

The Emperor's Vote
an examination of
the potential for an equality based challenge
to the current federal and Ontario electoral systems.

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Equality in Democracy

The ultimate theoretical democracy is direct democracy in which every citizen may vote directly on any governmental issue. In small groups direct democracy can work very well. On a grand scale though, direct democracy is not practically functional. We therefore use a form of representative democracy in which ridings are delineated and the population of each riding elects a representative to speak on their behalf. This theoretically allows for a group small enough to use direct democracy within itself to accurately represent the will of the larger group provided that the ridings' populations are equal. This paper will focus on the main question in our representative democracy – how much deviation from absolute parity, if any, does the Canadian conception of "equal" permit?

Overview of the current electoral system

To evaluate the potential for a Charter of Rights or equality based challenge to the current federal electoral system and its Ontario counterpart requires an understanding of the structure of those systems. Since the Ontario legislation¹ essentially declares that the Ontario electoral boundaries and constituency names shall mirror the federal boundaries and names, the analytical methods and arguments which apply to the federal electoral process can be transferred directly to the provincial arena. The transferability of defenses once a breach has been identified is not as certain. The lack of consideration of any issues related to citizens' rights to vote, the prima facie laissez-faire approach to the equity of votes in Provincial elections and the failure to ensure that deviations from relative equality of votes is justified by matters of intra provincial relevance are a few of

¹ Representation Act, S.O. 1996, c. 28. §2 & §4

the hurdles which would confront the Provincial government in its attempt at a §1 justification of any infringement of an Ontario resident's §3 rights in a Provincial election.

The setting of federal electoral boundaries is governed primarily by the Electoral Boundaries Readjustment Act² ("Readjustment Act") which includes by way of reference³ the formula and rules contained in §51 of the Constitution Act 1867. Under the Readjustment Act, following each decennial census, the formula and rules embodied in §51 of the Constitution Act 1867 are applied by an appointed commission to determine the number of seats in the House of Commons to which each Province is entitled. The commission then determines the intra-provincial boundaries of individual federal ridings. The Readjustment Act provides that the population within each Provincial riding shall not deviate by more than 25% more or less than the Provincial quotient⁴; but permits the commission to exceed this limit by requiring only that "the commission shall make every effort to ensure that, *except in circumstances viewed by the commission as being extraordinary*, the population of each electoral district in the province remains within twenty-five per cent more or twenty-five per cent less of the electoral quota for the province."⁵ (emphasis added). The readjustment act includes a list of possible justifications for exceeding the 25% guideline; but no guidelines as to what would

2 *Electoral Boundaries Readjustment Act*, R.S.C. 1985 c. E-3.

3 *Ibid* at § 14(1).

4 *Ibid* at §15(2)(b).

5 *Ibid*.

constitute "extraordinary". Further, there is no absolute limit on the extent to which the population of any riding may deviate from the provincial quotient.

The use of a provincial quotient is itself an issue in an equality analysis of the current electoral system since that figure is not necessarily related to the national quotient due to the operation of the notwithstanding provisions of §51A of the Constitution Act 1867. Whether each vote cast in a particular Province is relatively equal to any other vote cast in that same Province may be the issue in a Provincial election, but not in a national election. In a national election the question must be whether individual votes are relatively equal across the country.

Overview of equality issues raised by current process

The current process for the determination of electoral boundaries raises the following equality issues:

§51 (1) of the Constitution Act 1867 sets out a mathematical formula for the assigning of seats in the House of Commons to the Provinces, but includes provisions which override the results of the application of that formula.

The formula contained in §51(1) of the Constitution Act 1867 is based on population and not on number of electors, thereby permitting the strength of a citizen's vote to be influenced by disparities in age distribution and percentage of the population who cannot vote (non-citizens) from riding to riding.

§51(1) applies only to Provinces and makes no allowances for Territories.

Regardless of future population growth, the Territories' representation in the House of Commons is restricted to one member until and unless the Constitution is amended.

§51(2) of the Constitution Act 1867 allocates one seat in the House of Commons to the Yukon Territory, one to the North West Territories and one to the Nunavut, with no provision for the addition of seats to account for an increase in population.

§51A of the Constitution Act 1867 is a notwithstanding provision which requires that no Province shall be allocated fewer seats in the House of Commons than it has seats in the Senate regardless of population, which not only allows but requires that some votes be given much more weight than other votes.

Deviation of 25% more or less from a Provincial "Quotient"⁶, which itself deviates from mathematical equality by virtue of "notwithstanding" provisions⁷ built into the formula for allocating seats to Provinces, without reason, allows a dramatic difference in the relative voting strength of individual citizens (75% of quotient v. 125% of quotient, a 66.66% disparity) without requiring any justification; and more if the commission has reason for

6 The Constitution Act 1867, §51(1).

7 Ibid. §51(2) & §51A.

the disparity⁸. A list of factors is provided in the Electoral Boundaries Readjustment Act.⁹

Application of direct democracy principles in Canada

According to data from Statistics Canada¹⁰ (see Appendix A), in terms of population, the smallest riding in the 2000 federal election was "Nunavut", in the newly created Territory of the same name, with a population of 24,730; the largest was "Surrey Central" in British Columbia with a population of 149,468. This difference in population, assuming population to be a good proxy for electors, means that a citizen's vote cast in the "Nunavut" riding has slightly more than 6 times the impact of a citizen's vote cast in "Surrey Central". If the comparison were made in terms of number of electors in each riding, as may be more appropriate in determining the relative impact of each citizen's vote, a single vote cast in "Nunavut" carries almost 7 times the weight (678%) of a vote in "Surrey Central".

Restricting the enquiry to Provincial ridings by acknowledging that the Territorial ridings are in a different class and that it is more reasonable in a free and democratic

⁸ *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E-3 §15(2)

⁹ *Ibid.* §15(1)(b).

¹⁰ Canada, Elections Canada, *Thirty-sixth General Election 1997, Thirty-seventh General Election 2000: Official Voting Results*, EC 95054), online: Elections

Canada <http://www.elections.ca/content.asp?section=gen&document=index&dir=rep/37d&lang=e&textonly=false> (last modified: 17 May 2001). Table corrected to reflect error in data provided by Elections Canada which was discovered in the writing of this paper. Elections Canada confirms that the population figures for Nunavut and Western Arctic were incorrectly reported in all of their charts and data files – the values were switched.

society that the citizens within these ridings be over represented as little as possible than that they be completely unrepresented does not resolve the issue. The population of Labrador, in the newly renamed Province of Newfoundland and Labrador is only 29,190 with a voter tally of 19,654. A moment with a calculator and the figures contained in Schedule A will confirm that, based on population, a vote in Labrador has 512% of the impact of a vote in Surrey Central. Comparing the respective numbers of voters makes little difference, lowering that figure to 496%.

Allowing for the geographic division between Newfoundland and Labrador and using instead the next smallest provincial riding, "Cardigan" in Prince Edward Island, narrows the gap only slightly since that riding's population is only 30,561, and it has only 22,556 voters. There is no justification for making exceptions for the ridings in Prince Edward Island, which are all very close to each other in terms of population and number of voters resident in each, other than §51A of the Constitution Act 1867. The exception cannot serve as justification for itself.

It is not the case that only a few federal ridings are over-represented. As the data in Appendix A shows, 43% of Canada's population (42% of electors) controls a majority of the House of Commons, the parliamentary minority is elected by the remaining 57% of the citizenry (58% of electors). On the assumption that ridings vote as a block of voters, which they effectively do in the House of Commons, given that the representatives of 8,940,175 voters are in favour of a resolution and the representatives of 12,303,298 voters are against, the resolution should clearly fail. Under our current electoral system whether

the resolution passes or not depends on where the 8,940,175 votes are cast. There are effectively 3,363,124 voters who simply don't count in any real way because of where they live.

To ignore that many votes is mathematically worse than telling the electors in Nunavut, North West Territories, Prince Edward Island, Newfoundland and Labrador, Nova Scotia, Saskatchewan, and Manitoba that their votes won't be counted. After ignoring those votes, there would remain 47,887 votes to be ignored before the total number of votes ignored would reach 3,363,124.

One way to remove the extant chasm between citizen's votes is to read in to the seat allocation formula a requirement for additional steps in the calculations whenever the notwithstanding clause in §51A of the Constitution Act 1867 is invoked. If the invocation of that formula required the nation-wide use of the lowest Provincial or Territorial quotient in the assigning of seats in the House of Commons, relative parity of votes could be obtained.

If, under such a provision, the electoral boundaries commission were to create ridings strictly according to the population of the "Nunavut" the House of Commons would have 1,166 members. Using "Labrador's" population as a guide would be a bit better, requiring only 988 members of Parliament; while "Cardigan's" population would yield a 944 seat House of Commons. Not surprisingly, the Supreme Court of

Canada has rejected the notion of a Charter requirement of absolute voter parity.¹¹ This begs the question, is voter parity to any degree a factor, and if it is, to what degree, under which provision of which law?

What is the basis of an assertion that Canada is a democracy when we permit or require the dilution of one citizen's vote far beyond what is required or reasonable for another citizen to be effectively represented? If a measure which would fail a nation-wide referendum by 3,363,124 votes can be passed by a majority of the House of Commons, who were elected to represent their constituents, what argument is there that those 3,363,124 electors have not been denied “effective representation”? If you and I can both vote, but your vote will count only as much as 14%, or 16% or 20% of my vote, is it a vote? Is a society which permits such differences in votes entitled to call itself a democracy? Clearly a line must be drawn somewhere, absolute parity (100%) is not possible in a representative democracy, but surely even 14%, 16% or even 20% is far too low a mark at which to set the bar.

The Canadian model of equality in democracy

It should be understood that, having rejected a requirement of absolute equality of voting power, the Supreme Court of Canada has in no way denied the importance of *relative* equality between individual citizen's votes; in fact it has unanimously expressed

¹¹ *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at para. 49.; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 76.

support for this ideal.¹² The guarantee of the right to vote contained in §3 of the Charter has been interpreted by the majority of the Supreme Court to be a guarantee of what the Court terms "effective representation"¹³. The Court has also clearly said that departure from voting parity which deviates from the principle of "effective representation" will be found to violate §3 of the Charter¹⁴.

Although he does not adopt the terminology of the majority, Cory, J., writing for a three Justice minority, accepts that deviation from voting parity can be justified, but he stresses the importance of voting parity far more than the majority.¹⁵ The drafters of the Constitution Act 1867 also appear to have considered the relative strength of individual citizen's votes to be important enough to be explicitly protected.¹⁶

It is clear then, that any challenge to the current electoral system based on a difference in voting strength would have to show that the disparities inherent in the system are great enough to deny or impair effective representation. The mere fact that votes are not weighted exactly equally will not sustain an argument. Common sense alone dictates that some discrepancy must be allowed. As McLachlin J. points out "*It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, voters move*".¹⁷ The question remains, is 16.5% (14.7% if the

¹² *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. at paras 3, 13, 18 & 27 for the minority, and at paras 50, 52, 55 & 62 for the majority, and at para 88 for Sopinka, J. (as he then was).

¹³ *Ibid* at paras. 49, 63 & 88.

¹⁴ *Ibid* at para. 60.

¹⁵ *Ibid* at paras 2,3.

¹⁶ Constitution Act 1867, §52.

¹⁷ *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. at para 53.

comparison is made using number of electors) sufficient to sustain “effective representation”?

What the Supreme Court has not yet done is to clearly define "effective representation". That definition will likely be the focus of the next voting strength based challenge. Since such a challenge could be brought based on either §3 or §15 of the Charter I will examine both possibilities. There is also the potential for a challenge based on the unwritten principles underlying the constitution.¹⁸ These underlying principles, whether they give rise to an independent cause of action or not¹⁹, certainly must be considered in any equality issue which goes so to the core of what our society is, and would serve to bolster either a §3 or §15 based argument.

The first hurdle to be overcome in advancing either a §3 or §15 Charter based complaint about the disparities in voting strength is the Supreme Court's established position that the Charter can not be used to invalidate another section of the Constitution.²⁰

There are two ways to deal with this issue within the context of a Charter based action. Either make the main argument a collateral attack on §51A of the Constitution Act 1867 by challenging the Readjustment Act for violating the equality provisions of the

18 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras 48 & 49.

19 The Ontario Superior Court of Justice Divisional Court has accepted that the underlying principles can give rise to a cause of action. See *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [1999] 48 O.R. (3d) 50 at §III.

20 *Reference re Bill 30, an Act to Amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1148 at para. 63 – 65.

Charter by making use of the formula and procedures contained in the Constitution Act 1867 without incorporating changes or additions sufficient to safeguard the Charter rights of the citizens of Canada; or, argue that this case should be an exception to the general rule of Constitutional immunity to Charter review based on the underlying principles identified by the Supreme Court itself.²¹

The stronger, and more forthright, argument is that such a vast difference in the impact of citizens' votes strikes so fundamentally at the core of what defines democracy, one of the fundamental principles underlying our Constitution, that the flaw must be corrected even if it is contained in the Constitution itself. This argument could be made either by referring to the underlying principles of the Constitution as supporting the Charter, or in an approach not yet attempted before the Supreme Court, by arguing the underlying principles and using the Charter to support them. The difference may appear minimal, but could also be crucial in gaining the acceptance of the Court.

There is no jurisprudence to prevent the application of the principles underlying the Constitution to sections of the Constitution, but the Supreme Court has stated that actions of the legislature can not circumscribe the provision of the Constitution, but rather “the activities of the legislature ... must be consistent with the principles set down in the Constitution.”²² The Supreme Court has also confirmed that the Constitution is the supreme law of Canada, and that it is the task of the judiciary to ensure that the

²¹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 48 & 49.

²² *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at para 75.

government complies with the Constitution²³, although little room for doubt of that is left by §52 of the Constitution Act 1982.

Short of requiring absolute mathematical parity of all citizens' votes, which, even if not practically impossible (without repealing §51A of the Constitution Act 1867 or building a large addition on to the House of Commons), has been rejected by the Supreme Court²⁴, the best guide to what deviation from such parity Canadian society should reasonably accept is the Charter of Rights and Freedoms, particularly §3 and §15.

Another issue which could be raised is whether it is appropriate to base electoral distribution calculations to be based on the **population** rather than the **number of electors** in a given area. The answer is sure to be that population is being used as a proxy, but the reliability of population as a proxy for elector count is questionable at best. “Calgary—Nose Hill” has a population of which 88.66% are registered electors. On the other extreme is “Davenport” having only 48.75% of its population counted as voters. If the populations of these two ridings were identical, the votes cast by electors in “Calgary—Nose Hill” would be diluted to the point of each being worth only slightly more than half vote in “Davenport”. The question of whether there is a demonstrable justification for using a proxy is easily answered in the negative since the government has both values.

²³ Reference re: Manitoba Language Rights (Man.), [1985] 1 S.C.R. 721 at paras 47-49.

²⁴ Reference Re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158 at para. 49.; Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at para. 76.

Based on the national population quotient, 37 ridings exceed the 25% deviation permitted under other than extraordinary circumstances by the formula invoked by the Readjustment Act and located in §51 of the Constitution Act 1867. If we use electors rather than population to calculate distribution of seats, the number of seats which deviate by more than 25% rises to 47.

Within each Province, wide variations in concentration of voters by population exist. There are variations between Provinces as well. Alberta's voters make up over 84% of its population. British Columbia's population is only 66% voters. The nation wide percentage of population who are registered voters is 73.64. Population is a poor proxy for counting registered or eligible voters. No justification for the use of this proxy is to be found in the legislation or the jurisprudence, likely because its use has never been challenged. Due to the time and length limitations on this paper and to the nature and gravity of the issue I have not explored it in depth here.

§ 15 of the Charter

To be successful in a §15(1) based claim, the plaintiff must establish that the Charter applies to the impugned provision, that he/she has been denied equal benefit of the law on a listed or analagous ground of discrimination, to his/her detriment. The plaintiff must also be prepared to answer a claim that the impugned act is an ameliorative program protected by §15(2) or is reasonable in a free and democratic society and therefore saved by §1.

A §15 argument would only be the primary argument against the validity of the federal Readjustment Act in a collateral attack on §51 of the Constitution Act 1867. Otherwise, and primarily, it is of persuasive value only and serves to assist the Court in determining how much deviation from absolute equality of voting power Canadian society should accept as consistent with the concept of "relative equality".

The applicability of the Charter to the federal Readjustment Act is not an issue, unless the government can establish that it forms part of the Constitution itself and is therefore immunized against Charter based claims. This is not likely, and even if it should happen there is still a powerful argument in favour of permitting Charter review as the Readjustment Act violates the fundamental principles which are the foundation of our Constitution.

The most potentially problematic element of a §15(1) claim is that despite having been considered a number of times, Province of Residence has never been recognized as an analogous ground of discrimination.²⁵

Since the formula contained in §51 of the Constitution Act 1867 and the exception in §51A are based on Provincial boundaries, there is little potential for asserting that a ground other than Province of Residence was used. Given the nature of the issue and the clarity of the grounds, it is likely that the Supreme Court would recognize Province of

²⁵ See generally: *Black v. Law Society Alberta*, [1989] 1 S.C.R. 59; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *R. v. S. (S.) [S.S.]*, [1990] 2 S.C.R. 254; *Shaw v. Shaw (S.C.C.)*, [1990] S.C.C.A. No. 120; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157; *Canada v. Wong*, [1998] S.C.C.A. No. 61.

residence as an analogous ground for this purpose.²⁶ In the alternative the Court might assume without deciding the validity of Province of Residence as an analogous ground to permit the rest of the §15 analysis to continue

A claimant would have no difficulty establishing that the application of the federal Readjustment Act bestows unequal benefits; the data in Schedule A clearly show that votes are not accorded anything approaching equal weight. Barring a complete denial of worth, what stronger statement can a society make than that your input is valued as little as 1/7th as much as someone else's? Surely this must satisfy the third branch of the test set out in Law.²⁷

Given the apparent trend in the Supreme Court of resolving equality cases based on individual rights in §2-14 instead of §15 noted by Sheilah Martin²⁸, the Court might well bypass the entire §15 based argument and resolve the matter based only on the stronger, more direct argument made under §3.

²⁶ For an analysis of the Supreme Court's consideration of province of residence as an analogous ground, see: Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1997) ("Equality" - Chapter 52), particularly §52.8(d) and §52.16

²⁷ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para 39.

²⁸ Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals"(2001) 80 CBR 299.

§ 3 of the Charter

Basing a claim on a violation of §3 would allow the plaintiff to avoid the potential difficulties involved in establishing Province of residence as an analagous ground, since the principal argument would not be discrimination but rather the denial of the plaintiff's right to vote in a manner which ensures "effective representation" consistent with the Supreme Court's standing interpretation of §3²⁹.

By locating the authorization for deviation from absolute voter parity in §3³⁰, rather than read §3 as requiring parity and proceeding to a §1 analysis to determine whether such deviations are reasonable in a free and democratic society, the Supreme Court has effectively imported much of the §1 analysis into §3. Although this will make establishing a breach of §3 more difficult, it also effectively precludes the possibility of finding such a breach to be saved under §1, since to do so would be to declare that a dilution of one citizen's vote which cannot be justified by a requirement for effective representation is reasonable in a free and democratic society.

Because the Supreme Court has yet to clearly define what is meant by its term "effective representation", we are left to speculate as to what the term means and what if any test can be used to ascertain compliance with its requirements. We are not left completely in the dark though. Referring to the general approach to be taken in interpreting individual rights conferred by the Charter, McLachlin J., speaking for the

²⁹ *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at paras 49 & 88.

³⁰ *Ibid* at paras 62 & 63.

majority, refers us to “*the canon that in interpreting the individual rights conferred by the Charter the Court must be guided by the ideal of a "free and democratic society" upon which the Charter is founded*”³¹ and quotes Dickson C.J. (as he then was) in Oakes “*The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.*”³² with approval.

Using these principles, we can make an educated guess as to how the Supreme Court is likely to react to the hypothetical challenges to the current federal and provincial electoral systems raised in this paper. There is more than sufficient evidence to establish that individual votes have been diluted far beyond what is prima facie reasonable in a free and democratic society and it is difficult to imagine what the government could successfully argue as justification. The Court would almost certainly find the current electoral system in violation of the Charter. Whether the breach would be located in §3, or in §15, or in the underlying principle of democracy, or in any two or all three of these possibilities is less certain.

³¹ *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at para 44.

³² *R. v. Oakes*, [1986] 1 S.C.R. 103, at para 64.

§1 to the rescue?

Once the Supreme Court finds that the current electoral system violates the Charter, whether they locate the breach in §3 or in §15 or in the underlying principle of democracy, the government will have the opportunity to defend the violation as reasonable in a free and democratic society and therefore saved under §1.

The first argument to spring to mind is that the system has existed since Confederation, and nobody has objected yet. This argument cannot succeed. The fact that these disparities have existed throughout history will not save the existing electoral system if it is found to violate the Charter.³³

The government might also argue that it is doing the best it can, or that to do better would be too difficult or expensive. This type of claim, if made, must fail. Two possible alternatives to the current system are given in this paper. Either of them would result in drastically reduced differences between citizens' votes.

The current formula could be retained with the addition of a clause requiring that when the notwithstanding clause in §51A of the Constitution Act 1867 is triggered other Provinces' seat allocations are calculated using the lowest triggering Province's quotient, or the House and Senate could be restructured.

³³ *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at para 60.

Rights must exist even when they are inconvenient. Rights which yield to convenience are not rights, they are privileges. Voting is not a privilege, it is a right³⁴. The right to vote is at least as fundamental a right in Canada as the right to not be denied life, liberty and security of the person unless in accordance with the principles of fundamental justice guaranteed under §7 of the Charter. The Supreme Court has ruled that administrative expediency will not rescue a breach of § 7 of the Charter under §1³⁵; it is less likely to save a breach of §3.

Ontario

Ontario is the only Province to have abdicated its responsibility for setting its electoral boundaries. British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador have all enacted legislation which either sets out a mechanism for determining the boundaries of electoral districts or delineates the boundaries directly³⁶. True, the federal act contains a detailed procedure for defining the boundaries of electoral districts including the preparation of a report, review of the report and opportunity for input from those affected.³⁷ There is no provision in that act for input of any kind from provincial

³⁴ The Constitution Act, 1982; §3.

³⁵ *Reference re Motor Vehicle Act*, [1985] 2 S.C.R. 486 at para 83.

³⁶ See generally: *Electoral Boundaries Commission Act*, R.S.B.C. 1996, c. 107; *Electoral Boundaries Commission Act*, S.A. 1990, c. E-4.01; *The Electoral Divisions Act*, R.S.M. 1987, c. E40; *The Constituency Boundaries Act*, S.S. 1993, c.C-27.1; *The Election Act*, S.Q. 2000 c. E 3-3; *The Election Act*, R.S.P.E.I. 1988, c.E 1; *Elections Act*, R.S.N.B. 1973 c. E-3; *Elections Act*, S.N.S. 2001 c. 43; *Electoral Boundaries Act*, R.S.N. 1990 c. E4.

³⁷ *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E3.

officials, nor are intra-provincial issues other than those with federal significance necessarily considered by the commission established thereunder. Nevertheless, Ontario's Readjustment Act defers completely to the federally established ridings, even going so far as to immediately and automatically adopt whatever changes are made to federal electoral boundaries including the names given to the ridings³⁸.

Within Ontario, the greatest disparity in impact of votes is between the ridings of "Brampton West Mississauga" and "Algoma Manitoulin". Figures from Appendix A reveal that, based on population, a vote cast in "Algoma Manitoulin" has 178% of the impact of a vote cast in "Brampton West Mississauga". One of these ridings, or both, therefore deviates by more than the 25% expressly permitted by the federal statute. There may be valid federally relevant reasons for such a deviation, but there has been no exploration of whether such reasons exist or are valid in the Provincial arena. Ontario permits the deviation from parity of votes without knowing or apparently caring whether they are justified.

In the event that the Supreme Court found that the federal electoral boundaries, having been determined in accordance with a Constitutionally entrenched formula and process, are immune from Charter or equality based review, Ontario's use of those boundaries for Provincial elections would not necessarily be protected since that use is not prescribed by the Constitution.

³⁸ Representation Act, S.O. 1996, c. 28. §2 & §4.

A simultaneous challenge to both the federal and Ontario readjustment acts would therefore put the Court in the untenable position of declaring the same ridings both constitutionally valid (federally) and invalid (provincially). The alternative would be to rule that the right to vote means only the right to cast a vote and have it counted, however unequally, because the federal government, having entrenched the violation in the Constitution, can get away with it and it wouldn't be fair to refuse that same latitude to the Provinces. How a society governed by that kind of ruling could lay claim to being "free and democratic" is beyond my comprehension.

One possible, practical, alternative to the current system

Given that the current electoral system would not withstand a properly framed constitutional challenge, regardless of whether it should fail under §3 or §15 or the fundamental principles underlying the Constitution, it would then be necessary to replace the current system with a more Charter compatible arrangement immediately. I believe this can be done, and with fewer Members of Parliament than we now have.

The House of Commons should be restructured to allow for representation by population, with reasonable but minimal deviation from a strict one person one vote rule. Since no Province or Territory can be left without representation, each should have one seat in the House of Commons regardless of population. The newly formulated House would also include 100 seats to be awarded after each decennial census based only on the

percentage of the Canadian population residing in each Province or Territory. In the event of fractional percentages, the seats would be awarded based on which Province or Territory is closest to earning a seat by virtue of population until all the seats are allocated. If desirable to minimize the impact of non-population based seats on relative equality of votes, or necessary to comply with a Supreme Court ruling as to maximum permissible differential in voting impact, the number of purely representation by population seats could be increased to 200 or 300 with seats then being earned by 0.5% or 0.33% of the population.

In practice, such a strictly representation by population House of Commons could be controlled by Quebec and Ontario, should they form an alliance. Of course, that is not much different than the current House of Commons, in which Quebec and Ontario combined control 178 of 301 seats, or 59% of the House. In the reformed House the two Provinces would retain a majority. Based on the data in Appendix A the two Provinces contain slightly more than 62% of the total Canadian population.

The newly structured House would not allow for effective regional representation, which is admittedly a major part of Canadian history and society. Regional representation would be accomplished by reforming the Senate.

To give the Senate the legitimacy it would need to truly balance the influence of the House, it would have to be an elected body. Note that the interests being represented are **regional** and not **provincial**. Provincial (and Territorial) representation is the

purview of the members of the House of Commons elected by citizens in their respective Provinces and of the Provincial governments.

I would create 5 regions for the purpose of Senate reform. The regions would be as follows:

- 1) **East Coast**, which would include Prince Edward Island, Nova Scotia, New Brunswick and Newfoundland and Labrador.
- 2) **Quebec**
- 3) **Ontario**
- 4) **The Prairies**, including Alberta, Saskatchewan, Manitoba, Nunavut and the North West Territories
- 5) **West Coast**, comprised of British Columbia and the Yukon.

The Senate would remain a 105 seat body. Each region would elect a total of 21 Senators, 7 every 2 years, to serve a six year term. Thus no Senator would have reason to defer to, or fear retribution from, the House of Commons during whose term she or he was elected since the Senator's term would outlast that of the House³⁹. Seats in the reconstituted Senate would be distributed to ensure effective representation of regional interests, including, where appropriate, minority interests, with relative equality of populations being at most a secondary concern.

³⁹ *The Constitution Act, 1867*, §50.

The longer terms of Senators would allow for both stability and accountability in the upper chamber. The Canadian population would have the opportunity to change one third of the composition of the Senate biannually, which would give the governing party reason to pay close attention to the will of the people throughout their mandate, and would empower the people to effect substantial change in a government which does not keep its promises.

Thus, in the newly constituted federal government it would be possible for any three regions, even if they represent a minority of the population, to pass a bill through the Senate; and for the majority of the population (Ontario and Quebec acting together) to pass a bill through the House. Without cooperation or the typically Canadian style of compromise, no bill could pass both Houses. To pass, a bill would require the support of either Ontario's representatives in the House or Quebec's as well as the support of at least one of the less populated regions in the Senate.

Such a restructuring of both the House of Commons and Senate would allow the preservation of both Canadian ideals in a Canadian representative democracy – relative equality of votes (representation by population) in the House of Commons, and protection of minority rights and regional interests (representation by region) in the Senate. With the Senate and House thus balancing each other, no equality based challenge brought under the Charter, or otherwise, would likely succeed.

The fundamental issue

Legal technicalities, detailed arguments, jurisprudence and advocacy aside, the core of the issue in this argument can be explained in simple terms. The complaint is simple: depending only on where you and they live, another one citizen's vote may count 6 or 7 times as much as yours in determining who is going to make the laws under which you will both live. Is that what democracy is? Is that what "equal" means? Is that fair?

Any answer other than an unqualified "No." is unlikely to be accepted by the general population, and is likely to be met with outrage and indignation. Neither 7 nor 6 nor 5 equal one. Nor are any of them close.

Schedule "A" (corrected data from Elections Canada – see footnote 10)			
Electoral District	Province	Voters on list	Population
Nunavut	Nunavut	14369	24730
Labrador	Newfoundland	19654	29190
Cardigan	Prince Edward Island	22556	30561
Yukon	Yukon Territory	20901	30766
Malpeque	Prince Edward Island	25361	33430
Egmont	Prince Edward Island	25500	35282
Hillsborough	Prince Edward Island	29617	35284
Western Arctic	Northwest Territories	24716	39672
Manicouagan	Quebec	40059	55018
Miramichi	New Brunswick	47337	59454
New Brunswick Southwest	New Brunswick	45627	61112
Churchill River	Saskatchewan	39807	62947
Tobique--Mactaquac	New Brunswick	47940	64860
Cypress Hills--Grasslands	Saskatchewan	46627	66887
Regina--Lumsden-Lake Centre	Saskatchewan	46570	67345
Jonquière	Quebec	54137	68715
Palliser	Saskatchewan	50849	69112
Frontenac--Mégantic	Quebec	54559	69701
Lac-Saint-Jean--Saguenay	Quebec	52895	69777
Lotbinière-L'Érable	Quebec	52350	69952
Regina--Qu'Appelle	Saskatchewan	46711	69952
West Nova	Nova Scotia	52453	70134
Saskatoon--Humboldt	Saskatchewan	55795	70808
Souris--Moose Mountain	Saskatchewan	48533	70848
Yorkton--Melville	Saskatchewan	50038	71190
Blackstrap	Saskatchewan	55190	72081
Saint John	New Brunswick	54937	72668
Rimouski-Neigette-et-la Mitis	Quebec	56694	72837
Saskatoon--Rosetown-Biggar	Saskatchewan	48441	72921
Wascana	Saskatchewan	55698	73079
Roberval	Quebec	54041	73139
Madawaska--Restigouche	New Brunswick	56435	73175
Fundy--Royal	New Brunswick	55364	73472
Battlefords--Lloydminster	Saskatchewan	49193	73555

Schedule "A" (corrected data from Elections Canada – see footnote 10)			
Electoral District	Province	Voters on list	Population
Fredericton	New Brunswick	58845	73975
Matapédia--Matane	Quebec	55320	74237
Prince Albert	Saskatchewan	50831	74695
Saskatoon--Wanuskewin	Saskatchewan	53862	74817
Burin--St. George's	Newfoundland	53526	75001
Algoma--Manitoulin	Ontario	53781	75120
Humber--St. Barbe--Baie Verte	Newfoundland	54745	75347
Bonaventure--Gaspé--Îles-de-la-Madeleine--Pabok	Quebec	56286	75543
Charleswood St. James--Assiniboia	Manitoba	57406	75629
Timiskaming--Cochrane	Ontario	53409	75769
Winnipeg Centre	Manitoba	52383	76026
Nipissing	Ontario	57689	76047
Winnipeg North Centre	Manitoba	48254	76466
Bras d'Or--Cape Breton	Nova Scotia	56074	76677
Dauphin--Swan River	Manitoba	52629	76797
South Shore	Nova Scotia	58726	76980
Winnipeg South Centre	Manitoba	60471	77170
Compton--Stanstead	Quebec	59382	77974
Thunder Bay--Atikokan	Ontario	55899	78360
Churchill	Manitoba	45860	78464
Gander--Grand Falls	Newfoundland	57014	78550
Charlevoix	Quebec	58737	78659
Brandon--Souris	Manitoba	54829	79102
Pictou--Antigonish--Guysborough	Nova Scotia	59269	79189
Saint-Maurice	Quebec	61810	79230
Kenora--Rainy River	Ontario	54792	79550
Timmins--James Bay	Ontario	53985	79627
Thunder Bay--Superior North	Ontario	55685	79680
Sault Ste. Marie	Ontario	58533	80054
Winnipeg North--St. Paul	Manitoba	58779	80460
Halifax	Nova Scotia	67849	80677
Saint Boniface	Manitoba	60395	80900
Portage--Lisgar	Manitoba	56082	81014
Winnipeg--Transcona	Manitoba	56345	81107

Schedule "A" (corrected data from Elections Canada – see footnote 10)			
Electoral District	Province	Voters on list	Population
Sydney--Victoria	Nova Scotia	60499	81594
Cariboo--Chilcotin	British Columbia	53434	81881
Winnipeg South	Manitoba	63562	82463
Nickel Belt	Ontario	57761	82576
Parry Sound--Muskoka	Ontario	64448	82853
Cumberland--Colchester	Nova Scotia	62180	83066
Selkirk--Interlake	Manitoba	61294	83154
Beauséjour--Petitcodiac	New Brunswick	64526	83353
Dartmouth	Nova Scotia	62877	83423
Longueuil	Quebec	68927	83442
Skeena	British Columbia	50363	83598
Bellechasse--Etchemins--Montmagny--L'Islet	Quebec	64379	83911
Drummond	Quebec	66084	84250
Brome--Missisquoi	Quebec	66730	84359
Athabasca	Alberta	61446	84541
Sackville--Musquodoboit Valley--Eastern Shore	Nova Scotia	64426	84965
Provencher	Manitoba	58020	85146
Témiscamingue	Quebec	61709	85163
Kootenay--Columbia	British Columbia	58326	85287
Sudbury	Ontario	64220	86243
Chicoutimi--Le Fjord	Quebec	67058	86252
Bas-Richelieu--Nicolet--Bécancour	Quebec	67815	87597
Acadie--Bathurst	New Brunswick	67918	87601
Saint-Lambert	Quebec	70288	87895
Moncton--Riverview--Dieppe	New Brunswick	72640	88463
Kamouraska--Rivière-du-Loup--Témiscouata--Les Basques	Quebec	67208	88621
Macleod	Alberta	70197	88781
Champlain	Quebec	68914	88944
Portneuf	Quebec	69432	89315
Sarnia--Lambton	Ontario	63850	90697
Bourassa	Quebec	67488	90902
Verdun--Saint-Henri--Saint-Paul--Pointe Saint-Charles	Quebec	71085	91481

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Electoral District	Province	Voters on list	Population
Bonavista--Trinity--Conception	Newfoundland	67199	91865
Saint-Jean	Quebec	72281	92132
Kootenay--Boundary--Okanagan	British Columbia	64366	92916
Trois-Rivières	Quebec	75168	92989
Niagara Falls	Ontario	68854	93103
Prince George--Bulkley Valley	British Columbia	59286	93151
Hochelaga--Maisonneuve	Quebec	75947	93160
Shefford	Quebec	68698	93311
South Surrey--White Rock--Langley	British Columbia	70916	93596
Beauharnois--Salaberry	Quebec	72089	93685
Prince Edward--Hastings	Ontario	70962	93743
Halifax West	Nova Scotia	77579	93901
Saint-Hyacinthe--Bagot	Quebec	71626	94057
Westmount--Ville-Marie	Quebec	70801	94058
Perth--Middlesex	Ontario	69015	94576
Erie--Lincoln	Ontario	66436	94672
Mercier	Quebec	76437	95070
Anjou--Rivière-des-Prairies	Quebec	74695	95099
Edmonton Southeast	Alberta	67337	95287
Vaudreuil--Soulanges	Quebec	74800	95318
Joliette	Quebec	73908	95470
Ancaster--Dundas--Flamborough--Aldershot	Ontario	74574	95568
Mount Royal	Quebec	68605	95616
Outremont	Quebec	68115	95665
Stormont--Dundas--Charlottenburgh	Ontario	67476	95834
Abitibi--Baie-James--Nunavik	Quebec	65934	95948
Huron--Bruce	Ontario	67004	95981
Yellowhead	Alberta	67430	96150
Leeds--Grenville	Ontario	72261	96284
Laurier--Sainte-Marie	Quebec	79109	96640
Medicine Hat	Alberta	71588	96769
Saint-Laurent--Cartierville	Quebec	71836	96788
Hastings--Frontenac--Lennox and Addington	Ontario	71314	97025
Sherbrooke	Quebec	81592	97084

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Electoral District	Province	Voters on list	Population
Oxford	Ontario	69900	97142
Hull--Aylmer	Quebec	74742	97240
Prince George--Peace River	British Columbia	60658	97399
Hamilton East	Ontario	64726	97491
LaSalle--Émard	Quebec	75961	97542
Renfrew--Nipissing--Pembroke	Ontario	73228	97571
Bruce--Grey--Owen Sound	Ontario	72569	98317
Louis-Hébert	Quebec	83217	98496
Brossard--La Prairie	Quebec	78535	98516
Lambton--Kent--Middlesex	Ontario	69206	98542
Kings--Hants	Nova Scotia	73052	98676
Richmond--Arthabaska	Quebec	76250	98830
Northumberland	Ontario	73646	98971
Haldimand--Norfolk--Brant	Ontario	72336	98989
Kamloops, Thompson and Highland Valleys	British Columbia	72188	99356
Beauce	Quebec	75170	99453
Crowfoot	Alberta	72488	99532
Québec	Quebec	88320	99661
Lethbridge	Alberta	74568	99753
Burlington	Ontario	77578	99763
Edmonton North	Alberta	75604	99982
Hamilton West	Ontario	71567	100149
Glengarry--Prescott--Russell	Ontario	73451	100204
Calgary East	Alberta	69624	100254
Mississauga South	Ontario	68907	100260
St. John's West	Newfoundland	75623	100573
Ottawa--Orléans	Ontario	78516	100659
Toronto--Danforth	Ontario	68855	100678
Saint-Bruno--Saint-Hubert	Quebec	77145	100756
Notre-Dame-de-Grâce--Lachine	Quebec	75657	100927
Trinity--Spadina	Ontario	73147	101104
St. John's East	Newfoundland	77449	101266
Argenteuil--Papineau--Mirabel	Quebec	81024	101268
Beauport--Montmorency--Côte-de-Beaupré--Île-d'Orléans	Quebec	80217	101444

Schedule "A" (corrected data from Elections Canada – see footnote 10)			
Electoral District	Province	Voters on list	Population
Elgin--Middlesex--London	Ontario	70962	101573
Elk Island	Alberta	78983	101628
Calgary Southeast	Alberta	85536	101810
Chambly	Quebec	81181	102009
Wetaskiwin	Alberta	75900	102152
Edmonton Southwest	Alberta	83890	102210
Rosemont--Petite-Patrie	Quebec	82336	102375
Okana gan--Coquihalla	British Columbia	74297	102463
Niagara Centre	Ontario	77670	102510
Verchères--Les-Patriotes	Quebec	81810	103001
Davenport	Ontario	50251	103074
Saint-Léonard--Saint-Michel	Quebec	73898	103336
Pontiac--Gatineau-Labelle	Quebec	78429	103404
Ottawa--Vanier	Ontario	85051	103418
Calgary Southwest	Alberta	84905	103508
London--Fanshawe	Ontario	71274	103511
St. Paul's	Ontario	79543	103725
Okanagan--Shuswap	British Columbia	73143	103748
Victoria	British Columbia	87866	103774
Stoney Creek	Ontario	77995	103863
London North Centre	Ontario	82123	104291
Etobicoke Centre	Ontario	74625	104398
Lakeland	Alberta	70660	104692
York West	Ontario	53987	104957
Ahuntsic	Quebec	81288	104960
Edmonton--Strathcona	Alberta	89248	104973
Charlesbourg--Jacques-Cartier	Quebec	86371	105007
Chatham--Kent Essex	Ontario	72009	105174
Hamilton Mountain	Ontario	77589	105316
Oakville	Ontario	76513	105572
Papineau--Saint-Denis	Quebec	73360	105607
Brant	Ontario	76270	105679
Parkdale--High Park	Ontario	72274	105740
St. Albert	Alberta	83800	105853
Edmonton West	Alberta	88544	105931

Schedule "A" (corrected data from Elections Canada – see footnote 10)			
Electoral District	Province	Voters on list	Population
Durham	Ontario	80730	106045
St. Catharines	Ontario	78215	106105
Windsor--St. Clair	Ontario	75358	106108
Brampton Centre	Ontario	72264	106393
Lac-Saint-Louis	Quebec	82507	106473
London West	Ontario	81817	106531
Thornhill	Ontario	73783	106628
Simcoe North	Ontario	80404	106630
Surrey North	British Columbia	64583	106645
Laval Centre	Quebec	87535	106931
Laval East	Quebec	86759	106942
Scarborough--Agincourt	Ontario	69996	107030
Saanich--Gulf Islands	British Columbia	83574	107104
Esquimalt--Juan de Fuca	British Columbia	78669	107111
York Centre	Ontario	65136	107370
Willowdale	Ontario	77817	107416
Oshawa	Ontario	75843	107771
Waterloo--Wellington	Ontario	77610	107797
Edmonton Centre-East	Alberta	78673	107923
Haliburton--Victoria--Brock	Ontario	79616	108011
Windsor West	Ontario	76973	108119
Scarborough Southwest	Ontario	67382	108178
Don Valley West	Ontario	75400	108254
Eglinton--Lawrence	Ontario	72463	108410
Ottawa West--Nepean	Ontario	83584	108564
Scarborough East	Ontario	72092	108644
Wild Rose	Alberta	91655	108656
Mississauga East	Ontario	66397	108843
Beaches--East York	Ontario	75284	108997
Vancouver East	British Columbia	71989	109021
Québec East	Quebec	91015	109210
Etobicoke--Lakeshore	Ontario	75490	109253
Kitchener Centre	Ontario	80566	109398
Nanaimo--Alberni	British Columbia	81188	109806
Peterborough	Ontario	86319	109902

Schedule "A" (corrected data from Elections Canada – see footnote 10)			
Electoral District	Province	Voters on list	Population
Ottawa Centre	Ontario	93551	109903
Pierrefonds--Dollard	Quebec	80160	110147
York South--Weston	Ontario	62212	110264
Dufferin--Peel--Wellington--Grey	Ontario	81706	110571
Châteauguay	Quebec	85512	110605
Essex	Ontario	79532	110713
Red Deer	Alberta	84409	110736
Guelph--Wellington	Ontario	90076	110836
Kingston and the Islands	Ontario	87793	111411
Ottawa South	Ontario	83930	111532
Simcoe--Grey	Ontario	83416	111559
Dewdney--Alouette	British Columbia	76439	111692
Vancouver Quadra	British Columbia	78664	111761
Nepean--Carleton	Ontario	88454	111886
Vancouver Island North	British Columbia	75698	112267
Terrebonne--Blainville	Quebec	89796	112750
Rivière-des-Mille-Îles	Quebec	87100	112800
Don Valley East	Ontario	71351	113338
Calgary--Nose Hill	Alberta	100544	113398
Burnaby--Douglas	British Columbia	73370	113409
Vancouver Kingsway	British Columbia	67413	113521
New Westminster--Coquitlam--Burnaby	British Columbia	78658	113583
Vancouver South--Burnaby	British Columbia	71523	113830
Whitby--Ajax	Ontario	83443	113924
Peace River	Alberta	76363	114165
Kitchener--Waterloo	Ontario	91616	114390
Toronto Centre--Rosedale	Ontario	83243	114416
Scarborough Centre	Ontario	74272	114844
Mississauga Centre	Ontario	74356	114855
Nanaimo--Cowichan	British Columbia	78772	114986
Etobicoke North	Ontario	64872	115067
Calgary Northeast	Alberta	89878	115400
Kelowna	British Columbia	89153	115814
Cambridge	Ontario	83165	115848
Vancouver Centre	British Columbia	96399	116083

Schedule "A" (corrected data from Elections Canada – see footnote 10)			
Electoral District	Province	Voters on list	Population
Calgary West	Alberta	99550	116226
West Vancouver--Sunshine Coast	British Columbia	83706	116383
Calgary Centre	Alberta	101181	116516
Laval West	Quebec	93243	116520
York North	Ontario	85329	117859
Vaughan--King--Aurora	Ontario	98805	119117
Pickering--Ajax--Uxbridge	Ontario	85627	119171
Markham	Ontario	85207	119462
Halton	Ontario	99079	119537
Scarborough--Rouge River	Ontario	72143	120264
Gatineau	Quebec	91031	120369
Repentigny	Quebec	95534	120562
Bramalea--Gore--Malton--Springdale	Ontario	78498	120699
Fraser Valley	British Columbia	86387	121901
Delta--South Richmond	British Columbia	82852	122064
Lévis-et-Chutes-de-la-Chaudière	Quebec	97982	122255
North Vancouver	British Columbia	81601	122713
Richmond	British Columbia	77226	122733
Lanark--Carleton	Ontario	96157	124295
Barrie--Simcoe--Bradford	Ontario	99720	124450
Laurentides	Quebec	100045	124776
Langley--Abbotsford	British Columbia	82972	124831
Berthier--Montcalm	Quebec	94011	125619
Mississauga West	Ontario	90170	128029
Oak Ridges	Ontario	99152	129379
Port Moody--Coquitlam--Port Coquitlam	British Columbia	91222	130605
Brampton West--Mississauga	Ontario	98614	133554
Surrey Central	British Columbia	97421	149468