Meaningful Participation? The Judicialization of Electoral Reform in Canada Post-Figueroa v. Canada

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Abstract. Despite pressure for reform and the concomitant benefits of more inclusive and participatory electoral systems, major electoral reform in Canada rarely takes place through legislative or public deliberative processes. As a result, citizens demanding electoral reform have turned to other venues to pursue their claims for democratic change. This article considers such venue shifting efforts through the use of the courts to pursue electoral reform in Canada. Using precedent tracing and content analysis approaches, it considers all the final judicial decisions citing the Supreme Court of Canada's decision on democratic rights in *Figueroa v. Canada*. It finds that courts were willing to intervene in some cases involving technical aspects of the exercise of democratic rights, but tend not to entertain more major systemic-based reforms. As such, the article concludes that such pursuits for democratic reform through judicialization are likely to fail.

Keywords. Electoral reform; judicialization; courts; law.

Résumé. Malgré les pressions pour conduire des réformes et les avantages concomitants qui se trouvent dans des systèmes électoraux plus inclusifs et participatifs, les réformes électorales au Canada ont rarement lieu par le biais de processus législatifs ou délibératifs. Ainsi, les citoyens appelant à des réformes électorales se sont tournés vers d'autres cadres pour mener à bien leurs demandes de changement démocratique. Cet article considère que ces efforts se matérialisent dans l'usage des tribunaux pour continuer les réformes électorales au Canada. En utilisant la jurisprudence et l'approche de l'analyse du contenu, cet article analyse toutes les décisions judiciaires finales qui citent la décision de la Cour Suprême du Canada sur les droits démocratiques, *Figueroa v. Canada*. Cet article suggère que les tribunaux se sont montrés désireux d'intervenir dans quelques cas qui impliquent des aspects techniques relatifs à l'exercice de droits démocratiques, mais ont été plus réservées s'agissant de réformes plus vastes. Ainsi, il conclut que les efforts pour poursuivre les réformes démocratiques par le biais de la judiciarisation sont probablement voués à l'échec.

Mots clefs. Réforme électorale; judiciarisation; tribunaux; droit.

While Canadians have traditionally demonstrated little concern over the broader issues associated with electoral reform (Massicotte 2001), the first half of the 2000s decade marked a significant departure from the status quo. Concerns with the lack of representative nature of the Canadian governance system drove electoral reform and other democratic deficit issues higher on both public and government agendas and caused political actors to pursue various types of democratic reform (Studlar 2003, Aucoin and Turnbull 2003). At the federal level, changes were made by successive Liberal and Conservative governments to an election financing regime for parties that had remained relatively untouched for almost thirty years. The combined effect was to limit the amount of contributions that could be provided by individual Canadians, removed corporate and union funding as a source for contributions and provided a publicly funded subsidy on a per vote basis, thereby significantly altering the methods of financing parties, elections and leadership campaigns (Tanguay 2009). The pursuit of the holy grail of electoral reform, changing the voting method, also received considerable attention and consideration. While ultimately unsuccessful, there was reason for proponents of electoral system change to be hopeful. In early 2004, the Law Commission of Canada provided a report to the federal government recommending change from the single member plurality system to one based on proportional representation. The two major opposition parties also included significant electoral reform provisions in their election platforms, including consideration of changes to the voting method. Furthermore, at least half of the provincial governments explored the potential of changing their method of selecting representatives, albeit to varying degrees (Stephenson and Tanguay 2009). In British Columbia and Ontario, governments went so far as to convene citizens' assemblies to debate the issues associated with possible reform and hold referenda to poll their respective populations on the subject. However, despite the potential for and the significant efforts expended in pursuit of electoral system change, no actor or organization was successful in bringing about this institutional reform at any level of government in Canada.

There is another, less well-known element to the pursuit of electoral reform in Canada during this time, namely its consideration in multiple sites of decision-making authority. One such consideration was the strategic choice to use litigation as means of pursuing democratic reform agendas. While the democratic rights provisions set out in section 3 of the Charter of Rights and Freedoms did not receive much judicial consideration during the first two decades of the Charter era (MacIvor 2004), there has been an increasing number of cases involving the litigation of section 3 over the course of the last decade (Knight 1999). Chief amongst these cases was the Supreme Court of Canada's 2003 decision in *Figueroa v. Canada (Attorney General)* where the court clarified the meaning and purposes of the democratic rights provisions of the Charter to provide Canadian citizens with the opportunity for both "effective representation" arising from and "meaningful participation" in the electoral system.

This article examines the impact of the venue shifting of the democratic reform debate into the courts in Canada and evaluates whether this site of decision-making authority provides a means for achieving electoral reform. Underlying this focus is the growing trend within Canada and other democratic states for a diverse range of actors, both external to and within government, to seek judicial consideration of democratic processes and other forms of mega-politics (Hirschl 2008). In this regard, the judicialization of political disputes is viewed, in part, as a strategy employed by political actors to shift the venue of contestation of an issue in an effort to either enhance or rebut efforts at securing institutional change (Baumgartner and Jones 1991). Our findings demonstrate the difficulty of this approach to institutional change through the use of litigation due to the particular biases and characteristics of courts as sites of decision-making authority. In pursuit of this argument, we employ an institutionalist examination of the courts in the context of various electoral reform challenges in Canada as a means of illuminating the receptiveness of this site of institutional decision-making authority to particular types or forms of discourse. In particular, we find that the consistent utilization and application of procedural and technical definitions of democracy, rather than the application of broader and more normative interpretations of the meaning of "effective representation" and "meaningful participation, in consideration of claims for electoral reform and greater democratic legitimacy, constitutes a key attribute of the courts as an institution. As a result of this bias, we find that courts may address individual and procedural based constraints in the electoral system, but tend not to intervene where greater systemic institutional change was sought. As such, the article concludes that the courts, as a venue, are not particularly receptive to normative based concerns associated with electoral system change. As a result, our article therefore serves to not only explain electoral reform successes and failures through the courts in Canada, but also moves beyond the electoral reform debate and contributes to the broader neo-institutionalist literature by providing greater insight into the characteristics and biases of courts as institutions.

The article is organized in the following manner. The first section undertakes a brief examination of the literature on electoral reform, judicialization and venue shifting. The second section briefly reviews the Supreme Court of Canada's decisions under section 3 of the Charter of Rights and Freedoms culminating in its 2003 *Figueroa* decision where the court clarified the scope of the democratic rights under section 3 to include effective representation and meaningful participation. The third section explores the judicialization of electoral reform in Canada post-*Figueroa* through an examination of all of the final judicial decisions in Canada following that decision, thereby establishing the circumstances under which courts were willing to intervene in the electoral process. The fourth section places the electoral reform debate into a broader consideration of the judicialization of democratic practices and draws conclusions concerning the state of democracy in Canada.

Electoral Reform, Judicialization and Venue Shifting

The general emphasis of the electoral reform debate literature has been on the impact of and the particular advantages and disadvantages of different types of electoral systems, with much more limited consideration on the processes associated with the successes or failures in implementing electoral system change (Katz 2005, 2011). More recently, there has been a growing interest on the causes of both situations of reform as well as stability. This has led to the identification and consideration of at least seven different obstacles to electoral reform of varying degrees of intensity (Rahat and Hazan 2011).[1] However, in Canada, one such perceived barrier, the institutional pathway provided through the courts by way of a Charter claim, may provide as much an opportunity for reform as a constraint (MacIvor 2004, Knight 1999). Historically, efforts at enacting electoral reform in Canada were concentrated not on changes to the method of voting, but rather on disproportionalities between electoral districts (Massicotte 2005). This focus has shifted to the method of voting within the electoral system and has culminated in criticisms of Canada's first-past-the-post electoral system as being under-representative, leading to false majority governments with a lack of majority support in the population, a disengagement of the electorate from politics and declining voter turnout, and a significant contributing factor to regionalism in the country (Cairns 1968, Milner 2000, Pilon 2007). Conversely, it has also been the suggested that change in the method of voting may do more harm than good and should be approached cautiously (Courtney 1980, Carty 2004). The more recent investigations by various provincial governments in Canada of electoral system change, whether by virtue of government committee, independent commissions, citizen assemblies or referendum, has led to a renewed interest in the electoral reform debate. It has also resulted in wider investigations into the processes associated with attempts at enacting electoral system reform in Canada (Mendelson, Parkin and Van Kralingen 2001). In particular, the unique processes (at least by Canadian standards) employed by the provinces of Ontario and British Columbia to change to their electoral

systems has resulted in explorations of those processes and the causes of their failures (LeDuc, Bastedo and Baquero 2008, Stephenson and Tanguay 2009). The previous arguments for electoral system reform have been rooted in assertions that the implementation of a different electoral system may result in increased youth engagement, gender balance, stronger local representation, a Parliament that would better reflect the diversity of the population, and fairer election results. While these are substantial arguments in favour of electoral system reform, the venues in which these arguments were contemplated and advanced failed to generate the desired outcomes. More recently, proponents of electoral system reform have advocated for the use of Charter-based litigation as a plausible means of achieving their electoral reform goals (MacIvor 2004, Pilon 2007). This approach is predicated on a fundamentally different argument than has been advanced in other institutions, mainly that the first-past-the-post system does not treat all votes equally and is therefore a violation of the democratic rights provisions of the Charter (Knight 1999).

The pursuit of this strategic litigation approach to electoral system change is neither novel nor particularly surprising. In fact, there is an increasing tendency in Canada and other Western democratic states to transform political conflicts into legal disputes. (Shapiro and Stone Sweet 2002; Bazowski 2004; Hirschl 2008). As the use of the courts and legal discourses and concepts to contest political issues has increased, so has the importance in the questions under contestation, including the consideration of fundamental and core political questions (Hirschl 2006). With these developments has come a growing understanding that courts are important actors in the political and policy-making processes. Rather than viewed as simple adjudicative bodies that resolve disputes on a case-by-case basis, these sites of decision-making authority are now considered as possessing the potential to significantly impact overall political and policy directions (Hausegger, Hennigar and Riddell 2009). Not surprisingly, these developments raise questions concerning the location of decision-making authority in democratic states (Clayton and Gillman 1999; Clayton 2002). This has, in turn, led to questions concerning which site of institutional decision-making authority is better positioned to protect the rights of both groups and individuals in democratic societies (Hiebert 2001; Banfield and Knopff 2009). It has also led to concerns over judicial activism, the sidestepping of politics and the lack of democratic legitimacy associated with judicialization practices (Knopff and Morton 2000; Rex and Jackson 2009; Lever 2009).

The judicial activism debate is predicated, in part, on the belief that the judiciary is an independent body free to render decisions with or without regard to the law, the other branches of government or the will of the general public (Segal and Spaeth 1996). This view underlies much of the behavioural models of judicial decision-making literature (Gillman 2004). However, judges, whether guided by strategic motivations or their own personal principals, attitudes or characteristics, remain influenced and constrained by the institutional biases and characteristics of courts as a whole. While seemingly free to make decisions based on the facts and issues before them, individual judges remain bound by factors inherent to courts as institutions more generally, such as adherence to rules of evidence, past precedents and appropriate standards of review (Songer and Lindquist 1996). Failure to abide by these constraints runs the risk of successful appeal or legislative override. Accordingly, the judicialization of particular political and policy making disputes may be more fully understood through a consideration of these types of institutional characteristics and factors that are at play, such as through a manifestation of and in the context of the venue-shifting framework. Baumgartner and Jones (1991, 1993) view venue shifting as an attempt by policy actors, generally those opposed to a particular policy status quo, to move a political or policy dispute into an institutional setting that may be more receptive of their policy goals. Institutions are defined as the rules and procedures that structure the relationships between actors in a given policy community or in relation to a particular political or policy issue (Hall, 1996). They shape ideas and discourses by determining who talks to whom and the content, timing and place of those conversations and deliberations (Schmidt 2006). In doing so, they provide both opportunities and constraints on the actions and strategies that actors may employ in the pursuit of their policy goals, including attempts to alter the institution itself or, where possible, avoid it altogether (Thelen and Steinmo 1992; Hay 1995).

The rules and procedures that constitute specific and separate institutional arrangements each impact the efforts of policy actors in at least two different ways. First, they serve to shape the interactions of policy actors within the processes of each individual institutional site of decision-making authority (Campbell 2004, Schmidt 2008). Second, the decisions generated from one institution, and perhaps most importantly, the justification for those decisions, may also provide opportunities or constraints in other institutions. For example, judicial decisions may serve as constraints in other sites of decision making authority, particularly in the case of multi-institutional decision making processes and in relation to both factual and legal issues (Flynn 2011). Implicit in this impact is the understanding that courts are not separate institutions apart from the other branches of government, but rather are one part of a broader landscape of political activity and overall governmental decision making processes (Shapiro 1964). However, while the importance of the interaction of ideas, interests and institutions is understood, the specific causal mechanisms of institutional change are not (Campbell 2004). Furthermore, less is known about the characteristics and biases of various institutional decision-making settings in which policy or political goals are pursued (Boothe and Harrison 2009), including the courts, or the receptiveness of particular institutional decision-making settings to the differing forms of discourse (Montpetit, Rothmayr and Varone 2005). This is particularly salient to any dispute, including the electoral reform debate, which seeks to alter the institutional arrangements underlying the practices of democracy in Canada.

Section 3 of the Charter of Rights and Freedoms

Much of the early litigation surrounding the democratic rights provisions of the Charter of Rights and Freedoms dealt with situations in which individuals had been denied the right to vote or run for office due to considerations such as residency, incarceration, prior electoral fraud convictions and the holding of certain public offices or with concerns surrounding equality of voting power in relation to the establishment or revision of electoral boundaries (Knight 1999). The latter set of electoral boundary cases culminated in the first case to appear before the Supreme Court of Canada in relation to section 3, the 1991 decision in *Carter v. Saskatchewan (Attorney General).*[2] The majority of the court reasoned that there were more elements to the democratic protections contained in section 3 than the simple guarantees of the rights to vote and run for office. As is the case with most Charter rights, the court held that the democratic rights should be interpreted in a broad and purposive fashion and established an underlying principle supporting democratic rights in Canada, namely the notion of effective representation. The court went on to hold that while equality of voting power was an important component to effective representation, it was not the only consideration. The end result was the dismissal of the claim for an equalization of voting power through interference with the electoral district boundaries established by the independent commission.

Two years later, in *Haig v. Canada*, the Supreme Court appeared to expand effective representation to also include the right "meaningful participation" in the electoral processes to select those representatives. However, the court dismissed the applicant's claim to vote in a referendum on the Charlottetown Accord in the province of Quebec due to residency restrictions, holding that section 3 was explicitly limited to the election of federal and provincial representatives alone. The court did not provide any further articulation of the scope of section 3 or an expanded definition of the phrase "meaningful participation". Subsequent cases also provided the Supreme Court the opportunity to more fully clarify and expand on the two underlying principles, but failed to do so. For example, in *Thompson Newspapers v. Canada*, the court held that restrictions on publication of opinion polls in the last three days of an election campaign did not infringe upon section 3, but did not consider the issue of meaningful participation. In *Harvey v. New Brunswick* the court found that restrictions on the right vote and hold office due to conviction of election related offences were a prima facie violation of section 3, but upheld the provisions under section 1. Similarly, in *Sauve* (2002), the Crown conceded that restrictions on the right to vote for prisoners incarcerated for a period of two years or greater was also a violation of section 3. In neither case was there a detailed consideration of the underlying principles.

The lack of clarity concerning effective representation and meaningful participation was rectified by the Supreme Court in *Figueroa v. Canada*. Figueroa, the leader of the Communist Party of Canada, challenged a number of the provisions of the federal Elections Act that created a fifty candidate threshold on political parties for official party status and provided a number of benefits to organizations that crossed that threshold while withholding the same from independent candidates and smaller parties. While the federal government responded to adverse lower court decisions by amending the act to lower the threshold and remove some of the more punitive elements of the legislative scheme, Figueroa's appeal to the Supreme Court continued on the issues of the validity of any threshold, the rights of smaller parties and individual candidates to issues tax receipts outside of the election period, the right to retain unspent election funds and restrictions on party identification on the ballot.

In reaching its decision, the majority of the Supreme Court held that the right to participate in the electoral process was the "central focus" of section 3.

> *The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses.* In each instance, the democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process. (*emphasis added*)

While the court was in agreement on the final decision, they were divided on the interpretation of section 3 and its consideration with respect to the rights of both individuals and communities. The majority grounded its decision on notions of individual participation. In contrast, the minority indicated that claims to democratic rights had to be based in the broader historical development and context of the political community as a whole. This has, in turn, led to a debate surrounding the theoretical models of democratic regulation employed by the courts, namely egalitarian versus libertarian or individual versus collective rights claims (MacIvor 2004, Manfredi and Rush 2008, Katz 2011). On the basis of either judgment, the Supreme Court provided a broad right to participate in the electoral process; a right that extended beyond the simple exercise of the franchise and the right to stand as a candidate. In doing so, it also expanded the potential for individuals disenchanted with some aspect of the electoral process to seek redress and remedy through charter based litigation.

Electoral Reform and Meaningful Participation Post Figueroa

Methodology

In examining the impact of the courts on the electoral reform debate in Canada as a means of better understanding the inherent characteristics and biases of this site of institutional decision making authority, we combine the standard legal research technique of precedent tracing with a content analysis approach. This combination of methodologies provides a number of advantages. For our purposes, we are primarily concerned with how it provides a technique to expose the diversity of questions that are pursued through alternate policy-making venues as well as highlighting the receptiveness of those institutions (in this case the courts) to particular issues. This provides the opportunity to consider the likelihood of success in using courts to contest a policy or political dispute in the future or whether political actors are better off pursing their goals in alternate venues of contestation.

We divide the sixteen final court decisions following *Figueroa* on the basis of outcomes as a means of providing a preliminary and quantitative understanding of the receptiveness of courts on a general basis to institutional reform claims. As a means of better understanding the institutional characteristics and biases of courts, we also explore the nature of the issues under dispute in each case for a greater qualitative understanding of the reasons why courts make their decisions. We categorize electoral participation on an application of a threefold typology of the scope of electoral reform being sought (technical, minor and major) as established by Jacobs and Leyenaar (2011).[3] We follow their listing of electoral reform dimensions (proportionality, election levels, inclusiveness, ballot structure and electoral procedures) and also expand upon it by considering two additional categories: financial and initiation.

Analysis of Decisions

From a quantitative perspective, the categorization of the various electoral reform disputes based on their outcomes provides a tentative conclusion of the receptiveness of the electoral reform issue to judicial intervention. The sixteen final post-*Figueroa* decisions suggest that the courts appear to be strongly disinclined to the various electoral reform arguments, with only four cases being successful while the remaining twelve were dismissed. This suggests a relatively conservative orientation by the courts in relation to electoral reform arguments. We now turn to consideration of the issues under dispute in each case.

Positive Decisions

In *Jong v. Ontario (Attorney General)*, the court found that mandatory candidate deposits in Ontario also violated the Charter. In particular, the mandatory deposit scheme may force smaller parties to divert funds away from communication with the public and into allocating a significant amount of their resources to nominate a full slate of candidates. The court focused on the importance of the informational aspects of election campaigns, finding that it required protection for participants to say and voters to hear a particular message. Of specific concern was the fear that parties and individuals with greater financial resources would monopolize election discourse and render the involvement of less financially well off participants inconsequential. The removal of the deposits for all candidates affects the ballot structure dimension and is a major reform.

Two other positive decisions dealt with issues of individual participation in the electoral process by public servants and fall under the general dimension of electoral procedures. In *Directeur général des élections du Québec v. Camirand*, the issue before the court was whether the Chief of Staff to the mayor of the city of Repentigny was prohibited from attending and participating in partisan activities on behalf of the incumbent mayor during the course of the municipal election campaign. In *Calgary Health Region v. United Nurses of Alberta*, judicial review of an arbitration award was pursued in relation to a finding that the Health Region's policy requiring employees seeking political office to take an unpaid leave was contrary to provisions in collective agreement. In each case, the court found that limitations on the ability of public servants to participate in partisan activity during the course of an election campaign infringed on the notion of meaningful participation. These electoral procedure dimension claims affect less than one percent of the eligible population and would thereby be technical in nature.

At issue in *R. v. Nunziata* were the provisions of the federal election scheme that required independent candidates to transfer excess campaign funds to the Receiver General. In contrast, party affiliated candidates were able to retain excess funds by way of transfer to either the local or national party organizations. The court found that this differential treatment of individual candidates affected the ability of Canadians to meaningfully participate in election campaigns, both for candidates as well as the general public. First, the excess fund transfer requirement negatively affected the possibility that individuals may run for office due to the fact that they may lack sufficient financial resources to be able to communicate with the public on the same level as parties. Second, the possibility that donated funds could be forfeited to the government may make individuals reluctant to financially contribute to the campaigns of individual candidates, thereby also indirectly affecting broader aspects of electoral participation. As part of the financial dimension of the electoral system, the reforms seek to extend rights held by some participants to others, but likely effect less than twenty percent of the candidates, thereby being a minor reform.

Negative Decisions

From a judicialization-based approach, there has been a single case that sought to alter the proportionality dimension of electoral systems in Canada. The Quebec Court of Appeal was faced with a challenge to the method of voting in *Daoust v. Quebec,* with the applicants seeking to overturn the first-

past-the-post system in favour of a proportional representation system. While the court found that the issue was one that was capable of review by the courts and not a matter to be left solely to the legislatures, it dismissed the appellants' claim. On a factual basis, and relying upon expert evidence led by the government, the Court found that while elections under the first past the post system may lead to disproportionate results, this was not always the case and that the consistent under-representation of voters' wishes did not equate to a democratic deficit or a lack of effective representation. Similarly, it found that an electoral system that tended to lead to majority governments, even in the absence of majority support, was both a political choice as well as lacking any impact on the right to participate. Notably, the court appeared to establish the boundaries of the rights under section 3; indicating that they included the right to vote in periodic elections and to do so freely and secretly, the right to vote for the party or candidate of a voter's choice the right to be a candidate, and the right to speak in public during an election campaign. In particular, the court indicated that effective representation was not dependent on the type of electoral system in place.

In *Henry v. Canada*, as an aspect of the electoral dimension of inclusiveness, the applicant sought to strike down the provisions of the Elections Act that required individuals to prove their identity and place of residence in order to receive a ballot. While the court found that the restrictions in question clearly violated section 3 as they may prevent people who are unable to provide identification or demonstrate residency from being able to vote, the restrictions were a reasonable limitation under section 1. As an aspect of voter registration, the proof of identification and residence requirements are minor based reforms as they impose a cost on a voter.

On the fourth dimension of electoral reform, namely ballot choice, there were two cases. In *Mahoney v. Chief Electoral Officer of Canada*, the court faced a challenge to the provisions of the federal Elections Act that required a candidate's nomination papers include a statement signed by an auditor consenting to act in that capacity. While the court accepted that the applicant raised significant legal issues that required consideration by the court, the request for an interlocutory injunction preventing the federal election from occurring in the Yukon was dismissed, even though it had the effect of preventing the applicant from standing for office. The effort by Mahoney to remove the auditor provisions would affect the available range of voter choices and therefore falls within the ballot structure dimension. It would also have the effect of removing the requirement for every candidate, thereby making it a major reform. In *Stevens v. Conservative Party of Canada*, the issue before the court dealt with the registration of the Conservative Party of Canada and, more particularly, opposition to the merger of its two constituents, namely the Canadian Alliance and the Progressive Conservative Party of Canada. The applicant, a former cabinet minister in the Mulroney Progressive Conservative government, sought judicial review on the basis of procedural irregularities on the part of the Chief Electoral Office in the registration process of the newly formed party. The court dismissed the application, finding that the irregularities did not lead to any substantial defect or departure from the purposes of the Act and, citing *Figueroa*, the need for stability within the electoral system. As the dispute involved procedural irregularities involving a single party, the issue under dispute was technical.

In *Bourassa v. Ferdland*, the applicant sought to annul the results of a municipal election on the grounds that the municipality had employed an experimental balloting system. As this case involved the simple manner of how ballots were counted (by hand versus electronically) and did not effect voters or candidates, it falls under the general electoral procedures dimension and was technical in scope. The court dismissed the applicant's case, finding that there was no evidence of any impropriety in the process of voting or the counting of the results. Notably, the court also held that the provisions of section 3 were not fully applicable to municipal elections in any event.

The first set of financial dimension based decisions addressed issues of third party or non-candidate participation in election campaigns. In *Harper v. Canada (Attorney General)*, the Supreme Court faced a challenge to advertising and spending limitations on third parties. The court cited *Figueroa* for the proposition that each citizen had the right to participate in the processes of democratic discussion that occurred during election campaigns, including the advancement of unpopular or distasteful positions. However, in doing so, it found that unfettered participation may lead to a flooding of the electoral discourse by some parties, thereby drowning out other voices and denying those parties the right to meaningful participation. The court accepted advertising and spending limitations on third parties as a significant component of the legislative scheme to promote fairness in the electoral process in order to allow for the potential participation by as many groups and individuals as possible.[4] A similar result, at least in relation to the section 3 arguments was reached in *British Columbia Teachers' Federation v. British Columbia (Attorney General)* where a public sector union contested provincial third party advertising restrictions. The provisions in question did not prohibit advertising by third parties, but rather permitted them on a level lower than parties and candidates. The court, relying on *Figueroa* and *Harper*, held that while section 3 included the right to meaningful participation, those rights were not unlimited. In this case, given that the legislation did allow for modest informational campaigns by third parties, the court found no violation of section 3.[5] From a financial dimension perspective, both cases sought to repeal provisions limiting third party participation and would therefore be considered major reforms.

In terms of an impact on direct participants in election campaigns, there were four additional cases of financial based reform claims. In *Longley v. Canada (Attorney General)* the federal party financing scheme put in place following the prohibition of corporate and union donations to parties was called into question. The applicant challenged the provisions that provided state funding on a per vote basis for parties that received either two percent of the vote nationally or five percent of the vote for all ridings in which the

party fielded candidates. The court found that the state funded party financing scheme violated section 3 in that it provided an unfair disadvantage to larger parties. However, the court upheld the financing scheme under section 1 as its purpose of ensuring confidence and integrity of electoral and public financing systems was a valid purpose and outweighed the unfair treatment of smaller parties. As with *Harper and BCTF*, the applicant sought to repeal the financial provisions affecting all parties and therefore sought a major reform of the system.

In *Dostie v.Regie des alcool, des courses et des jeux*, the applicant sought to alter the system of funding arrangement for parties through an appeal over the denial of tax exemption status. The application was predicated on the argument that parties, by virtue of their contributions to political debate, performed a beneficial purpose at the community level and were therefore similar in purpose and activity to other charitable organizations. The commission rejected that charitable status under provincial legislation was considered part of the arguments advanced in relation to democratic rights under the Charter. As this would have involved the creation of a new financing system for political parties in the province of Quebec, it would be considered a major reform.

The issue before the court in *Conservative Fund Canada v. Canada (Elections Canada)* dealt with the post-election financial reporting requirements of parties. In particular, the Conservative Party of Canada sought an order permitting it to amend its financial returns in order to include GST rebates as part of its financial transactions. The change would result in an overpayment by the party, thereby necessitating a need to repay funds to elections Canada.[6] The court relied on *Figueroa* for the proposition that the purpose of the election-financing regime was to promote equality in the level of political discourse that took place during the course of an election campaign through the use of financing and spending limits. The court rejected the applicant's arguments, thereby privileging spending limits as a means of controlling the level of discourse. Given its limited application, this case involved a technical reform claim. In *Jackson v. City of Vaughan*, the sitting mayor sought to quash a pair of municipal by-laws that charged her with campaign finance offences under the Ontario Municipal Elections Act. The application was denied on the basis that the by-laws did not violate various provisions of the Charter of Rights and Freedoms. In its reasons, the court, citing *Figueroa*, commented on the importance of the electoral financing regime as an integral component of the electoral process and the pursuit of fairness in the electoral process. While the issues under consideration could have wide ranging impact, the specific by-laws in question applied only to the applicant, thereby rendering this a technical based reform claim.

On the initiation-based dimension, there was a single case. In *Conacher v. Canada (Prime Minister)* the court dismissed an application for a declaration that the 2008 election call was illegal due to the failure of the Prime Minister to abide by fixed election date legislation. The court held that meaningful participation included the right of voters to make an informed decision between candidates and parties. In this case, there was no evidence that the applicant could not provide voters with information on the various policy positions of the parties. While the early election call may have resulted in an initial lack of preparedness on the part of various electoral participants, including third parties, this was insufficient to conclude an inability to meaningfully participate or that voters could not make informed decisions. The removal of the Prime Minister's discretion to initiate an election would be a major reform if it had been successful.

Discussion and Conclusion

As Katz (2011) has identified and the plethora of post-*Figueroa* cases demonstrate, electoral reform efforts in Canada have been pursued in alternate venues than legislative arenas, and to the courts in particular, as a means of pursuing electoral reform goals. These claims included both individual participation as well as systemic challenges ranging from simple limitations on the right to vote due to identity and residency requirements through to calling into question the constitutionality of the foundations of the electoral system itself. It demonstrates the broad range of electoral reform objectives pursued through the courts and the apparent lack of consideration and/or receptiveness of these issues in the legislative and public deliberative arenas.

Electoral system change involves a number of different components, of which the method of voting is only one (Massicotte et al. 2004). This proportionality aspect of the various Canadian electoral systems has been contested in the courts in relation to the Quebec electoral system. However, as demonstrated in Table 1, there was a range of electoral system dimension based claims in Canada, with the regulation surrounding the financing of parties and elections having proven to be most litigious issue of electoral reform in Canada, making up seven of the sixteen cases (43.7 percent). Ballot structure and general election procedures were also fairly important issues, making up three of the sixteen (18.7 percent) cases each. In terms of the scope of electoral reform issues being disputed, these pursuits included all three levels of reform, ranging from technical to minor and major based claims. However, the majority were primarily aimed at major electoral reform claims, with eight of the sixteen (50.0 percent) cases being pursued through the courts involving major based reform claims.

The review of the precedent effect of the Supreme Court's decision in *Figueroa* also reveals that the courts appear to be a relatively conservative site of decision-making authority in relation to the electoral reform issues. Of the sixteen final decisions considered post-*Figueroa*, twelve of the sixteen (75.0 percent) cases brought forward by applicants were dismissed. More importantly, the courts, in giving meaning to the principles of effective representation and meaningful participation underlying the democratic rights under the Charter, established the boundaries of their willingness to intervene in institutional reform arguments. The courts have been willing to recognize and interfere with individual and collective participation based impediments and thereby protected the ability to participate by way of voting, standing

as candidates and having their voices heard within the broad arena of electoral discourse. However, when faced with the opportunity to give effect to broader issues of institutional reform, the Courts have tended to defer to the legislative branches of government and demonstrated an unwillingness to strike down or amend major electoral system concerns, with only one of the eight major electoral system claims (12.5 percent) being successful.

Table 1 – Electoral Reform Cases Post-Figueroa by Nature of Reform and Decision

	Case	Dimension	Reform	Decision
1	Jong	Ballot Structure	Major	Positive
2	Camirand	Electoral Procedures	Technical	Positive
3	Calgary Health Region	Electoral Procedures	Technical	Positive
4	Nunziata	Financial	Minor	Positive
5	Daoust	Proportionality	Major	Negative
6	Henry	Inclusiveness	Minor	Negative
7	Mahoney	Ballot Structure	Major	Negative
8	Stevens	Ballot Structure	Technical	Negative
9	Bourassa	Election Procedure	Technical	Negative
10	Harper	Financial	Major	Negative
11	BC Teachers Federation	Financial	Major	Negative
12	Longley	Financial	Major	Negative
13	Dostie	Financial	Major	Negative
14	Conservative Fund Canada	Financial	Technical	Negative
15	Jackson	Financial	Technical	Negative
16	Conacher	Initiation	Major	Negative

Source: Author Generated

The consideration of the post-*Figueroa* decisions also provides the opportunity to subject existing explanations of the manner in which the courts intervene in the electoral reform debate to greater scrutiny. For example, the suggestion that the litigation of electoral reform issues provides a greater opportunity for success in Canada due to the egalitarian nature of the courts is predicated on the Supreme Court of Canada's decisions in *Figueroa and Harper*. The precedent tracing approach confirms that this argument is also supported by the Ontario Court of Appeal's decision in *Conservative Fund Canada*. Through a content analysis of these decisions, it becomes apparent that these cases involved claims by parties or individuals that had the potential of also affecting the rights of other participants in the system. In this sense, the rights claimants were seeking to privilege their claims to participation over the rights of others. As a result, it is likely not surprising that the courts opted for the interpretation of the democratic rights provisions that would afford the widest range of participation for the greatest number of individuals or organizations. However, the review of all of the *Figueroa* progeny demonstrates that there are a number of decisions in which the courts have restricted individual participation in some cases and have completely rejected systemic major based reform claims, such as alteration of the method of voting, that would provide for more fair and equal electoral outcomes. A similar observation is evident in relation to individual versus collective claims, such as *Mahoney, Stevens* and *Conacher*. The underlying assumption is that the rights of the collective to an orderly, fair and efficient electoral process outweigh the rights of the individuals in these circumstances. In fact, the denial of individual claims for democratic rights that are upheld on the basis of section 1, as in *Longley* and *Henry*, is an explicit recognition of communal and collective interests over those of the individual. In contrast, our findings show that institutional reform cases predicated on the denial of an individual participation rights, particularly of a procedural nature, have been more successful than those cases where there has been a direct challenge to the decision making settings of the electoral machinery themselves as sought in major based reform claims. It demonstrates that when it comes to issues of equality and fairness in the electoral process, courts possess relatively thin notions of democratic participation.

The implications of these findings are clear. The courts consistently tend to utilize and apply technical definitions of democracy, rather than investigating the broader implications of the meaning of "effective representation" and "meaningful participation" in their consideration of claims for electoral reform and greater democratic legitimacy. As a result it would appear there is little reason for advocates of broad and significant electoral system change to continue to pursue their goals through this avenue of decision-making authority. Beyond the scope of this article, these findings also raise questions as to why advocates of electoral system change continue to use litigation as a strategy of change despite these apparent limitations. It also serves to placate concerns and fears of associated with judicial activism and the threat of the imposition of significant unwanted institutional reform. Evidently, when it comes to institutional reform, courts appear to follow, not lead.

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Endnotes

1 The seven identified barriers include the institutional/procedural path to reform which favours the status quo, political tradition, social structure, party system level stability, vested interests, the presence of coalition politics, the degree of agreement over the need, scope and type of reform.

2 Also known as the the *Reference Re: Provincial Election Boundaries (Sask)*.

3 Our body of cases includes both federal and provincial based reform efforts. Given the sovereign nature of provinces in Canada in relation to their own procedures and lack of impact on the federal Parliament, we do not draw a distinction on the national versus sub-national aspects of reform being sought. See Jacobs and Leyenaar (2011) at footnote 9 .

4 The Court did find that the advertising and spending limitations were a violation of freedom of expression under section 2(b) of the Charter, but were upheld under section 1.

5 Unlike *Harper*, the Court found that provisions violated section 2(b) and were not saved under section 1.

6 The putative rational for the argument was to bring the Conservative Party into compliance with the elections financing regime. However, the real purpose behind the move was more likely to force other and less financially well off parties to also undertake similar amendments and repayments and thereby exacerbating the financial disparity between them and the financially well-off Conservatives.