

MAKING DEMOCRACY CONSTITUTIONAL

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Political scientists have been writing about the inequities of Canada's election laws for a very long time. Alan Cairns' pathbreaking essay, documenting how the Canada Elections Act has exacerbated regional tensions in the country, was written in 1968. A decade later, in 1979, William Irvine published his internationally acclaimed book, *Does Canada Need a New Election System*, in which he highlighted these and other discriminatory effects of election laws, (known as the single member plurality (SMP) or first-past-the-post (FPTP) system), that award representation (seats) in Parliament and our Provincial Assemblies to those who win the most votes in geographically defined constituencies.

Since then, many others have added their names to calls for a re-evaluation of the laws we use to translate votes cast in an election into representation in Parliament and our Provincial Assemblies. All of the more recent studies confirm the biases that Cairns and Irvine had identified against smaller, issue based parties like the Greens and established national parties, like the NDP, (and more recently the Progressive Conservatives), whose supporters are spread across the country but which have no realistic hope of winning an election. They also show that our election laws make it much more difficult for women, (and members of minority groups who are not concentrated geographically), to stand as candidates and claim their fair share of seats in the legislative and executive branches of government.

The unfairness of election laws that give representation in legislatures only to candidates who win the most votes in geographically defined constituencies is widely understood in other parts of the world. Canada, along with the U.K. and France, (from whom we inherited our political traditions), India and the United States, is one of the few "free and democratic" societies that still conducts its elections on a rule of winner-take-all. A number of countries, including New Zealand, South Africa and Japan have recently scrapped their FPTP laws in favour of systems based on the principle of proportional representation (PR). Even the United Kingdom and France now elect their representatives to the European Parliament on the principle of proportional representation.

In contrast with the spirit of reform that has flourished in other countries, the established institutions of Canadian politics have been embarrassingly resistant to change. So much so that, when Brian Mulroney's Conservative Government set up the Lortie Commission on electoral reform in 1989, proportional representation was deliberately kept off the agenda. Even the NDP, whose representation in Parliament would be greatly enhanced if the Canada Elections Act were based on the principle of proportional representation, has been unwilling to mount a sustained

campaign for reform largely because a few of its provincial cousins have been shameless beneficiaries of the current regime.

Our history suggests it is unlikely that, left on their own, either of the elected branches of government is capable of initiating meaningful electoral reform. Canadian politics has so far not had the benefit of the sorts of serendipitous and seismic events that have precipitated structural changes in the way votes are counted and representatives selected in other parts of the world. If proportional representation is ever to come to Canada, it seems, the third branch of our government – the courts – will have to insist on the change.

The idea that judges could order such a sweeping reform of the way Canadians govern themselves is not as radical as it might first appear. The Supreme Court of Japan, which is widely regarded as one of the most cautious and conservative courts in the world, actually declared three national elections to be unconstitutional before the Japanese Government adopted a modified system of proportional representation for the two houses of its National Diet.

Even the most deferential theories of judicial review insist courts should be vigorous and unforgiving in ensuring that laws that define the processes and institutions of politics are held to the highest constitutional standards. Even constitutionalists who believe courts have no business second guessing Governments when it comes to social and economic policy, think they do have a duty to police the processes by which representatives are elected to ensure that they are as fair and even handed as possible. As our own Supreme Court put it in a recent judgment, “it is precisely when legislative choices threaten to undermine the foundations of democracy ... that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of [the] system.”

In strictly legal terms, a constitutional challenge to the Canada (or any provincial) Elections Act is surprisingly simple and straightforward. All of the major inequities that political scientists have identified in election laws that use the principle of winner-take-all constitute clear violations of either the right to vote (section 3) and/or the right to equality (section 15) that are guaranteed in the Charter of Rights.

The Supreme Court of Canada has characterized the right to vote as one of the Charter’s most important guarantees (“one of the touchstones of a free and democratic state”) from the very beginning. In its seminal ruling in the *Saskatchewan Electoral Boundaries* case, the Court reflected at some length on what the right to vote should be understood to mean and concluded that its overarching purpose was to ensure the equal and effective representation of every citizen in the country. Relative parity of voting power, the Court said, was a pre-condition of the kind of effective representation that section 3 of Charter guarantees. More recently, in its decision in *Figueroa*, the Court told Parliament that section 3 imposes an obligation on it “not to enhance the capacity of one citizen to participate in the electoral process in a manner that compromises another citizen’s parallel right to meaningful participation in the electoral process.”

When they are measured against a principle of “equal, meaningful representation,” it is hard to imagine how any of our federal or provincial election laws would be able to meet the test. The evidence that has been collected by political scientists since Cairns’ seminal work is

overwhelming. It shows our election laws do more to frustrate than further the goals of parity of voting power and meaningful representation of each and every citizen in the country. The fact is that, in virtually every federal and provincial election that has ever been held, some significant number of Canadians can make the claim that their votes were seriously undervalued and they did not receive as effective representation of their political principles and ideas as their numbers, and the representation of others, warranted.

The biases and distortions that Cairns wrote about more than thirty years ago have continued to manifest themselves in more recent elections and, if anything, have gotten even worse. In the last three federal elections, the differences in the value of votes cast for the five major parties far exceed the differentials between urban and rural ridings that the Supreme Court approved in the

Electoral Boundaries case.

In the *Saskatchewan* case, the Court ruled that the province's election law did not violate the right to vote even though some urban ridings had almost twice as many voters as the most sparsely populated rural constituencies. The Court recognized that the value or weight of a rural vote was double that of a ballot cast in an urban riding but it concluded the disparity was justified because, in its opinion, the effective representation of the most isolated parts of the province required a differential of that size.

In our most recent federal elections, the value or weight of a vote cast by a supporter of a Liberal, Bloc or a Reform/Alliance Party candidate has been as much as five, ten, even thirty times greater than a ballot that was marked for the Progressive Conservatives or the New Democrats. On occasion, including two recent elections in Québec and B.C., the distortions have been so severe that the party that won the largest share of the popular vote actually lost the election!

Undoubtedly the most egregious disparities occurred in the 1993 federal election when a Conservative vote counted for next to nothing. Even though they received more votes than the Bloc Québécois and almost as many as Reform, they only won two seats while the latter got 54 and 52 respectively. In effect, supporters of the Conservative Party got a seat in the House of Commons for every 1,093,211 votes while the Bloc elected a Member of Parliament for every 34,186 votes they received. In terms of electing representatives to give voice to their opinions and points of view, Bloc votes were worth thirty times more than ballots that were marked for Conservatives.

In the last two elections, the fortunes of the Conservatives improved slightly, but the disparities remain shockingly large. In 1997 the Conservatives held less than half the number of seats occupied by the Bloc Québécois, even though they received almost twice as many votes. In 2000, a Conservative vote was still three times less valuable than a vote for the Bloc.

Voters who support the New Democrats have suffered a similar devaluation of their votes since the birth of their party, as the CCF, in 1935. Although the prejudice to the party has never been as extreme as what the Conservatives endured in 1993, they have frequently received less than half the number of seats that they would have won had their votes been weighted equally and in

1993 they would have elected three times more M.P.s if their votes had carried the same weight as the Liberals. Moreover, supporters of the party who live in Québec have practically been denied any representation in Parliament even in elections when their share of the popular vote in the province has been as high as 15%.

Not only are the deviations from parity between supporters of different parties much greater than they were between urban and rural voters in the *Saskatchewan Electoral Boundary* case, neither can they be defended on the basis that they ensure minority groups more meaningful representation, as the preferential treatment of rural voters did in that case. Unlike the disparity of voting power between rural and urban ridings, the inequalities that are caused by the rule of winner-take-all frustrate rather than foster more effective representation of millions of voters. Those who support national parties like the New Democrats, and more recently the Progressive Conservatives, that have no realistic chance of winning an election, never get the representation they deserve. People who vote for small, issue-based parties like the Greens, get no representation at all! In terms of the number of representatives their votes have elected to the House of Commons, supporters of all of these parties have had far less influence in the legislative process and the formation of public policy than Canadians who cast their ballots for the Liberals, the Bloc and the Alliance/Reform.

The fact is that voters who want to back smaller parties like the Greens do not “have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives” as the Supreme Court has said they must. Environmentalists do not have as much input into government policy in Canada, as in other parts of the world, precisely because of the way our election laws aggregate their votes.

In addition to the various ways in which our federal and provincial election laws infringe the right to vote of many Canadians, it is also the case that they offend the Charter’s guarantee that every person is entitled to the equal benefit and protection of the law, especially in their treatment of women. The fact that women are consistently elected in significantly smaller numbers in elections conducted under laws that are based on the principle of first-past-the-post, than those that use the principle of proportional representation, constitutes a clear violation of the Charter’s proscription of discrimination on the basis of sex that is impossible to defend.

In its landmark ruling *Law v. Canada*, the Supreme Court identified the central purpose of the Charter’s guaranteeing every Canadian the equal benefit and protection of the law to be “to prevent the violation of [a person’s] essential human dignity ... through the imposition of disadvantage, stereotyping, or *political* or social *prejudice*” (emphasis added). In considering whether a law discriminates in the way s.15 was meant to proscribe, the Court said reference should be made to a variety of factors including (i) any pre-existing disadvantage endured by those who are prejudiced by the law and (ii) the nature and scope of the interest that is adversely affected.

When Canada’s election laws are measured against the test the Supreme Court laid down in *Law*, they fall well short of the mark. Women currently occupy roughly one seat in five in the House of Commons and Provincial Assemblies and that is the highest that it has ever been. By comparison, depending on the time frame that is used, anywhere from two to four times more

women have been elected to national assemblies that use the principle of proportional representation. In countries where both systems are used, such as Germany, New Zealand and Australia, women are elected in significantly greater numbers to seats that are not attached to any geographic area than to those that are.

Deliberately designing an election system in a way that systematically results in such underrepresentation of women compounds their “disadvantage” and demeans their “dignity” as persons. Women suffer both in their opportunity to do public service and be elected to our most important governmental institutions and, instrumentally, to the extent that their underrepresentation contributes to the enactment of laws which do not fairly reflect their interests and priorities.

The interests that are prejudiced by our election laws implicate our most basic ideas about how we govern ourselves. There is no social institution that is more fundamental or of greater political significance than Parliament. By making it much more difficult for women to claim their fair share of seats in the House of Commons and Provincial Assemblies, our electoral laws deny half the population a “basic aspect of full membership in Canadian society.” Election laws that impose barriers which inhibit the election of women, (as well as aboriginal people and other geographically dispersed minorities) perpetuate a stereotype (of women’s traditional role in society) and constitute a profound affront to their dignity and self respect.

To prove that a law violates the Charter a case must pass through two stages. At first, the onus is on those who say their constitutional rights have been violated to make their case. If, as seems certain in a challenge against any of our election acts, this hurdle is cleared, the case moves on to the second phase and the onus shifts to the Government to justify why a law which does not respect people’s constitutional rights should be allowed to remain on the books.

Those who are inclined to defend our current electoral system invariably make the argument that FPTP is a better method of counting votes than PR because it makes for more stable and therefore more effective Governments. They say FPTP is more likely to produce majority Governments and “foster a strong political centre” which is important in a country like Canada which is so linguistically and geographically diverse.

Although the claim that FPTP is conducive to stronger and more durable Governments is still popular in some political circles, it is unlikely to be well received in the courts. Two fundamental problems stand out. Legally, in *Figuroa* the Supreme Court was very emphatic that election laws can’t be enacted for the purpose of promoting majority governments because that privileges one group of voters and their parties over others. Empirically, the argument that FPTP does a better job than PR in facilitating the formation of strong, stable Governments is flatly contradicted by the facts.

The truth is that many countries including Germany, the Netherlands, Norway and Sweden, which use the principle of proportionality in their election laws, have enjoyed long histories of incredibly stable and effective government. Elected on a mixed system of SMP and PR, German Governments led by Adenauer, Brandt, Schmidt and Kohl have been among the most stable and effective in the free and democratic world.

If election laws are deliberately designed to encourage the proliferation of political parties, – by, for example, allowing parties with only a tiny fraction of the total vote (1 or 2%) to claim representation in a legislative chamber, – instability in government is certain to become part of the system. That is what has happened, for example, in Israel. The experience of Germany and the Scandinavian countries (that use higher (5%) thresholds) proves, however, that laws based on a principle of proportional representation don't have to have such negative effects.

Our own experience confirms that the capacity of FPTP laws to foster all-inclusive majorities and counter factionalism has been greatly exaggerated. In election after election, the way the Canada Elections Act requires votes to be counted has resulted in Parliaments dominated by regionally concentrated parties that accentuate and aggravate the fissures and fault lines that cut across the country. Our history proves FPTP is more an antagonist than an ally of a “strong political centre” and the unity of the country more generally.

When our country's election laws are analysed through the lens of the Charter, their constitutional frailties stand out in stark relief. Regrettably, however, the strength of the argument that all of our country's election laws are blatantly unconstitutional does not mean Canadians can expect fair elections soon. The Constitutional Test Case Centre in the Faculty of Law at the University of Toronto has launched a constitutional challenge to the Canada Elections Act in the Ontario Superior Court of Justice on behalf of Joan Russow and the Green Party of Canada but it is not expected to be heard until after the next election. If the case proceeds in the usual way it will take at least another two to three years to make it to the Supreme Court. Beyond that, it is almost certain the Court would give Parliament an additional year or two to study the different models of proportional representation that exist in the world and choose one that is most suitable to our constitutional traditions and needs.

The wheels of justice can grind slowly, but it is important to be clear that the case doesn't need to take this long. The Government has the power to refer important constitutional questions directly to the Supreme Court as it has with its proposed legislation on same-sex marriages. If it exercised its prerogative in this case we could be reasonably certain that Paul Martin's next Government would be the last to be elected without the support of a majority of the citizens in the country.

Only the selfish interests of the Liberal Party are served by requiring the issue to be debated in front of three different courts instead of one. The national interest would be better served if the Government asked the Supreme Court to rule directly on the constitutional status of the Canada Elections Act. Scarce resources would be saved and everyone's attention could be focused on the more important question of what particular model of proportional representation will work best for us. Rather than tying the issue up in the courts, and allowing the lawyers to drag on a debate about relatively simple and straightforward questions of constitutional law, ordinary Canadians, through their elected representatives, could become actively involved in the critical research and policy work that needs to be done.

Referring the case directly to the Supreme Court would be a very powerful way for our new Prime Minister to show he really is committed to democratic reform. It would finally allow

Parliament to have the debate about the fairest way for Canadians to choose their elected representatives that Brian Mulroney censured more than fifteen years ago. How Paul Martin instructs his legal team to respond to the Green Party's case will tell us whether he thinks of himself as a Canadian or a Liberal first.