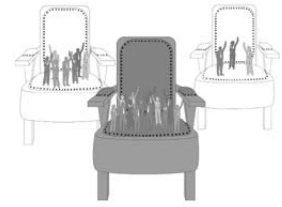


# MAKING DEMOCRACY CONSTITUTIONAL



David Beatty

*By adhering to first-past-the-post, the Canada Elections Act denies Canadians effective and equal political representation. Supporters of small national parties are under-represented and women are present in the House of Commons in much smaller numbers than they are in countries that use proportional representation. Judicial intervention against systemic biases in electoral systems is neither illegitimate nor unusual. A proceeding currently underway should be referred directly to the Supreme Court of Canada.*

*En préconisant le scrutin majoritaire à un tour, la Loi sur les élections refuse aux Canadiens une représentation politique réelle et équitable. Les partisans des petits partis sont sous-représentés et le nombre de femmes à la Chambre des communes est nettement moindre que dans les pays ayant adopté la représentation proportionnelle. Les démarches judiciaires visant à corriger les disparités causées par les systèmes électoraux n'ont rien d'illégitime ou d'inhabituel. Une poursuite en ce sens est d'ailleurs en cours, et elle devrait être directement portée devant la Cour suprême du Canada.*

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 single-member plurality (SMP) systems, that award representation in a parliament or legislative assembly 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 have no realistic hope of winning an election. They also show that our election laws make it much more difficult for women and for 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. Along with the UK, India and the United States, Canada is one of the few "free and democratic" societies that still use laws that are based on the principle of winner-take-all. A number of countries, including New Zealand, South Africa and Japan have recently scrapped election laws that were based on the principle of winner-take-all, or first-past-the-post, in favour of systems based on the principle of proportional representation (PR). Even the United Kingdom now elects its representatives to the European Parliament on the principle of PR.

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, PR 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 PR, has been unwilling to mount a sustained campaign for reform largely because 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 avoided the sorts of serendipitous and/or 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 take up its cause.

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 the National Diet.

Even the most deferential theories of judicial review insist courts should be scrupulously vigilant in ensuring that laws that define the processes and institutions of politics are held to the highest standards that are embedded in a constitution. Patrick Monahan, one of the country's leading constitutional lawyers, has argued that even though courts have no business second guessing governments when it comes to social and economic policy, they have a duty to police the processes by which representatives are elected in order to ensure that they are as fair and even handed as possible.

In strictly legal terms, a constitutional challenge to the *Canada Elections Act* 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 and Freedoms*.

Regarding the right to vote, the Supreme Court of Canada has already issued a number of important rulings on what the right to vote guarantees, including its landmark ruling in the *Saskatchewan Electoral Boundaries* case. In that judgment, 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* guaranteed. In the Court's words, "a system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representa-

tion to the citizen whose vote is diluted."

When measured against a principle of equal and effective 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 that our election laws actually frustrate rather than further the goals of parity of voting power and effective 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 could have made the claim that their votes were seriously undervalued and that they did not receive as effective representation of their political ideas as their numbers and the representation that others received warranted.

The biases and distortions that Cairns wrote about more than 30 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 overarching goal of 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 30 times greater than a ballot that was marked for the Progressive Conservatives or the New Democrats. On occasion, including the last provincial elections in Québec and BC, the distortions have been so severe that the party that won the largest share of the popular vote has 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 Bloc and Reform got 54 and 52 seats respectively. In effect,

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supporters of the Conservative Party got one 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 30 times more than ballots that were marked for Conservatives.

In the last two elections, the fortunes of the Conservatives did improve 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. Last November 27, a Conservative vote was still three times less valuable than a vote for the Bloc.

Voters who support the New Democrats have endured 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 fewer than half the number of seats that they would have won had party votes been weighted equally, and in 1993 they would have elected three times more MPs 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 10 to 15 per cent.

Not only are the deviations from parity between supporters of different parties greater than they were between urban and rural voters in the *Saskatchewan Electoral Boundary* case, they also cannot be defended on the basis that they promote the overarching goal of ensuring effective representation of all Canadians, 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 many 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 not only are denied equality of voting power, but the effective representation of their values and interests is compromised as well. People who vote for small, issue-based parties like the Greens, get no representation at all. In terms of the number of representatives that their votes elected to the House of Commons, supporters of all of these parties had far less influence in the legislative process and the formation of policy than

Canadians who cast their ballots for the Liberals, the Bloc Québécois and Alliance/Reform.

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, especially in their treatment of women, that they offend the *Charter's* guarantee that every person is entitled to the equal benefit and protection of the law. 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, or winner-take-all, than in those that use the principle of proportional representation, constitutes a violation of the *Charter's* proscription of discrimination on the basis of sex that is both clear and 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." 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 the various 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.

An election system 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 democratic institutions and, instrumentally, to the extent that their underrepresentation leads 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 the various 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.

Every case in which it is claimed that a law violates the *Charter* must pass through two separate stages or parts. At first, the onus is on those who say their constitutional rights have been violated to prove their case. If this hurdle is cleared, as seems certain in a challenge mounted against any of our election acts, 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 often make the argument that election laws that use the SMP rule of winner-take-all are better than those which use the principle of proportional representation because they produce more stable and therefore more effective governments. The constantly shifting coalitions that form Israeli governments are often cited to prove the point.

Empirically, the argument equating stability with effective governance cannot be sustained. Many countries, including Germany, the Netherlands, Norway and Sweden, that use the principle of proportionality in their election laws have enjoyed long histories of very stable and effective government. Elected on a mixed system, German governments led by Chancellors Adenauer, Brandt, Schmidt and Kohl have been among the most stable in the free and democratic world.

If election laws are deliberately designed to encourage the proliferation of political parties—by, for example, having a very low threshold for parties to satisfy in order to claim representation in a legislative chamber—instability in government may become part of the system. That is certainly what has happened in Israel. The experience of Germany and the Scandinavian countries proves, however, that laws based on a principle of proportional representation don’t have to be designed in that way.

When our 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 overnight. The Constitutional Test Case Centre at the Faculty of Law at the University of Toronto is launching 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. The case is not expected to be heard until next winter or fall. If it 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 another year or two to study the different models of proportional representation and choose one that is most suitable to our constitutional traditions and political needs.

The wheels of justice can grind slow, but it is important to be clear that they don’t need to take that long. The government can refer important constitutional questions directly to the Supreme Court. If it did so in this case we could be reasonably certain that no government of Canada would ever be elected again without the support of a majority of citizens. Only the parochial interests of the Liberal Party are served by requiring the issue to be debated in front of three different courts instead of one. Delay offers Liberals the prospect of hanging on to power, against the wishes of a majority of Canadians, one last time.

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 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. If Jean Chrétien remained faithful to the spirit of the *Charter* he was so instrumental in bringing to life, Parliament could finally have the debate about the fairest way for Canadians to choose their representatives that the Lortie Commission effectively stifled a decade ago.

*David Beatty is Professor of Law at the University of Toronto.*

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