

# Unconstitutional Democracy?

## A *Charter* Challenge to Canada's Electoral System\*

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*The electoral system structures the conversion of citizens' votes into seats in the legislature. Many countries' electoral systems are based on proportional representation (PR). In these countries, the system is designed to achieve proportionality between the percentage of votes that a party receives and the percentage of seats that the party wins in the legislature. In contrast, Canada has a single member plurality (SMP) electoral system. In SMP systems, the winner of the most votes in each geographically defined constituency is elected to the legislature. The legislatures created by SMP systems therefore represent a distorted picture of the actual electoral preferences of the populace. Marginalized groups, including women, Aboriginal people, and visible minorities, tend to have poorer*

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*representation in the legislatures of countries with SMP systems than in those of countries with PR systems. The SMP system also exaggerates and compounds regionalism in Canada by misrepresenting the true electoral strength of political parties within various provinces. This paper argues that a challenge to the constitutionality of the SMP electoral system could be brought under s. 3 of the Canadian Charter of Rights and Freedoms. Such a challenge would be based on the s. 3 jurisprudence developed in electoral districting cases in Canada. These cases have found that s. 3 guarantees the right to effective representation. Effective representation is primarily provided by a relative parity of voting power, but this right may be restricted in order to support other values—especially the representation of diversity. However, the SMP system does not provide parity of voting power and, in fact, detracts from the representation of many social and cultural groups in our society. It is argued that the constitutionality of the electoral system is an inappropriate area for judicial deference to the legislature, given the incentive that legislators have to skew the system to their advantage. It is submitted that a court should find the electoral system to be unconstitutional, but suspend any further action to allow the legislature time to create a new, constitutionally valid electoral system through study and democratic debate.*

*Les systèmes électoraux régissent le processus par lequel les votes des citoyens sont transformés en sièges dans la législature. Dans plusieurs pays, le système électoral est basé sur la représentation proportionnelle (RP), lequel vise à ce que le nombre de sièges occupés par un parti politique soit proportionnel au nombre des voix obtenues par ce même parti. Le Canada se distingue de ces pays en ce qu'il s'est doté plutôt d'un système électoral de majorité relative (MR), selon lequel le député détenant le plus de voix dans une circonscription électorale donnée est automatiquement élu à la législature. Conséquemment, les législatures formées selon un système MR présentent une image déformée des préférences électorales du peuple. Les groupes marginalisés, y compris les femmes, les autochtones, et les minorités visibles, ont tendance à être moins bien représentés dans les pays dotés d'un système électoral MR. De plus, le système MR accentue le régionalisme au Canada en donnant une représentation inexacte du vrai pouvoir électoral des partis politiques dans les provinces. Cet article soutient qu'il y a lieu de contester la constitutionnalité du système MR sous l'article 3 de la Charte canadienne des droits et libertés. Cette contestation procéderait d'une analogie avec les arrêts de jurisprudence traitant de l'application de l'article 3 à la question de la délimitation des régions électorales au Canada. Dans ces arrêts, la cour a en effet déterminé que l'article 3 garantit le droit à la représentation efficace, que la représentation efficace s'effectue principalement par le biais de la parité relative du pouvoir des votes, et que ce droit peut néanmoins être restreint afin de protéger d'autres valeurs—particulièrement la représentation de la diversité. Le système MR ne produit pas la parité du pouvoir des votes et il diminue la représentation de plusieurs groupes sociaux et culturels. L'auteur suggère que la déférence à la législature est inappropriée lorsqu'il s'agit de la constitutionnalité du système électoral, étant*

*donné les incitatifs qu'ont les législateurs à organiser le système à leur avantage. L'auteur soumet que la cour devrait déclarer le système électoral inconstitutionnel et suspendre toute autre action afin de donner à la législature le temps d'étudier et de débattre de la question de façon démocratique et d'instituer un nouveau système électoral conforme à la constitution.*

On November 30, 1998, the Parti québécois (PQ) won re-election as the government of Quebec. According to preliminary results,<sup>1a</sup> the PQ won 60.5 per cent of the seats in the Quebec National Assembly and will be able to control the legislative agenda in that province for the next five years. The PQ will enjoy this commanding majority despite winning the support of only 42.7 per cent of the voters. The opposition Liberal Party actually won a higher share of the vote—43.7 per cent—yet won only 38.7 per cent of the seats on election night. Although it earned 11.8 per cent of the popular vote, the fledgling Action Démocratique du Québec was rewarded with less than 1 per cent of the seats in the legislature. This election has special significance for all Canadians due to the looming possibility of another referendum on Quebec sovereignty, but the result is not an anomaly. The result of almost every Canadian election has shown a disjunction between the popular vote won and the number of seats earned in the legislature. The cause is the particular type of electoral system used in Canada.

In a seminal article published in 1968, Alan Cairns argued that the Canadian electoral system distorts the results of federal elections in such a way as to exaggerate and compound regional divisions within the country.<sup>1b</sup> Since that time political scientists and others have debated the relative merits of the Canadian single-member plurality (SMP) electoral system and an electoral system based on the principle of proportionality.<sup>2</sup> This article will argue that the SMP system violates the *Canadian Charter of Rights and Freedoms*<sup>3</sup> and should be replaced with an electoral system based on the principle of proportional representation (PR).

The electoral system is the means by which the preferences of Canadians, as expressed by their votes, are translated into seats in the legislature.<sup>4</sup> The Canadian electoral system is referred to as a single-member plurality system because seats are awarded to the candidates who obtain a plurality of votes in each of the 301 geographically defined constituencies. In contrast, electoral systems based on the principle of proportionality, are “specifically designed to allocate seats in proportion

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1a. Online: Chief Electoral Officer of Quebec <[http://www.dgeq.qc.ca/generales/tab\\_resu\\_prelim.html](http://www.dgeq.qc.ca/generales/tab_resu_prelim.html)> (date accessed: 2 December 1998).

1b. A. Cairns, “The Electoral System and the Party System in Canada, 1921-1965” (1968) 1 *Can. J. Pol. Sci.* 55.

2. Although there are a variety of proportional electoral systems, the term ‘proportional representation’ or PR will be used throughout this article to represent the general category. See B. O’Neal, *Electoral Systems* (Ottawa: Minister of Supply and Services, 1994) for an overview of the many different kinds of electoral systems.

3. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

4. O’Neal, *supra* note 2 at 1.

to votes, in the hope that assemblies and governments will accurately reflect the preferences of the electorate.”<sup>5</sup> Although the distinction between the two types of systems is simple, it has a powerful effect on the outcome of elections.

The first section of this article discusses the failure of the SMP electoral system to translate accurately the votes of Canadians into seats in the legislature. As well, the arguments usually raised against more proportional electoral systems will be discussed and analyzed. The second section examines the effects of the failure of the SMP system on three specific groups—women, geographically dispersed minorities, and parties whose membership is spread across the country. The third section discusses the ways in which the distortions caused by the electoral system exaggerate and increase regionalism in Canada. Finally, the fourth section considers and evaluates possible constitutional challenges to the electoral system, with a focus on the claims that could be made under s. 3 of the *Charter*.<sup>6</sup> It will be argued that whereas many claims are made about the advantages of Canada’s electoral system, the system fails to pass constitutional scrutiny because it does not perform its intended function within a democratic system. That is to say, the SMP electoral system utterly fails to provide fair and equal or ‘effective’ representation for Canadians.

## I THE PROBLEMS WITH SMP ELECTORAL SYSTEMS

The first problem with SMP electoral systems is their failure to provide representation in a way that accurately reflects vote tallies. This failure results because a candidate simply has to win more votes than any other in a particular district in order to represent that entire district. Thus, if each party’s respective level of support were evenly distributed throughout every electoral district in the country, the party with the highest level of support would win all of the seats.<sup>7</sup> Such a distribution is unlikely to occur, but studies have shown that SMP systems nonetheless create much greater inequality in translating votes into seats than do electoral systems based on the principle of proportionality.<sup>8</sup> Cairns argued that Canada’s system consistently creates biased results in favour of both strongest parties and regionally concentrated parties, while working against smaller national parties with diffuse national support (see Appendix 1).<sup>9</sup> Michael Cassidy used an index of disproportionality and found that SMP systems produce much less proportional

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5. *Ibid.* at 5.

6. *Supra* note 3. Section 3 states: “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”

7. An example is the 1987 election in New Brunswick in which the Liberals took all 58 seats with 60 per cent of the vote. See S. Hyson, “The Horrible Example” (October 1988) 9 *Pol’y Options* 25 at 26.

8. A. Lijphart, “Constitutional Choices for New Democracies” (1991) 2 *J. Democracy* 72 at 76 [hereinafter Lijphart 1991]. See also A. Lijphart, “The Political Consequences of Electoral Laws, 1945-85” (1990) 84 *Am. Pol. Sci. R.* 481 [hereinafter Lijphart 1990]. For a counter-argument, see R. Rose, “Electoral Systems: A Question of Degree or of Principle” in A. Lijphart & B. Grofman, eds., *Choosing an Electoral System: Issues and Alternatives* (New York: Praeger, 1984) 73.

9. Cairns, *supra* note 1b.

legislatures than do PR systems.<sup>10</sup> Other studies have found similar results.<sup>11</sup> Indeed, it has been found that the degree of ‘disproportionality’ in Canada, while high at a national level, is even higher if broken down by province, as the gains of parties in one region tend to compensate for losses in another region.<sup>12</sup> Thus, the legislatures produced by SMP do not accurately reflect the voting preferences of Canadians.

A second problem is the tendency of the SMP system to waste votes. Douglas Amy noted that citizens in countries with SMP systems have become used to many people “losing” their votes, in the sense that they do not count toward electing any candidate.<sup>13</sup> However, as he pointed out, this is not “normal” and in a more proportional electoral system, most votes go towards electing a representative. R.J. Johnston noted that supporters of winning candidates in SMP systems waste that fraction of their vote that is in excess of the total amount necessary to win the seats, while those who vote for losing candidates “waste all of their vote.”<sup>14</sup> He argued that “[i]n any one constituency, the number of *effective* votes [the number of votes that actually go toward electing a candidate] may be relatively small.”<sup>15</sup> [Emphasis in original.] With many ridings in Canada currently having three or four major parties in contention, the number of wasted votes is always in excess of 50 per cent and is often much higher.

A third problem with SMP electoral systems is that they manufacture and exaggerate majorities. A manufactured majority occurs when a party without the electoral support of a majority of voters forms a majority government. In a study of 21 democracies, Arend Lijphart found that between 1945 and 1980, SMP systems translated a minority of votes into a majority of seats in 45 per cent of cases. The comparable figure for PR systems was seven per cent.<sup>16</sup> In Canada, from 1945 to the present, 11 of 17 federal elections have produced majority governments, but in only two cases has the majority party actually won a majority of votes. In these two cases, bare majorities of votes have been rewarded with an overwhelming majority of seats.<sup>17</sup> Manufactured majorities are particularly significant in a system such as the

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10. M. Cassidy, “Fairness and Stability: How a New Electoral System Would Affect Canada” (1992) 42 Parl. Govt. 3 at 9.
  11. See e.g. Lijphart 1990, *supra* note 8. Lijphart found that plurality systems produce less proportional results than do PR systems, but also found large variations in proportionality between different PR formulae.
  12. See e.g. R.K. Weaver, “Improving Representation in the Canadian House of Commons” (1997) 30 Can. J. Pol. Sci. 473 at 499-500.
  13. D.J. Amy, *Real Choices New Voices: The Case for Proportional Representation Elections in the United States* (New York: Columbia University Press, 1993) at 24.
  14. R. J. Johnston, “Seats, Votes, Redistricting, and the Allocation of Power in Electoral Systems” in A. Lijphart & B. Grofman, eds., *Choosing an Electoral System: Issues and Alternatives* (New York: Praeger, 1984) 59 at 63.
  15. *Ibid.*
  16. A. Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven: Yale University Press, 1984) at 167.
  17. In 1984, the Progressive Conservatives (PCs) won 50.2 per cent of the vote, which was enough to give them 74.8 per cent of the seats, while in 1958 the PCs won 78.5 per cent of the seats on 53.7 per cent of the vote: J.L. Finlay & D.N. Sprague, *The Structure of Canadian History*, 4th ed. (Scarborough: Prentice-Hall, 1993) at 556.

Canadian one, in which rigid party discipline allows a majority government a great deal of leeway in passing legislation.<sup>18</sup>

A fourth problem is correlated to the tendency of the SMP system to create and exaggerate majorities—its tendency to produce weak or ineffective oppositions.<sup>19</sup> An effective opposition is clearly necessary to the proper functioning of a democratic legislature. Here, as well, the Canadian electoral system has produced some troubling results. In 1958, the Liberals received only 18.5 per cent of the seats on 33.8 per cent of the vote, while in 1984 the Liberals formed the official opposition holding just 14.2 per cent of the seats on 28.1 per cent of the vote.<sup>20</sup> Certain provincial elections have produced even more disturbing results. In the New Brunswick election of 1987, a combined opposition vote of 39.1 per cent did not produce a single opposition voice in the legislature.<sup>21</sup> This example is far from unique.<sup>22</sup> Opposition parties are often hobbled in the legislature with representation that does not reflect their true electoral strength. A more proportional system would allow the true strength of the opposition to be represented in the legislature.

A fifth problem relates to the effect of SMP electoral systems on minor parties, which can often accumulate a substantial level of electoral support while achieving little or no representation. In New Zealand, the report of the Royal Commission on the Electoral Systems noted that minor parties are “heavily penalized” by the SMP electoral system, which it found to be “grossly unfair” to the supporters of these parties.<sup>23</sup> Nonetheless, new parties have been able to emerge in Canada, arguably showing that the electoral system does not impose barriers to access. However, the small parties that have achieved electoral success in the past—Progressives, Social Credit, Reform, the Bloc québécois (BQ)—have been almost exclusively regional parties. Smaller parties, such as the New Democratic Party (NDP) or the Green Party, that make their appeal nationally are harmed by the SMP electoral system (see section III below). Further, efforts by regional parties to grow beyond their regional base have been hampered by the electoral system. These effects are multiplied when it is considered that many voters likely do not consider minor party candidates, because it seems clear that this would only be a wasted vote. The electoral system’s under-representation of non-regionally based minor parties also provides a disincentive to groups seeking to begin their own political parties. Such was the fate of efforts to launch women’s parties in Canada, the United States, and the United Kingdom in the 1970s.<sup>24</sup>

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18. C.E.S. Franks, *The Parliament of Canada* (Ottawa: University of Toronto Press, 1987) at 99-115.

19. Cairns, *supra* note 1b at 57.

20. Weaver, *supra* note 12 at 479-80; Finlay & Sprague, *supra* note 17 at 556.

21. Hyson, *supra* note 7 at 25.

22. Cassidy, *supra* note 10 at 4. Cassidy noted that the Parti québécois opposition in Quebec in 1973 received 5.5 per cent of the seats on 30.2 per cent of the vote, while the Alberta New Democratic Party opposition in 1982 received just 2.5 per cent of the seats on 18.7 per cent of the vote.

23. New Zealand, *Report of the Royal Commission on the Electoral Systems: Towards a Better Democracy* (Wellington: Government Printer, 1986) at paras. 2.8, 2.10 [hereinafter *New Zealand Report*].

24. L. Young, *Electoral Systems and Representative Legislatures: Consideration of Alternative Electoral Systems* (Ottawa: Canadian Advisory Council on the Status of Women, 1994) at 12.

Thus, the SMP electoral system utterly fails to translate votes into seats fairly or to give equal meaning to all votes. The New Zealand Report concluded that “the plurality system as operated in New Zealand fails to achieve fairness between the supporters of political parties.”<sup>25</sup> The same can be said for the system in Canada. Unfairness occurs through over-representation of the winning party in any election, the under-representation of small national parties, and the over-representation of regionally based parties. SMP also wastes the votes of a high proportion of electors. The system also exaggerates and manufactures majorities while weakening oppositions and creating barriers to minor parties entering the system.

Many of the distortions noted above could be removed by a more proportional electoral system. This is because such a system allows the true strength of a party’s electoral or popular strength to be reflected in the composition of the legislature. However, a number of arguments have been raised against such a change and in favour of Canada’s SMP system. Arguments criticizing more proportional systems can be classified under two headings: (a) benefits of the current system, and (b) fear of the unknown consequences of a move to a more proportional electoral system.

#### **Benefits of the Current System**

Supporters of the SMP system argue that it is preferable because it tends to produce one-party governments. This advantage is often heralded as SMP’s greatest strength. One-party government is believed to produce stability and coherence in government policies whereas coalition governments—the hallmark of more proportional systems—are regarded as volatile.<sup>26</sup> Cairns claimed that one problem with this argument is that minority governments are far from rare under the current electoral system.<sup>27</sup> Since 1945, six of the seventeen governments elected in Canada have been minorities. Nonetheless, studies show that one-party government under PR is extremely unlikely.<sup>28</sup>

But it is far from clear that coalition governments are less stable than majority ones. Consensus and coalition building in these systems simply happen after elections, rather than before. In countries with more proportional electoral systems, parties are smaller and represent more homogenous interests but make agreements following elections in order to form a government with their allies. Lijphart argued that PR systems are much better suited to divided societies because they allow “the greatest possible inclusion of representatives of [different] groups in the decision-making process.”<sup>29</sup> William Irvine noted that “[a] large measure of the current alienation from the federal government comes from the fact that its formal power exceeds its real social power.”<sup>30</sup> He pointed out that coalition governments would be more broadly based, arguing that “[t]his would certainly increase the difficulties of

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25. New Zealand Report, *supra* note 23 at 16.

26. Cairns, *supra* note 1b at 55.

27. *Ibid.* at 56.

28. F.L. Seidle, “The Canadian Electoral System and Proposals for Reform” in A.B. Tanguay & A.G. Gagnon, eds., *Canadian Parties in Transition*, 2nd. ed. (Scarborough: Nelson, 1994) at 290.

29. Lijphart 1991, *supra* note 8 at 81.

30. W. Irvine, *Does Canada Need a New Electoral System?* (Kingston: Queen’s University, 1979) at 77.

government formation, but Canada *is* a difficult country to govern and it is unwise to mask this artificially.”<sup>31</sup> [Emphasis in original.] While it may be argued that Canadian parties do not have a tradition of coalition building, and that minority government is more likely under a more proportional electoral system, it should be noted that many authors have argued that minority governments often produce more desirable policy outcomes.<sup>32</sup>

There are also potential problems with one-party governments. The New Zealand Report noted that one-party governments produce the possibility of an abuse of executive power by the government party.<sup>33</sup> A government, once elected to a comfortable majority, has few restraints on its ability to act, especially in the first years of its mandate. As well, coalition governments that have continuity from one coalition to the next can provide greater stability than would result from the replacement of one majority government by another with a very different policy agenda.<sup>34</sup> Thus, coalition governments are not inherently unstable; indeed, they may be more stable than governments formed under the current system.

A second defence of the current system is that it screens out extremist parties. The rise of Adolf Hitler in Germany has been linked to his ability to get a toehold in the Reichstag due to the PR electoral system.<sup>35</sup> However, Irvine noted that the SMP system has not removed the possibility of extremists being elected in Canada. He observed that as long as a party’s strength is concentrated regionally, the plurality system does not prevent any opinion from getting representation.<sup>36</sup> In both Serbia and Croatia, the SMP system was responsible for allowing highly nationalist parties to come to power on less than a majority of votes in the years leading up to the civil war, while more moderate parties were shut out.<sup>37</sup> As well, unlike SMP, which encourages parties to emphasize sectional differences, a more proportional system gives parties an incentive to make appeals to a broader constituency.<sup>38</sup> No electoral system can prevent voters from holding extreme viewpoints. However, a more proportional system gives parties an incentive to make as broad an appeal as possible.

A related concern is that small parties under PR systems gain power that belies their electoral support because of their ability to put coalitions “over the top.”<sup>39</sup> Israel is a good example; it is claimed that a few small religious parties have been able to extract significant policy concessions from more mainstream parties.<sup>40</sup> However, as Irvine noted, proportional systems can be designed to set “fairly precise limits” on

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31. *Ibid.* Amy, *supra* note 13 at 165, agreed and pointed to the example of Northern Ireland, where the SMP system allowed the Protestant majority to dominate Parliament, thereby forcing Catholics to resort to other means of political expression.

32. H. Milner, “The Case for Proportional Representation” (November 1997) 18 *Pol’y Options* 6 at 7.

33. New Zealand Report, *supra* note 23 at para. 2.50.

34. Seidle, *supra* note 28 at 291.

35. F.A. Hermens, *Democracy or Anarchy?* (Notre Dame, Ind.: University of Notre Dame Press, 1941).

36. Irvine, *supra* note 30 at 16.

37. G. Schopflin, “The Rise and Fall of Yugoslavia” in J. McGarry & B. O’Leary, eds., *The Politics of Ethnic Conflict Regulation* (London: Routledge, 1993) 178 at 199.

38. Milner, *supra* note 32 at 7.

39. Johnston, *supra* note 14 at 65.

40. Amy, *supra* note 13 at 167.



the ability of new parties to emerge.<sup>41</sup> This precision arises because the designers of an electoral system are able to set a minimal vote threshold that must be reached in order to achieve representation.<sup>42</sup> Israel has a very low threshold (until recently 1 per cent, now 1.5 per cent) and therefore is not representative of how most proportional systems work.<sup>43</sup> Germany has had a very stable party system in the post-war years, partially due to a relatively high 5 per cent threshold.<sup>44</sup> Nonetheless, New Zealand also has a 5 per cent threshold, and following that country's first election with PR, a small party held the balance of power.<sup>45</sup> However, the presence of a smaller coalition partner does not mean that that party will be able to wield power out of proportion to its popular support. For example, the presence of the small Free Democratic Party (FDP) in most post-war coalitions in Germany has not meant that these governments have pursued FDP policies.<sup>46</sup>

The possibility of extremist parties emerging may be greater under more proportional systems than under SMP systems, as is the possibility that small parties will play a role in governing coalitions, but such results can be attenuated by proper system design. It must be remembered, however, that the reason that these parties deserve representation is that they have sufficient popular support. It should also be noted that it might be highly beneficial to foster increased bargaining between traditional, larger parties and smaller parties representing political minorities.<sup>47</sup> Even if coalitions are not formed, groups that might not otherwise converse may engage in political dialogues that lead to new understandings.

A final benefit that is believed to accrue from the current Canadian system is the direct representation of constituents by their representative in the central Parliament.<sup>48</sup> This benefit is important, but the New Zealand Report noted that in many cases constituency representation is not well served by SMP, as "[m]any electors may feel uncomfortable consulting an MP [Member of Parliament] of a different gender, ethnic origin, age, or value system from their own."<sup>49</sup> Nonetheless, there are clear advantages to having local representatives, especially in a country as vast as Canada. Again, however, this function need not be given up under a more proportional system. All the significant proposals for reforming the Canadian electoral system retain local representation, supplementing constituency MPs with

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41. Irvine, *supra* note 30 at 20.

42. Amy, *supra* note 13 at 170. Thus, a higher threshold will prevent smaller parties from gaining representation in the legislature.

43. Amy, *supra* note 13 at 170.

44. See M. Kaase, "Personalized Proportional Representation: The 'Model' of the West German Electoral System" in A. Lijphart & B. Grofman, eds., *Choosing an Electoral System: Issues and Alternatives* (New York: Praeger, 1984) 155 at 161.

45. J. Smith & P. Aucoin, "Proportional Representation: Misrepresenting Equality" (November 1997) 18 *Pol'y Options* 30 at 32.

46. E. Lakeman, *Power to Elect: The Case for Proportional Representation* (London: Heinemann, 1982) at 161-62.

47. Amy, *supra* note 13 at 168.

48. This was referred to as the "ombudsman role" by McLachlin J. in *Reference Re Electoral Boundaries Commission Act, ss. 14, 20 (Sask.)* (1991), 81 D.L.R. (4th) 16 at 35 (S.C.C.) [hereinafter *Saskatchewan Reference*].

49. New Zealand Report, *supra* note 23 at para. 2.29.

additional seats to achieve a more proportional result.<sup>50</sup> As well, the German and New Zealand systems maintain constituency-based MPs while electing others from a list to allow for greater proportionality.<sup>51</sup> Thus, proper system design can ensure that a benefit of our current system—local representation—is maintained in a move to a more proportional electoral system.

### **Fear of the Unknown**

The Royal Commission on the Economic Union and Development Prospects for Canada, reporting in 1985, stated that a “movement to full PR ... would introduce unpredictable, but potentially far-reaching changes into our party system and the functioning of responsible government.”<sup>52</sup> Many of the arguments against a more proportional electoral system are grounded in this uncertainty. However, such arguments are often entirely speculative and do not stand up to scrutiny.

It is sometimes argued that political accountability will suffer under PR because it would be difficult to establish clear lines of responsibility between a particular policy and a member of the governing coalition.<sup>53</sup> In addition, some fear that party lists controlled by party hierarchies would prevent voters from holding specific MPs accountable.<sup>54</sup> It is far from certain, however, that coalitions would prevent clear lines of accountability from being drawn; indeed, Irvine noted that cabinet bargaining would be opened up in a situation of coalition government, making clearer which party supported what policy.<sup>55</sup> Lists controlled by parties may reduce the accountability of individual MPs, but accountability may be increased if the system allows voters to influence parties’ lists, as in Denmark and Belgium.<sup>56</sup> The claim that a party hierarchy would control the make-up of a list is dependent upon the internal democracy of a particular party. Indeed, depending upon the system, parties may not control which of their candidates are chosen to fill proportional seats.<sup>57</sup> Further, it must be remembered that even in our current system, party leaders exercise a great deal of control over the nomination process.<sup>58</sup>

A second subcategory of arguments that emerges under this heading is the concern that PR electoral systems will not achieve the results claimed for them by

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50. Canadian proposals for a more proportional electoral system are summarized in Seidle, *supra* note 28 at 292-296, and Irvine, *supra* note 30 at 52-67. These proposals generally suggest maintaining most, if not all, of the current constituencies, but adding members to each province who could supplement the parties’ totals to ensure that their seat totals are closer to their vote totals.

51. *Electoral Systems: A Worldwide Comparative Study* (Geneva: Inter-Parliamentary Union, 1993) at 41.

52. Seidle, *supra* note 28 at 295. See also J.C. Courtney, “Electoral Reform and the Role of National Parties” (November 1997) 18 *Pol’y Options* 26 at 27-28. P. Lortie, “A Minimalist Electoral Reform Agenda” (November 1997) 18 *Pol’y Options* 22 at 23, argued that a change is not justified in terms of the upheaval it would cause.

53. C.J. Kam, “P.R.: A Political Shibboleth?” (November 1997) 18 *Pol’y Options* 29 at 29.

54. Irvine, *supra* note 30 at 24-25.

55. *Ibid.* at 25-26.

56. *Ibid.* See also Amy, *supra* note 13 at 181. Amy noted that in Denmark and Belgium voters not only choose a party, but can also vote for specific individuals from the party list, thereby changing the order of the list. This gives voters a greater influence over which candidates are elected.

57. Amy, *supra* note 13 at 181.

58. Franks, *supra* note 18 at 100.

their proponents. Jennifer Smith and Peter Aucoin argued that PR may achieve greater correspondence between votes cast and seats won, but this will not result in greater equality in the formation of a government or a cabinet.<sup>59</sup> However, under a more proportional electoral system, a coalition government would need the support of legislators representing the wishes of at least 50 per cent of the voters. Further, while real power arguably rests in the cabinet and not in the legislature, it is clear that a legislature more representative of the voting profile of the electorate will inevitably lead to a government that is more representative of that voting profile.

Smith and Aucoin also argue that votes will still be wasted under a more proportional system in that all those who have voted for parties who do not subsequently participate in a coalition government can be thought of as wasting their votes.<sup>60</sup> However, under a more proportional system, these wasted votes will represent less than 50 per cent of the electorate; more importantly, these votes will not actually have been wasted because almost all of them will have gone toward electing a representative. If the representative is unable to play a part in policy formation and governance, that is a fault of our parliamentary system, not of the electoral system. As David Beatty noted, the simple fact that perfect equality is not achieved by a more proportional electoral system does not take away from the central argument that greater equality can be achieved under such a system.<sup>61</sup>

Jane Jenson argued that New Zealand's first election with PR did not lead to greater transparency or inclusion within parties, and supporters had no more control over those parties than before.<sup>62</sup> However, while there are no greater guarantees under a PR system that parties and leaders of parties will behave well, this does not detract from the broader argument in favour of a more proportional system. A change in the electoral system cannot correct all the flaws in our democracy; however, a move to a more proportional system would prevent the distortions caused by the SMP system. The next section will review the ways in which those distortions harm specific groups in our society.

## II THE HARMED GROUPS

Studies by political scientists have shown that three groups have been especially harmed by the distortions created by the SMP system: women, non-geographically based minorities, and parties that run national as opposed to regionally based campaigns. In this section, each group is examined briefly.

### Women

Women are highly under-represented in the national legislatures of most, if not all countries. In Canada, just over 20 per cent of the members of the current House of

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59. Smith & Aucoin, *supra* note 45 at 31.

60. *Ibid.* at 32.

61. D. Beatty, Letter to the Editor (December 1997) 18 Pol'y Options.

62. J. Jenson, "Out of Proportion" (March 1997) Can. Forum 27 at 29. Jenson's critique is also based on the failure of PR to produce what she saw as a more desirable policy outcome in New Zealand. However, it is dangerous to assume that any electoral system will produce a substantive policy outcome except to the extent that a more democratic procedure has substantive benefits in and of itself.

Commons are women. In a 1994 study, Lisa Young concluded that the most effective way to alter Canada's electoral law in order to allow more women to participate in politics would be to adopt PR.<sup>63</sup> Although many factors serve as barriers to increased female representation in Parliament, countries with PR systems elect a larger share of women than countries with plurality systems.<sup>64</sup>

Some have argued, though, that a country's political culture is more likely to influence an electoral outcome for women than is its choice of electoral system.<sup>65</sup> However, electoral results from countries that have one house elected by a plurality system and one elected by a more proportional method suggest that electoral systems play a large part in the election of women.<sup>66</sup> As well, Young noted that in Germany's mixed system more women are elected from the proportional party lists than from the single member districts.<sup>67</sup> Thérèse Arseneau noted similar results from New Zealand's first mixed proportional-plurality election where the record number of women elected (29 per cent) was primarily due to the proportional party lists which returned a much higher proportion of women (45 per cent) than did the single member districts (15 per cent).<sup>68</sup>

A number of explanations have been advanced as to why women are better represented in PR systems than under SMP. Seidle claimed that because parties in many PR systems present lists of candidates, voters are better able to assess the representativeness of a certain party's slate.<sup>69</sup> Young noted that

the logic of the single-member system requires that the most appealing (or least offensive) candidate be selected. In such a situation, deviation from the norm of the white, male, professional candidate is noticeable. Again, this can be contrasted to a PR system, where the failure to present a balanced ticket may be commented upon and may limit the party's appeal to some voters.<sup>70</sup>

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63. Young, *supra* note 24 at 39.

64. See W. Rule & P. Norris, "Anglo and Minority Women's Underrepresentation in Congress: Is the Electoral System the Culprit?" in W. Rule & J.F. Zimmerman, eds., *United States Electoral Systems: Their Impact on Women and Minorities* (New York: Greenwood Press, 1992) 41 at 45. See also New Zealand Report, *supra* note 23.

65. See J. Brodie & C. Chandler, "Women and the Electoral Process in Canada" in K. Megyery, ed., *Women in Canadian Politics: Toward Equity in Representation* (Toronto: Dundurn Press, 1991) 3 at 35. Young, *supra* note 24 at 6 noted this as a qualification on her conclusion. See also Bruchta & Bruchta, "The Extent of the Impact of the Electoral System Upon the Representation of Women in the Knesset" in W. Rule & J.F. Zimmerman, eds., *Electoral Systems in Comparative Perspective: Their Impact on Women and Minorities* (New York Conn.: Greenwood Press, 1994) 116.

66. See e.g. T. McNally, "'Woman Power' in Japan's 1989 Upper House Election" in W. Rule & J.F. Zimmerman, *supra* note 65, 149.

67. Young, *supra* note 24 at 17. See also Brodie, *supra* note 65 at 35, where she notes a similar phenomenon in Australia where women have been consistently represented in higher numbers in the proportionally elected Senate than in the SMP-based House of Commons.

68. T. Arseneau, "The Representation of Women and Aboriginals Under PR: Lessons from New Zealand" (November 1997) 18 *Pol'y Options* 9 at 11.

69. Seidle, *supra* note 28 at 291.

70. Young, *supra* note 24 at 11.

Further, Young noted that SMP systems are not suitable for implementing affirmative action programs, as decisions are made on an all-or-nothing basis constituency by constituency.<sup>71</sup>

The under-representation of women in legislatures is a concern (or ought to be) of all Western democracies. This under-representation, however, is much worse in SMP systems than in countries with more proportional electoral systems.

#### **Minorities That Are Geographically Dispersed**

It is also generally accepted that minorities that are geographically dispersed, such as Aboriginal people and ethnic minorities, are under-represented in Parliament partially due to the workings of the SMP system.<sup>72</sup> Will Kymlicka noted that in 1993 visible minorities represented 6 per cent of the Canadian population, but only 2 per cent of MPs; similarly, Aboriginal persons represented 3.5 per cent of the population, but only 1 per cent of the House of Commons.<sup>73</sup> This under-representation is usually attributed to the fact that geographically dispersed groups are unlikely to be able to make much of an impact as a group in any given geographically defined electoral district.<sup>74</sup> The New Zealand Report noted similar under-representation of visible minorities and the Maori population under the SMP system in that country.<sup>75</sup> However, in New Zealand's first election under a more proportional system, 15 Maori MPs were elected, providing representation roughly proportional to their presence in the population as a whole.<sup>76</sup> Roger Gibbins noted that a consequence of the under-representation of Aboriginal people in Canada is that "the existing electoral system does not provide an effective bridge between Aboriginal communities and the broader political community."<sup>77</sup> The evidence therefore suggests that geographically dispersed minorities are under-represented in the legislatures of countries with SMP systems. This under-representation contributes to the disjunction between members of these groups and the broader political community.

It could be argued that a group is not under-represented merely because its members are not present in a legislature in numbers equivalent to their proportion of the population. Representation is a highly disputed concept.<sup>78</sup> The argument that various groups are under-represented in Parliament is based on the belief that to be representative, a legislature must 'mirror' or be a 'microcosm' of a community.<sup>79</sup>

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71. *Ibid.*

72. Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report* (Toronto: Dundurn Press, 1991) at 95.

73. W. Kymlicka, "Group Representation in Canadian Politics" in F.L. Seidle, ed., *Equity and Community: The Charter, Interest Advocacy and Representation* (Montreal: Institute for Research on Public Policy, 1993) 61 at 61.

74. R. Gibbins, "Electoral Reform and Canada's Aboriginal Population: An Assessment of Aboriginal Electoral Districts" in R.A. Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada* (Toronto: Dundurn Press, 1991) 153 at 157. Of course, if a minority group happens to be geographically concentrated, the situation can be very different.

75. New Zealand Report, *supra* note 23 at paras. 2.16-2.17.

76. Arseneau, *supra* note 68 at 11.

77. Gibbins, *supra* note 74 at 153.

78. For an historical accounting of the debate over the concept of political representation, see H.F. Pitkin, *Representation* (New York: Atherton, 1969).

79. A.H. Birch, *Representation* (New York: Praeger, 1971) at 20.

This belief is at least partially based on the assumption that to represent someone fully, the representative must share personal characteristics and experiences.<sup>80</sup> However, a theory referred to as 'virtual representation' holds that it is enough that there exist formal institutional mechanisms by which to hold a representative accountable and responsive to the wishes of his or her constituents.<sup>81</sup> This latter view is supported by the argument that if differences between groups in society warrant separate representation based on different experiences, this must surely apply within groups as well.<sup>82</sup> Mirror representation, taken to its extreme, would mean no representation at all.<sup>83</sup>

The theory of virtual representation, however, also suffers from serious flaws. By ignoring group differences, it can lead to the continued marginalization of oppressed groups. In order to make a fully informed political judgment, it is not sufficient for legislators simply to attempt to put themselves in the position of their constituents whose ascriptive characteristics they do not share. Instead, it is necessary that there be a significant contingent of individuals with these different characteristics present within the legislature, so that MPs who represent dominant perspectives have a chance to engage with these different perspectives on a daily basis.<sup>84</sup>

There is evidence suggesting that opinions on political issues are affected by one's ascriptive characteristics. A number of studies have found a statistically significant difference between men's and women's attitudes on political questions such as crime control, social spending, and foreign policy.<sup>85</sup> Other studies, conducted in the United States, have found even stronger differences between the opinions of Blacks and Whites on various questions of public policy. For example, L.B. Inness and J. Sittig found statistically significant differences between the opinions of Black and White voters on four of five public policy issues they surveyed. These differences remained even when they controlled for other variables.<sup>86</sup> Such studies reveal the weaknesses in the theory of virtual representation. If different groups within our society hold different political viewpoints, it is necessary that our theory of representation accommodate the expression of those views within the legislature.

In any event, the Canadian political and legal systems already recognize the importance of group rights in a number of ways, such as guaranteed regional representation in Parliament and guarantees of the rights of groups (linguistic minorities, multicultural groups, women, Aboriginal persons) within the *Charter*.<sup>87</sup> Kent Roach has noted that "Canada has never been ruled by rep[resentation] by pop[ulation] because of the need for effective representation of provinces and

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80. Kymlicka, *supra* note 73 at 67.

81. Pitkin, *supra* note 78 at 14.

82. Kymlicka, *supra* note 73 at 69.

83. *Ibid.*

84. I.M. Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (Princeton: Princeton University Press, 1997) at 59.

85. J. Hurwitz & S. Smiley, "Gender Differences on Crime and Punishment" (1998) 51 Pol. Res. Q. 89, found differences between women's and men's opinions on public policy matters relating to crime control and provided a summary of other studies.

86. L.B. Inness & J. Sittig, "Race, Class and Support for the Welfare State" (1996) 66 Soc. Inquiry 175.

87. *Ibid.* at 63-64.

communities.”<sup>88</sup> This was recognized in the *Electoral Boundaries Readjustment Act*, which allows commissioners engaged in the redrawing of federal electoral boundaries to deviate from the principle of equality of voting power where “any special community or diversity of interests of the inhabitants of various regions of the province appears to the commission to render such a departure necessary or desirable.”<sup>89</sup> Thus, it cannot be argued that absolute mirror representation forms the underlying theory of representation in Canada, as our existing democratic institutions recognize the importance of shared group characteristics.

The debate over representation is likely to continue. Regardless of the position one takes, however, PR systems have an inherent advantage in that they do not force individuals to choose between two theories of representation. While SMP privileges the theory of virtual representation, PR allows individuals to determine by whom they would like to be represented. If it matters to individuals that they be represented by those who share or mirror their ascriptive characteristics, they can vote accordingly. If it does not matter, no one has to vote on the basis of ascriptive characteristics.

#### **National Political Parties**

A third group harmed by the distortions of the electoral process is comprised of parties whose support is spread across the country rather than being concentrated regionally. The most commonly noted distortion created by SMP systems is that they give the winning party in an election more seats than votes, while giving small parties a lower percentage of seats than votes.<sup>90</sup> However, the current electoral system also rewards regionally based parties with a better seat-to-vote ratio than smaller parties with diffuse national support.<sup>91</sup> These distortions of the electoral system are described quantitatively in Appendices 1 and 2.

Some recent examples will also reveal the extent of the problem. In the 1997 federal election, the Liberals were able to win 51.5 per cent of the seats with 38.4 per cent of the vote whereas the Progressive Conservatives (PCs) won just 6.6 per cent of the seats on 18.9 per cent of the votes. The BQ won 14.6 per cent of the seats with 10.7 per cent of the vote. The results can be described in terms of equality of voting power by noting that the Liberals won a seat for every 31,817 votes whereas the PCs won one for every 121,287 votes. The BQ, running a strictly regional campaign, won a seat for every 31,233 votes whereas Reform won one for every 41,501 votes. The NDP managed one seat for every 67,723 votes.

In 1993, the PCs won just 0.67 per cent of the seats on 16 per cent of the vote whereas the BQ took 18.3 per cent of the seats with 13.5 per cent of the vote. In other words, the BQ won a seat for every 34,186 votes whereas the PCs received a seat for every 1,093,211 votes. In terms of electing MPs, each BQ vote was worth 32 PC votes. The bias in favour of regional parties can often outstrip even that in favour of

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88. K. Roach, “Chartering the Electoral Map Into the Future” in J.C. Courtney, P. MacKinnon & D.E. Smith, eds., *Drawing Boundaries: Legislatures, Courts and Electoral Values* (Saskatoon: Fifth House, 1992) 200 at 213.

89. R.S.C. 1985, c. E-3, s. 15(2).

90. Cairns, *supra* note 1b at 58-59.

91. *Ibid.* at 59.

the winning party; thus, in Quebec in 1993, the BQ elected an MP for every 34,186 votes whereas the Liberals elected one for every 65,046 votes.<sup>92</sup>

A more proportional electoral system, by definition, would ensure that such skewed results would not occur. This is important, because the bias against parties that run national campaigns has serious implications for regional divisions that will be examined in the next section.

### III THE ELECTORAL SYSTEM EXAGGERATES AND COMPOUNDS REGIONALISM

The SMP electoral system causes regionalism to be accentuated by over-representing parties that make a regional appeal, while under-representing parties that have diffuse national support. In addition, the SMP system skews regional representation within the caucuses of national parties. This latter result causes parties to be less sensitive and responsive to certain regional interests. It also increases regional divisions by exaggerating the political differences between regions and by identifying certain regions with certain parties.

In his 1968 essay, Cairns noted the tendency of the electoral system to favour parties that appeal to regional interests as opposed to those that have diffuse national support.<sup>93</sup> He pointed to the election of 1935, when the Reconstruction Party ran a national campaign and received a single seat (0.4 per cent) despite getting 8.7 per cent of the votes. The Social Credit party, on the other hand, running exclusively in the west, were able to win 17 seats (6.9 per cent) with only 4.1 per cent of the national vote.<sup>94</sup> Cairns and Irvine both noted that in every year it was represented in Parliament, the regionally based Social Credit Party was more successful in translating votes into seats than the CCF/NDP, which attempted to run national campaigns.<sup>95</sup> This tendency has shown up again in the last two elections, in which the regionally based BQ and Reform Party received better seat-to-vote ratios than either the PCs or the NDP, which sought to run national campaigns (see Appendix 1).

Weaver cautioned, however, that "the tendency of the Canadian electoral system to reward regionally concentrated parties in recent Canadian elections should not be overstated."<sup>96</sup> He pointed out that only four times in the thirteen elections since 1958 has a regional party's share of seats exceeded its share of the popular vote.<sup>97</sup> As well, Nelson Wiseman claimed that the CCF/NDP has had a greater influence on policy formation than has any regional party.<sup>98</sup> However, this claim does not alter the fact that when parties make their pitch to a specific region they are rewarded more by the electoral system than those parties that seek to bridge regional divides. The reality of

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92. The data for these calculations are available on the Internet: online: Elections Canada <<http://www.elections.ca>> (date accessed: 10 November 1998).

93. Cairns, *supra* note 1b at 59.

94. *Ibid.*

95. *Ibid.* Irvine, *supra* note 30 at 15.

96. Weaver, *supra* note 12 at 477.

97. *Ibid.* The four examples were Social Credit in 1968, the BQ in 1993 and 1997 and the Reform in 1997.

98. N. Wiseman, "Cairns Revisited—The Electoral and Party System in Canada" in P. Fox, ed., *Politics: Canada*, 7th ed. (Toronto: McGraw-Hill Ryerson, 1991) 265 at 269-70.



the matter is that based on their popular support, regional parties have had too much representation whereas smaller national parties have had too little.

The SMP system also skews the results for larger national parties, so that they are under-represented in some regions and over-represented in others. The national election results tabulated in Appendix 1 show that the SMP system distorts the results of the election on a national scale, but these numbers hide the true extent of a distortion in particular provinces because the under-representation of a party in one region may be partially compensated by over-representation in another part of the country. In 1972 and 1974, the Liberals did not elect a single member from Alberta, despite receiving 25 per cent of the vote in that province in both elections.<sup>99</sup> The PCs were traditionally hurt by this phenomenon in Quebec where in 1980, for example, they received only one seat in the House (1.3 per cent), despite having garnered 12.6 per cent of the vote in that province. In this election, the Liberals won a Quebec seat for every 27,259 votes earned whereas the PCs won one for the 268,409 Quebec votes they won. With 14 per cent of the Quebec vote in 1988, the NDP was unable to win a seat in that province.<sup>100</sup> In the same elections, however, these parties were all overcompensated within certain regional strongholds, thereby skewing further the regional make-up of their caucuses.

Such results have serious implications for regional alienation in an already regionally divided country. Irvine noted that by misrepresenting the true electoral strength of parties, "the electoral system confers a spurious image of unanimity on provinces."<sup>101</sup> Thus, Quebec was identified with the Liberal party in 1980 because that party won 98.7 per cent of the seats (all but one). This result masked the fact that over 30 per cent of the province did not vote for the Liberals. More recently, in 1993, it seemed as if 'almost everyone' in Quebec had voted for the BQ because that party garnered 72 per cent of the province's seats. However, more than half of all Quebecers (50.7 per cent) had voted for other parties. Reform's solid block of 75 per cent of the seats in British Columbia in 1993 masked deep divisions within that province which resulted in Reform earning a mere 36.4 per cent of the votes cast.<sup>102</sup> Such results become self-perpetuating as the media and voters begin to identify a party with a specific province or region.

Many authors have noted the importance of national parties as institutions that bring together interests from across the country, fostering political integration.<sup>103</sup> SMP's distortions stunt the influence and development of truly national parties. George Perlin commented that "because of the weakness of Quebec representation in the Conservative caucus [prior to 1984], more moderate anglophones at the elite level have been deprived of the contacts with French Canadians which might have

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99. Irvine, *supra* note 30 at 12.

100. A.C. Whitehorn, *Canadian Socialism: Essays on the CCF-NDP* (Toronto: Oxford University Press, 1992) at 202. Whitehorn also noted (at 3) that between 1962 and 1988, the NDP averaged 8.1 per cent of the Quebec popular vote in federal elections. This never translated into any seats, and the NDP has remained essentially an 'English-Canadian' party.

101. Irvine, *supra* note 30 at 14.

102. Seidle, *supra* note 28 at 288.

103. Cairns, *supra* note 1b.

helped them acquire a better appreciation of French Canadian concerns.”<sup>104</sup> A lack of understanding of French Canadian concerns has also made the NDP less responsive to patterns of public opinion in Quebec.<sup>105</sup> Irvine argued that Prime Minister Trudeau’s insensitivity to matters that affected the west could have been reduced by a larger group of colleagues in caucus “who would make it their business to communicate these [views and feelings] to the rest of the party, and, in particular to the party leadership.”<sup>106</sup> He summed up this situation:

The fact that the votes [that parties receive from all regions] are not translated into seats ... makes it inevitable that all parties will be needlessly insensitive to certain currents of feeling—needless, literally, because the views *could* have been present within the party but for the operation of the electoral system.<sup>107</sup> [Emphasis in original.]

The tendency of the electoral system to over-represent certain regions within the caucuses of parties and concomitantly to under-represent other regions leads to a real inability on the part of the major parties to become truly national institutions.

Several studies have noted the danger of parties becoming identified with certain sections of the country. The Pepin-Robarts Report argued that research from other federations showed that “when party membership in the central parliament becomes concentrated in regional blocks it is an advance signal of eventual disintegration.”<sup>108</sup> Seidle noted that a 1980 report of the Canada West Foundation reached a similar conclusion, arguing that as a result of the imbalance of regional representation in Ottawa, provincial politicians become the primary defenders of regional interests, thereby undercutting the “legitimacy and strength of the national government.”<sup>109</sup> The imbalance of regional representation needlessly created by the electoral system can have very real effects on the legitimacy of the federal government and may further divide Canada.

Other authors have noted that in contrast to the SMP system, which provides incentives for parties to ignore—or indeed be actively antagonistic toward—certain regions, a PR electoral system encourages parties to run more unifying campaigns. It was pointed out that “there may be real political gain for a party to exploit its weakness by running a campaign against that region [in which it has no Parliamentary representation] hoping to gain votes and seats in other more competitive areas.”<sup>110</sup> At the very least, parties have an incentive to invest fewer resources in regions in which

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104. G.C. Perlin, *The Tory Syndrome: Leadership Politics in the Progressive Conservative Party* (Montreal: McGill-Queen’s University Press, 1980) at 181.

105. A.C. Whitehorn, “The CCF-NDP and the End of the Broadbent Era” in H.G. Thorburn, ed., *Party Politics in Canada*, 6th ed. (Scarborough: Prentice-Hall, 1991) at 333.

106. Irvine, *supra* note 30 at 36.

107. *Ibid.* at 37.

108. Canada, Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Minister of Supply and Services, 1979) at 105.

109. Seidle, *supra* note 28 at 293 citing D. Elton & R. Gibbins, *Electoral Reform: The Need is Pressing, The Time is Now* (Calgary: Canada West Foundation, 1980).

110. P. McCormick, E. Manning & G. Gibson, *Regional Representation: The Canadian Partnership* (Calgary: Canada West Foundation, 1981) at 54.

they have little hope of winning seats.<sup>111</sup> Milner noted that such incentives are reversed in a more proportional electoral system since under this sort of system “every vote counts” toward electing an MP.<sup>112</sup> Thus, parties “have every incentive to moderate the divisive elements of their platform, and emphasize the unifying ones.”<sup>113</sup>

It could be argued that the skewed election results produced by the SMP system reflect divisions that do exist in the country, and these divisions should be reflected in the federal Parliament. Thus, the election of many BQ MPs from Quebec exemplifies the dissatisfaction felt in that province towards the federal government. However, it must be remembered that a more proportional system would simply reflect the actual state of people’s electoral preferences. It is not useful to gloss over actual conflicts. In fact, a more proportional electoral system simply reflects political differences as they are, without the exaggeration produced by the SMP system.

It may also be argued that the SMP system serves Quebec well in that, by allowing a large block of MPs to be elected from that province, there has generally been a solid group of representatives in Ottawa to forward the interests of that province. Arguably, this has facilitated the mediation of the most significant regional division in Canada—that between Quebec and the rest of the country—within the federal government. However, it is doubtful that the presentation of Quebec voters as a monolithic block has actually improved inter-regional understanding. By producing a Parliament that does not truly represent the electoral opinions of Quebeckers, the SMP system gives the rest of the country a skewed picture of the situation within that province. A PR system that allotted seats on the basis of votes would allow the nuances of the political situation in Quebec to be reflected in Parliament, thereby giving the rest of the country a better understanding of the complexity of the situation. The current system has given the impression that the majority of Quebeckers either wholeheartedly approve of the position of the federal government (as in the election of 1980) or wholeheartedly reject it (as in the election of 1993). The reality is probably somewhere in between and, for the sake of national unity and understanding, our political institutions should reflect that fact.

Thus, one of the most damaging effects of the SMP electoral system is that it exaggerates and perpetuates regional divisions in a regionally divided country. Political parties in Canada have a fundamental role in bringing together and integrating interests from across the country. The electoral system acts as a barrier to parties performing this function effectively. Worse still, the system actually gives parties an incentive to ignore or even be antagonistic towards specific regions of the country. The division of Parliament into regional blocks is not conducive to Canadian unity and, to a large extent, is the product of distortions in the electoral system. A system of greater proportionality would work to mitigate these regional divisions.

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111. I. McLeod, *Under Siege: The Federal NDP in the Nineties* (Toronto: Lorimer, 1994) at 72. McLeod noted that following the continuing failure of the NDP to gain a representational toehold in Quebec, efforts to do so were abandoned in the 1990s.

112. Milner, *supra* note 32 at 7.

113. *Ibid.* See also Irvine, *supra* note 30 at 4.

The next section will discuss the possibility of changing Canada's electoral system through a challenge under the *Charter*.

#### IV POSSIBLE *CHARTER* CHALLENGES TO THE ELECTORAL ACT

The SMP system, as such, is not set out within a statute. In order to challenge the electoral system, a *Charter* action would instead have to be brought against s. 189 of the *Canada Elections Act*,<sup>114</sup> challenging the way that section operates in conjunction with ss. 2(1) and 14(1) of the same act. Subsection 14(1) provides that a returning officer shall be appointed for each electoral district (as defined in s. 2(1)); s. 189 provides that each returning officer declares elected the candidate who receives the largest number of votes.<sup>115</sup> Together, these provisions ensure that the one candidate in each electoral district who has received a plurality of votes is declared elected to the House of Commons.

Certain preliminary objections may be raised. The idea of a constitutional challenge to the SMP electoral system may seem surprising, given the system's history and familiarity. This history may suggest to some that the SMP electoral system itself is part of our constitutional structure and thus somehow immune from constitutional review. However, there is nothing to suggest that this is the case. Peter Hogg has referred to Canada's system of parliamentary government, sometimes called responsible government, as "probably the most important non-federal characteristic of the Canadian Constitution."<sup>116</sup> In responsible government, the executive is responsible to the legislature for its actions. But even if an executive that is responsible to the legislature is part of the Constitution, this does not mean that the way in which individuals are elected to the legislature is also part of the Constitution.

Hogg noted that the rules that govern responsible government "are almost entirely 'conventional'" and perhaps it could be argued that, to the extent that it is tied to responsible government, the SMP electoral system represents a constitutional convention.<sup>117</sup> Even if this were the case, it would not prevent the SMP system from being subjected to *Charter* scrutiny. In *Osborne v. Canada (Treasury Board)*, Sopinka J., writing for a unanimous court on this point, held that constitutional

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114. R.S.C. 1985, c. E-2.

115. *Ibid.* Subsection 2(1) provides: "In this Act ... 'electoral district' means any place or territorial area entitled to return a member to serve in the House of Commons." Subsection 14(1) provides: "The Governor in Council may appoint a returning officer for any new electoral district and a new returning officer for any electoral district in which the office of returning officer becomes vacant." Section 189 provides: "Each returning officer, immediately after the sixth day next following the date on which he has completed the official addition of the votes, unless before that time he has received notice that he is required to attend before a judge for the purpose of a recount, immediately after the recount, shall forthwith declare elected the candidate who has obtained the largest number of votes by completing the return to the writ on the form provided for that purpose on the back of the writ."

116. P.W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1992) at 9-3.

117. *Ibid.* Hogg himself did not make the argument that the electoral system is constitutionally entrenched, and seemed to reject implicitly such a situation: see *ibid.* at 9-12, n. 32. He further noted at 9-4 that the only phrase in the written constitution that can give support to a stronger entrenchment of responsible government is found in the preamble to the *Constitution Act, 1867* which states that Canada is to have "a constitution similar in principle to that of the United Kingdom."

conventions, even when encompassed within a statute, are not immune from *Charter* review.<sup>118</sup> Thus, there is nothing that would initially prevent the *Charter* from being applied in this case.

A second preliminary objection that could be made is that by focusing on political parties, a challenge to the electoral system overlooks the fact that Canadians do not vote for parties, but for individuals. While formerly true, this argument fails to recognize the increasingly primary role of political parties within the electoral process. Academics, legislators, and the courts have recognized this primary role. The Royal Commission on Electoral Reform and Party Financing, which reported in 1991, found that political parties now play a fundamental role in our electoral process.<sup>119</sup> The Commissioners stated that “comparative and historical experience demonstrates that parties, as primary political organizations, are best suited to performing a host of activities essential to representative democracy.”<sup>120</sup> Political parties bring together varied interests, and assist in the formation of governments. Janet Hiebert stated that the important role of political parties “is reflected in the institutional advantages conferred upon them as opposed to individuals or interest groups wanting to participate in the electoral process.”<sup>121</sup> The institutional advantages conferred upon political parties include special provisions for public funding<sup>122</sup> and the allocation of free and paid broadcasting time during election campaigns.<sup>123</sup> As well, courts have been willing to entertain *Charter* challenges brought by political parties against various provisions of the electoral law.<sup>124</sup> At one time individuals may have been the focus of our election campaigns, but to ignore the role of political parties today would be to hide behind a legal fiction.

Although there are no apparent initial barriers to a *Charter* challenge, it may still be asked why such an action should be considered as a way to bring about change in the electoral system. Given their inherently political nature, it seems logical that such questions should be resolved through the political process. However, electoral systems are notoriously difficult to alter. Given that those in power owe their political lives to the particular system under which they were elected, most have little incentive to push for change. In New Zealand, the electoral system was only altered following two referendum campaigns in which both major political parties opposed the change.<sup>125</sup>

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118. *Osborne v. Canada (Treasury Board)* (1991), 82 D.L.R. (4th) 321 at 334 (S.C.C.). Sopinka J. did note that the existence of a constitutional convention would lend credence to a government claim that it was pursuing an “important political objective.”

119. *Reforming Electoral Democracy*, *supra* note 72 at 207.

120. *Ibid.*

121. J. Hiebert, “Interest Groups and Federal Elections” in F.L. Seidle, ed., *Interest Groups and Elections in Canada* (Toronto: Dundurn Press, 1991) 3 at 6.

122. See e.g. *Canada Elections Act*, *supra* note 114 at s. 322(1).

123. *Ibid.*, ss. 307(1) (paid broadcast time) and 316(1) (free broadcast time).

124. See e.g. *Reform Party of Canada v. Canada (Attorney-General)* (1995), 123 D.L.R. (4th) 366 (Alta. C.A.) [hereinafter *Reform Party*], where the Reform Party and one of its members challenged the provisions on broadcast time.

125. K. Asaka, “Electoral Reform in Japan: A Comparative Constitutional Law Perspective” (1997) 27 *Vict. U. Well. L. Rev.* 25 at 36-37.

The difficulty of changing electoral systems through political means has led citizens in other jurisdictions to look to the courts for relief. In Japan, the Supreme Court declared three elections unconstitutional due to large disparities between riding sizes and the resulting disproportionality in voting power.<sup>126</sup> Although the court did not nullify the elections because of the fear of constitutional chaos, these decisions are remarkable given the Japanese Supreme Court's history of deference to the legislature.<sup>127</sup> The government of Japan has since adopted a modified system of PR for the House of Representatives.<sup>128</sup>

It is not unusual for US courts to find electoral maps to be unconstitutional because they violate the equal protection clause of that country's constitution.<sup>129</sup> Courts in the US have also acted to strike down electoral systems that violate statutory and constitutional rights.<sup>130</sup> Where the legislature refuses to act to alter an electoral system that was found to violate constitutionally protected rights, courts have not shied away from declaring the law to be constitutionally invalid.

### Section 15

A challenge to Canada's electoral system could be brought under a number of different *Charter* sections. Given the inequality in the way that the electoral system translates votes into seats, perhaps the most obvious section under which a *Charter* challenge could be brought is s. 15.<sup>131</sup> Such a challenge could proceed on two bases. First, women, Aboriginal people, and visible minorities could bring a claim that the electoral system's role in their continued under-representation in Parliament constitutes a denial of the equal benefit of the law as guaranteed by s. 15. Such a claim would be an effects-based claim, focusing on evidence from different jurisdictions, as outlined in section II of this article.

Second, it could be argued that the system produces inequalities between those affiliated with different political parties. This argument would be based on the fact that the SMP system rewards certain parties with a much better seat-to-vote ratio than others. Such a claim would involve arguing that political membership or affiliation should be an analogous ground for the sake of s. 15 of the *Charter*. Such a claim has been considered by two different provincial Courts of Appeal. In *Barrette v. Canada*, the Quebec Court of Appeal dismissed the suggestion that candidates who receive less than 15 per cent of the vote constitute an analogous ground for the purposes of

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126. See *ibid.* at 29-30. See also L.W. Beer & H. Itoh, eds., *The Constitutional Caselaw of Japan, 1970 through 1990* (Seattle: University of Washington Press, 1996) 355-94.

127. Besides the three elections that it held unconstitutional, the Japanese Court has only ever held three other laws unconstitutional. See Asaka, *supra* note 125 at 32, n. 34.

128. *Ibid.* at 32.

129. US courts found electoral districting to be a justiciable issue in *Baker v. Carr*, 369 US 186 (1962). A recent summary of the jurisprudence in this area can be found in E. Daly, "Idealists, Pragmatists, and Textualists: Judging Electoral Districts in America, Canada, and Australia" (1998) 21 B.C. Int'l & Comp. L.R. 261 at 270-93.

130. See *e.g. Cane v. Worcester County*, 35 F.3d 921 (4th Cir. 1994), *aff'g* in part 847 F.Supp. 369 (D.Md.1993), which imposed a cumulative voting system.

131. *Charter, supra* note 3. Section 15(1) provides: "Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

the *Charter*; McCarthy J.A. stated that such persons do not constitute a “discrete or insular minority” or a “traditionally disadvantaged group.”<sup>132</sup> In *Reform Party*, the majority of the Alberta Court of Appeal found that for the purposes of the legislative provisions being challenged in that case, political party membership could not be considered to be an analogous ground under the *Charter*. However, the court did say, “[i]t may be that in some circumstances, membership in a political party could be an analogous ground.”<sup>133</sup>

An argument could be made that a challenge to the electoral system may represent just the right circumstances under which to consider political affiliation as an analogous ground. Certainly the problems with the electoral system can easily be distinguished from the claims in both *Barrette* and *Reform Party*. In those cases, the plaintiffs were challenging laws that distributed electoral benefits on the basis of public support in the electoral process. Thus, *Barrette* sought to challenge a law that restricted the receipt of public funding for election campaigns to those candidates who received at least 15 per cent of the popular vote. The plaintiffs in *Reform Party* wanted to overturn a law that allocated broadcasting time during elections on the basis of past electoral support. However, the courts viewed both of these challenges somewhat skeptically because the plaintiffs essentially sought to argue that even though they could not attract greater public support, they should receive similar benefits to those who had.<sup>134</sup> In a challenge to the electoral system, such reasoning could be utilized by the plaintiffs, since the precise reason for such a challenge would be that the electoral system does not treat parties fairly or equally on the basis of their popular support.

Although there is reason to believe that equality rights have been adversely affected in this case, it is more desirable to evaluate the constitutionality of the electoral system within the framework provided by s. 3 of the *Charter*—the right to vote. Although the structure of the argument differs, the points that would come out under a s. 15 analysis—the inequality between voters, and the under-representation of different groups within the electorate—would also be brought out in a s. 3 discussion. However, unlike s. 15, where the harms to different groups within the electorate would have to be considered discretely, s. 3 allows the many different harms (and benefits) of the SMP electoral system to be considered within one analysis. Thus, a focus on s. 3 will allow a more comprehensive consideration of all of the issues at play and will avoid repetition.

A further reason to prefer a s. 3 analysis is the continuing confusion surrounding the Supreme Court of Canada’s interpretation of s. 15. Although the court enunciated an agreed-upon test in the case of *Eldridge v. British Columbia*,<sup>135</sup> this test still made reference to a step in the analysis which has deeply divided the court in the past.<sup>136</sup>

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132. *Barrette v. Canada (Attorney-General)* (1994), 113 D.L.R. (4th) 623 at 627-28.

133. *Reform Party*, *supra* note 124 at 391, McFadyen J.A.

134. *Ibid.* at 390-91.

135. (1997), 151 D.L.R. (4th) 577 (S.C.C.).

136. *Ibid.* at 614. The debate is highlighted in the cases of *Miron v. Trudel* (1995), 124 D.L.R. (4th) 693 (S.C.C.), *Egan v. Canada* (1995), 124 D.L.R. (4th) 609 (S.C.C.) and *Thibaudeau v. Canada (M.N.R.)* (1995), 124 D.L.R. (4th) 449 (S.C.C.). The dispute revolves around the issue of whether it is necessary to consider the relevancy of the personal characteristic upon which a distinction has

Although the different interpretations of s. 15 may not make a great deal of difference to the present analysis, there is a danger of getting bogged down in arguing which s. 15 analysis should be preferred, instead of arguing the substantive issues. In contrast, s. 3 jurisprudence is much clearer and offers a much more straightforward way to approach the constitutional problems created by the SMP electoral system. Further, the cases most analogous to the question of the constitutionality of the electoral system are the electoral districting cases,<sup>137</sup> which have been decided under s. 3.

A final reason to prefer an analysis under s. 3 is that the courts have repeatedly emphasized that the right to vote should be given a broad interpretation. Courts have recognized that the importance of the right to vote is reflected in the fact that it is not subject to the s. 33 override clause, as are the fundamental freedoms protected in s. 2 and the legal and equality rights protected in ss. 7–15.<sup>138</sup> In addition, as Chief Justice McLachlin, then of the British Columbia Supreme Court, said in *Dixon*, “the right to vote and participate in the democratic election of one’s government is one of the most fundamental of the *Charter* rights. For without the right to vote in free and fair elections all other rights would be in jeopardy.”<sup>139</sup> Analyzing the electoral system under s. 3 focuses one’s attention on the importance of the rights at stake.

### Section 3—The Right to Vote

Section 3 has not received a great deal of attention from the courts. Several courts have, however, utilized the section to invalidate different parts of the *Canada Elections Act*<sup>140</sup> that prevented prisoners,<sup>141</sup> judges,<sup>142</sup> mental patients,<sup>143</sup> and out-of-province students<sup>144</sup> from voting. These cases relied primarily on the text of s. 3, and most of the discussion centred on the government’s justification under s. 1 for restricting the right to vote.<sup>145</sup> A second group of cases in which the right was raised involved challenges to statutory provisions that placed restrictions on electoral spending,<sup>146</sup> or the publication of opinion polls during election campaigns.<sup>147</sup>

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been drawn, with respect to the functional values underlying the law. See W. Black & L. Smith, “Equality Rights” in G. Beaudoin & J. Mendes, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1996) at 14-1.

137. *Saskatchewan Reference*, *supra* note 48; *Dixon v. British Columbia (Attorney-General)* (1989), 59 D.L.R. (4th) 247 (B.C.S.C.) [hereinafter *Dixon*]; *MacKinnon v. Prince Edward Island et al.* (1993), 104 Nfld. & P.E.I.R. 232 (P.E.I.S.C.) [hereinafter *MacKinnon*]; *Reference Re Electoral Boundaries Commission Act (Alberta)* (1992), 83 Alta. L.R. (2d) 210 (C.A.); *Reference re: Electoral Divisions Statutes Amendment Act, 1993 (Alberta)* (1995) 24 Alta. L.R. (3d) 1 (C.A.).

138. Most recently in *Thomson v. Canada (Attorney-General)*, [1998] 1 S.C.R. 877 at 935, Bastarache J. [hereinafter *Thomson*].

139. *Dixon*, *supra* note 137 at 257.

140. *Supra* note 114.

141. *Sauvé v. Canada (Attorney-General)*, [1993] 2 S.C.R. 438.

142. *Muldoon v. Canada*, [1988] 3 F.C. 628 (T.D.).

143. *Canadian Disability Rights Council v. R.*, [1988] 3 F.C. 622 (T.D.).

144. *Re Hoogbruin* (1985), 24 D.L.R. (4th) 718 (B.C.C.A.).

145. *Charter*, *supra* note 3. Section 1 provides: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

146. *Libman v. Quebec (A.G.)* (1997), 151 D.L.R. (4th) 385 (S.C.C.) [hereinafter *Libman*]; *Somerville v. Canada* (1996), 184 A.R. 241 (C.A.) [hereinafter *Somerville*]. The Court in *Somerville* did find that the right to vote was infringed by one of the two provisions discussed in that case, while the rights



However, the courts have generally declined to decide these cases on the basis of the right to vote, preferring to make their determinations on the grounds of the right to freedom of speech protected by s. 2(b) of the *Charter*.<sup>148</sup> A third group of cases in which the right to vote was considered examined the way electoral boundaries are drawn.<sup>149</sup> These cases are especially relevant to a discussion of the constitutionality of the electoral system as a whole, as they are concerned with the same questions of differently weighted votes and the need for representation of certain interests within society.

#### *The Saskatchewan Electoral Boundaries Case*

The key case on the subject of electoral boundaries is *Reference Re Electoral Boundaries Commission Act, ss. 14 & 20 (Sask.)*, which dealt with the 1989 Saskatchewan electoral map. This is the only decision of the Supreme Court of Canada concerning electoral boundaries. In this case, the plaintiffs sought to overturn an electoral map on the grounds that the differences between riding sizes were too high. The government had produced an electoral map in which constituencies could be drawn that deviated by certain percentages from the provincial quotient.<sup>150</sup> Ridings in the south of the province were allowed to deviate by up to 25 per cent, while two northern ridings were allowed to deviate by up to 50 per cent.<sup>151</sup> The complaint was that individuals who lived in constituencies with populations above the provincial quotient were having their votes diluted. It was claimed that this dilution infringed their right to vote. The Court was asked to determine whether, and to what extent, the right to vote enshrined in the *Charter* allows deviation from absolute equality of voting power. The Court answered that equality of voting power is the primary value preserved by the right to vote, but this right is tempered by other concerns.

McLachlin J. began her analysis by setting out the general principles she was to use in defining the right to vote. First, she noted that the Court has stressed that the rights in the *Charter* must be interpreted in a purposive way.<sup>152</sup> She endorsed the Court's earlier ruling in *R. v. Big M Drug Mart*<sup>153</sup> that the interpretation of the *Charter* must be "a generous one, rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."<sup>154</sup> She also emphasized the importance of history in interpreting the rights contained in the *Charter*, noting that it is "engrafted onto the living tree that is

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to freedom of expression and association were violated by both provisions. However, as this case was disapproved of by the Supreme Court in *Libman* it is unclear that it is of much value in this discussion.

147. Thomson, *supra* note 138.

148. See *e.g. ibid.*

149. See the cases cited *supra* note 137.

150. The provincial quotient is obtained by dividing the number of voters in the province by the number of ridings. If the provincial quotient is 10,000 and the boundary commission is allowed to deviate from this by 25 per cent, constituencies may contain anywhere between 7,500 and 12,500 voters.

151. *Saskatchewan Reference*, *supra* note 48 at 40.

152. *Ibid.* at 32.

153. (1985), 18 D.L.R. (4th) 321 (S.C.C.).

154. *Saskatchewan Reference*, *supra* note 48 at 32.

the Canadian Constitution.”<sup>155</sup> Finally, McLachlin J. stressed that the interpretation of the *Charter* must be guided by the ideal of a “free and democratic society.” She quoted from Dickson C.J.C.’s ruling in *R. v. Oakes* in which he held:

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.<sup>156</sup>

Although McLachlin J. did not see absolute equality of voting power as the overriding goal that s. 3 sought to achieve, she did feel that this was extremely important. Indeed, her decision suggested that parity of voting power is of primary importance in considering the right to vote.<sup>157</sup> She stated that a system that dilutes the votes of some citizens “runs the risk of providing inadequate representation to the citizen whose vote is diluted.”<sup>158</sup>

However, McLachlin J. emphasized that the right to equality of voting power may be restricted legitimately in order to promote policies that support other values. She utilized examples from Canadian history to show that in drawing electoral boundaries, our democratic tradition has been concerned with the representation of various groups within our society as well as with the equality of voting power. She quoted a statement by Sir John A. Macdonald to the effect that in drawing electoral districts, “different interests, classes and localities should be fairly represented, [so] that the principle of number should not be the only one.”<sup>159</sup> In her earlier decision in *Dixon*, Chief Justice McLachlin had noted that the only provision of the Canadian constitution to deal with electoral apportionment “places regional considerations over strict rep[resentation] by pop[ulation].”<sup>160</sup> In *Saskatchewan Reference*, she stated that “to insist on voter parity might deprive citizens with distinct interests of an effective voice in the legislative process as well as of effective assistance from their representatives in their ‘ombudsman’ role.”<sup>161</sup>

The view that Canadian constitutional history tempers equality of voting power with other factors did not go uncriticized. Ronald Fritz called this aspect of the majority’s decision in *Saskatchewan Reference* “revisionist history.”<sup>162</sup> Other commentators, however, agreed with the Court’s perspective on this matter. Kent Roach, for example, wrote that “[i]t seems likely that judges who turn to Canadian

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155. *Ibid.*

156. (1986), 26 D.L.R. (4th) 200 (S.C.C.) at 225.

157. *Saskatchewan Reference*, *supra* note 48 at 35.

158. *Ibid.*

159. *Dixon*, *supra* note 137 at 263, adopted in *Saskatchewan Reference*, *supra* note 48 at 35.

160. *Dixon*, *supra* note 137 at 265, referring to section 42(1)(a) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

161. *Saskatchewan Reference*, *supra* note 48 at 38.

162. R. Fritz, “The Saskatchewan Electoral Boundaries Case and Its Implications” in J.C. Courtney, P. MacKinnon & D.E. Smith, *supra* note 88, 70 at 74. Fritz contended that to the extent that politicians have derogated from absolute equality, it has been for partisan political reasons and not because of an overriding ideal.

history for a better understanding of Canadian voting rights will conclude that although population has been the dominant consideration, it has never been the sole criterion.”<sup>163</sup> Roach noted that this principle is enshrined in ss. 51 and 51A of the *Constitution Act*,<sup>164</sup> which guarantee a floor below which the representation of the provinces may not fall, regardless of changes in population.<sup>165</sup>

If s. 3 does not guarantee Canadians absolute equality of voting power, what exactly does it provide? McLachlin J. reasoned that it guarantees Canadians the right to effective representation.<sup>166</sup> In setting out the practical formulation of this principle in *Saskatchewan Reference*, McLachlin J. adopted a statement from her earlier judgment in *Dixon*:

only those deviations [from relative voter parity] should be admitted which can be justified on the ground that they contribute to the better government of the populace as a whole, giving due weight to regional issues within a populace and geographic factors within the territory governed.<sup>167</sup>

Although this formulation placed a great deal of emphasis on the need for parity of voting power, McLachlin J. discussed elsewhere in *Saskatchewan Reference* the sort of factors that could justify deviations from the principle of voter equality:

such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic.<sup>168</sup>

She summarized the different values that these factors fostered as follows:

Respect for individual dignity and social equality mandate that citizens’ votes not be unduly debased or diluted. But the need to recognize cultural and group identity and to enhance the participation of individuals in the electoral process and society requires that other concerns also be accommodated.<sup>169</sup>

In *Saskatchewan Reference*, the majority of the Supreme Court accepted that the legislation was justified in deviating from relative voter parity because of “other factors.”<sup>170</sup> The Court held that the smaller size of rural ridings was justified because of the less sophisticated transportation and communication systems in the country as

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163. K. Roach, “One Person, One Vote? Canadian Constitutional Standards for Electoral Distribution and Districting” in D. Small, ed., *Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral Boundary Reform* (Toronto: Dundurn, 1991) 3 at 9.

164. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

165. Roach, *supra* note 163 at 11.

166. *Saskatchewan Reference*, *supra* note 48 at 35.

167. *Dixon*, *supra* note 137 at 267, adopted in *Saskatchewan Reference*, *supra* note 48 at 36.

168. *Saskatchewan Reference*, *supra* note 48 at 36.

169. *Ibid.* at 39.

170. La Forest, Gonthier, Stevenson and Iacobucci JJ. concurred with Justice McLachlin. Cory J. (Lamer C.J.C. and L’Heureux-Dubé J. concurring) wrote a dissent in which he essentially agreed with Justice McLachlin’s formulation of the test, but argued the map should be found to be unconstitutional given the process by which it had been drawn. See *Saskatchewan Reference*, *supra* note 48 at 27. Sopinka J. wrote a separate judgment that essentially concurred with McLachlin J. See *ibid.* at 20-22.

compared to urban areas. These factors made rural ridings more difficult to serve; therefore, the need for effective representation of rural voters justified the deviations.<sup>171</sup>

In *MacKinnon* and *Dixon*, the governments made similar arguments, but the courts in those cases held that the deviations from voter parity were too large to be justified by “other factors.”<sup>172</sup> Although both of these decisions are trial court judgments, it is probably significant that the latter decision was written by Justice McLachlin while she was Chief Justice of British Columbia, and that a great deal of its reasoning was adopted at the Supreme Court of Canada in the *Saskatchewan Reference*. Although the particular map in the *Saskatchewan Reference* was found to be justified in its deviations from relative voter parity, other courts have held that an electoral map that does not provide effective representation will be found unconstitutional.

### *The US Experience*

In order to understand fully the issues at play in s. 3 cases, it is useful to have some understanding of the US jurisprudence in this area. Although a full exposition of the vast body of case law and debate that has built up in the US surrounding these issues would be impossible within the confines of this article, a brief examination of the leading cases and issues will help to place the Canadian jurisprudence in context. The issues discussed in these cases resonate both in the Canadian electoral boundary decisions and in considering the constitutional validity of the electoral system.

The US jurisprudence has its beginning in suits brought to remedy the systemic under-representation of groups, especially urban Americans, in legislatures. Electoral systems, or electoral boundaries, that over-represented the rural minority at the expense of the urban majority were quite common in the middle of this century.<sup>173</sup> As a result, there is now a large body of jurisprudence and commentary on electoral rights in that country.

Most US cases have considered challenges to two types of policies: legislative attempts to reduce a certain group’s representation through the manipulation of electoral boundaries and voting systems,<sup>174</sup> and government actions to increase minority representation through the use of affirmative gerrymandering.<sup>175</sup> The US Supreme Court has restricted both of these legislative activities with a rule that demands strict voter equality between districts.<sup>176</sup> The Court found that such a rule is mandated by the equal protection clause of the US Constitution. It has gone to great lengths to ensure absolute equality in congressional districting, even striking down one map where a district deviated from the average size by only 0.6984 per cent.<sup>177</sup>

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171. *Ibid.* at 44.

172. See *Dixon*, *supra* note 137 at 268; *MacKinnon*, *supra* note 137 at 258.

173. Daly, *supra* note 129 at 271.

174. *Reynolds v. Sims*, 377 U.S. 533 (1963).

175. Affirmative gerrymandering is the process whereby legislatures draw electoral districts in ways that incorporate a majority or significant minority of voters from traditionally underrepresented groups while disregarding other elements of electoral boundary drawing such as geographic features, municipal boundaries, or historical communities.

176. See *e.g.* *Reynolds*, *supra* note 174.

177. *Karcher v. Daggett*, 77 L.Ed.2d 133 (U.S.S.C. 1983).

However, a rule of strict equality weakens minority representation. It leads to electoral maps that, intentionally or not, provide for the continued under-representation of minorities. A classic example would be a situation in which a minority represents 20 per cent of the population of a given five-seat jurisdiction, but is evenly distributed throughout that area.<sup>178</sup> If racial block voting occurs, the minority will be shut out of the legislature, even though they would seem to deserve at least one seat.

John Low-Beer argued in 1984 that two competing constitutional values are at play in the US jurisprudence—the right to an equally weighted vote and the right to an equally meaningful vote.<sup>179</sup> These values roughly correspond to the concern for absolute voter parity and the concern for effective representation of minorities.<sup>180</sup> Although he noted that absolute equality of voting power—the right to an equally weighted vote—was the dominant trend in the cases, he pointed out that there is a body of jurisprudence that seeks to protect “minority representation interests.”<sup>181</sup> The difficulty is that the achievement of one of these values under a SMP electoral system comes at the expense of the other.<sup>182</sup> This trade-off is because strict adherence to voter equality restricts the ability of legislators to draw smaller districts that incorporate a majority or significant minority of a minority group. However, if the courts were to mandate minority representation through affirmative gerrymandering, it would compromise the principle that each person’s vote should be equally weighted. At a certain point, it becomes physically impossible to design contiguous geographic districts that conform to both values.

Low-Beer advocated the adoption of PR as a way to facilitate both values within one electoral system.<sup>183</sup> This is because PR treats all votes, regardless of where they happen to be cast, as having the same value. This treatment eliminates the danger of dilution of voting power that can result from deviations in riding size. However, as discussed in section II, PR also facilitates minority representation. Geographically dispersed minorities who cannot be squeezed into artificially drawn boundary lines can combine their votes under PR for candidates or parties who best represent their interests.

Thus, as with Justice McLachlin’s judgment in *Saskatchewan Reference*, the US cases have focused on two values—minority representation and voter equality. Recently, however, it has become increasingly clear that in the US courts, the value of equal voting power has won out over the need for minority representation. This shift was evident in the Supreme Court’s actions in striking down districting plans that made a conscious effort to improve minority representation.<sup>184</sup> The *Saskatchewan Reference* decision, with its emphasis on the need to consider “other

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178. See *Cane v. Worcester County*, 35 F.3d 921 (4th Cir. 1991) for an example of a similar situation.

179. J. Low-Beer, “The Constitutional Imperative of Proportional Representation” (1984) 94 Yale L.J. 163 at 163-64.

180. *Ibid.*

181. *Ibid.* at 168-72. Low-Beer discussed different sorts of minority representation interests (racial, political and those of political subdivisions) that have been protected in the US case law.

182. *Ibid.* at 172-74.

183. *Ibid.* at 182. Low-Beer suggested that these values can be “fully guaranteed” by PR.

184. See e.g. *Shaw v. Reno*, 509 U.S. 630 (1993).

factors” in achieving effective representation, can be seen as an explicit repudiation of the US rule of absolute equality of voting power.<sup>185</sup>

***The Right to Vote Applied to the SMP Electoral System***

Based on the test of effective representation enunciated by the Supreme Court of Canada in *Saskatchewan Reference*, it is clear that the SMP electoral system violates the right to vote guaranteed by s. 3. The system does not provide relative parity of voting power, and it also fails to represent effectively the diversity of our social mosaic.

The distortions created by the SMP electoral system are much more dramatic than those seen in the provincial boundaries cases. In *Saskatchewan Reference*, other factors justified deviations from the electoral quotient by  $\pm 25$  per cent in the south and 50 per cent in the north. However, the deviations in *Dixon*, which reached a high of 86 per cent, were found to be too extreme to be justified by the need for effective representation of rural and remote areas.<sup>186</sup> In comparison, had all votes carried the same weight in the 1993 election, it would have taken 46,994 votes to elect an MP.<sup>187</sup> Instead, it took 31,909 Liberal votes to elect a candidate, 34,186 BQ votes, 49,216 Reform votes, 104,397 NDP votes, and 1,093,211 PC votes. The Liberal total deviated -32 per cent from the electoral quotient whereas the PC total deviated +2,226 per cent from the quotient. Another way of looking at this result is to note that in *Dixon*, McLachlin C.J.B.C. declared the British Columbia legislation to be unconstitutional, observing that “Atlin [a constituency] has 2,420 voters, while Coquitlam-Moody has 36,318, 15 times as many. Yet each elects one member, meaning that the value of a citizen’s vote in Atlin is 15 times the value of a citizen’s vote in Coquitlam-Moody.”<sup>188</sup> In *MacKinnon*, the Prince Edward Island Supreme Court struck down a districting plan where the largest riding had approximately 5.85 times the population of the smallest.<sup>189</sup> In the 1993 election, it took 34.36 times as many PC voters as Liberal voters to elect a candidate. As in the electoral districting cases, all votes do not have an equal impact under SMP. However, the disparities under the SMP system are much worse than were seen in any of the boundaries cases.<sup>190</sup>

At first, it might appear that the disparities in the boundaries cases are of a different kind than those seen under SMP. However, it can be seen on closer inspection that the inequities created in the two cases are exactly the same. McLachlin J. reasoned that representation serves two primary purposes: it allows a citizen to have a voice in the deliberations of government and to bring concerns to the attention of his or her representative. The former, she calls the “legislative” role; the latter, the “ombudsman” role.<sup>191</sup> Clearly, the concern in the electoral districting

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185. See Daly, *supra* note 129 at 305-306.

186. *Dixon*, *supra* note 137 at 253.

187. This number is arrived at by dividing the total number of valid votes cast (13,863,135) by the total number of ridings (295); see Elections Canada, *supra* note 92.

188. *Dixon*, *supra* note 137 at 267-68.

189. *MacKinnon*, *supra* note 137 at 241. The largest riding had 11,964 voters whereas the smallest had 2,042.

190. See the text accompanying footnotes 90-102 above, and Appendices 1 and 2.

191. *Saskatchewan Reference*, *supra* note 48 at 35.

cases is that the deviations will mean that voters in those ridings above the provincial quotient will have a diminished role in the deliberations of the legislative process. More voters will be required to elect a representative than are necessary in a riding below the provincial quotient. Similarly, this former group of voters will have less opportunity to access the resources of their ombudsperson because their representative has to serve a larger population.

Similar problems result from the distortions caused by SMP. A PC or NDP voter in 1993 had far less influence over the legislative process and legislative outcomes than a voter for the Liberals or the BQ. And although all voters have access to an ombudsperson, the New Zealand Report noted that many citizens may be uncomfortable approaching a legislative representative who is not of their party and does not share their political value system.<sup>192</sup> Further, it may be awkward for some voters to approach a representative who is not of their ethnic group or gender.<sup>193</sup> Thus, the problems created by the electoral map of British Columbia, which led the court to find that map to be in violation of relative parity of voting power, are also produced by the SMP electoral system.

McLachlin J. reasoned, however, that s. 3 allows derogations from voter parity to be justified if it can be shown that they foster effective representation, but “[b]eyond this, dilution of one citizen’s vote as compared to another should not be countenanced.”<sup>194</sup> Having shown that the current electoral system derogates from relative voter parity and dilutes certain citizens’ votes as compared to others, the question remains whether other factors that assure effective representation are present to such a degree as to justify this violation. Although the Court in *Saskatchewan Reference* did not provide an exhaustive list of “other factors” that must be considered in justifying deviations from relative voter parity, among those to be considered are geography, community history, community interests and minority representation.<sup>195</sup>

Certainly, the SMP electoral system facilitates the representation of community interests to the extent that those interests are geographically concentrated. Indeed, the whole theory behind SMP electoral systems is that one’s geographic community interests should be represented in the legislature. However, the representation of these interests is hardly sufficient to justify the lack of voter parity that results from the SMP system, especially when one considers all of the minority and community interests that are under-represented under SMP. Indeed, as discussed in section II, the SMP electoral system actually hinders the representation of geographically dispersed community interests.

It is submitted that in setting out the other factors that could be considered as reasons to derogate from voter parity, McLachlin J. was expressing the concern that political minorities and communities should not be swamped by the strict majoritarianism brought about by US-style absolute voter parity. She recognized that

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192. New Zealand Report, *supra* note 23 at 20-21.

193. *Ibid.*

194. *Saskatchewan Reference*, *supra* note 48 at 36.

195. R.G. Richards & T. Irvine, “Reference Re Provincial Electoral Boundaries: An Analysis” in J.C. Courtney, P. MacKinnon, & D.E. Smith, *supra* note 88, 48 at 59. See also *Saskatchewan Reference*, *supra* note 48 at 36.

the “other factors” listed above may have to be considered to “ensure that our legislative assemblies effectively represent the diversity of our social mosaic.”<sup>196</sup> Further, she stated that these concerns must be accommodated “to recognize cultural and group identity.”<sup>197</sup> The concern for protecting minority interests as a reason to deviate from absolute majoritarian democracy was recently reiterated by the Supreme Court in the *Reference Re Secession of Québec*.<sup>198</sup> Effective representation of Canadians means that all are allowed to participate equally in the process. However, treating people equally does not necessarily mean treating people the same. To ensure effective representation, it may be necessary to deviate from voter parity in order to allow for the better representation of a certain community or minority interest.

The Canadian *Electoral Boundaries Readjustment Act* allows for deviation from the principle of relative parity of voting power where “any special community or diversity of interests of the inhabitants of various regions of the province appears to the commission to render such a departure necessary or desirable.”<sup>199</sup> [Emphasis added.] Unfortunately, the diversity of our social mosaic is not completely made up of groups that happen to be concentrated in one of the various regions of a province. The electoral system as it now exists may assist in the representation of minorities that happen to be geographically concentrated. However, Justice McLachlin’s judgment underscores the need to represent the diversity of our social mosaic and the various group identities within our society. The SMP system does not, indeed cannot, allow for the effective representation of groups and minorities that are not geographically concentrated.

Therefore, it could be argued that, as in *Dixon* and *MacKinnon*, the disparities created under SMP systems are too large to be justified by any other factors. Nonetheless, even if the government tried to justify the SMP system on the argument that the representation of geographically based community interests justifies the disparities, this argument would have to be quickly discounted. An electoral system that provides for more effective representation of certain groups in our society, but actually hinders it for others, surely cannot justify the sorts of disparities in voting power that the SMP system creates. Effective representation seeks to foster the values of equality between individuals and fair representation of the various groups and interests in our society. The SMP system does not provide the former, and provides the latter only for those who as a matter of chance happen to be living near those with whom they share interests. As such, the SMP system fails to provide effective representation, and thus violates s. 3 of the *Charter*.

#### ***Government Arguments under Section 3***

Generally, where a violation of the *Charter* is shown, the government must attempt to justify the violation under s. 1. However, given the internal balancing that occurs within s. 3 under the test set up by McLachlin J., it is unclear whether such a

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196. *Saskatchewan Reference*, *supra* note 48 at 36.

197. *Ibid.* at 39.

198. [1998] S.C.J. No. 61 at para. 64, online: QL (SCJ).

199. *Electoral Boundaries Readjustment Act*, *supra* note 89.



justification would occur under the traditional s. 1 test as set out in *Oakes*,<sup>200</sup> or whether it would be considered within the discussion on the right to vote. Robert Charney argued that the majority judgment in *Saskatchewan Reference* “has incorporated legitimate *Charter* s. 1 considerations into the definition of the ‘right to vote’ in *Charter* s. 3.”<sup>201</sup> Essentially, the “other factors” on which McLachlin J. allowed the government to rely on in order to justify deviations from voter parity look a great deal like the sort of factors a government may otherwise rely on under s. 1.

The s. 3 jurisprudence reflects this mixing of tests. In *MacKinnon*, the PEI Supreme Court utilized the analysis laid out by McLachlin J. to find that the electoral boundaries violated s. 3. When it turned to the s. 1 analysis, the Court noted that “[t]he government’s position in the instant case is that if it is called upon to justify the population deviations that exist in the electoral map of this Province, then those deviations can be justified on the same grounds advanced during the s. 3 inquiry.”<sup>202</sup> Although the court went through the ritual of the *Oakes* test, the analysis did not differ a great deal from that performed under s. 3.<sup>203</sup>

The court undertook a similar exercise in *Dixon*. Chief Justice McLachlin stated that she viewed “the task of defining a standard of reference of what a vote should be worth as properly falling under s. 3. Practical problems of implementing that standard, on the other hand, are appropriately considered under s. 1 of the *Charter*.”<sup>204</sup> In the actual proportionality analysis in *Dixon*, however, McLachlin J. simply summarized the findings of her earlier s. 3 analysis.<sup>205</sup> Given the focus on internal balancing of interests within s. 3, the government would likely bring out certain defences of the SMP electoral system within its argument under the right to vote.

One problem the government would have in defending the SMP electoral system is that, unlike most laws that are challenged on constitutional grounds, there is little evidence of why the government ‘chose’ this particular electoral system. The system was designed at a time when the population was much more homogeneous and less mobile, so that where one lived very much defined one’s political identity. The society that we live in today is much more mobile and has a multitude of identities and opinions that were not present, or were disenfranchised, when the SMP system was adopted in Canada.

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200. To prove a limitation on a *Charter* right is reasonable and demonstrably justified in a free and democratic society, the government must show on a preponderance of probabilities that (1) the measure is prescribed by law, (2) the objective served by the measure limiting the *Charter* right is sufficiently pressing and substantial to warrant overriding a *Charter* right; and (3) the means must be reasonable and demonstrably justified in proportion to the importance of the objective. The proportionality issue requires considering whether (a) the measures are rationally connected to the objective, (b) the means impair the *Charter* right as little as possible, and (c) there is proportionality between the effects of the limiting measure and the objective. See *Oakes*, *supra* note 156 at 224-30.

201. R.E. Charney, “Saskatchewan Election Boundary Reference: ‘One Person—Half a Vote’” (1991-92) 1 N.J.C.L. 225 at 225.

202. *MacKinnon*, *supra* note 137 at 259.

203. *Ibid.*

204. *Dixon*, *supra* note 137 at 270.

205. *Ibid.* at 272.

Nonetheless, these ancient roots may serve as a springboard for the strongest government argument to defend the legality of the SMP electoral system. The courts have always looked to history in helping them define the scope of rights, and the right to vote is no different, as suggested in *Saskatchewan Reference* by Justice McLachlin.<sup>206</sup> The government could argue that the framers of the *Charter* could not have meant for the entrenchment of the right to vote to threaten the very existence of the only electoral system that Canada has known.

Arguments that look to the intentions of the framers of the constitution have been heavily criticized. Ronald Dworkin has argued that “there is no such thing as the intention of the Framers waiting to be discovered, even in principle. There is only something waiting to be invented.”<sup>207</sup> He argued that an attempt to discover the intentions of the framers requires the resolution of a number of intractable issues, including a determination of the intention of individual framers, of how to translate these individual intentions into a collective intention, of whose intentions should be considered, of whether we should be looking at framers’ hopes or expectations, and of whether we should be looking at their abstract intention regarding the right in general or their concrete intention in this specific fact situation.<sup>208</sup> Dworkin stated that this list of choices is meant to show that

the idea of a legislative or constitutional intention has no natural fixed interpretation that makes the content of the Framers’ intention just a matter of historical, psychological, or other fact. The idea calls for a construction which different lawyers and judges will build differently.<sup>209</sup>

Many of these same concerns are reflected in the Supreme Court of Canada’s decision in *Reference re: Section 94(2) of the Motor Vehicle Act*.<sup>210</sup> In that case, the Court was interpreting the phrase “Principles of Fundamental Justice” in s. 7 of the *Charter*. The government pointed to statements of high-level bureaucrats and the Minister of Justice at the time of the adoption of the *Charter* to support their argument for a narrow reading of the words.<sup>211</sup> However, Lamer J. (as he then was) stated that “the Charter is not the product of a few individual public servants ... but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter.” He asked, “[h]ow can one say with any confidence that within this enormous multiplicity of actors ... the comments of a few federal civil servants can in any way be determinative?”<sup>212</sup> He then pointed out the larger danger of utilizing the comments of certain framers to interpret the *Charter*: “in so doing, the rights, freedoms and values embodied in the Charter in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs.”<sup>213</sup> Framers’ intent arguments restrict the

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206. *Saskatchewan Reference*, *supra* note 48 at 32.

207. R. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 39.

208. *Ibid.* at 33-57.

209. *Ibid.* at 55.

210. [1985] 2 S.C.R. 486.

211. *Ibid.* at 505.

212. *Ibid.* at 508.

213. *Ibid.* at 509.

natural evolution of a constitution. To argue that the rights in the *Charter* should be restricted to what was considered by the framers in 1982 and the years leading up to that is to eschew the broad interpretation that is given to *Charter* rights.

Nonetheless, it could be argued that the SMP electoral system is so entwined in our history that the entrenchment of the right to vote should not allow that system to be challenged. However, there is much in *Saskatchewan Reference* to suggest that courts need not defer to a governmental choice simply because it has deep historical roots. McLachlin J. noted that “the past plays a critical but non-exclusive role in determining the content of rights and freedoms granted by the Charter.”<sup>214</sup> Further, she stated that “[t]he right to vote, while rooted in and hence to some extent defined by historical and existing practices, cannot be viewed as frozen by particular historical anomalies.”<sup>215</sup>

Clearly, history plays a role in the interpretation of rights. As noted, McLachlin J. utilized the history of voting in Canada to assist her in determining the content of the right to vote. Yet, in the *Saskatchewan Reference* judgment itself, she nicely summarized the way in which history can be something of a double-edged sword in constitutional interpretation, stating:

This is not to suggest, however, that inequities in our voting system are to be accepted merely because they have historical precedent. History is important in so far as it suggests that the philosophy underlying the development of the right to vote in this country is the broad goal of effective representation. It has nothing to do with the specious argument that historical anomalies and abuses can be used to justify current anomalies and abuses, or to suggest that the right to vote should not be interpreted broadly and remedially as befits Charter rights.<sup>216</sup>

The courts are right to look to history to determine how the right to vote should be interpreted. However, history can only provide a guide to the ideals and aspirations that society is attempting to achieve with the *Charter* and the rights enshrined therein. If the electoral system we use leads to inequities, it cannot be justified on the ground that it has been creating the same inequities for decades.

### **Section 1 Analysis**

Notwithstanding the internal balancing of interests that would take place within a s. 3 analysis, it is still important to consider the s. 1 arguments that the government might make in defence of the SMP electoral system. At the same time, though, it must not be forgotten that an internal balancing of interests has already taken place. Where other rights in the *Charter* are internally qualified, it is much more difficult to justify violations of such rights under s. 1. For example, s. 7 is only violated when an individual’s life, liberty, or security of the person is deprived in a manner that is not in accordance with the principles of fundamental justice.<sup>217</sup> A violation of such a right may not be capable of being saved under s. 1 of the *Charter*. Certainly the

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214. *Dixon, supra* note 137 at 33.

215. *Ibid.*

216. *Ibid.* at 38.

217. See *Charter, supra* note 3. Section 7 provides: “Everyone has the right to life, liberty, and security of the person and the right not deprived thereof except in accordance with the principles of fundamental justice.”

majority of the Supreme Court has never found a s. 7 violation justifiable.<sup>218</sup> Similarly, Hogg argued that a violation of the right to be free from cruel and unusual punishment in s. 12 would probably never be capable of being justified.<sup>219</sup> All violations of rights are subject to governmental justification, but it is clear that internal qualifications placed on certain rights allow the government less room for argument under s. 1. In this case, at the point of the s. 1 inquiry, the government will already have had an opportunity to argue that other factors justify the derogation from relative parity of voting power caused by the SMP electoral system.

The initial stages of a s. 1 inquiry would be simple for a government trying to justify the SMP system.<sup>220</sup> As noted above, the electoral system is prescribed in the *Canada Elections Act*.<sup>221</sup> The electoral system in general has a clear pressing and substantial objective—it allows votes to be organized in order to elect members to Parliament. It is also clear that the SMP electoral system is rationally connected to the goal of organizing votes to elect members to Parliament. It has been doing so for hundreds of years.

The real question is whether the SMP system minimally impairs the rights at issue in s. 3. Clearly, there are PR electoral systems, widely used around the world, that would fulfill the objectives that the government pursues with the SMP system. At the same time, these PR systems would restrict the right to vote much less than the current system. Initially, the Court construed this part of the s. 1 test very strictly, looking for governmental proof that the right was impaired “as little as possible,”<sup>222</sup> but over time the test has been attenuated. Thus, in *R. v. Edwards Books & Art Ltd.*, the Court held that the government should not be required to show that the scheme adopted is the optimal scheme.<sup>223</sup>

The Supreme Court has since distinguished between cases in which the government is the singular antagonist of an individual whose rights have been infringed, and those cases in which the government is mediating between the claims of competing groups. In the former cases, it has been stated that courts must ensure that the government has chosen the “least drastic means” for achieving the purpose of the legislation.<sup>224</sup> However, in the latter situation, especially where there is “conflicting scientific evidence,” the majority in *Irwin Toy* noted that courts must not usurp the legislature’s function in choosing the best way to mediate these claims. The majority stated that “as courts review the results of the legislature’s deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature’s representative function.”<sup>225</sup> Given the volume of writing on the subject of electoral systems, and the apparently ‘political’ nature of the issue, a court

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218. Hogg, *supra* note 116 at 35-40.

219. *Ibid.* at 35-41. The *Charter*, *supra* note 3 at section 12 provides: “Everyone has the right not to be subjected to any cruel and unusual treatment and punishment.”

220. The stages of the section 1 inquiry are summarized at *supra* note 200.

221. *Supra* note 114.

222. *Oakes*, *supra* note 156 at 227.

223. [1986] 2 S.C.R. 713.

224. *Irwin Toy v Quebec (A.-G.)* (1989), 58 D.L.R. (4th) 577 at 626 (S.C.C.) [hereinafter *Irwin Toy*].

225. *Ibid.* at 625.

may be tempted to defer to the legislature's 'judgment' that the SMP electoral system is more desirable than a more proportional system.

However, a powerful argument can be made that this is one area in which courts should not defer to the will of the democratically elected legislature, either under s. 3 or s. 1. No majority government that has won an election on less than half the popular vote has a strong incentive to alter a system that facilitates such results.<sup>226</sup> Similarly, no opposition party with a chance of forming a majority government in the near future has an incentive to push for a change to the electoral system. Even parties that are not likely to form a national government in the near future (such as the NDP and the BQ) have little incentive to place the item on the political agenda. Generally, these parties have provincial allies who benefit from the SMP system, or else they are regional parties which receive the benefits discussed above in section III. Deference to the judgment of the legislature in this case means deference to an interested party.

The debate over judicial deference is a complex and contentious one. However, even the most deferential theories of judicial review insist that courts should ensure that the political processes to choose members of the legislature measure up to constitutional standards. The US constitutional law scholar, John Hart Ely, for example, argued that social and economic value choices in a democracy must be left to the legislature, as opposed to being given over to courts. However, he argued that a problem develops when the legislature making those social and economic choices is itself chosen by unfair or unconstitutional means. He stated that "[m]alfunfunction occurs when the *process* is undeserving of trust, when the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."<sup>227</sup> [Emphasis in original.] Patrick Monahan has argued that such a claim has even more validity in Canada as the values of democracy infuse the *Charter*. He stated that "the courts should direct their energies towards policing the political process, rather than to determining the correct allocation of resources in society."<sup>228</sup> Courts have a duty to ensure that the rules of the political game by which legislators are chosen are fair to all.

Deference to the decision of a legislature may be legitimate in certain circumstances. If such deference is to be acceptable, however, there must be assurances that the political process by which such questions are determined is open, equitably and fairly, to all in society. It is in this way that all other rights in the *Charter* are dependent upon the preservation of the right to vote. Given that legislatures have an inherent conflict of interest in determining how their membership is chosen, judicial deference is not appropriate in this case. Those who are injured by the current electoral system have no recourse but to the courts to protect the processes of democracy.

Given that this is an inappropriate situation for deference, a court could not find that the SMP electoral system minimally impairs the rights at issue. A number of

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226. Seidle, *supra* note 28 at 300.

227. J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 103.

228. P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 252.

other options are available which impair the right less, but also achieve the objectives that the SMP electoral system seeks to achieve. These other options are exemplified in the multitude of PR electoral systems found in mature democracies around the world. Since the electoral system violates s. 3 of the *Charter*, and does not minimally impair that right under s. 1, the system must be unconstitutional.

### **Remedy**

Having found the electoral map of British Columbia to be unconstitutional in *Dixon*, McLachlin C.J.B.C. was confronted with two questions: whether the court should decline to answer the constitutional question and, if not, what remedy should be granted. The government in that case suggested that the question of the design of the electoral map was a political question outside of the court's competence and, as such, the court should decline to answer the question of constitutionality.<sup>229</sup> Chief Justice McLachlin first noted that the Supreme Court of Canada in *Operation Dismantle*,<sup>230</sup> rejected the suggestion that courts should decline to resolve *Charter* issues because they involve political questions.<sup>231</sup> She stated that “[w]hile the courts are not to enter the domain of policy underlying legislation, they are empowered and indeed required to measure the content of legislation against the guarantees of the Constitution.”<sup>232</sup> She noted that “the mere fact that the legislature is better suited to weigh the myriad factors involved in electoral apportionment, does not remove from this court the ultimate responsibility of weighing the product of the exercise of the legislature’s discretion against the rights and freedoms enshrined in the *Charter*.”<sup>233</sup> Thus, no matter how political a question is, the courts must still fulfil their duty to review the law for possible violations of individuals’ rights.

The second issue in *Dixon* was the form that the remedy should take when an electoral map was found to violate the *Charter*. A finding that the electoral system is in violation of the *Charter* presents a similar problem—that is, to strike down the law as it stands would leave Canadians disenfranchised. Chief Justice McLachlin stated that following the *Reference: Re Language Rights Under the Manitoba Act, 1870*,<sup>234</sup> it is open to courts to strike down a law but to specify a temporary period during which the existing legislation remains valid while the legislature enacts new legislation.<sup>235</sup> She reasoned that the court had to “articulate an objective and manageable standard by which the legislature can be guided” in designing the new, constitutionally valid map.<sup>236</sup> She also stated that she would not discuss what would happen if appropriate remedial legislation was not produced by the legislature within the necessary amount of time; she simply reminded the government that “just as the courts have a duty to measure the constitutionality of legislative acts against the

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229. The Attorney General’s argument is summarized in *Dixon*, *supra* note 137 at 273-76.

230. *Operation Dismantle Inc. v. R.* (1985), 18 D.L.R. (4th) 481 (S.C.C.).

231. *Dixon*, *supra* note 137 at 276.

232. *Ibid.* at 277.

233. *Ibid.* at 278.

234. (1985), 19 D.L.R. (4th) 1 (S.C.C.).

235. *Dixon*, *supra* note 137 at 283.

236. *Ibid.*

Charter guarantees, so are they under an obligation to fashion effective remedies in order to give true substance to these rights.<sup>237</sup>

A similar remedy should be applied in the case of a finding that the SMP electoral system is unconstitutional. Courts must not back down from their duty of measuring the constitutionality of the electoral system, even though they lack the institutional competence to determine the shape of a new one. The form and type of the system, the number of seats to be contested, the method of voting, as well as issues such as the minimum vote threshold should all be decided through study and democratic debate. The requirement of an electoral system that allows for effective representation of all Canadians provides an objective standard against which a government could measure a new, proportional system. It is unlikely that a government would not comply with such a court order, but a court could issue a warning similar to that issued by McLachlin C.J.B.C. at the end of *Dixon* in order to ensure compliance. The court would not be choosing a new electoral system, but would simply be requiring that, through a process of study and debate, the government put its mind to developing a constitutionally valid system that makes the votes of all Canadians count.

## V CONCLUSION

The Canadian electoral system does not translate votes into representation in the legislature in a proportional way. Political scientists agree that the SMP system distorts election results to the detriment of women, geographically dispersed minorities, and national political parties. It also has devastating effects on national unity, exaggerating regionalism within parties and advancing parties that run regional campaigns at the expense of those that try to bridge sectional differences. Arguments are made in favour of the current system and against a more proportional system, but many of these arguments are open to question or are based on hypothetical situations.

A legal challenge could proceed on the basis that the electoral system as it now stands does not provide the effective representation guaranteed by s. 3 of the *Charter*. Such a challenge may seem surprising, simply because the SMP electoral system is so familiar. However, the SMP system was designed for another era and for a less democratic world. The courts have repeatedly insisted that the *Charter* was not meant to freeze rights in time, but should be interpreted in a broad and generous manner. Even a deferential court should have trouble reasoning that a law that violates our most basic democratic rights can be justified simply because it is the way things have always been done.

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237. *Ibid.* at 283-284.

## APPENDIX 1

**Bias of the Electoral System in Translating Votes into Seats**

The following table sets out the seat-to-vote ratio for the political parties from 1921 to 1997. If a party receives exactly the same percentage of seats as votes—a perfectly proportional result—the ratio will be 1.00. Thus, numbers above 1 show where the electoral system has created a bias in favour of a party, and numbers below 1 show where the electoral system has created a bias against a party.

Year*	Rank order of parties in terms of percentage of vote**				
	1	2	3	4	5
1921	1.21 (Lib)	0.70 (Con)	1.20 (Pro)		
1925	1.02 (Con)	1.02 (Lib)	1.09 (Pro)		
1926	1.13 (Lib)	0.82 (Con)	1.55 (Pro)		
1930	1.15 (Con)	0.82 (Lib)	1.53 (Pro)		
1935	1.57 (Lib)	0.55 (Con)	0.33 (CCF)	0.05 (Rec)	1.68 (Soc)
1940	1.43 (Lib)	0.53 (Con)	0.39 (CCF)	1.52 (Soc)	
1945	1.24 (Lib)	1.00 (Con)	0.73 (CCF)	1.29 (Soc)	
1949	1.49 (Lib)	0.53 (Con)	0.37 (CCF)	1.03 (Soc)	
1953	1.32 (Lib)	0.62 (Con)	0.77 (CCF)	1.06 (Soc)	
1957	0.97 (Lib)	1.09 (Con)	0.88 (CCF)	1.09 (Soc)	
1958	1.46 (Con)	0.55 (Lib)	0.32 (CCF)	0 (Soc)	
1962	1.17 (Con)	1.01 (Lib)	0.53 (NDP)	0.97 (Soc)	
1963	1.17 (Lib)	1.09 (Con)	0.49 (NDP)	0.76 (Soc)	
1965	1.23 (Lib)	1.13 (Con)	0.44 (NDP)	0.72 (Cred)	0.51 (Soc)
1968	1.30 (Lib)	0.88 (Con)	0.46 (NDP)	1.06 (Cred)	
1972	1.09 (Lib)	1.16 (Con)	0.65 (NDP)	0.71 (Soc)	
1974	1.24 (Lib)	1.03 (Con)	0.40 (NDP)	0.83 (Soc)	
1979	1.01 (Lib)	1.34 (Con)	0.51 (NDP)	0.43 (Soc)	
1980	1.18 (Lib)	1.11 (Con)	0.57 (NDP)		
1984	1.50 (Con)	0.51 (Lib)	0.56 (NDP)		
1988	1.33 (Con)	0.88 (Lib)	0.75 (NDP)		
1993	1.35 (Lib)	0.88 (Ref)	0.04 (Con)	1.26 (BQ)	0.31 (NDP)
1997	1.34 (Lib)	1.03 (Ref)	0.35 (Con)	1.36 (BQ)	0.64 (NDP)

\* 1921-1988: N. Wiseman, "Cairns Revisited—The Electoral and Party System in Canada" in P. Fox, ed., *Politics: Canada*, 7th ed. (Toronto: McGraw-Hill Ryerson, 1991) 265 at 268; 1993, 1997: online: Elections Canada <<http://www.elections.ca>> (date accessed: 10 November 1998).

\*\*Abbreviations: BQ, Bloc québécois; CCF, Cooperative Commonwealth Federation; Con, Conservatives or Progressive Conservatives; Cred, Creditistes; Lib, Liberals; NDP, New Democratic Party; Pro, Progressives; Ref, Reform; Soc, Social Credit; Rec, Reconstruction.



## APPENDIX 2

**Political Parties' Share of Popular Vote and Seats in Recent General Elections**

	Percent of Votes	Percent of Seats
1988*		
PC	43.0	57.3
Liberal	31.9	28.1
NDP	20.4	14.6
Reform	2.1	0.0
1993*		
Liberal	41.3	60.0
Reform	18.7	17.6
PC	16.0	0.7
BQ	13.5	18.3
NDP	6.9	3.1
1997**		
Liberal	38.5	51.5
Reform	19.4	19.9
PC	18.8	6.6
BQ	10.7	14.6
NDP	11.0	7.0

\* D.M. Eagles, *The Almanac of Canadian Politics*, 2nd ed. (Toronto: Oxford University Press, 1995) at xviii.

\*\*online: Elections Canada <<http://www.elections.ca>> (date accessed: 10 November 1998).