Canadiau Electoral Boundaries and the Courts: Practices, Principles and Problems

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This case comment offers a critical assessment of *Reference Re Provincial Electoral Boundaries (Sask.)*, decided by the Supreme Court of Canada in the summer of 1991. This significant and controversial case marks the first *Charter* appeal dealing with the constitutionality of a Canadian electoral distribution system. The case is significant in that it deals with the validity of the ways and means by which electoral districts are created in this country, the meaning of the right to vote found in the *Charter*, the constitutional weight to be accorded to the principle of "one person — one vote", and the extent to which factors other than population can be used to structure such districts. The case is controversial, however, in that the majority decision was antiquated and problematic, leading the Court to uphold a pluralist approach to distribution which was narrow, questionable, and in certain respects, unprincipled. The majority was willing to interpret the right to vote in light of a number of factors, only one of which was rooted to the principle of "one person — one vote". By giving constitutional weight to other factors such as geography, access to communications, minority representation and communities of interest, the Court provided legitimacy to factors which are questionable at best and unprincipled at worst. This decision, far from offering persuasive guidance in addressing the issue in dispute, will likely result in more distribution cases flowing to the courts.

Ce commentaire d'arrêt propose une analyse critique de la décision rendue en 1991 par la Cour suprême du Canada dans l'affaire *Renvoi relatif aux circonscriptions électorales provinciales (Sask.)*. Cette décision, à la fois importante et controversée, est la première à aborder la constitutionnalité du système de répartition des districts électoraux au Canada en vertu de la *Charte*. C'est une décision importante dans la mesure où elle discute de la validité des moyens par lesquels les districts électoraux sont créés au pays, de la signification du droit de vote énoncé dans la *Charte*, du poids constitutionnel devant être accordé au principe «une personne — un vote» et de l'utilité de certains facteurs, autres que la population, pour organiser les divers districts électoraux. Il s'agit cependant d'une décision controversée. En effet, le test de la majorité, au demeurant dépassé et problématique, manifeste une approche pluraliste de la répartition, approche qui est restrictive, discutable et, à certains égards, mal fondée. Une majorité de juges a interprété le droit de vote à la lumière d'un certain nombre de facteurs dont un seul découle du principe «une personne — un vote». En accordant ainsi un poids important aux autres facteurs tels que la géographie, l'accès aux communications, la représentation des minorités et les communautés d'intérêts, la Cour suprême accorde une légitimité à des facteurs qui sont, au mieux, discutables, sinon sans fondement. Cette décision, loin de présenter une solution persuasive pour l'analyse des questions de répartition, aura probablement pour effet d'engendrer une recrudescence de cas de ce type devant les tribunaux.

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Synopsis

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Introduction

The issue of representation within legislative assemblies has long been a matter of concern in this country, and in recent years questions respecting the quality of such representation have, in fact, spawned a number of constitutional challenges culminating in the decision of the Supreme Court of Canada in *Reference Re Provincial Electoral Boundaries*.[1] When this case was heard in the spring of 1991, the Court was confronted with its first *Charter*[2] appeal dealing with the constitutionality of a Canadian electoral distribution system. While this subject matter has, unfortunately, not been one to excite the passions of most political scientists or scholars of constitutional law, the issues at stake in this case were, and still are, highly important; so much so that this decision can be viewed as the most significant yet to be rendered by the Supreme Court of Canada on the nature and functioning of the parliamentary process in this country.

The significance of the decision stems from its scope. In *Reference Re Provincial Electoral Boundaries*, the Supreme Court of Canada was called to rule upon the validity of the ways and means by which electoral districts are created in this country, the meaning of the right to vote found in the *Charter*,[3] the con-

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[1]*Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, (*sub nom. Reference Re Electoral Boundaries Commission Act, ss. 14, 20 (Sask.)*) 81 D.L.R. (4th) 16 [hereinafter *Reference Re Provincial Electoral Boundaries* cited to S.C.R.].

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

[3]*Ibid.*, s. 3.

stitutional weight to be accorded to the principle of "one person — one vote", and the extent to which factors other than population can be used to structure the size of such districts. The Court was thus given the task of reviewing and assessing certain of the fundamental aspects of the system of parliamentary representation found in Canada.

The controversy with this decision, in turn, stems from the substantive conclusions reached in regard to the two competing approaches to distribution present in the case. While problems appear in the decisions of both the Saskatchewan Court of Appeal and the Supreme Court of Canada, the majority decision of the Supreme Court has serious weaknesses, as will be illustrated in this paper. Its ruling respecting the meaning of the right to vote was antiquated and highly problematic, leading the Court to uphold a traditional, pluralist approach to distribution which was narrow, questionable and, in certain respects, unprincipled. The majority was willing to interpret the right to vote in light of a number of factors, only one of which was rooted to the equality principle of "one person — one vote". The majority was supportive of the contention that, in the drafting of electoral boundaries, governments may take into consideration certain factors other than population, such as geography, access to communications, minority representation and communities of interest. It was the acceptance of these factors as valid guides to determining distribution which elicits problems.

Such factors in relation to distribution are questionable at best and unprincipled at worst. The bestowal of constitutional validity upon the factor of community of interest was acceptance of a factor so hopelessly indeterminate as to be worthless as a guiding principle in distribution. Similarly, the acceptance of minority representation as a factor which may need to be incorporated into decision-making respecting distribution is a development which raises a host of practical and theoretical problems related directly to the nature of the system of representation in this country. Through reflection on the issues enveloping the process of distribution it will be asserted that the egalitarian approach taken by the Saskatchewan Court of Appeal, in upholding the primacy of population in devising electoral boundaries, offers a far more principled and practical approach to distribution than that found in either of the majority or minority decisions of the Supreme Court of Canada. From this conclusion it will be argued that *Reference Re Provincial Electoral Boundaries* marks not the end of constitutional litigation on this subject, but only the beginning of a process of litigation that will continue until the Court sets a principled and practical approach to the drawing of electoral boundaries.

I. Political and Legal Origins

The dispute in *Reference Re Provincial Electoral Boundaries* centred upon a challenge to the constitutional validity of Saskatchewan's *Representation Act, 1989* and *Electoral Boundaries Commission Act*.[4] Under the latter statute the provincial legislature established a boundaries commission and instructed it to

[4]See *The Representation Act, 1989*, S.S. 1989-90, c. R-20.2; *The Electoral Boundaries Commission Act*, S.S. 1986-87-88, c. E-6.1.

create 66 electoral ridings, of which 29 were to represent urban centres and 35 were to represent rural areas, with two ridings designed to cover the far north of the province. As is common with Canadian electoral boundaries legislation, the Commission was entitled to vary the population of the southern ridings by plus or minus 25% of the average population size for southern ridings so as to take account of such factors as geography, mode of communications and community of interest. Under the *Representation Act, 1989*, it was recommended that 66 ridings be varied. This proposed set of electoral districts, though, quickly came under attack as did the Commission itself.

With regard to the Commission, a number of critics[5] impugned its legitimacy on the grounds that its enabling legislation dictated that it must establish a set number of rural and urban ridings regardless of its own judgement as to how the number of seats should be apportioned between rural and urban areas. As such, the argument was raised that the discretion of the Commission had been fettered. While these concerns became significant, most critical attention was devoted to the substantive outcome of the Commission's work. The critics attacked what they considered to be the debasement of the right to vote through the proposed creation of constituencies with quite widely varying populations.[6] Through the use of the 25% variance rule, of the 64 southern ridings, 34 were within plus or minus 10% of the southern average, 10 ridings exceeded the average by between 10% to 15%, 12 ridings exceeded the average by between 15% to 20%, and a total of 8 ridings exceeded the average by a figure of more than 20%, but less than 25%. Fully 20 ridings, 31% of all southern ridings, exceeded the southern average by more than 15%, which was the stipulated maximum allowable deviation from the most recent electoral distribution.[7] The effect of these variances, so critics argued, was the devaluation and debasement of the worth of votes held by citizens living in constituencies with relatively large electorates. Roger Carter noted that the southern riding with the smallest electorate — Saskatoon Sutherland University, with a population of 7684 — was only 61% of the size of the riding with the largest electorate — Saskatoon Greystone, with a population of 12,567. As such, it would take at most only 3843 voters to elect a representative in the former riding, whereas the corresponding figure for the latter riding would be 6284. The effect of this population imbalance on individual votes would be striking: 100 votes in Saskatoon Sutherland University would carry the same electoral weight as 164 votes in Saskatoon Greystone. In other words, a single vote in the smaller riding carried 63.5% more electoral weight than a single vote in the larger riding.[8] This dynamic of

[5]Certain of the leading critics who eventually received intervener standing before the Supreme Court of Canada included such groups as Equal Justice for All and the British Columbia Civil Liberties Association. Individual interveners included Professor John F. Conway of the University of Regina. Given that this case developed as a reference, the court-appointed counsel for the critics was Mr. Roger Carter, Q.C.

[6]See Respondent's Factum in *Reference Re Provincial Electoral Boundaries* at 3-7 [hereinafter Respondent's Factum]; Factum of Intervener John F. Conway in *Reference Re Provincial Electoral Boundaries* at 20-24 [hereinafter Factum of John Conway]; Factum of Intervener Equal Justice for All in *Reference Re Provincial Electoral Boundaries* at 2-5.

[7]Saskatchewan, *Final Report* (Regina: Electoral Boundaries Commission, 1988) at 9-10.

[8]Respondent's Factum, *supra* note 6 at 13.

vote weight imbalance on account of variances in population was found throughout the province.

Beyond such examples of the discrepancies in constituency electorate size and vote weight, the critics argued that the distribution created a rural representational bias. The Boundaries Commission recommended the creation of 29 urban ridings with an average elector population of 10,998, while the average elector population of the 35 rural ridings was 9,637. The value of the urban vote, it was then argued, was thereby less equal, thereby debased, in relation to the rural vote. The critics made the point that, on average, the rural vote carried 14% more electoral weight than an urban vote.[9] In his factum to the Supreme Court of Canada, John Conway went so far as to contend that the proposed distribution constituted a gerrymander, designed by the then ruling Progressive Conservative government to maximize its electoral support amongst a rural population which was historically more predisposed than the urban electorate to support the Progressive Conservative party.[10]

All of these findings led to the criticism that the proposed distribution was unjust and unconstitutional. Carter, Conway and Equal Justice for All, amongst others, all challenged the mandate of the Commission and its substantive recommendations as being in violation of the *Charter*. It was alleged that the set rules of distribution found in the enabling legislation, as well as the given distribution itself, violated the right to vote provision of the *Charter* in that the riding system would be created in such a manner that the voting power of citizens of Saskatchewan would vary depending on where they lived, resulting in the effective worth of votes not being equal throughout the province. This, it was argued, violated the principle of vote equality which the challengers held to be implicit in the concept of "one person — one vote", a concept which they also held to be fundamental to the right to vote entrenched in the *Charter*.[11]

A. Sister Province; Related Challenge

This critique of the merits of the proposed electoral boundary system and the aforementioned *Charter* challenge were not unprecedented. For example, in 1989, the constitutionality of British Columbia's existing electoral boundary system was challenged in *Dixon* v. *British Columbia (A.G.)*[12] on similar grounds to those raised in *Reference Re Provincial Electoral Boundaries*. In the decision of the British Columbia Supreme Court on this matter, the Court found the impugned distribution system to be unconstitutional as it was held to be a violation of the right to vote provision within the *Charter*. In a judgement written by Chief Justice Beverly McLachlin (as she then was), the Court recognized that

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[9]Factum of John Conway, *supra* note 6 at 1-2. It is to be noted, however, that this 14% discrepancy did not fully carry over into the distribution of seats between rural and urban Saskatchewan. Through the proposed distribution, rural Saskatchewan was granted 53% of legislative seats representing 50% of the electorate, while urban Saskatchewan was granted 44% of legislative seats representing 47% of the electorate.

[10]Factum of John Conway, *ibid.* at 16-19.

[11]Respondent's Factum, *supra* note 6 at 3-7; Factum of John Conway, *ibid.* at 20-25.

[12](1989), 59 D.L.R. (4th) 247, [1989] 3 W.W.R. 393 (B.C.S.C.) [hereinafter *Dixon* cited to D.L.R.].

while the principle of vote equality was central to the right to vote as found in the *Charter*, this right did not guarantee all citizens perfect mathematical equality of vote strength in relation to the votes of all other citizens. The Court accepted that the elector population size of ridings could deviate from the provincial average so as to take account of such factors as population shifts over time, geographic considerations, the quality of communications in territorially large ridings, and the concept of community of interest. In addressing the issue of what would constitute an acceptable range of deviation from the principle of equality, McLachlin C.J. accepted the proposition that deviations up to plus or minus 25% from the provincial average would be tolerable if, through these deviations, other important concerns relating to the factors listed above were incorporated into the distribution system.

Despite this acceptance of a generous deviation rule, McLachlin C.J. nevertheless found the British Columbian boundary system unconstitutional due to its excessive and unwarranted violation of this rule. The Court found that only 7 of 52 ridings were within 10% of the provincial average. Of those in excess of this figure, fully 9 ridings had electorates more than 25% below the provincial average, while 10 ridings had electorates more than 25% above the average. As McLachlin C.J. noted, "[S]uch anomalies cannot but suggest a gross violation of the fundamental concept of representation by population which is the foundation of our political system."[13] The Court proceeded to rule this entire distribution of seats unconstitutional, though providing the provincial government time to redistribute its legislative seats in accordance with the 25% deviation rule.

B. Judgement in Regina

Because of the criticisms raised against the Saskatchewan distribution legislation, the provincial government, in 1990, referred questions to the Saskatchewan Court of Appeal respecting the constitutionality of the mandate of the Boundaries Commission and of the distribution of seats recommended by the Commission. In a decision rendered during March of 1991, the Court, in a unanimous decision, accepted the validity of the challenges and ruled unconstitutional the Commission's general mandate, as well as the bulk of its substantive conclusions.[14]

In reaching this decision, the Court of Appeal stressed that in assessing distribution systems in light of the right to vote provision in the *Charter*, "the controlling and dominant consideration in drawing electoral constituency boundaries must be voter population in the province."[15] The guiding ideal giving meaning to the right to vote and its operationalization through distribution systems, according to the Court, was the principle of "one person — one vote".[16] In theo-

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[13]*Ibid.* at 267-68.

[14]*Reference Re Electoral Boundaries Commission Act (Sask), ss. 14, 20* (1991), 78 D.L.R. (4th) 449, (*sub nom. Reference Re Provincial Electoral Boundaries*) [1991] 3 W.W.R. 593 (Sask. C.A.) [hereinafter *Reference Re Electoral Boundaries Commission Act* cited to D.L.R.].

[15]*Ibid.* at 463.

[16]*Ibid.* at 460.

ry, all electors were to be treated equally, all were to possess a vote of comparable worth.[17] The Court of Appeal was quick to assert, however, that the notion of absolute equality in distribution was undesirable due to the practical impossibility of devising and maintaining electoral districts with absolutely equal electorates. Some deviations from the provincial average were then countenanced as a practical necessity, but the Court stipulated that these deviations must be as limited as practically possible. In creating electoral boundaries, the legislature was ordered to apportion seats "to constituencies of substantially equal voter population."[18] With respect to the Commission and its work, the Court of Appeal was condemnatory. Though it held that northern Saskatchewan required special attention in distribution due to the vastness of its territory and the difficulties this posed to elected representatives in effectively communicating and interacting with their constituents, the Court was unwilling to view rural Saskatchewan from a similar perspective. The Court found that due to those provisions of its mandate requiring it to create a set number of urban and rural constituencies, the Commission was fettered in its ability to implement the principle of substantial elector equality amongst all such ridings. Socio-geographic considerations regarding the uniqueness of rural areas, their special communities of interest, and the difficulties faced by elected representatives in providing services to territorially large ridings thus came to interfere with the controlling and dominant consideration of population, with such interference being viewed as unconstitutional.[19]

Despite the arguments of the Attorney General of Saskatchewan respecting the importance of these socio-geographic considerations, the Court rejected the contention that rural Saskatchewan deserved any special treatment in distribution on account of its socio-geographic nature. The Court held that the interests and concerns of urban areas were as valid and broad as those of rural Saskatchewan, and that it was fallacious to assert that elected representatives of one type of area are ignorant and insensitive to the concerns affecting other types of areas.[20] The Court stressed, furthermore, the importance which modern technologies of communications have had in facilitating the ability of persons living in rural areas to interact with their elected representatives, in particular, and with government offices, in general. Indeed, the Court argued that when there is serious concern respecting the ability of a representative to effectively serve a territorially large area, policy instruments other than over-representation present themselves, such as "additional travel allowances, support staff, and 'up-to-date' communication services."[21]

With regard to the actual distribution, the Court observed the wide deviations from the general average as found in numerous ridings and ruled that these "egregious" deviations violated the principle of substantial equality.[22] The Court

[17] *Ibid.* at 460-62.
[18] *Ibid.* at 463.
[19] *Ibid.* at 477-81.
[20] *Ibid.* at 479-80.
[21] *Ibid.* at 480.
[22] *Ibid.* at 478.

held, moreover, that these violations could not be justified as a reasonable limitation to voting rights under section 1 of the *Charter*. The Crown had not been able to demonstrate to the satisfaction of the Court that the interests of rural Saskatchewan were so unique from those of urban Saskatchewan, and so endangered by a distribution undertaken in accordance with the principle of substantial equality, as to be "pressing and substantial", thus deserving special consideration under the *Charter*.[23] Rather, the Court reasserted that any special communications problems faced by rural residents and their representatives could be resolved "by other, non-infringing and equally effective methods" of communication.[24]

C. Judgement in Ottawa

Following the release of the Court of Appeal's decision, the government of Saskatchewan, as expected, moved to appeal this judgement to the Supreme Court of Canada. On account of the substantive nature of the decision, the federal government, as well as a host of provincial and territorial governments, moved to intervene on behalf of the Saskatchewan government.[25] If the Saskatchewan Court of Appeal was correct, and the province's boundary system was unconstitutional, then many other jurisdictions in the country would be in legal peril since most distribution systems allowed for significant deviations from average quotients so as to accommodate interests unrelated to the principle of substantial elector equality.

The Supreme Court of Canada heard the appeal in late April of 1991 and rendered its judgement in June. In a split decision the Court overturned the lower court decision and upheld the constitutionality of the Saskatchewan commission and its work. In writing for the majority, Madame Justice McLachlin (as she now is) rejected the Court of Appeal's proposition that, with regard to electoral distribution, the right to vote was to be understood, in principle, as being a right to substantial equality among votes, thus a right to substantial elector equality. Rather, McLachlin J. contended that the key principle governing the right to vote in relation to distribution was a guarantee of "effective representation".[26] Such representation, according to the majority, would be contingent upon a number of factors. One such factor was the "relative parity of voting power". The relative equality of voting power and consequent relative equality of electorate size per riding were held to be important matters to be taken into consideration by distribution commissions.[27] But they were not the only factors defining the right to effective representation.

McLachlin J. was quick to proclaim that "[f]actors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent

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[23]*Ibid.* at 478-81.

[24]*Ibid.* at 480.

[25]Intervener governments included the federal government and those of Newfoundland, Prince Edward Island, Quebec, Alberta, British Columbia, the Northwest Territories and the Yukon.

[26]*Reference Re Provincial Electoral Boundaries*, *supra* note 1 at 183.

[27]*Ibid.*

the diversity of our social mosaic."[28] In order to ensure that the various interests associated with these factors are reflected in the composition of legislatures, she held that electoral boundary systems may depart from the principle of substantial elector equality so as to give representation to these other valid interests. McLachlin J. asserted, moreover, that the factors which she enumerated were not exhaustive: "These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed."[29] Deviations from the equality principle, though, were only to be upheld on the basis that they provided more effective representation. As Madame Justice McLachlin stated:

> I adhere to the proposition asserted in *Dixon*, ... that only those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed.[30]

Furthermore, McLachlin J. stressed, "[B]eyond this the dilution of one citizen's vote as compared with another should not be countenanced."[31]

Through this interpretative approach the majority upheld the work of the Saskatchewan commission as promoting the effective representation of rural, urban and northern areas of the province. McLachlin J. found that the special treatment accorded to northern Saskatchewan was necessary to deal with the transportation and communication difficulties experienced by persons living in this huge area.[32] As for the variations found between rural and urban ridings, she contended that the distribution was fair, as was the mandate of the Commission itself. The mandate, according to the majority, simply reflected the historic pattern of electoral representation which had always been used to distribute seats between rural and urban areas, coupled with an appreciation of demographic trends in the province. As such, McLachlin J. stressed that the mandate was not arbitrary and did not threaten the interests of urban electors.[33] The majority noted, in fact, that under the *Electoral Boundaries Commission Act*, the Commission was instructed to add two additional urban seats to the legislature to take account of population growth in Saskatoon and Regina.[34]

The majority furthermore stressed the fact that, given the proposed distribution, rural Saskatchewan was accorded 53% of the legislature's seats with 50% of the province's electorate, while urban Saskatchewan was granted 44% of the seats with 47% of the electorate. This variation was viewed by McLachlin J. to be "relatively small" and ultimately justifiable on the basis of "factors such as geography, community interest and population growth patterns."[35] With regard to population variations between specific ridings, McLachlin J. was again unperturbed. She accepted the legitimacy of the 25% variance rule as

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[28] *Ibid.* at 184.
[29] *Ibid.*
[30] *Ibid.* at 185.
[31] *Ibid.*
[32] *Ibid.* at 190, 196.
[33] *Ibid.* at 191-92.
[34] *Ibid.* at 192.
[35] *Ibid.* at 192, 197.

upheld in *Dixon* and proceeded to justify given deviations on the grounds of the poorer levels of transportation and communication services in rural areas, as well as on the basis "that rural voters make greater demands on their elected representatives, whether because of the absence of alternative resources to be found in urban centres or for other reasons."[36] Given this understanding of rural Saskatchewan, the majority consequently asserted that "the goal of effective representation may justify somewhat lower voter populations in rural areas."[37] As such, no violation of the *Charter* right to vote was found.[38]

In dissent were Chief Justice Lamer and Justices L'Heureux-Dubé and Cory. Their judgement, authored by Cory J., affirmed many of the conclusions reached by the Saskatchewan Court of Appeal, though it offered some interesting variations. The dissenters accepted that "representation of community interests" and "geographic considerations" may need to be given attention in distribution, but held that the key principle in interpreting the right to vote and in drafting electoral boundaries is necessarily "that each vote must be relatively equal to every other vote."[39] In assessing the nature and work of the Commission, Cory J. attacked its mandate for dictating that it establish a set number of rural and urban seats regardless of the Commission's independent appraisal of what would constitute a just distribution.[40] In addition, the minority attacked the 25% variance rule permitted in the legislation and used by the Commission. According to Cory J., a 15% deviation should have been the maximum acceptable figure to provide for the representation of special factors while ensuring the relative equality of riding electorates and vote strength. The minority noted that the most recent Saskatchewan distribution of 1981 had resulted in all ridings existing within a 15% deviation from the general provincial average. On account of this, Cory J. asserted that he was presented with no pressing and substantial reasons from the government of Saskatchewan as to why the current distribution had to allow for significant exceptions from this 15% standard.[41] Accordingly, the minority found that the impugned legislation did not constitute a reasonable limit on the right to vote enshrined in the *Charter*.

II. The Judgements in Retrospect

A review of these decisions reveals that the courts were divided between two significantly different approaches to electoral distribution. The egalitarian approach, as advocated by the challengers to the Saskatchewan legislation and as upheld by the Court of Appeal, and further supported in modified form by

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[36]*Ibid.* at 195.

[37]*Ibid.*

[38]Mr. Justice Sopinka wrote a short judgement concurring with McLachlin J. on most points, while elaborating on the right of a legislative assembly to establish electoral boundaries commissions with strict guidelines delineating the powers to be held, and the nature of decisions to be rendered, by such commissions. According to Sopinka J., this was in accordance with the sovereign power of the delegating legislature to construct a subordinate institution as it deems fit (*ibid.* at 197-99).

[39]*Ibid.* at 165.

[40]*Ibid.* at 169-70.

[41]*Ibid.* at 172-74.

the dissent in the Supreme Court of Canada, is rooted to the principle of individual elector equality of opportunity. As Carter and Conway argued in their factums, the *Charter* recognizes the equality of all citizens, with all citizens having the right to vote. Therefore, all such votes should carry a substantially equal weight, thereby allowing all citizens to possess an equal ability to influence electoral outcomes and an equal claim to representation from legislative assemblies.[42] This approach is infused with the ideas surrounding the classical understanding of representation by population: "One Man — One Vote, One Vote — One Value".[43]

In contrast to this, the pluralist approach to distribution, as supported by the government of Saskatchewan and all other intervener governments, and as upheld by the majority of the Supreme Court of Canada, is based on the understanding that a variety of social factors must be taken into consideration in the drafting of electoral boundaries. Population is clearly such a factor and advocates of this approach stress that there should not be a gross variance in the population sizes of various constituencies. But, population is only one factor. As the factum for the Attorney General for Saskatchewan asserted, the key principle to be promoted in distribution is not the strict equality of voting power and consequent equal riding populations, but the guarantee of "effective representation". The achievement of such representation necessitates the incorporation of a number of social matters into the thinking about distribution.[44] As the governments of Saskatchewan and Canada suggested, these matters may include concern over geography and the ability of elected representatives to service geographically large areas and concern for the representation of distinct communities with special interests rooted to their historical-geographical-cultural identity.

An analysis of the reasoning in *Reference Re Provincial Electoral Boundaries* must then devote attention to the merits of these contending approaches. As will be argued below, the arguments raised in favour of the pluralist approach are unconvincing, while also raising a host of problems respecting the theoretical and practical workings of the electoral process within this country. In contrast, the egalitarian approach offers a relatively uncomplicated, practical yet principled means of organizing a democratic electoral process.

A. Territory and Communications

Much concern was expressed regarding the degree of importance which geography should play in distribution. The majority of the Supreme Court of

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[42]Respondent's Factum, *supra* note 6 at 4-6; Factum of John Conway, *supra* note 6 at 20-24.

[43]F. Schindeler, "One Man One Vote: One Vote One Value" (1968) 3 J. Can. Stud. 13. This approach, moreover, is very much informed by, and related to, congressional distribution doctrine as found in the United States and upheld by the United States Supreme Court in such landmark cases as *Baker* v. *Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962); *Reynolds* v. *Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964). The doctrine of substantial elector equality can thus be viewed as one having its ideological origins in the American political tradition.

[44]This is also the position held by various academic commentators. See *e.g.* R. Knopff & F.L. Morton, *Charter Politics* (Scarborough, Ont.: Nelson Canada, 1992) c. 12; K. Roach, "Reapportionment in B.C." (1990) 24 U.B.C. L. Rev. 79 at 80.

Canada accepted the contention raised by the government of Saskatchewan and all other intervener governments that rural and remote ridings should be accorded smaller average electorates than urban ridings on account of the factors of territorial size and attendant problems in transportation and communication. It has long been recognized that the operationalization of the principle of substantial elector equality would result in the creation of territorially large electoral districts in rural and remote areas of the country given their sparseness of population. According to the critics of the substantial equality principle, the practical effect of this would be the imposition of a hardship on residents of such areas in that the transportation and communication facilities of these areas are neither as developed, nor as numerous, nor as easy to access as those in urban areas. Hence the acceptance by McLachlin J. of the legitimacy of establishing rural and remote constituencies with often substantially smaller electorates than urban ridings.

This conclusion is reached, however, in disregard to the arguments made by the Saskatchewan Court of Appeal respecting both the quality of the transportation and communication services actually existing throughout most parts of rural Saskatchewan and the variety of alternative instruments which can be used to enhance effective communication between the represented and the representative. As the Court of Appeal argued, the transportation and communication system existing in the rural Saskatchewan of the 1990s is far different from that which existed in the province in its early years of development. The current system of transportation is impressive, based upon a network of highways, secondary roads and local air services. Similarly, a system of high technology telecommunications is as readily accessible in rural as in urban Saskatchewan.[45] The implication should be clear. A rural bias in distribution designed to compensate for weaknesses in the transportation and communication infrastructure is situationally specific. The practice of rural over-representation emerged in the nineteenth century when the quantity and quality of transportation and communication services were rudimentary in this country. Under these circumstances the policy of rural over-representation was understandable and can be viewed as reasonable.[46]

Such a policy, however, is only justified for so long as the infrastructure in question is weak and underdeveloped. As the infrastructure is improved, the need to maintain such a policy should be re-evaluated accordingly. To do otherwise is to perpetuate as a valid policy instrument a legal construct designed for a differing era and differing social conditions. Yet this is what the majority did; at no time did McLachlin J. address the specific arguments raised by the Court of Appeal, by Carter or by other interveners, respecting the quality of the modern transportation and communications system found in Saskatchewan and the capabilities this system offers to representatives of rural and remote ridings desiring to enhance their interactions with constituents.

This narrowness of vision is especially evident in McLachlin J.'s treatment of the alternative means of enhancing communications among elected represent-

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[45]*Reference Re Electoral Boundaries Commission Act, supra* note 14 at 479.

[46]T.H. Qualter, *The Election Process in Canada* (Toronto: McGraw-Hill, 1970) at 94-95.

atives and their constituents should existing modes of communication be viewed as problematic.[47] The Court of Appeal stressed that in these instances other policy instruments exist, such as "additional travel allowances, support staff, and 'up-to-date' communication services."[48] The two former instruments can be viewed as traditional means to enhance the communications capacities of elected representatives. Additional travel grants would provide members in territorially large ridings with the financial power to engage in more movement within their constituencies than hitherto, thus enabling them to meet with more of their constituents. The provision of additional support staff, similarly, would enable these representatives to increase the size of their constituency offices, if not to establish a number of such offices throughout their ridings, thereby creating more linkage points at which constituents could meet with the member and officials working on behalf of the member.

While these instruments should be well understood reform options, the latter instrument represents a range of technological developments which are new, innovative and worthy of close analysis. With the development of fax machines, electronic mail, teleconferencing and inter-active video technology, the modern communications services available to legislatures desiring to enhance the communications capacities of members in rural and remote areas are impressive, ever improving and ever more economical. As Bercuson and Cooper have argued, through such developments the inhibition which geography has posed to effective communication is being increasingly eliminated, thereby calling into question the need to provide for rural and remote over-representation as a means to promote communication between representatives and the represented.[49] Yet McLachlin J. ignored this information and by so doing failed even to consider whether there are, as the Court of Appeal proclaimed, effective practical alternative means to improve the communications capacities of representatives without needing to have recourse to a policy which does damage to the principle of substantial elector equality. The majority of the Supreme Court of Canada obviously disagreed with the Court of Appeal on this point, yet good judicial reasoning should have, at the very least, necessitated that the majority address the matter on its merits.

B. Community of Interest

The majority's use of the concept of community of interest as a factor integral to distribution and capable of justifying deviations from the principle of substantial elector equality is similarly controversial. Madame Justice McLachlin accepted that "community interests" may need to be taken into account in devising electoral boundaries and she proceeded to justify the work of the Commission, in part, on the basis of the special communities of interest found in rural ridings. Nowhere in the judgement, however, did the majority address the tough theoretical and practical issues regarding the definition of the concept.

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[47]*Reference Re Provincial Electoral Boundaries, supra* note 1 at 195.

[48]*Reference Re Electoral Boundaries Commission Act, supra* note 14 at 480.

[49]D.J. Bercuson & B. Cooper, "Electoral Boundaries: An Obstacle to Democracy in Alberta" in J.C. Courtney, P. MacKinnon & D.E. Smith, eds., *Drawing Boundaries: Legislatures, Courts and Electoral Values* (Saskatoon: Fifth House, 1992) at 123-24.

In the most definitive and supportive work to date on the use of the concept of community of interest in distribution, even Alan Stewart[50] is forced to admit that there can be no rigorous definition given to the term. Stewart proceeds to justify the use of the concept on the basis of practical reasoning. Specific communities and their distinct interests will be identifiable when officials vested with the authority to devise electoral boundaries closely probe the socio-economic nature of particular areas and observe the patterns of social behaviour which link or divide certain groups of people from other groups within those areas.[51] It is just this lack of definition, coupled with rough reasoning, which makes the concept vague, subject to great debate as to its meaning, and open to great inconsistency in application.

Stewart contends that the concept must be operationalized in reference to geographic space, with such space being partitioned so as to encompass distinct socio-economic communities.[52] It was this approach, of course, which was adopted by the majority in *Reference Re Provincial Electoral Boundaries*. According to Stewart's reasoning, electoral ridings in the British parliamentary system have always been territorially based with elected members being called upon to represent the interests of the inhabitants of these territories.[53] Patterns of settlement, moreover, are not considered random. Particular types of people sharing various interests tend to congregate together for a variety of socio-economic reasons, leading to certain territories possessing distinctive community traits. As distinctive communities can be identified, they may be accorded special treatment in the drafting of electoral boundaries so as to facilitate the correspondence of electoral constituencies to these communities. In theory, this process of distribution is seen as promoting the representation of these community interests within the legislative process.[54]

Though the logic here has a *prima facie* attractiveness given its symmetry, it nevertheless falters by failing to define the key concept. The question simply and starkly becomes, What constitutes a community? Stewart is correct to assert that there are a host of answers to this question, but is mistaken in arguing that no useful purpose can be served in seeking to provide a definition of the concept. A review of the sociological literature on community indicates that the concept is open to a variety of interpretations. MacIver, for example, stressed that communities are intrinsically bound to territory, with communities being identifiable through the study of sentiments, values, loyalties and affections held by people living in particular areas as distinct from those held by others in differing areas.[55] This territorial sense of community, however, has been vigorously challenged in the past three decades. Broom and Selznick have asserted that while communities are usually to be understood in relation to territory, a distinct

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[50]"Community of Interest in Redistricting" in D. Small, ed., *Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral Boundary Reform* (Toronto: Dundurn Press, 1991) at 117-19.

[51]*Ibid.* at 128-35.

[52]*Ibid.* at 124-28.

[53]*Ibid.* at 117-18.

[54]*Ibid.* at 119-26.

[55]R.M. MacIver, *Society: A Textbook of Sociology* (New York: Rinehart, 1948) at 146-53.

contiguous territory is not a necessary condition of community. According to these authors, a community is "an inclusive group" which is "bound together by a shared sense of belonging and by the feeling among its members that the group defines, for them, their distinctive identity."[56] As such, one can speak of a Catholic, or a Jewish, or an academic community within a state.[57] Lenski and Lenski support this line of reasoning in affirming the existence of "geographic" and "cultural" communities, with the latter being created through shared cultural traditions, values and experiences held by particular groups, such as racial or ethnic groups.[58] Wellman, Carrington and Hall, in turn, stress the importance of social networks over territory. Community ties, they posit, are the result of "informal links of companionship and aid between individuals — and the patterns formed by these links."[59] These networks also are established by individuals sharing common interests and values.[60]

The development of an understanding regarding the meaning of community must then take account of the breadth of the approaches to community. Communities should be understood not only in territorial terms, but also in their social-cultural terms. In the most general sense, then, a community can be understood as a collectivity of individuals, of varying numbers, sharing certain interests, attributes and characteristics with one another. On this basis, communities can be defined by gender, language, ethnicity, race, religion, age, class, profession, occupation or geography; and this list is not exhaustive.[61] The problem then faced in thinking of community of interest in relation to distribution is not that there is no such thing as community, but rather that any society is composed of an array of varied yet inter-related communities. Which communities are then deserving of special attention in distribution through the concept of community of interest? The concept itself provides no answer to this question.

An appeal to geographically defined communities, moreover, will not resolve this problem for the very reason that, given the plurality of communities in any society, numerous and varied communities will co-exist in all geographically defined areas of society. Certain areas may have a population composed of a number of differing ethnic, racial, religious and age groups, with each viewing itself as a distinct community. Similarly, certain areas may possess a population blending lower and middle income households of varied ethnic and linguistic backgrounds; certain other areas may possess a population blending urban and rural households of varied ethnic and religious backgrounds. Which of these groups become the key groups defining the nature of the community in a given area? Or do we look to the inter-relationship of such groups leading to

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[56]L. Broom & P. Selznick, *Sociology: A Text with Adapted Readings*, 3d ed. (New York: Harper & Row, 1963) at 31-32.

[57]*Ibid.*

[58]G. Lenski & J. Lenski, *Human Societies: An Introduction to Macro Sociology*, 5th ed. (New York: McGraw-Hill, 1987) at 45-46.

[59]B. Wellman, P. Carrington & A. Hall, "Networks as Personal Communities" in B. Wellman & S.D. Berkowitz, eds., *Social Structures: A Network Approach* (Cambridge, Eng.: Cambridge University Press, 1988) at 131-34.

[60]*Ibid.*

[61]Qualter, *supra* note 46 at 96.

the creation of distinct inter-group communities within the areas where group mingling occurs?

As various communities exist everywhere in society, they necessarily blend into one another geographically. Differing ethnic and racial groups, for example, spatially merge into one another as do groups defined by income and language. It is difficult, therefore, to determine where one community ends and another begins. Wherever a dividing line is drawn, reasonable arguments can be raised that the people living on the margins in fact share community interests among themselves with such interests rooted to the nature of the mix of identities occurring on the margins. Recourse to geographically defined communities of interest thus cannot resolve the question of what is a community of interest since the delineation of any geographic area will cut across some community ties.

The logic of the foregoing line of reasoning suggests that the concept of community of interest, as a general factor to be taken into consideration in electoral distribution, is questionable and ultimately unhelpful. This is not because the concept of community is invalid, but because the concept is too broad. The concept itself, in short, cannot be used as a precise directive for instructing and guiding distribution commissions in the delineation of communities worthy of special electoral representation. Since all societies are formed of a plethora of communities, all possessing distinct interests, electoral boundaries can be drawn in a plethora of manners, with all of them being subject to justification under the rubric of community of interest. Such over-inclusiveness renders the general concept worthless as an organizing principle of distribution; it simply promotes and justifies arbitrary decision-making by electoral boundaries commissions as certain communities of interest are delineated and given preference, while others are ignored.

C. Minority Representation

Given that the theoretical and practical worth of the general concept of community of interest falters on the plurality of communities in society, an intriguing variation on the theme of community representation is that of "minority representation", a concept to which McLachlin J. gave brief mention.[62] The initial difficulty with McLachlin J.'s use of this concept is that it is undefined as to meaning and scope, and unrefined as to its practical operationalization. The concept of "minority representation" is open to a variety of interpretations.

In the most permissive sense, the concept can mean that all minorities are to be entitled to special representational rights in legislatures. Through this approach, Canadians of Scottish or German descent, for example, would possess such an entitlement. In contrast to this open approach, a more restrictive interpretation of "minority representation" would hold that only those groups such as native Canadians, certain ethnic and racial groups, and the aged and handicapped, for example, which can make a claim to having been historically discriminated against within the life of this society, should be entitled to special representational rights as a means of redress for past wrongs, as well as a means

[62]*Reference Re Provincial Electoral Boundaries*, *supra* note 1 at 188.

of integrating historically disadvantaged groups into the mainstream of political and social life. As McLachlin J. asserted, a system of minority representation could enable legislative bodies to more accurately reflect the "social mosaic" of society.[63] This approach would be in keeping with current approaches to combatting discrimination within our society via policies of affirmative action.[64]

If this latter form of reasoning best captures the logic of concern for minority interests, certain questions of definitional scope immediately arise. Which minorities are to be accorded special representational status? What is the threshold level of discrimination which a group must have experienced in order to be considered disadvantaged? And over what time period? As Karl Peter has argued, all non-Anglo-Saxon ethnic groups in this country have faced severe discriminatory behaviour at the hands of the Anglo-Saxon ethnic elite and still suffer from such discrimination in terms of social status and income.[65] In a more recent work, though, Robert Brym has concluded that while Canadians of European but non-Anglo-Celtic backgrounds have faced discrimination in this country in the past, and still confront certain inequities attributable to ethnicity, ethnicity now generally "does not strongly influence status or income attainment."[66] For non-European racial minorities, however, such is not the case, with these groups continuing to bear the burden of racist discriminatory behaviour.[67] The question then becomes whether European ethnic groups merit special representational rights or not. And if so, should these rights be prorated to the degree of discrimination which the group has suffered and is still suffering in comparison to that of other groups?

If minorities are to be accorded such special status on account of having faced past discrimination, what of certain groups which, although not demographic minorities, can make analogous claims of discrimination? Representatives of women's organizations, labour organizations and poverty groups have all made such claims on behalf of their members. Are these groups to be entitled to special representation? And would such special representation accorded to minority groups be contingent upon the geographic concentration of such group members? In certain instances, historically disadvantaged minority groups have concentrated in certain distinct geographic areas, as has been the case with various ethnic groups forming ethnic neighbourhoods, for example, but this is not universally the case. Numerous members of ethnic minority groups do not live in ethnic enclaves. Questions then arise as to how these citizens should be accorded special representation if they constitute but a small fraction of the pop-

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[63]*Ibid.* at 189.

[64]See *e.g.* J. Edwards, *Positive Discrimination: Social Justice and Social Policy* (London: Tavistock, 1987) c. 1; A. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at 16-21, 116-24; G. Brodsky & S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 190-98.

[65]"The Myth of Multi-Culturalism and Other Political Fables" in J. Dahlie & T. Fernando, eds., *Ethnicity, Power and Politics in Canada* (Toronto: Methuen, 1981) at 60-64.

[66]*From Culture to Power: The Sociology of English Canada* (Toronto: Oxford University Press, 1989) at 109-13.

[67]*Ibid.* at 29-30.

ulation of the area in which they live. In certain other instances, minority group enclaves, while existing as distinct enclaves, may have small populations far below average riding quotients even taking into consideration a 25% deviation rule. This is the case with rural and remote areas possessing distinct clusters of native populations and with urban areas possessing unique ethnic communities, such as Toronto's downtown Chinatown. At the other extreme are those groups which are very diffuse, such as women, the aged and the handicapped, for example, which are found throughout all areas. It is extremely difficult, therefore, to determine how these various minority interests should be represented.

The issue to be confronted, ultimately, is whether there should be a paradigm shift away from the concept of territorially based constituencies to interest group based constituencies, thereby providing for the possibility of distinct native ridings, women's ridings, elderly ridings, ethnic ridings, class and occupational ridings, and so forth. If this is the direction which political leaders in this country adopt respecting distribution, and if it is upheld — if not encouraged or even mandated — by the courts, we will be witnessing a profound and complex change in our system of representation.

The immediate problems associated with a shift to group representation would be organizational. Precisely which groups would be accorded representational rights and which would not? The decision-making called for by this simple question would be contentious and controversial as the foregoing analysis has illustrated. Other questions arise. Would such representation be established to the exclusion of traditional representation by population or would it be an adjunct to traditionally composed legislatures? If the latter, what proportion of seats would be allocated to such group representation? And what of voting rights? Would individuals have a singular or plural entitlement? Would individuals have to register an affinity with only one group, thus claiming a vote for only one category of constituency, or could individuals claim a variety of group affinities, thereby claiming a plurality of votes? If the latter, the principle of individual elector equality could be compromised as certain individuals may be able to claim more group affinities than others, thereby entitling themselves to more votes than others.

A move to group based constituencies would also raise difficult questions regarding the distribution of seats among the represented groups. A move toward group representation on the basis of general proportional representation would be fraught with complexity. The initial problem would be ordering the groups to be accorded such representation. Should legislative apportionment rules begin, for example, in terms of ethnicity or gender or religion or income? Depending on the first group chosen, certain tensions can be foreseen as concern is then directed to the proportional representation of other groups into the first grouping. If racial and ethnic groups constituted the base groups of representation, would 52% of all racial and ethnic representatives have to be women, for example? Would such a rule of gender equality be enforced on certain ethnic groups notwithstanding that gender equality may be foreign to the social culture of particular groups? Similarly, if the base groups are the gender groups, would these groups have to be perfectly subdivided into ethnic and religious sub-

groups even if certain of these sub-groups reject female representation? If the base group was defined, in turn, by income, this could have the beneficial result for women of them possessing greater than 52% representation given the larger proportion of women than men comprising the poorer yet more populous lower echelons of society. An initial income based grouping could also result in some ethnic groups being accorded greater, and some lesser, representation in proportion to their complement of the general population given the relative wealth experienced by certain ethnic groups.

Beyond these organizational issues, the development of a system of group representation would also raise certain theoretical issues of importance. Whereas the current system of representation is grounded upon the representation of citizens *qua* citizens, albeit organized along geographic lines, a system of minority group representation is geared to the representation of members of particular groups, with group affiliation alone being the defining factor. Such a development would not only challenge the principle of "one person — one vote", but it would also challenge the concept of citizenship in this country, as well as the traditional role of elected representatives being guardians of the common interest of the community as a whole.

The most controversial form of minority representation would be one where group representation was the sole basis of electoral representation, with individuals casting a single ballot for one designated group constituency. This development would constitute a clear signal to individuals that they are most important in political life as members of one particular group, that they should be primarily concerned with this particular group's interests, and that they need not be concerned, as individual citizens, with questions regarding the common welfare of other groups or of the greater society in which they exist. This approach, in short, would deny the pluralism which can and does exist in any society.

As Katharine Swinton has argued,[68] individuals do not possess a unidimensional identity rooted to but one aspect of their character. Rather, we are "complex individuals with multiple identities."[69] An individual identity will be founded upon a host of factors such as one's gender, ethnicity, race, religion, language, class, education, occupation and age, to name just a few. Any one individual will thus be a member of all of these component groups with which the individual shares an affinity, and may have strong opinions and beliefs regarding political and socio-economic matters affecting any and all of these groups. Individuals, in short, relate to the world through a plurality of group identities, with these pluralist inter-relationships serving to link together, into a social whole, the numerous and various groups within society.[70] A move to promote specific group representation would then act in defiance of this multidimensional understanding of human identity, while serving to divide rather than unite the groups composing society.

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[68]"Federalism, Representation and Rights" in J.C. Courtney, P. MacKinnon & D. Smith, eds., *supra* note 49 at 31.

[69]*Ibid.*

[70]*Ibid.*

An initiative to promote minority representation, while avoiding these problems of exclusivity and division, would then have to be founded upon the establishment of a multiplicity of group constituencies going far beyond the mere representation of historically discriminated against groups. Rather, to adequately represent the social mosaic which creates human personality, a system of representation would have to be founded upon the inclusion of all those groups within society which contribute to the social mosaic. The list, of course, would be long. Such a system, as well, would also have to be founded upon a pluralist voting process with individuals casting ballots for the various and numerous groups with which they are affiliated. This initiative, in turn, would then run into the practical and theoretical problems associated with concern for elector equality and apportionment of group representation as outlined above.

This initiative would still represent a fundamental rejection of the concept of general representation within a legislative assembly. Whereas the current system posits that elected members can and should strive to represent the diversity of the individual and group interests within their constituencies, a system of group representation posits that only members of a specific group can represent that group's interests. Unlike the existing system which recognizes that individuals, as representatives, party members and common citizens, can and should seek to understand and sympathize with people from differing social groups and even promote and represent their interests, group representation, in theory, challenges these ideas by stressing that only members of a particular group can truly understand and represent the interests of the group. The danger implicit in this line of thinking is that it rejects the human capacity for sympathetic reasoning and action and, again, serves as a dynamic of division rather than union within society.

Any initiative to promote group representation, in short, must take account of the practical and theoretical issues raised by the concept. All of the questions, concerns and ideas mentioned above, however seemingly far-fetched or idealistic, flow directly from consideration of the meaning and operationalization of the concept of minority representation in distribution. These are matters which will have to be addressed should political leaders or the courts move to accept the concept of minority representation as a requirement of distribution. It is indeed unfortunate, therefore, that the majority on the Supreme Court of Canada did not devote serious attention to the breadth of matters related to this concept or the host of issues emanating from it. On matters of such importance, particularly with the Court suggesting that this concept may provide a criterion for making decisions in the future respecting electoral distribution, judicial reasoning should be sound and enlightening, not weak or ambiguous.

All of the foregoing is not to belittle the importance of the concept of community in political or social life. As Charles Taylor and Michael Walzer have long argued, communities are crucially important to the construction of societies and the development of human understanding respecting self and others, and the distributional relationships between the individual and the collectivity.[71]

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[71]See *e.g.* C. Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989); M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

The problem, though, is that the use of the concept of communities of interest in distribution biases the very system of representation from the outset by providing special status to particular communities over others. Representation based on the equal representation of individuals *qua* individuals does not negate the various communal concerns held by those individuals; rather, it enables those concerns to continue to exist and influence political life free from institutionalized representational favouritism.

D. Deviation Quotients

Closely related to the concepts of minority representation and community of interest is the questionable practice of allowing the electorates of ridings to deviate from a general quotient by a set percentage figure so as to take account of factors such as geography and community of interest. Such a permissive rule was upheld by the Supreme Court of British Columbia in *Dixon* and the Supreme Court of Canada in *Reference Re Provincial Electoral Boundaries* as the constitutionally correct approach through which to give effect to considerations pertaining to the territorial size of ridings and community interests within ridings, while maintaining a level of concern for the principle of substantial equality. Pursuant to the rule, ridings are allowed to vary in electorate size up to the given percentage figure. Deviations in excess of the percentage figure and lacking any exceptional justification, as was the case in *Dixon*, are to be viewed as unconstitutional violations of the principle of substantial elector equality.

Of note is that differing authorities, both political and judicial, have upheld differing allowable deviation figures. In federal distribution law, as well as that of Newfoundland, Quebec, Ontario, Alberta and British Columbia, for example, deviations of 25% are generally allowed, with greater deviations being permissible in exceptional circumstances. Nova Scotia has made allowance for deviations of up to 33%, while New Brunswick and Prince Edward Island have no restrictions on permissible deviation. At the other extreme, Manitoba generally restricts deviations to a maximum of 10%.[72] The impugned Saskatchewan legislation allowed for deviations up to 25% in southern Saskatchewan, with variances up to 50% being acceptable in the two northern ridings. Given the disparity within the approaches to this matter taken by legislators, it is not surprising that various members of the judiciary have likewise offered differing views as to what should be an acceptable deviation figure. Though the members of the Saskatchewan Court of Appeal asserted that it would have been inappropriate for them to set a *de minimus* acceptable deviation figure, they stressed that any deviation should be as limited as possible.[73] At the Supreme Court of Canada, Madame Justice McLachlin and the majority upheld her reasoning in *Dixon* in which the general 25% deviation figure was accepted as valid.[74] It was partly their inability to agree with this deviation figure which led three of the

[72]See Supreme Court of Canada, Pleadings and orders, supporting materials filed by Counsel in *Saskatchewan (A.G.)* v. *Carter*, [1991] 2 S.C.R. 158, 81 D.L.R. (4th) 16, vol. 1 at 124, 141, 151, 156; vol. 2 at 170, 173, 179, 184, 187.

[73]*Reference Re Electoral Boundaries Commission Act, supra* note 14 at 462-64.

[74]*Reference Re Provincial Electoral Boundaries, supra* note 1 at 190, 194.

members of the Court to issue a dissenting opinion. In this dissent, the minority upheld the validity of the factors of geography and community of interest as being important, but stressed that these factors could be accommodated within a general 15% deviation figure.[75]

The range of options respecting an appropriate percentage deviation represents more than simple differences of opinion concerning how best to operationalize interests associated with geography and community; rather, these differences illustrate the major problems of principle which flow from the nature of a percentage deviation rule. If a 25% deviation is considered acceptable, why not 26% or 27% or 33%? What qualitative difference in principle arises in the interstices between these quantitative figures? Of course, the argument is made that increasingly large deviations impugn the integrity of the principle of elector equality, leading to the proposition that at some point this principle must take precedence. But at what point? Why not at the point of a 20% deviation, or 15% as suggested by the minority, or 10% as enshrined by the relevant Manitoba legislation?

These questions go to the heart of the dilemma posed in *Reference Re Provincial Electoral Boundaries*. The case pits the egalitarian moral principle of "one person — one vote" against various social factors and interests which are also viewed by many to reflect principles important to the quality of representation. An equality principle rooted to a conception of individual rights thus confronts competing principles rooted to collective interests. The dilemma is created, however, through the combined recognition by most actors concerned with representation that, on the one hand, the principle of absolute equality implicit in the pure conception of "one person — one vote" is impossible to operationalize given practical constraints in distribution-making and maintenance. On the other hand, concern for the collective interests in competition with the principle of elector equality cannot be allowed to vitiate the general principle of elector equality implicit in the concept of "one person — one vote". The principle of elector equality is thus viewed as unattainable in absolute terms, while remaining the key value needing recognition and support in all distribution systems.

This interplay of practical considerations with moral principle then becomes highly problematic. The creation of percentage deviation figures represents the creation of devices designed to quantify a moral principle, or more precisely, the extent to which a moral principle can be modified while still retaining its legitimacy. The very attempt to quantify a qualitative condition, though, is questionable given the subjective decision-making surrounding any attempt to delineate, in scalar form, qualitative changes in a moral condition. Differing actors will bring differing perspectives to bear in assessing the nature of the moral condition, the extent to which the condition can be modified while remaining true to principle, and in defining instruments to measure qualitative changes to the condition under analysis. This final point is not to be underestimated. A gulf exists between the blunt nature of quantitative analysis and the

[75] *Ibid.* at 172-74.

complexities of moral conditions. Given that the nature of the moral condition in this case is open to interpretation, so too are all statistical indicators designed to measure the nature of the condition.

Beyond this general theoretical problem, moreover, lies the problem of practical justification. Pursuant to the pluralist approach, deviations from the principle of equality are justified on the basis of serving other practical considerations, with these considerations being viewed as relating to matters of principle. As argued above, however, these practical considerations rooted to concerns over territorial size of ridings, communications and the representation of communities of interests or minority representation, are all subject to deep criticism. For example, it has been argued that either the practical consideration giving rise to the concern can be met with practical alternative policy instruments, as is the case with the issue of territory and communications, or the practical consideration is rooted to a concept so vague and indeterminate or questionable as to be analytically worthless, as is the case with the concept of community of interest, or theoretically and practically dubious, as is the case with minority representation. If the practical considerations giving rise to the claims for special treatment via a deviation rule are found to be either susceptible to remedy by other means, or are found to be philosophically questionable, then the practical justification for the deviation from the substantial equality principle falters.

Given the foregoing analysis, the one practical factor which does stand as a valid concern militating against the principle of elector equality, and which is devoid of alternative treatment other than through a deviation rule, is that of the impossibility of devising and maintaining electoral constituencies composed of absolutely equal electorates. The practical impossibility of the realization of absolute elector equality in distribution necessitates that some deviation from absolute equality be recognized and endorsed as a practical necessity of boundary drawing. Yet, given the practical and mechanical nature of this rule of exception, the exception hardly stands as a principled countervailing factor to the principle of elector equality. Substantial elector equality thus stands as the fundamental principle structuring the democratic nature of the electoral system in this country, while also representing a practical method of distribution which, in contrast to the pluralist approach, is relatively uncomplicated and easily understood and operationalized. As such, it is a principle and practice which should be circumscribed as little as possible. Thus, the opinion of the Saskatchewan Court of Appeal is commendable for its recognition that any rule of deviation should be as limited as possible, while still allowing for a modicum of pragmatism to be exercised by boundaries commissions in drafting constituencies and by courts in reviewing the constitutionality of electorate variances in existing constituencies.

Final Reflections

Judicial review of systems of electoral distribution is of crucial importance to the structure and functioning of representation and, thus, of immediate relevance to the nature of democracy in this country. It is then unfortunate that the

quality of the decision in *Reference Re Provincial Electoral Boundaries* was not equal to the importance of the matter under review. To their credit, the different judgements of the Supreme Court of Canada stressed the importance of the egalitarian principle of "one person — one vote" as being integral to the working of democracy in this country. The Court, however, failed to rigorously address the validity of the main claims made based on the pluralist approach to distribution to constrain the operationalization of the principle of elector equality. The Court failed to critically evaluate the merits of such concepts as special representational entitlement to territorially large areas, special minority interests, and communities of interest. By failing to address the many issues enveloped in the concept of community of interest, the Court also failed to devote serious attention to the merits and demerits of allowing distribution commissions to vary the electorates of constituencies by set percentages. On account of these many failings, the decision of the Court is open to great criticism; indeed, by adhering to the basic tenets of the pluralist approach, the decision does damage to the working of democracy within this country.

These weaknesses suggest that the Court's work in *Reference Re Provincial Electoral Boundaries*, far from providing authoritative guidance in distribution matters and far from foreclosing litigation on such matters, may but enhance questions amongst those concerned with distribution, thereby encouraging future litigation. Furthermore, it is not hard to foresee future challenges being made to electoral distribution legislation on the grounds that concerns respecting effective representation of territorially large areas can be met through the use of policy instruments which are less violative of the *Charter* than territorial over-representation. Similarly, future challenges could be rooted to arguments that the general concept of community of interest is inherently problematic and unprincipled, thus leading it to be inoperative as a legitimate guide to distribution. The 25% deviation rule is likewise open to attack, while the majority's reference to the concept of minority representation is questionable.[76]

In *Reference Re Provincial Electoral Boundaries* the Supreme Court of Canada rendered an important and controversial decision respecting electoral distribution in this country. In light of this, and as a result of parliamentary representation becoming increasingly an issue of popular political discourse, it is fair to suggest that this case represents but the first of a number of equally major decisions which have yet to be crafted by the Court respecting electoral distribution. It is hoped that in future adjudication the Court's decision-making will do justice to the seriousness and complexity of the subject matter. It is hoped that in future consideration of these matters, the Court will affirm and promote, as did the Saskatchewan Court of Appeal, the egalitarian approach to distribution founded upon the theory and practice of substantial elector equality as the core principle defining representative democracy in this country, and thus being the principle which should guide all future redistributions in this country.

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[76]It is interesting to note that the current distribution of seats in the Legislative Assembly of Prince Edward Island has been ruled unconstitutional by the trial division of the provincial Supreme Court on the basis that the distribution violates *Charter* guarantees of equal representation. A new distribution is currently underway (*MacKinnon* v. *Prince Edward Island* (16 February 1993), (P.E.I. S.C.) [unreported]).