

THE PRINCIPLE OF REPRESENTATION BY POPULATION IN CANADIAN FEDERAL POLITICS

Andrew Sancton



School of Public Policy & Governance
UNIVERSITY OF TORONTO

EXECUTIVE SUMMARY

This Mowat Report documents the historical importance of representation by population as one of Canada's founding constitutional principles. It finds that there was widespread commitment to the rep-by-pop principle by Canada's constitutional architects at the time of Confederation and that the principle was accepted as part of Canada's original design.

The Report provides evidence that the deviations from rep-by-pop today are worse than at any time in our history and have been getting progressively worse with each new seat reallocation over the past four decades. Except for the passage of the "senatorial floor" in 1915, Canada's seat allocations to the provinces remained overwhelmingly faithful to the rep-by-pop principle until the 1960s. It is a relatively recent development that Canada experiences violations of the principle far greater than any that would have been contemplated by Canada's constitutional architects.

It is possible that current violations of the rep-by-pop principle are unconstitutional. The last time that the courts heard concerns about the distribution of seats between the provinces they found that the deviations were acceptable. However, those deviations were significantly lower than they are today and were a challenge to be brought anew, courts would have to grapple with widespread violations of the constitutional commitment to rep-by-pop that are unprecedented in Canadian history.

The federal Parliament has at its disposal a relatively simple solution to this emerging democratic problem. It is within its unilateral power to rescind the relatively recent change that provides that even provinces not protected by the senatorial floor can never have fewer seats in the House of Commons than they were allocated in 1976. It only makes sense that provinces that are losing population compared to other provinces will not have their number of seats guaranteed in perpetuity.



APPLIED PUBLIC POLICY RESEARCH

INFORMED BY ONTARIO'S REALITY

“It is obvious that we cannot depart from representation by population.”

George Brown, the Quebec Conference, 20 October 1864¹

The principle of representation by population is widely seen as a cornerstone of most modern democracies. This does not mean, however, that it is always perfectly implemented in even the most democratic of states. In Canada, as in most pluralistic democracies, some deviations from the principle of representation are seen as acceptable in order to accommodate other important goals, such as the need to ensure that sparsely populated regions still have a voice or to protect minority communities. Nevertheless, most citizens of democratic states tend to require compelling reasons to violate the principle of representation by population.

Is the current situation in Canada justifiable? The violations of the principle are greater in Canada today than they have ever been – and they have been getting progressively worse with each move to re-draw the country’s electoral boundaries. As a result, 61 per cent of Canadians are underrepresented in the House of Commons today. In fact, compared with peer federal countries around the world, Canada is now the worst violator of the representation by population principle.² How did we end up in this situation?

Representation by population was a founding constitutional principle of Canada’s Confederation. Since then, it has always been widely accepted by Canadians and their leaders across the country. At the same time, though, the pressures of regional politics have worked to undermine Canada’s commitment to the principle. Yet, while Canadian courts have in the past found deviations from the principle of voter parity to be acceptable, it is unlikely that they would arrive at the same conclusions today given how much the principle has been eroded in

recent years.

There is a simple solution to this issue and it is within the power of the federal government to undertake on its own, without recourse to constitutional amendment requiring the consent of the provinces. What is required is a provision allowing provinces to lose seats in the House of Commons in accordance with changes in their populations.

BACKGROUND

Before Confederation in 1867, the famed Toronto journalist and Reform politician George Brown built his political career in what was then known as Canada West (today we call it Ontario) on the idea that seats in the legislature of the Province of Canada should be allocated according to the principle of representation by population. When

the Province of Canada was created in 1840 by merging Upper and Lower Canada, each of the constituent parts was given the same number of seats in the legislature. At first, this decision favored Canada West because it had a smaller population than Canada East (which is now Quebec). Later, though, the situation switched because the population of Canada West was growing at a much faster rate.

This led French-speaking politicians in Canada East to fear that if representation by population was adopted, the parliament would be swamped with English-speakers from the west. This, in turn, would threaten the hard-won political concessions that protected the French-speaking people of North America. This stalemate between Brown and his French-speaking political opponents in Canada East created a political deadlock. In their search for a way forward, Canadian leaders started to look for other ways of running the country.

The solution they found led to the adoption of the British North America (BNA) Act in 1867 and the

The violations of the principle are greater in Canada today than they have ever been—and they have been getting progressively worse with each move to re-draw the country’s electoral boundaries.

creation of the Dominion of Canada as a federal union of four provinces. The Province of Canada was divided (again) into two units, this time to be known as Ontario and Quebec. They were joined in the new Dominion by the Maritime colonies of New Brunswick and Nova Scotia.

Confederation provided a solution to the debate between Brown and the French-speaking politicians of Canada East. Representation by population was accepted as a foundational principle of Canadian confederation in exchange for federalism and provincial autonomy. French-speakers in Quebec accepted this solution because they believed (rightly, as we now know) that the legislature of the new province of Quebec had enough legal authority to protect the province's language and culture. This was the compromise at the heart of Confederation.

The quote from Brown at the beginning of this paper suggests that representation by population was accepted as a fundamental principle even before the formal negotiations that led to Confederation. Significantly, Brown said those words at the Quebec Conference of 1864 during a debate in which some delegates from Prince Edward Island (PEI) were arguing that, if their colony was to enter Confederation, it deserved at least six seats in the federal House of Commons, rather than the five it was being offered. Brown noted that PEI could have six seats and the principle of representation by population could be preserved if the new House of Commons were launched with 230 members. This was much larger than the 193-member House that was being proposed at the time, and even Brown argued that a 230-member House was "altogether too large."³ PEI did not end up joining Canada until 1873 when it received six out of 206 seats in the House of Commons. But the 1864 debate over PEI's seats continues to reverberate in Canadian politics to this day. In fact, the PEI issue remains at the heart of our current problems with representation by

population. Unless Canada can address that issue, the goal of fulfilling this founding principle of our federation is likely to remain elusive.⁴

THE ORIGINAL FORMULA AND THE ADMISSION OF NEW PROVINCES

The House of Commons had 181 seats in 1867. Quebec was used as the base of the system with 65 seats. The remaining three provinces had seat totals that reflected their relative populations as determined by the censuses of 1861. And so, the new legislature was founded on the principle of representation by population.

The fact that the system was based on a 65-seat allotment for Quebec was simply a matter of convenience. Quebec received its fair share of seats according to population and nothing more. There were also no guarantees for the future about how strongly the province would be represented in the Commons. Canada's first prime minister, Sir John A. Macdonald, said Quebec was the best choice as a base for the system "on account of the comparatively permanent character of its population, and from its having neither the largest nor the least number of inhabitants."⁵ The number 65 was chosen because that was how many seats Canada East had in the Canadian legislature and most of the political leaders of the day thought it was an appropriate number of representatives.

Section 51 of the original BNA Act called for the number of seats allocated to each province to be "re-adjusted" after each census beginning with the 1871 federal census. These adjustments would happen while maintaining 65 seats for Quebec as the base. Significantly, there was one additional provision calling for no changes to a province's seat total if its proportion of the total Canadian population went up or down by less than 5 per cent. This provision, known as the "One Twentieth" clause, was designed to offer some insurance to

In fact, the PEI issue remains at the heart of our current problems with representation by population.

provinces that might otherwise see their seat total in the House decline because of changes in the Canadian population.

Brown, the stalwart champion of representation by population, was willing to accept this erosion of his cherished principle of voter equality because he believed that there would be little chance it would ever be used. In fact, he was actually the one who moved the motion that contained the clause.⁶ Alexander T. Galt, another father of confederation, said the clause was designed to protect the seats of the “Lower Provinces,” as the Maritimes were called in those days. He said it would allow them to keep their original number of seats even if Ontario’s population grew relatively faster, “unless in the very improbable case of any one falling off by five per cent or more – that is a decrease relatively to the whole Federation.”⁷

Galt turned out to be quite wrong. The clause ended up doing very little to protect the “Lower Provinces.” In the redistribution of 1891, all three Maritime provinces lost seats.⁸ Ironically, it was Ontario that benefited from the clause. In 1911 and 1921 Ontario did not lose any seats when its share of the total population decreased from 35.1 per cent to 33.4 per cent. Since this represented only a 4.8 per cent decline of its actual share of the total Canadian population, Ontario was under the 5 per cent threshold set by the “One Twentieth” clause. Ontario was protected again in 1931 when its share of the population declined to 33.1 per cent of the total population. And so, through three censuses from 1911 to 1931, Ontario kept its 82 seats in the House despite its declining share of the Canadian population. Galt had been right about the effect of the provision, but he had failed to predict that Ontario would be the province to reap the benefits. And so it was that the principle of representation by population was violated on behalf of Canada’s most populous province.

By that time, though, the principle had already been violated. In fact, it had been broken immediately after Confederation. Norman Ward writes that,

the principle was thrown to the winds when Manitoba and British Columbia entered the federation in 1870 and 1871. Manitoba, which had an electorate far too small to entitle it to even one member, was given four; British Columbia, which could muster almost enough citizens to justify a single representative, was given six. Both these provinces exacted this heavy over-representation as part of the agreement by which they entered the federation.⁹

Ward noted that British Columbia had been permanently guaranteed a minimum of six seats, a fact that lost all practical significance by 1901 because of the province’s booming population, while Manitoba’s four members were only guaranteed until 1881.¹⁰

PEI entered Confederation in 1873. Ward writes that it “was also given too many federal seats when it entered the union, but on a scale so far below British Columbia and Manitoba that this constituted a fruitful source of grievance for years to come.”¹¹ More importantly, unlike British Columbia, PEI was given no minimum guarantee. In 1881, the province’s six seats were protected by the “One Twentieth” clause. After that, though, the change in PEI’s share of the population was large enough for it to lose a seat in each redistribution until the one following the 1911 census. By that time, it had only three seats left.

As early as 1871, the Liberal opposition in the House of Commons was objecting to any grant of extra seats to new provinces on the grounds that it violated Section 51 of the BNA Act. The government’s ingenious response was that “the terms of the Act did not begin to apply until after the province had entered the federation.”¹² This approach was applied to both PEI and Manitoba. British Columbia, however, was a different story. The government argued that the latter province’s ongoing minimum guarantee of six seats had resulted from an imperial order-in-council specifically authorized by an imperial statute, an approach that

was in accordance with section 146 of the BNA Act.¹³ But Section 146 also states that any such order-in-council is “subject to the Provisions of this Act.” Arguably, therefore, the Liberal opposition was right. The government may have violated the BNA Act by guaranteeing British Columbia a minimum number of seats and granting it more representation between 1881 and 1901 than it should have had by law. In any case, the guarantee could have been made perfectly legal with a remedial statute approved by the British parliament, which was still clearly in charge of the BNA Act at the time.

Section 52 of the BNA Act also gave the Canadian parliament the authority to increase the number of seats in the House of Commons as long as the proportional representation of the provinces called for in the Act was not altered.

In the late 19th century, this provision provided Parliament with the legal authority to assign Commons representation to the northwestern territories. Parliament did this in 1886 when it provided representation to a huge area, including territory that was later to become Alberta and Saskatchewan. Four seats were allocated to this region although only two were justified according to the area’s sparse population.¹⁴ Following the census of 1901, this figure was raised to 11, even though the population only justified two seats. The situation changed in 1905, when Alberta and Saskatchewan were carved out of the northwestern territories. Those two provinces were given seven and 10 seats, respectively, while the remainder of the northwestern territories was left with just one. It is important to note that this initial number of seats for Alberta and Saskatchewan was strictly based on their respective populations,¹⁵ a fact that illustrates how quickly these two Western provinces were growing in the early 20th century.

The redistribution of seats that followed the census

of 1911 realized Canada’s commitment to representation by population. As in 1901, every province received exactly as many seats as it was entitled to under the principle of representation by population. Even the northwestern territories, which in 1901 had been grossly overrepresented with 11 seats, saw its representation cut to just one seat.

This was to be the high point of Canada’s commitment to representation by population. Ever since then, Canada has been in retreat from the principle. Instead, efforts have been made to protect the representation of small provinces and balance the west in relation to the east while simultaneously trying to ensure that Quebec is not underrepresented. Along the way, the principle of representation by population has been seriously eroded.

THE SENATORIAL FLOOR

The so-called “senatorial floor” is one of the key provisions that prevent Canada from delivering on its constitutional commitment to representation by population.

Each of the three Maritime provinces lost seats in the re-allocations that took place after the censuses of 1891, 1901 and 1911. During the redistribution of 1901, Nova Scotia and New Brunswick launched a constitutional challenge over the formula used to re-allocate seats. They argued that the formula in Section 51 applied only to the original four provinces and not to any provinces added later. PEI launched a

separate challenge arguing that its original six seats had been permanently guaranteed. Both challenges were rejected by the Supreme Court of Canada and the Judicial Committee of the Privy Council. Ward observed that “the question of Maritime representation was thus thrown back into the House of Commons where it has been a constant irritant almost ever since.”¹⁶

The redistribution of seats that followed the census of 1911... was the high point of Canada’s commitment to representation by population.

In 1914, parliament responded to PEI's complaint by asking the British Parliament to add a provision that was to become known as the "senatorial floor":

51A: Notwithstanding anything in this Act a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province.

The British parliament obliged with an amendment the following year. At the next redistribution in 1921, PEI was given four seats to match its allotment in the Senate. The province has held on to those seats ever since, despite the fact that its population does not warrant such a number. Since 1961, New Brunswick has had 10 seats for the same reason.

When the Canadian Constitution was patriated in 1982, Section 41 of the Constitution Act of 1982 secured the senatorial floor provision by requiring the unanimous approval of the Canadian parliament and the legislatures of all 10 provinces for any changes to it. This means that PEI and New Brunswick cannot lose seats in the future unless their own legislatures agree to an amendment that would permit this loss - an improbable scenario. While only these two provinces currently benefit from the provision, the senatorial floor is at the heart of many of the difficulties Canada has had in upholding the principle of representation by population.

THE 1946 FORMULA, ITS 1952 MODIFICATIONS AND THE AMALGAM FORMULA

By the time of the 1941 census, it was clear that the system of dividing up seats among the provinces "had broken down," as Ward puts it. The redistribution of seats was put off that year because of World War II, but Ward notes that if it had gone ahead in 1941 as planned, "only four provinces out of nine would have been allocated seats according to their actual populations."¹⁷ Alberta, Nova Scotia and

Ontario would have held on to extra seats thanks to the "One Twentieth" provision, PEI would have kept the extra seats it had thanks to the senatorial floor and New Brunswick would have started to benefit from the senatorial floor two decades earlier than it actually did.¹⁸

The fact that Ontario, the most populous of all the provinces, was being protected in this way was clearly bizarre. R. MacGregor Dawson explained the problem this way:

In 1914 Ontario had been given 82 members in the Commons. In 1924 she was entitled to 81; but the one-twentieth clause came to her aid, and she kept 82. In 1933 she would have received, under the general rule, 78; the exception allowed her to keep 82. Under the census of 1941, she normally would have fallen back to 74, but once again the one-twentieth clause would have permitted her to retain 82, the number established thirty years earlier. And this might have gone on indefinitely, each decade bringing about a greater and greater disparity between population and representation. Quebec with a mounting population thus saw her representation tied down to a fixed 65, while Ontario, whose population was not increasing at as fast a rate, nevertheless kept its artificial number of 82 intact. Quebec, not unnaturally, began to demand "rep. by pop.;" the whirligig of time had indeed brought its revenges.¹⁹

A totally new formula was approved by the Canadian parliament in 1946, but almost all attention was focused on the fact that the government refused to consult with the provinces about the changes.²⁰

Rather than having Quebec's representation as the starting point, the new formula started with a fixed number of seats in the House of Commons. The general election of 1949 was the only one fought using this new formula. For that election, the number

of seats was set at 262. One seat was allocated to the Yukon and the Northwest territories. The total population of all the provinces was then divided by the remaining 261 seats to create a national quotient, which was then divided into the population of each province. Each province was initially assigned as many seats as the resulting whole numbers. Provinces with the highest remainders were then

By the time of the 1941 census, it was clear that the system had broken down.

assigned an additional seat until the total assigned provincial seats reached 261. If these calculations resulted in any provinces receiving fewer seats than they had senators, the calculations were redone without including those provinces and their seats. In 1949, PEI was the only province that received extra seats thanks to the senatorial floor. Aside from that exception, the underlying principle was citizen equality and representation by population. These changes were made in part to respond to concerns from Quebec that Canada was not honoring its commitment to representation by population. As a result, the overrepresentation of Ontario came to an end.

But this arrangement and renewed commitment to representation by population would not survive the results of the 1951 federal census. Applying the 1946 formula to those census results would have resulted in Saskatchewan losing five of its 20 seats and Manitoba two of its 16 seats.²¹ The Liberal government of Prime Minister Louis St. Laurent amended the formula to: add a new seat for the Northwest Territories; prevent any province from losing more than 15 per cent of the seats it had received at the previous redistribution; and prevent any province from having fewer seats than another province with a smaller population.

These new rules meant the number of seats in the House of Commons was no longer fixed at 262. Under these rules, Saskatchewan lost only three seats instead of five and the Northwest Territories

gained a new seat, so the number of seats in the House rose to 265.

The most significant aspect of these new amendments, contained in the BNA Act of 1952, is that they were approved by the Parliament of Canada without reference to its British counterpart. Three years earlier, the British parliament had agreed to enable the Canadian legislature to amend the British North America Act in areas that fell under federal jurisdiction.²² This is significant because it gave the Parliament of Canada the sole authority to change the seat redistribution system. When the provisions of the British North America Act, 1952 were being formulated in 1952, the Parliamentary Counsel for the House of Commons, testified to the Select Committee on Redistribution that, as a result of the 1949 amendment to section 91 it was made lawful for the Parliament of Canada to amend parts of the Canadian Constitution affecting the operation of the Dominion government, including Sections 51, 51A and 52.²³ No one questioned this development during the parliamentary debate over the changes, although the Progressive Conservatives did re-iterate their view that the provinces should have been consulted.

The 1952 formula remained in place for the redistribution that followed the 1961 census. It protected New Brunswick's 10 seats with the senatorial floor, took one seat away from Quebec for the first time ever as well as one seat each from Manitoba and Nova Scotia and reduced Saskatchewan's allotment from 17 to 13, the largest proportional drop for any province in Canadian history.

But the new formula was never to be applied again. A quick examination of how the seats would be divided up after the 1971 census was enough for parliament to suspend the process. Quebec would have lost two more seats, and Newfoundland, Nova Scotia, Manitoba and Saskatchewan would have each lost one.²⁴ All three of the Maritime Provinces would have received more seats than their populations justified. This meant that the Maritimes would be overrepresented in relation to the west and

Quebec would be underrepresented in relation to the rest of Canada. The redistribution process was suspended and the stage was set for a prolonged and elusive search for an alternative formula.

A complex new “amalgam” formula for allocating seats among the provinces was enacted in 1974. The details are not relevant here because the amalgam formula was, in turn, replaced by yet another formula in the next decade. The key provision of the amalgam formula was that Quebec was to be allocated 75 seats automatically (up one from the 1960s) and was to receive four more seats every 10 years. Ontario would be allocated seats in proportion to those of Quebec. The other, smaller provinces were treated more favorably than Ontario and Quebec relative to their populations. This formula might well have led to a division of seats that more closely approximated the principle of representation by population. The cost, however, would have been a dramatically larger House of Commons. In the 1970s, the one and only time this formula was used, the number of seats in the House increased from 264 to 282. If it had been used after the 1981 census, the House would have grown to 310 members and Ontario would have received an unprecedented 10 new seats. There was little support for such an expansion of the House. Once again, the redistribution process was delayed and the search was on for yet another formula.²⁵

One crucial event that occurred a few years before must be noted. Soon after coming to office in 1964, Prime Minister Pearson moved to implement an election promise that future boundaries of federal electoral districts would be drawn by independent commissions.²⁶ The details of this process have been thoroughly described elsewhere.²⁷ The Electoral Boundaries Readjustment Act of 1964 required the commissions to “proceed on the basis that the population of each electoral district ...shall correspond as nearly as may be to the electoral quota,” which was the provincial population divided by the number of assigned seats. Commissions were allowed to depart from the strict application of the electoral quota to take account of “special

geographical considerations” and “special community or diversity of interests,” but they were prohibited from creating electoral districts whose populations were more than 25 per cent above or below the provincial quota. In the 1960s and 1970s, the electoral boundaries commissions were remarkably successful at reducing levels of population inequalities among electoral districts within each province.²⁸

THE REPRESENTATION ACT OF 1985

Prime Minister Brian Mulroney’s government produced a new, simpler formula with the Representation Act of 1985. Three seats were allocated to the territories. The combined population of the provinces was divided by 279, which was the number of seats allocated to the provinces by the previous amalgam formula of the 1970s. This produced a national quotient, which was, in turn, divided into the population of each province. The resulting number was rounded to the nearest whole number to produce the number of seats for each province. If this process gave any province fewer seats than it had received under the amalgam formula of the 1970s, the number of seats was raised to that level. When the formula was first applied in the 1980s, only the seats of Ontario, British Columbia, Alberta and Newfoundland did not have to be adjusted to the 1970s levels. In other words, the 1970s results of the amalgam formula lived on for most provinces. But instead of producing an overgrown House of Commons with 310 members, as the amalgam formula would have done had it remained in place in the 1980s, the new formula only increased the House to 295 members. Under the new formula, Alberta gained five seats, and Ontario and British Columbia added four each because of their growing populations.

The Representation Act of 1985 also changed the rules governing the creation of electoral boundaries. Since the 1960s, independent commissions had been responsible for drawing the boundaries of federal electoral districts.²⁹ The Act now made it

mandatory for the commissions to consider exceptions to the rule, such as a community of interest or identity or the historical pattern of an electoral district. Commissions were also required to establish a manageable geographic size for districts in sparsely populated, rural or northern regions.³⁰ The changes also allowed commissions to create electoral districts with populations that were more than 25 per cent larger or smaller than the electoral quota “in circumstances viewed by the commission as being extraordinary.”³¹

The commissions have made ample use of this change. The Newfoundland commission used this section to create an electoral district for Labrador that was 61.4 per cent below the provincial quota; the Ontario commission created Timiskaming with a population that was 30.5 per cent below the quota; the Quebec commission created Gaspé at 26.6 per cent below quota and Bonaventure – Iles de la Madeleine at 39.4 per cent below; and the British Columbia commission created Vancouver-Kingsway at 25.6 per cent above quota.³²

This erosion of the representation by population principle occurred despite the fact that the Constitution Act of 1982, which patriated Canada’s constitution, clearly entrenched the country’s commitment to the principle. The Act also highlighted the role of the provinces in this area. Section 42 (1) states that any amendment to the Constitution in relation to “the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada requires the approval of the Parliament of Canada and the legislatures of seven of the provinces representing at least half the population of Canada.” This provision clearly entrenches the substance of Section 52 of the BNA Act of 1867, a section that had arguably been subject to unilateral federal amendment since 1949.

This erosion of the representation by population principle occurred despite the fact that the Constitution Act of 1982... clearly entrenched the country’s commitment to the principle.

As early as 1961, the Progressive Conservative minister of justice, Davie Fulton, had included “the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada” as a part of the Constitution that could be amended only with provincial

approval.³³ Such a provision was not surprising, given that less than ten years before, his party was arguing in the House of Commons that changes to Section 51 required provincial consultation. In 1965, the Liberal minister of justice, Guy Favreau, acknowledged that this provision (and others included in the Fulton-Favreau formula) recognized matters “in which the provinces have a legitimate interest” and which therefore “should

be expressly excluded from Parliament’s unilateral amending authority.”³⁴ The provision was included as a matter requiring provincial approval throughout the subsequent constitutional negotiations that culminated in the adoption of the Constitution Act of 1982.

It did not take long for the provision giving provinces a role to become the subject of litigation. In 1987, the then-mayor of Vancouver, Gordon Campbell, launched a constitutional challenge against the changes in the Representation Act of 1985 on the grounds that they affected “the principle of proportionate representation of the provinces in the House of Commons” and were enacted without provincial approval. Campbell’s case was that

Rule 2 of the new Rules assigns a greater number of seats to some provinces than they are entitled to have according to the principle of proportionate representation (i.e. representation by population). Other provinces, including British Columbia, are assigned fewer seats than they would be entitled to have under the principle of proportionate representation.³⁵

In his December 1987 ruling, the Chief Justice of the Supreme Court of British Columbia agreed with the federal government's defense of the Act, saying:

[I]t cannot be said that perfect mathematical representation has ever been prescribed by the Constitution of Canada....The constitutional history of Canada has clearly been to cushion provinces against the loss of representation in the House of Commons by reason of declining relative population. In my view the principle of representation 'prescribed' by the Constitution does not require perfect mathematical representation but rather representation based primarily, but not entirely, upon population.³⁶

The decision was upheld by the British Columbia Court of Appeal and the Supreme Court of Canada refused to hear a further appeal. The judges were effectively saying that it was perfectly constitutional for the federal parliament to decide that some provinces could receive proportionately more representation than others. It is not at all clear that the reasoning behind this decision is in fact consistent with our constitutional history.

THE CHARTER, CARTER AND RAÏCHE

The Canadian Charter of Rights and Freedoms, which is part I of the Constitution Act of 1982, states, in Section 3, that "every citizen of Canada has the right to vote in an election of members of the House of Commons." Before the Charter, there were no constitutional provisions relating to voting in Canada. This meant that there was no mechanism for anyone to launch a constitutional challenge related to the electoral system. It is important to note, however, that Section 3 does not enable anyone to challenge the way Commons seats are allocated among the provinces, because the Charter does not over-ride other parts of the Constitution of Canada and Section 52 is clearly part of the Constitution. On the other hand, the

Charter did throw open the door for anyone to challenge the fact that the populations of electoral districts within particular provinces sometimes vary enormously.

The Supreme Court of Canada has heard only one challenge of this kind. A group of urban residents in Saskatchewan represented by Roger Carter launched a challenge against a proposed redistribution of seats in the provincial legislature that would have allotted different population levels for northern, rural and urban districts. The Saskatchewan Court of Appeal ruled that although special treatment was acceptable for northern constituencies, the differences between urban and rural constituencies in the south were not justifiable. The province appealed to the Supreme Court, which ruled in 1991 that the outcome of the Saskatchewan redistribution of seats was acceptable because Section 3 of the Charter guaranteed "effective representation" and "relative parity of voting power," not "absolute equality of voting power."³⁷

The implications of the Carter case are far from clear.³⁸ The decision suggests that any move to redistribute seats to give voters equal levels of representation, or as the court put it, "parity of voting power," might actually be unconstitutional if it ignored other factors that could be considered essential to "effective representation." Such an argument was advanced in New Brunswick in 2004 when residents of three parishes in the Bathurst area, including one named Carmel Raïche, objected to being moved from the predominately francophone electoral district of Acadie-Bathurst to the predominately anglophone district of Miramichi. The move

The judges were effectively saying that it was perfectly constitutional for the federal parliament to decide that some provinces could receive proportionately more representation than others.

by the commission in New Brunswick was aimed at reducing the difference in the size of the populations of the two districts. Without the changes, the population of Acadie-Bathurst was 14 per cent above the provincial average for an electoral district, while Miramichi was 21 per cent below. Although the Federal Court of Canada ruled against the claim that Charter rights had been violated in the Raïche case, it also ruled that the commission had violated the 1985 amendments on electoral boundaries by not giving enough consideration to a community of interest.³⁹ Later, the Parliament of Canada followed the court's lead by passing a law reversing the New Brunswick commission's original decision.⁴⁰

The effect of the Raïche case on the work of such commissions is likely to be far more profound than the more abstract and ambiguous notion of "effective representation" that was articulated by the Supreme Court in the Carter case. In the Raïche case, the Federal Court quoted extensively from transcripts of a public hearing held by the New Brunswick commission on the question of electoral boundaries in the Bathurst area. During the hearings, a member of the commission candidly explained that it was trying to ensure that the populations of the province's electoral districts did not deviate from the average by more than 10 per cent. In its ruling the court stated:

The Court finds that the Commission has not interpreted the Readjustment Act in the spirit of the Act. First, while the Commission was entitled to decide that, as a general principle, the variance between electoral districts should not be more than ten percent, it did not consider whether there were electoral districts where, having regard to the community of interest in the region or its geographic features, it would be desirable to depart from the general principle that the variance should not be more than ten percent.⁴¹

Although language issues were also significant in the Raïche case, the statement quoted above is

likely to force the commissions to be much more cautious about trying to implement the principle of representation by population.

THE LORTIE COMMISSION AND THE MILLIKEN COMMITTEE

After Carter but before Raïche, these issues were extensively examined in 1991 by the Royal Commission on Electoral Reform and Party Financing chaired by Pierre Lortie and in 1994 by the House of Commons Standing Committee on Procedure chaired by Peter Milliken.

The Lortie commission correctly predicted that under the formula for allocating seats introduced in 1985 only Ontario, Alberta and British Columbia would have their total number of seats "determined solely on the basis of population" and that "all three would be proportionately under-represented in relation to the other provinces."⁴² The Commission also observed that the formula's "guarantee that no province's seats will ever fall below the number it had in 1976 cannot be justified with reference to any principle of representation."⁴³ The Lortie commission recommended "a return to our roots" with a new formula that would:

- 1 Assign Quebec 75 seats and assign the other provinces seats on the basis of the ratio of their population to the population of Quebec; and
- 2 If necessary, assign additional seats to the provinces to ensure that:
 - i the senatorial floor is respected;
 - ii no province loses more than one seat; and
 - iii no province has fewer seats than a province with a smaller population.⁴⁴

The Lortie formula would have produced a House of Commons with 319 members if it had been adopted after the 2001 census. Instead, the existing formula was used, producing a 308-member House.⁴⁵

In its careful discussion of the Carter case, the Lortie commission noted that the Supreme Court had “re-affirmed that ‘relative parity of voting power’ is the first condition of ‘effective representation (148).”⁴⁶ The commission went on to recommend that electoral boundaries commissions be required to create districts with populations that do not deviate by more than 15 per cent from the provincial average. It added that the population numbers should be based on the number of

The relative weight of a single vote has never been more unequal among the provinces.

registered voters in the province at the last federal election rather than on the province’s total population. This number, the commission added, should be divided by the number of seats allocated to the province following a census.⁴⁷ The Lortie commission has been the only authoritative voice to strongly argue in favor of representation by population in the aftermath of the Carter decision.

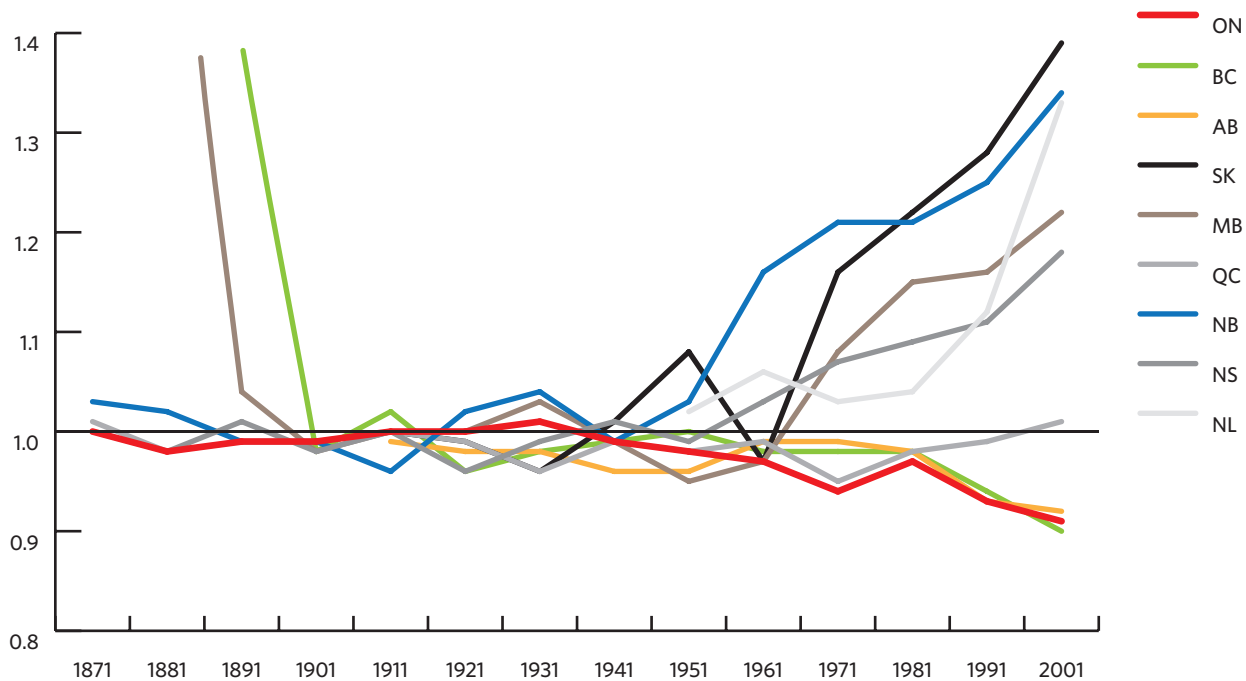
A few years after the Lortie commission report, the Milliken committee was charged in April 1994 with preparing a new bill on the redistribution of seats.⁴⁸ Its deliberations and report laid bare the various political forces that are at play around this issue.⁴⁹ The committee did not accept the Lortie formula for allocating seats among the provinces, arguing that it did not reduce the inequalities caused by the senatorial floor provision.⁵⁰ Because members could not agree on anything else, the committee accepted the formula established by the Representation Act of 1985. It recommended that parliament put together a list of remote regions that would not be affected by the redistribution process while requiring the rest of the districts in the country to have populations that fall within plus or minus 25 per cent of the provincial quota. The general effect of the Milliken committee’s plan was to dilute the concept of representation by population.⁵¹ The House of Commons based Bill C-69 on this plan, but the

bill died when parliament was prorogued in February 1996.⁵² It is clearly no accident that the politically independent Lortie commission had recommended “a return to our roots” by upholding the principle representation by population, while the Milliken committee of MPs focused on trying to accommodate the political problems caused by this principle.

THE CURRENT SITUATION

The redistribution that followed the 2001 census went remarkably smoothly. For the first time since the 1960s, the process was finished on schedule without any statutory suspensions. On the other hand, three years later, the Raïche case led to the amendment of electoral boundaries by Parliament after they had been determined by a federal commission appointed especially for this purpose.

More importantly, all is not well with the principle of representation by population. Table 1 shows conclusively that the relative weight of a single vote (using the total population of provinces as a measure) has never been more unequal among the provinces. The Table shows a ratio for each province in confederation at the time of each census and for the territories as a whole for the decades in which they had Commons representation. The ratio is constructed by dividing the total number of Commons seats allocated as a result of the rules in place for that decade by the total population of Canada. This number becomes the “national quotient,” a concept that has never existed in any of the formulae. For each province and for the territories as a whole, the total population is divided by the seats allocated to produce a provincial (or territorial) quotient. The national quotient is then divided by each provincial quotient to produce the ratios contained in the Table. A ratio for any province or territory of 1.00, as for British Columbia in 1951, means that, if an election had been held at the time of the census in 1951, and if the ratio of voters to population was constant across the country, a vote in an average-sized electoral district in British Columbia would have had the same relative value

TABLE 1. RELATIVE WEIGHT OF A SINGLE VOTE BY PROVINCE

* PEI and Territories are not included in this table because of their extreme deviations.

as the average weight of a vote in the entire country. This objective is surely part of what is meant by the principle of representation by population. It is what George Brown meant by the concept, and it is the principle enshrined in the Constitution through the commitment to the “proportionate representation of the provinces”. By this measure, a vote in British Columbia in 2001 was worth only 90 per cent of the national average; the story in Ontario and Alberta was very similar. In Saskatchewan, a province that is not even protected by the senatorial floor, a vote was worth almost 40 per cent more than the national average and 54 per cent more than a vote in British Columbia. These startling figures can be produced without even mentioning the traditionally distorting cases of little PEI or the sparsely populated northern territories. Table 1 illustrates how these figures have evolved since 1871 for each province, with the exception of PEI. Table 2 (see page 14) presents exact ratios including results for PEI and the Territories.

In the Campbell case, the courts of British Columbia rejected the argument that the 1985 amend-

ments to the formula for allocating seats among the provinces had affected “the principle of the proportionate representation of the provinces.” A glance at the seat redistribution for 1981 suggests that there was some justification for this position. But if the courts had foreseen the results that this same formula would produce in 2001, could they have possibly arrived at the same decision?⁵³ It seems unlikely.

RECENT PROPOSALS

In 2007, the current federal government introduced yet another bill⁵⁴ aimed at revising the seat allocation formula. Although Bill C-22 was not passed, its main provisions are significant because of the controversy they provoked by treating the concerns of British Columbia and Alberta differently from identical concerns raised by Ontario.

The formula in the bill would begin by dividing the total population of the provinces by 292, which was the number of seats assigned to all the provinces in the redistribution that followed the 1981 census.

This number would then be divided into the population of each province at the 2011 census. The number of seats that the provinces were allocated in the 1980s would be used as a floor. If the new formula ended up assigning any province fewer seats than it had in the 1980s, it would receive extra seats to bring it up to that minimum. Additional seats would then be allocated to BC and Alberta so that they would “be as close as possible to the... quotient of Quebec without being below it.”⁵⁵ There

Allowing provinces to lose seats below the number allocated to them in the 1970s would deal with both problems: a House that became too large and the possible underrepresentation of Quebec.

would be no similar top-up for Ontario. The main effect of this provision would be to give Alberta and British Columbia the same per capita representation as Quebec, leaving Ontario as the only province to which the original calculations would apply. For each future redistribution, these original calculations would begin by using the number of seats allocated to the provinces 30 years earlier (so, for instance, for 2021 the number would be 298; for 2031, 305). Not surprisingly, the Ontario government was vigorous in its opposition to this new proposal.⁵⁶

There are now indications that the federal government will soon propose a new formula that treats Ontario in the same way as BC and Alberta.⁵⁷ It is appropriate to treat the concerns of the three provinces in the same manner. But there are two major problems with such a solution. The first is that it would dramatically increase the size of the House of Commons. There is virtually no political support for such an increase.⁵⁸ As a Reform Party MP in the 1990s, the current prime minister, Stephen Harper, argued that the size of the House should be reduced. Back then, he supported a plan that would have lowered the number of seats for

all provinces except for PEI and New Brunswick, which are protected by the senatorial floor.⁵⁹

An even more serious flaw with this solution would be the under-representation of Quebec in relation to the rest of Canada. As we have seen, the 1985 formula has serious problems but, by accident rather than by design, it tends to produce a result in which Quebec is neither underrepresented nor overrepresented. Any formula that holds Quebec constant while adding seats to provinces that are currently underrepresented (Ontario, British Columbia and Alberta) will cause Quebec to lose electoral strength regardless of whether its population growth rate is above or below the national average. Such a course of action is indefensible

The only way to deal with these problems is to allow provinces to have fewer seats than had been allocated to them by the amalgam formula in the 1970s. In other words, they should lose seats if there is a relative decline in their population. Since Confederation in 1867, provinces have lost seats in the House of Commons on 22 separate occasions as a result of eight different censuses.⁶⁰ But no province has lost a seat since the 1970s, after Parliament amended Section 51 of the Constitution Act of 1867 to prevent such losses. There is nothing in the entrenched constitution, or in the conventions associated with it, that prevents Parliament from enacting a formula by which seats could once again be lost. Allowing provinces to lose seats below the number allocated to them in the 1970s would deal with both problems: a House that became too large and the possible under-representation of Quebec.

Once it is agreed that provinces can and should lose seats, then finding a new formula is not so difficult. The Lortie commission was a good starting point, although one would have to hope that Quebec's population growth rate would be roughly the same as Canada's in the future in order to prevent the House of Commons from ballooning in size. A safer approach for those more concerned with the size of the House would be to choose a starting point

for calculating seat allocations and then simply add senatorial floor seats as required. Using the results of the 2001 census, a starting number of 297 seats for all the provinces (plus three for the territories) would have produced a House of Commons with 308 seats, but the distribution, as shown in the final row of Table 2, would have been significantly different from what we have now.

CONCLUSION

Canada was founded on the principle of representation by population. Since then, the principle has gradually eroded. But this can be reversed. The only constitutionally entrenched source of erosion is the so-called senatorial floor established in 1915 and included in the Constitution Act of 1982 among the items that require the unanimous consent of all the provincial legislatures and Parliament to be amended. Beyond that, the sources of erosion have all been political choices. These can be undone. The larger the House of Commons, the less distorting is the effect of the senatorial floor. If the House of Commons were expanded to 890 members, PEI could keep its four seats and not be overrepresented

at all. Naturally, this is a highly improbable development, so we can be pretty sure that we will never again have perfect representation by population as we did back in 1911. But there is no justifiable reason for introducing additional distortions, with the one common sense exception that no province should have fewer seats than a province with a smaller population.

The Fathers of Confederation adopted the so-called “One Twentieth” clause so as to prevent the seat count of certain provinces from dramatically declining. They made a mistake. Rather than protecting the seats of the smaller provinces, as they intended, the clause ended up protecting Ontario, the most populous province in the country. This ill-fated clause was jettisoned in 1946, a triumph of common sense. It is now time to dispense with the rule that no province can have fewer seats than it had in the 1970s. By doing so, it would be possible to maintain a reasonably sized House of Commons and protect the principle of representation by population at the same time. Those were, after all, the objectives of George Brown and his colleagues at the time of Confederation. *MC*

TABLE 2. RELATIVE WEIGHT OF A SINGLE VOTE BY PROVINCE

YEAR	NL	PEI	NS	NB	QB	ON	MB	SK	AB	BC	TERRITORIES
1871			1.00	1.03	1.01	1.00	2.92			3.05	
1881		1.13	0.98	1.02	0.98	0.98	1.65			2.49	
1891		1.04	1.01	0.99	0.99	0.99	1.04			1.39	0.92
1901		0.97	0.98	0.99	0.99	0.99	0.98			0.98	5.83
1911		0.99	1.00	0.96	1.00	1.00	1.00	1.00	0.99	1.02	2.05
1921		1.62	0.96	1.02	0.99	1.00	1.00	0.99	0.98	0.96	2.92
1931		1.92	0.99	1.04	0.96	1.01	1.03	0.96	0.98	0.98	3.13
1941		1.90	1.01	0.99	0.99	0.99	0.99	1.01	0.96	0.99	2.66
1951	1.02	2.15	0.99	1.03	0.98	0.98	0.95	1.08	0.96	1.00	4.21
1961	1.06	2.64	1.03	1.16	0.99	0.97	0.97	0.97	0.99	0.98	3.67
1971	1.03	2.74	1.07	1.21	0.95	0.94	1.08	1.16	0.99	0.98	4.31
1981	1.04	2.75	1.09	1.21	0.98	0.97	1.15	1.22	0.98	0.98	3.75
1991	1.12	2.80	1.11	1.25	0.99	0.93	1.16	1.28	0.93	0.94	3.18
2001	1.33	2.88	1.18	1.34	1.01	0.91	1.22	1.39	0.92	0.90	3.15
2001 Seats	7	4	11	10	75	106	14	14	28	36	3
Seats using proposed formula...	6	4	10	10	72	113	11	10	30	39	3
...ratio with 2001 census	1.14	2.88	1.07	1.34	0.97	0.96	0.96	1.00	0.98	0.97	3.15

ENDNOTES

1. In G.P. Browne, ed. *Documents on the Confederation of North America* (Toronto: McClelland and Stewart, 1969), p.111.
2. Matthew Mendelsohn. *Some are More Equal than Others: Canadian Political Representation in Comparative Context*, Mowat Centre Research Note, March 2010. Available at <http://www.mowatcentre.ca/research-topic-mowat.php?mowatResearchID=10>
3. Brown, *Documents on the Confederation of North America*.
4. Starting in the 1960s, federal electoral boundaries within each province have been drawn by independent electoral boundaries commissions operating under the authority of the *Electoral Boundaries Readjustment Act*. Some of the most important constitutional issues facing these commissions will be addressed toward the end of this paper. The electoral boundaries commissions are charged with implementing representation by population within each province but recent developments in the courts have emphasized other factors.
5. As quoted in Norman Ward, *The Canadian House of Commons: Representation*, 2nd ed. (Toronto: University of Toronto Press, 1963), p.20.
6. *Ibid.*, p.73.
7. *Ibid.*, p.106.
8. Numbers of seats for each province in the House of Commons, as stated throughout this paper for the period 1867 to 1996, come from Canada, Elections Canada, *Representation in the House of Commons* (2002), p.5. Population figures for each province from 1851 to 1976, come from Canada, Statistics Canada, "Series A2 – Population of Canada, by Province, Census Dates, 1851 to 1976."
9. Ward, *Canadian House of Commons*, pp.23-4.
10. *Ibid.*, p.25. It should be noted that on the surface it is not clear why Manitoba's representation was increased to five members in 1882, because according to the size of its officially reported 1881 population in proportion to Quebec's, it should have received only three. The 1881 federal census did not include in Manitoba's population the approximately 25,000 people that had been added since the taking of the census, most of whom were living in a part of the Northwest Territory that was joined to Manitoba in that same year. Manitoba requested the federal government to consider such additional population as it prepared for the redistribution following the 1881 census. In reply, the federal cabinet stated:

The question of what might be called the "Territorial" claim to an additional member is difficult to deal with, but the Committee of Council [cabinet] advise that the Government of Manitoba be informed that that the Dominion Government will give it careful consideration, with a desire to meet, if possible, the wishes expressed on behalf of Manitoba by its delegates (Canada, *Sessional Papers*, No.82 (1882).

Later that same year, the Parliament of Canada approved *An Act to Readjust Representation in the House of Commons*, the preamble of which stated that by the census of 1881 and in accordance with the BNA Act, "the Province of Ontario is entitled to four additional members in the House of Commons and the Province of Manitoba, by its present population, to one additional member...." This was the only time in Canadian history that a province was allocated seats "by its present population" instead of by the official population figures for that province as reported in the decennial federal census. In any event, by the time of the next redistribution following the 1891 census, Manitoba was not treated in any special way.
11. Ward, *Canadian House of Commons*, p.25.
12. *Ibid.*, p.24.
13. *Ibid.*
14. *Ibid.*, p.26.
15. *Ibid.*, p.24.
16. *Ibid.*, p.41.
17. *Ibid.*, p.52.
18. *Ibid.*, p.53.
19. R. MacGregor Dawson, *the Government of Canada*, 5th ed. revised by Norman Ward (Toronto: University of Toronto Press, 1970) p.109.
20. Ward, *Canadian House of Commons*, p.54, fn1.
21. Norman Ward, "The Redistribution of 1952," *Canadian Journal of Economics and Political Science*, 19 (1953), 342-3.
22. The exact text is contained in Section 91 (1) of the *Constitution Act*, 1867.
23. Canada, House of Commons, Special Committee on Redistribution, *Minutes of Proceedings and Evidence*, No.1, April 30, 1952, p.29.
24. Andrew Sancton, "The Application of the 'Senatorial Floor' Rules to the Latest redistribution of the House of Commons: The Peculiar Case of Nova Scotia," *Canadian Journal of Political Science*, 6 (1973), 58.
25. Andrew Sancton, "Eroding Representation by population in the Canadian House of Commons: The Representation Act, 1985," *Canadian Journal of Political Science*, 23 (1990), 442-3.
26. Prior to the 1960s, the boundaries of electoral districts were drawn by committees of the House of Commons. For details, see Ward, *Canadian House of Commons*, ch.2-3.
27. John C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (Montreal and Kingston: McGill-Queen's University Press, 2001), pp.58-62.
28. For graphic evidence, see *Ibid.*, p.238.
29. For a comprehensive account of the operation of the commissions, see *Ibid.*
30. Canada, Chief Electoral Officer, *Electoral Boundaries Readjustment Act*, 1993 consolidation, Section 15 (1).
31. *Ibid.*, Section 15 (2).
32. Sancton, "Eroding," 445-6.
33. Canada, Department of Justice, *The Amendment of the Constitution of Canada*, 1965, p.37.
34. *Ibid.*, p.38.
35. Thomas R. Berger, lawyer for the plaintiffs, as quoted in Sancton, "Eroding," 449.
36. The Chief Justice of British Columbia, as quoted in *Ibid.*, 450.
37. As quoted in Courtney, *Commissioned Ridings*, p.159.
38. *Ibid.*, 160-71.
39. *Raiche v. Canada* (Attorney General) (F.C.), 11 May 2004.
40. Canada, *An Act to change the boundaries of the Acadie—Bathurst and Miramichi electoral districts* (2005).
41. *Raiche v. Canada*, para.69.
42. Canada, Royal Commission on Electoral Reform and Party Financing, *Final Report*, Vol.1, *Reforming Electoral Democracy*, (Ottawa, 1991), p.129.
43. *Ibid.*, p.131.

44. Ibid., p.135.
45. Carmen Moreau-Vena, "Federal Representation 2004: Redistribution Following the 2001 Census," *Electoral Insight* 4-2 (October 2002), 3.
46. Canada, *Reforming Electoral Democracy*, p.148.
47. Ibid., p.162.
48. For background, see Courtney, *Commissioned Ridings*, pp.131-2 and 147.
49. See especially, the minority report from the three Reform Party members, one of whom was Stephen Harper in Canada, House of Commons, Standing Committee on Procedure and House Affairs, *Minutes of Proceedings and Evidence*, Issue No.33 (25 November, 1994), 37-40.
50. Ibid., 6.
51. Ibid., 8-10.
52. Courtney, *Commissioned Ridings*, p.147.
53. Russell Alan Williams, "Canada's System of Representation in Crisis: The '279 Formula' and Federal Electoral Redistributions," *American Review of Canadian Studies*, 35-1 (Spring 2005), 99-134. For data showing that the voting strength of visible minorities is reduced by the current mechanism for allocating seats among the provinces (and by other factors), see Michael Pal and Sujit Choudhry, "Is Every Ballot Equal? Visible-minority Vote Dilution in Canada," *Choices*, 13-1 (January 2007), 1-30.
54. Canada, House of Commons, *An Act to amend the Constitution Act, 1867 (Democratic representation)*.
55. Ibid., section 3.
56. Keith Leslie, "Parliamentary representation: McGuinty won't retreat on demand for seats," *The Globe and Mail*, 22 November 2007.
57. Canada, *Speech from the Throne*, March 2010.
58. For an argument that the size of the House of Commons should be increased, see John C. Courtney, "the Size of Canada's House of Commons: An Assessment of the Implications of a Larger House of Commons," in Peter Aucoin, ed. *Institutional Reforms for Representative Government*, Volume 38 in the series of studies commissioned as part of the research program of the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985), pp.1-39.
59. See fn.45 above.
60. Calculated from Canada, *Representation in the House of Commons*, p.5.

About the Author

Andrew Sancton is a Professor of Political Science at the University of Western Ontario where he writes frequently on urban government and electoral redistribution. He is the author of *The Limits of Boundaries: Why City-regions Cannot be Self-governing*, one of five books shortlisted for the 2009 Donner Prize for the best book on Canadian public policy. He has served three times as a member of the federal Electoral Boundaries Commission for Ontario.

About the Mowat Centre

The Mowat Centre for Policy Innovation is an independent, non-partisan public policy research centre located at the School of Public Policy and Governance at the University of Toronto.

The Mowat Centre undertakes collaborative applied policy research and engages in public dialogue on Canada's most important national issues, and proposes innovative, research-driven public policy recommendations, informed by Ontario's reality.

We believe a prosperous, equitable and dynamic Canada requires strong provinces, including a strong Ontario, and strong cities.

Visit us at www.mowatcentre.ca



School of Public Policy & Governance
UNIVERSITY OF TORONTO