of Commons to decriminalize assisted suicide, but none was passed.[19]

In 2009, Gloria Taylor was diagnosed with fatal neurodegenerative disease (ALS), and initiated litigation in 2010 for the same kind of declaration that Sue Rodriguez had fought for in 1993. The litigation was supported by the British Columbia Civil Liberties Association, Dr. William Shoichet, a British Columbia doctor who said he would be willing to participate in physician-assisted dying if it were legally permitted, and by Lee Carter and Hollis Johnson. Lee Carter's mother, Kay Carter, was diagnosed in 2008 with spinal stenosis, a degenerative disease that is fatal. With the help of Lee Carter, and Lee's husband Hollis Johnson, Kay Carter travelled to Switzerland in 2010, where Lee Carter was able to arrange for a doctor-assisted suicide for Kay Carter. Gloria Taylor died in 2012, but the litigation continued, and the case reached the Supreme Court in 2015, where Lee Carter et al. won in a unanimous decision. The outcome in the Carter case was different from the 1993 *Rodrigues* decision for two reasons: the Supreme Court's interpretation of s. 7 of the Charter had changed and developed through two decades, and a number of jurisdictions had introduced assisted dying legislation, which meant that there was a great deal more factual evidence about how assisted dying could be regulated.

By 2015, many more public interest groups became involved in the litigation. Supporting Carter were Dying With Dignity, Farewell Foundation for the Right to Die, Association québécoise pour le droit de mourir dans la dignité, Canadian Civil Liberties Association, and Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society, as well as the B.C. Civil Liberties Association and Dr.

[19] Ibid., para. 6.

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Shoichet. There were twenty-one additional interveners: the Attorney General of Ontario, the Attorney General of Quebec, the Council of Canadians with Disabilities, the Canadian Association for Community Living, the Christian Legal Fellowship, the Canadian HIV/AIDS Legal Network, the HIV & AIDS Legal Clinic Ontario, the Association for Reformed Political Action Canada, the Physicians' Alliance against Euthanasia, the Evangelical Fellowship of Canada, the Christian Medical and Dental Society of Canada, the Canadian Federation of Catholic Physicians' Societies, the Canadian Medical Association, the Catholic Health Alliance of Canada, the Criminal Lawyers' Association (Ontario), the Catholic Civil Rights League, the Faith and Freedom Alliance, the Protection of Conscience Project, the Canadian Unitarian Council, the Euthanasia Prevention Coalition, and the Euthanasia Prevention Coalition — British Columbia.

The *Rodriguez* case of 1993 was, up to that time, one of the highest-profile cases that the Supreme Court had considered. In 1995, I interviewed eight Supreme Court of Canada judges as part of the research for the book, *Final Appeal*;[20] several of the judges commented that the Rodrigues case was the most difficult case, both from a legal and emotional perspective, that they had ever heard. The publicity surrounding the Supreme Court's decision in *Rodriguez* helped to generate a national debate about assisted dying, and it would not be surprising to discover that a majority of Canadian families have discussed the pros and cons of assisted dying at least once since the *Rodriguez* decision of 1993 drew attention to the issue. The Justin Trudeau government's draft legislation on assisted dying, which is its response to the *Carter* decision, has given rise to even more public debate about the issue. Lee Carter herself has declared that the government's draft legislation is too restrictive,[21] and her comments have mobilized thousands of Canadians with heart-felt views on the issue to contact their MPs. It is an

[20] *Final Appeal: Decision-making in Canadian Courts of Appeal*. With Carl Baar, Peter McCormick, George Szablowski and Martin Thomas. (Toronto: Lorimer, 1998).

[21] See, for example, Susana Mas, "Liberals should amend doctor-assisted suicide bill to respect top court ruling, Carter family says," CBC News, April 21, 2016, accessed on May 6 at: http://www.cbc.ca/news/politics/doctor-assisted-suicide-bill-carter-family-speaks-out-1.3546472 .

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emotional and wrenching issue about which litigation has helped to encourage citizen engagement in policy change.

Tsilhqot'in Nation v. British Columbia[22]

The Tsilhqot'in Nation consists of several thousand Aboriginals in six bands that have lived for centuries in central British Columbia on land they have always considered theirs. There was no treaty or land claims agreement that applied to their traditional territory. In 1983, the BC government granted a permit to a logging company to cut trees in an area claimed by the Tsilhqot'in. The Tsilhqot'in objected. Civil unrest resulted in blockades of logging roads by Aboriginal protesters and their supporters. The Tsilhqot'in began land claims litigation for part of their territory where several hundred Tsilhquot'in resided. [23]

"In 2002, the trial commenced before Vickers J. of the British Columbia Supreme Court, and continued for 339 days over a span of five years. The trial judge spent time in the claim area and heard extensive evidence from elders, historians and other experts. He found that the Tsilhqot'in people were in principle entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area."[24] The B.C. government appealed the trial decision.

In 2012 the BC Court of Appeal held that the Tsilhqot'in claim had not yet been established but might be in the future. As a result, the Tsilhqot'in appealed that decision to the Supreme Court of Canada, along

[22] Tsilhqot'in Nation *v.* British Columbia 2014 SCC 44.
[23] See Ian Greene, *The Charter of Rights and Freedoms: 30+ Years of Decisions That Shape Canadian Life* (Toronto: Lorimer, 2014), p. 378 ff.
[24] Ibid., para. 7.

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with a request that the Supreme Court grant Aboriginal title. The Tsilhqot'in won their appeal, and the Supreme Court recognized title.

At the Supreme Court level, there were 41 groups represented as interveners (either singly or with joint submissions); the majority were aboriginal residing in British Columbia.[25] Following is a list of interveners: Attorney General of Quebec, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta, Te'mexw Treaty Association, Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Assembly of First Nations, Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and on behalf of all Gitanyow, Hul'qumi'num Treaty Group, Council of the Haida Nation, Office of the Wet'suwet'en Chiefs, Indigenous Bar Association in Canada, First Nations Summit, Tsawout First Nation, Tsartlip First Nation, Snuneymuxw First Nation, Kwakiutl First Nation, Coalition of Union of British Columbia Indian Chiefs, Okanagan Nation Alliance, Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands, Amnesty International, Canadian Friends Service Committee, Gitxaala Nation, Chilko Resorts and Community Association, and Council of Canadians.[26]

Up to the time of the *Tsilhqot'in Nation* decision, many of the Supreme Court's decisions regarding treaty issues and lands claims urged negotiations between aboriginal peoples and the provincial and federal governments. Many of these negotiations have not been as successful as aboriginal peoples had hoped they would be, and I read the Tsilhqot'in Nation decision as the Supreme Court having lost

[25] In 1982 and 1983, when Canada's constitution was amended to recognize aboriginal rights in s. 35 and s. 35.1, most of British Columbia was not covered by treaties. As a result, a good deal of the litigation surrounding aboriginal land claims has been initiated in British Columbia.
[26] Tsilhqot'in Nation *v.* British Columbia, op. cit.

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patience with the foot-dragging of the federal and provincial governments. If the federal and provincial governments avoid good faith negotiations with aboriginal peoples, what is the incentive for aboriginal involvement in such negotiations? Litigation may be more appealing, especially as "[t]he dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title."[27] Aboriginal peoples are therefore more likely to get a fair hearing through litigation than through political negotiations, at least in some parts of Canada, and thus there is more incentive for the participation of individuals in aboriginal communities in the litigation process than in the political process.

Litigation vs. the political process

The handful of cases discussed in this paper, while hardly representative of citizen involvement in changing public policy through litigation, do help to illustrate the advantages and disadvantages of litigation as a vehicle for citizen involvement.

Barriers to citizen involvement in the policy process through litigation

The cost of litigation, of course, is the primary barrier to the use of litigation by citizens to change public policy. It is not easy to obtain accurate figures on the cost of litigation. However, we know that in the late 1980s, Merv Lavigne, a college teacher in Norther Ontario, challenged the use of the union check-off on his pay cheque to fund political activities. The cost of the litigation was far beyond Lavigne's

[27] Ibid., para. 14.

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means, but the National Citizens Coalition,[28] a right-wing lobby group once headed by Stephen Harper, supported Lavigne financially. Of course, his union had to defend itself, and prior to the case going to the Supreme Court of Canada, Lavigne's union and its affiliates had spent about $400,000 defending themselves.[29] In the end, Lavigne's side lost.[30]

Of course, there are groups like the National Citizens Coalition that will fund some litigation, and groups like the Canadian Civil Liberties Association, the British Columbia Civil Liberties Association, and the Women's Legal Education and Action Fund (LEAF) that will fund some litigation (often relying on *pro bono* donations of time from their lawyers). However, the funding problem means that those citizens who want to change public policy through litigation are at the mercy of groups that have both the desire and the funds to litigate. As a result, public policy litigation does not accurately represent the public's desire to change public policy. The selection of issues that are actually litigated is haphazard.

A second barrier to citizen involvement in public interest litigation is that there is always a danger that the litigation process can be nearly completely taken over by the lawyers representing the litigants. A good public interest litigation process will have genuine, authentic involvement of a steering committee composed of lay persons familiar with the issues involved. Such authentic involvement takes a great deal of work both on the part of the citizen participants and the lawyers, and so chances of success are not high. Lay persons who wish to be involved in the process need to master a certain minimum knowledge of the legal system, and the lawyers supposedly representing them need good

[28] National Citizens Coalition, "Merv Lavigne – a great man who fought for freedom of association and free speech," Published on Friday, 17 April 2015, accessed on May 7, 2016 at: https://nationalcitizens.ca/index.php/blog/11-blog-posts/141-merv-lavigne-a-great-man-who-fought-for-freedom-of-association-and-free-speech .

[29] Lorne Slotnick, "Use of union dues for political causes does not violate Charter, court rules," Globe and Mail, 31 January, 1989, A1.

[30] Lavigne v. Ontario Public Service Employees Union, [1991] 2 SCR 211.

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communication skills so as to be able to explain legal issues in lay terms, and they need the patience and time to do so successfully. That often means fewer billable hours and more *pro bono* work.

A third obstacle is that the court system filters out nearly everything except facts proven to be legal issues. All public policy issues that citizens groups wish to litigate have to be translated into bona fide legal disputes. The translation of public policy issues into the narrow realm of genuine legal disputes means that nearly always, citizens groups must leave aside some issues that are important to them.[31]

Finally, litigation is not usually a good route to choose for those who desire relatively quick policy change, as illustrated by the decades that it took the Tsilhqot'in Nation to achieve its goals through litigation.

Advantages to citizen involvement in the policy process through litigation

The major advantage of litigation is that within its confines, citizen litigators are often guaranteed a more substantial fair hearing than they would normally get through the political process.[32] The goal of courts is to review as impartially as possible evidence submitted by all parties. Of course, this means that lawyers and expert witnesses submitting evidence must do so in a way that judges can understand the evidence as accurately as possible. For various reasons, try as they might, judges can misinterpret

[31] See Peter McCormick, *Canada's Courts* (Toronto: Lorimer, 1994).
[32] In my book, *The Courts* (Canadian Democratic Audit; Vancouver: UBC Press, 2006). I argued that expert witnesses can sometimes act as proxies for the position of various groups of citizens.

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the evidence.[33] However, the key point is that judges are expected to review evidence impartially. The expectations we place on politicians to review evidence impartially is far lower.

Moreover, in contentious cases, the level of scrutiny put on evidence through the court process may be even higher than for peer-reviewed articles in the academic world. For example, I was an expert witness in a refugee case in 1991-2, a case in which I eventually submitted four affidavits.[34] But after submitting only the first affidavit, I had collected enough evidence to co-author a paper that was published by a reputable international journal.[35] The standard demanded by the litigation process was more demanding. My evidence was challenged the experts on the other side three times, and in response, I needed to collect ever more rigorous statistical evidence.[36] On the down side, however, one party to litigation can wear out the other through demanding higher and higher levels of proof, and so litigation battles can sometimes be won more through attrition than through truth-gathering.

Conclusions and Observations

Citizen involvement in changing public policy should rarely, if ever, focus solely either on litigation or the political process. From my perspective, the default should be the political process. My bias comes from a year's experience as assistant to an Alberta cabinet minister from 1982 to 1983. Much of my job consisted of meeting with constituents and lobbyists, and listening to their recommendations for

[33] For example, see Carl Baar, "Criminal court delay and the Charter: The use and misuse of social facts in judicial policy making." (72(3) Canadian Bar Review, 305). Baar demonstrates how the Supreme Court misinterpreted the social science evidence introduced in the *Askov* case.

[34] "Affidavit of Ian Greene re Disposition of Applications for Leave to Appeal and Leave to Commence Judicial Review in the Federal Court of Appeal," December 16, 1991, Federal Court of Appeal, 15 pages. Four supplemental affidavits, totalling 50 pages, were filed on the following dates: 12 December, 1992, 27

[35] Ian Greene and Paul Shaffer, "Leave to Appeal and Leave to Commence Judicial Review in Canada's Refugee-Determination System: Is the Process Fair?" 4(1) 1992 *International Journal of Refugee Law*, 71.

[36] See Ch. 1 of Ian Greene, Carl. Baar, Peter McCormick, George Szablowski and Martin Thomas, *Final Appeal: Decision-making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998).

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changes to public policy. By then, I had a Masters degree in political science, and I liked to think that I was pretty good at sorting out good evidence from bad, between identifying well-researched proposals from purely self-serving or ideological ones. However, I had the good fortune to work for a cabinet minister in the Peter Lougheed administration during its early years, and the Lougheed administration was more pragmatic than ideological. Well-researched policy recommendations would get serious consideration if there were facts to back them up. Unfortunately, however, Progressive Conservative governments in Alberta since the Lougheed era have not been nearly as pragmatic, and so for Albertans with policy preferences, trying to get a fair hearing through the political process has not been as accommodating as it was in the early years. It is instructive, I think, that Rachel Notley, in her acceptance speech after the 2015 Alberta election, devoted a few minutes to praising Peter Lougheed's pragmatic approach.

Even when citizens present policy positions to pragmatic governments, it is not unwise for them to consider whether a litigation approach might be more effective. I have been an engaged citizen throughout my adult life, and have from time to time approached my MP, MPP or city councilor with policy recommendations. In the back of my head, I often carry a legal argument: "I really think that if this issue were to go to court, the government would lose. Is it is really worth the cost and the bad publicity to you?"

When governments are rigidly ideological, however, litigation may be the only option for citizens to choose to try to change public policy, as was the situation in three of the cases discussed in this brief paper: *Canadian Doctors for Refugee Care*, the Marc Nadon case, and the *Tsilhqut'in Nation* case.

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