

Elections and Electoral Rules in a Unicameral Universe: A Note on the Context of Canadian Electoral Law

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Canada is an old democracy in the sense that it has a continuous history of some form of representative democracy under the same governing regime since 1867; if colonial self-government is included, the period can be extended back to the 1840s. This is much longer than most European countries for whom revolution, conquest, war and regime change have created major discontinuities in their experience of representative government. Such a long period of constitutional continuity makes the changes that have occurred in the nature and scope of popular representation in Canada of continuing comparative interest. In addition, Canada's commitment to plurality voting puts it unusual among representative parliamentary democracies, especially as it appears that Canada is entering a period where there is no longer settled acceptance of the long standing dominance of first past the post voting. This paper surveys some of the features which have characterised Canada's electoral history and the factors which have recently made electoral reform an issue of public debate.

Evolution

It is not suggested that the evolution of Canadian electoral law should be studied for Canadian triumphalist purposes, but because non-Canadians should be aware that Canada is an exceptionally interesting case for studying electoral change. What began as an electoral process with a limited franchise, grounded in local community politics and open to partisan manipulation, has become an electoral system with a universal franchise, dominated by the organs of mass politics and run by a bureaucratically impartial administration. John Courtney's excellent review

of this process (Courtney 2004) shows how each of the components of an electoral system have responded to changing assumptions about the nature of politics, the role of elections and the criteria for political participation. The franchise, for example, has moved from a base in property ownership through manhood suffrage in the 1880s to the enfranchisement of women by the 1920s and the final removal of discriminatory provisions against native peoples and racial groups by the 1960s.

Similar dramatic changes can be seen in the role of partisanship in the administration of elections. It might come a surprise to many Europeans to know the importance of community politics and the domination of regional elites in the design of electoral rules for national elections until well into the twentieth century. Similarly the early dominance of partisan concerns in the administration of elections is a theme that is at odds with the sober and impartial image currently projected by such agencies as Elections Canada. Courtney (2004) surveys the changing procedures for registering voters and running elections stressing the evolution from a highly partisan administration open to manipulation of the electoral process for partisan gain, to an impartial and professionally run operation. This has been matched by a similar shift in the procedures for the drawing of electoral boundaries from a partisan dominated process which generated malapportionment and gerrymandering to one controlled by independent boundary commissions with a commitment to implement fair representation (Courtney 2001).

While non-Canadians are familiar with the importance of language in electoral politics in Canada, the significance of religion is less well known, as is the range of institutional responses. Two member districts with plurality voting were used in some Maritime elections, for example, as a way of depoliticizing sectarian tensions by permitting two competing parties to each field a catholic and a protestant candidate (Courtney 2004, 108-9). This provides an alternative to the European solution of using proportional representation to accommodate cross-cutting partisan and religious differences. And, in terms of broad social and political change, the electoral history of Quebec before the 1960s might be seen as having much in common with European struggles for fair representation against urban under-representation and religious influence in preserving regional political fiefdoms (Courtney 2001, 44-56).

Nor are Canadian comparisons only of relevance to the European experience of elections and representation. To an Australian, the Canadian history of malapportionment is a comforting reminder that the temptations of drawing electoral boundaries for partisan benefit in a large

country with a major divide between urban and rural settlements is not something unique to Australia.

Federalism and Party

In addition to the national parliament, each of Canada's ten provinces and three territories has its own electoral history. As with other aspect of the political and governmental process, patterns of settlement, social and economic differences, and variations in attitudes to political activity and the role of the state all contribute to idiosyncrasies in the rules governing electoral politics and representation. A recent article by Harold Jensen (2004) analyzes some of the few cases in Canada of experimentation with electoral systems other than plurality voting; the use of the alternative vote in Alberta, British Columbia and Manitoba, and the single transferable vote for urban areas in Alberta and Manitoba. Jensen does an excellent job in looking at the comparative literature to examine hypotheses about the operation of these voting systems in Canada but his data would be equally useful for broader comparative studies about STV. The Canadian experience of STV, for example, was not included in a recent book surveying the use of STV in British derived parliamentary systems (Bowler et al. 2000).

It is easy to see the importance of variations in the use of electoral formulas but differences in the evolution of the franchise and electoral administration can have significant effects on representation. In this respect, Canada's national and provincial experience provides a wealth of evidence for testing hypotheses about the nature and effect of variation in electoral laws.

In any representative democracy, there is always the question of the interaction between the electoral system and party. This is well studied area and a large enough topic for a survey of its own, but several features make Canada an especially interesting case for comparison. The first is the long involvement of party officials and parliamentarians in many aspects of electoral administration. The second, and related characteristic is the highly decentralized nature of party activity in the selection of candidates in most parties for national and provincial elections. Paradoxically, the third feature is the current rule requiring the party leader to certify that a candidate is a member of the party.

These last two characteristics appear to work in highly contradictory directions; decentralized candidate selection disperses partisan influence to each electoral district, while endorsement by the leader is a brutal way of centralizing party control over candidates. This paradox can be partially resolved by regarding the power of the party leader to disendorse a candidate as an incidental consequence of an administrative requirement for the listing of a candidate's party affiliation on the ballot paper. Another consideration is that the leader's use of this power to withhold a party label from a candidate—effectively removing the party's endorsement—is something which can be used only sparingly because the leader has little control over party politics at the riding level. To deny a local selected candidate party endorsement may cripple the party's election campaign in that riding or may lead to the disendorsed candidate running as an independent. For this reason, Ken Carty uses the analogy of a party as a franchise (Carty 2004a; 2004b); candidates contest for the right to use the party franchise for their election in return for accepting party discipline in parliament should they be elected. Even so, the electoral rules which give the leader the power to disendorse candidates give party leaders in Canada a resource which would be the envy of party leaders elsewhere. It would be interesting to know what long term effect this Canadian electoral characteristic has on parliamentary politics and the operation of intraparty democracy in comparison with similar parliamentary democracies.

Plurality voting

The topic of electoral rules and parties in a comparative context always raises the issue of Duverger's law (Duverger 1959; Riker 1982). An unkind summary of the law is that a first past the post (plurality) electoral system using single member districts will produce a two party system, except where it doesn't. This summary is unfair to the subtleties of Duverger's work and to political scientists who have investigated its applicability over the last fifty years but, however interpreted, the Canadian electoral experience at the national level for most of that period is hard to square with the law unless the law is modified in a way which destroys its system wide effect (Gaines 1999).

The Canadian national elections are, in many respects, a case of the reverse—or the dark side—of Duverger's law. A party system will generate an electoral system which maintains it, with the subsidiary proposition that the party in power will, if it is able, manipulate the electoral

system to keep it in power. Canada is an example of governing parties' consistent choice of a plurality system, usually in single member districts, to achieve this end at in both national and provincial spheres. As Jensen (2004) shows, the rare examples of Canadian forays into other electoral territory were introduced by the governing party or parties, in large part, to limit an opposition party's gains in urban areas (Alberta and Manitoba), or to maintain a coalition against the insurgence of a left wing party (British Columbia). All achieved their goal (for Manitoba see Courtney 2001, 39-41), even the short lived use of the alternative vote (AV) in British Columbia for the 1952 and 1953 provincial elections. While the voting system backfired against the Liberal and Conservative parties who had initiated the adoption of AV, the system kept the Cooperative Commonwealth Federation (CCF) out of office even though the unintended beneficiary of the new system was WAC Bennett's Social Credit party (Elkins 1976).

All these electoral experiments were discarded once the governing party found that a reversion to first past the post would better suit its likelihood of electoral success. Nor, as Jensen (2004) points out, did these electoral systems appear to change the electoral party system or invoke coalition arrangements beyond those already in place before the adoption of the new system. Canada has been singularly attached to plurality electoral systems as the sole medium for achieving representative democracy in a way which has become unusual in parliamentary systems.

In comparison with Australia, Elkins (1992) has argued that the relative lack of experimentation with electoral formulas in Canada reflects a political culture with a notion of electoral fairness based on simplicity and a sense that confederation is too fragile a flower to risk the consequences of electoral reform. Australian governments, by contrast, have been willing to adopt complex electoral schemes because the federation is secure; their concept of fairness can be seen as a cover for electoral rules which gave partisan advantage to one or other of the two large party groupings which have dominated Australian electoral politics since the early 1900s. This explanation has a certain plausibility, but the persistence of plurality voting throughout Canada can, perhaps, be better explained by two defining characteristics of parliamentary government in Canada; unicameralism and the ambiguous place of electoral law in Canada's constitutional framework.

Unicameralism

Elective bicameralism did not find a home in the Canadian colonies. Where upper houses were created, they were nominated chambers and, with the exception of the Canadian Senate, have all been abolished. Unlike the Australian colonies, responsible government in Canada did not coincide with the need to check the powers of radically minded majorities in colonial lower houses or, in the case of the Australian Senate, to accommodate the strong demand for popular representation within the requirements for a federal union. As has often been remarked, the lack of a directly elected Senate in Canada has denied national politics a second forum for the representation of the electoral diversity which currently characterizes Canadian elections. Whether this has been a good or a bad thing, and whether change to a directly elected Senate would generate more costs than benefits, is a matter of debate well surveyed by David Smith (2003).

In another context Smith argues that a strong executive exercising power through the Crown has been a critical theme in Canadian constitutionalism and essential for the preservation of confederation (Smith 1995). As is clear from his work on the Senate (Smith 2003), he regards the dominance of the House of Commons and, by implication majority governments, as an essential component of Canadian parliamentary government. Plurality voting is an electoral system designed to enhance the odds of electoral contests producing governing parties with a majority of parliamentary seats and the ability to use the levers of executive power with few restraints. Moreover, plurality voting is rooted in the representation of territory permitting partisanship to be identified with benefits to particular regions. What better system for the operation of a polity characterised by wide territorial variation, decentralized parties and the reliance on government for the provision of many services?

The downside is that unicameralism places a double burden on the national electoral system—the maintenance of a parliamentary system and the representation of popularly expressed regional interests in the national parliament. In his seminal 1968 article, Alan Cairns argued that the single member plurality electoral system did not discharge these two functions adequately because of the distortion of party representation across Canada (Cairns 1968). He was less concerned with the representation of a diversity of partisan interests than the regional under-representation of the major parties. The first past the post system exacerbated federal strains by

exaggerating the partisan differences between regions in Canada.¹ Appointments to the Senate and to cabinet to reflect regional interests, and the use of regional ministers (see Bakvis 1991) were a poor second to the more balanced regional representation of partisan support that would, for example, follow from some system of proportional representation.

The Cairns argument also applies to the provinces. Without an upper house, representation of diverse interests within provinces must rely on a single electoral system. Much of the debate in the recent British Columbia Citizens' Assembly on Electoral Reform was over the design of an electoral system that not only represented partisan diversity but could accommodate strongly felt regional interests. Elective bicameralism permits citizen voters to be aggregated in ways which reflect differences in regional as well as partisan concerns, and allow the application of different electoral systems to respond to different sets of citizen choices. In addition, it has the potential to enhance the scope of parliamentary scrutiny and to give citizen voters an increased opportunity to signal their preferences to governments.²

By focussing on a single parliamentary forum, unicameralism accentuates the majoritarian propensities in parliamentary government and forces a head to head clash over partisan representation and all other bases for popular expression of voting preferences. Where the electoral system used in a unicameral system is a plurality system, the clash is accentuated by rival views of what should be the basic principle for parliamentary government; the representation of diversity or the creation of artificial parliamentary majorities. This conflict is even more acute where the parliamentary system is the British derived variant in which the executive dominance generated by the acquisition of a parliamentary majority is enhanced by largely unconstrained use of executive power.

Nothing illustrates this difference more clearly than the debate over the merits of the BC-STV system proposed by the BC Citizens' Assembly on Electoral Reform³ and put to the electors at a referendum on 17 May 2005. The supporters and opponents of proportional representation started from such different assumptions that they largely talked past each other. The supporters of BC-STV argued that an electoral system's primary goal should be to create a legislative assembly which fairly represented the pattern of partisan support in the community. If this

¹ This characteristic had been commented on by Frank Underhill in 1935; see Underhill (1967 [1935]).

² The evolution of upper houses in the Australian states to achieve these goals is surveyed in Stone (2002; 2005).

³ For details, see the Citizens' Assembly webpage at <http://www.citizensassembly.bc.ca/public>.

resulted in coalition or minority government, then so be it. Moreover, these parliamentary configurations could have benefits in requiring partisan accommodation in parliament and enhancing the parliamentary scrutiny of the executive; assumptions very much along the lines of what Lijphart (1999) has labelled consensus democracy.

Opponents took the position that the primary goal of the electoral system was to select a government. The greatest benefit of a plurality electoral system was that it generated a dichotomous choice between a government and an alternative government and that, without such a choice, government responsibility to the electorate was weakened. Far from being a disadvantage, electoral distortions which over-represented the governing party permitted thorough house-cleaning after the defeat of an incumbent government. Aberrations such as the gross over-representation of a governing party, or the election of a governing party with more seats but fewer votes than an opposing party, were infrequent and did not detract from the structural merits of a plurality electoral system. It is, perhaps, not a surprise that those who argued most strongly for this position were those with a majoritarian cast of mind, including former cabinet ministers and senior public servants.

The point of this section is not to argue the merits of these two positions to point out the close match between traditional Canadian views of parliamentary government, assumptions about the virtues of majoritarian government, and the first past the post electoral system. Canada has become an extreme case of dependence on the plurality electoral system for the maintenance of representative government.

Electoral rules and constitutions

Given the implications of the electoral system for the style of government, there is the question of the extent to which the electoral system is given constitutional recognition in Canada. This is important both the style of constitutionalism and for the procedures required for changing the electoral system. At the very least, electoral laws can be considered organic laws in the sense that they affect the functioning of a critical component of the government. Such laws can be given special status and require procedures for their amendment which are in addition to those needed for amending other laws. The assumption, for example, that the STV system recommended by the BC Citizens' Assembly on Electoral Reform required a referendum before

the government would replace the existing electoral system is an implicit recognition of the changing status of electoral laws. Canada has a mixed record in its treatment of electoral rules, both over time and in the categories under which electoral law has fallen.

The pattern for British colonial constitutions around the middle of the nineteenth century was that some aspects of the electoral system were often entrenched in constitutional documents in the sense that boundaries of electoral districts might be included in a schedule to the act setting up the legislative assembly. The *British North America Act 1867*, specified the electoral districts from which members of the House of Commons were to be elected (s.40) and the electoral districts for the new legislatures of Ontario and Quebec (first and second schedules). Colonial constitutional documents could require constitutional majorities—the support of a majority of the total membership of the assembly—for their amendment, and be reserved for approval by the Colonial Office in London. Such manner and form imitations no longer bind provincial constitutional documents and electoral provisions are now dealt with in separate federal and provincial legislation. Electoral rules may be organic laws, but Canadian governments have removed any special status they may have had so that law governing elections can be dealt with by the legislature as any other law. This is so even though there is much talk currently of the importance of gaining popular endorsement for electoral change through a process of quasi-constitutional amendment.

There are, however, two respects in which electoral laws in Canada are the subject of constitutional regulation. The first are constitutional requirements guaranteeing that a province will not have fewer members in the House of Commons than it has senators (inserted by the *British North America Act 1915*, s.2). This has the effect of over-representing the residents of some provinces at the expense of others, a process accentuated by a 1985 amendment to *Constitution Act* (s.51; for details and discussion see Courtney 2004, 50-53).

And section 3 of the *Canadian Charter of Rights and Freedoms* provides that '[e]very citizen of Canada has the right to vote in an election of members of the House of commons or of a legislative assembly and to be qualified for membership therein.' This section and others in the *Charter* which might be held to relate to the electoral process can be used by the courts to give constitutional sanction to some electoral rules. One of the best know is the Carter decision of the Supreme Curt of Canada (*Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 SCR 158) which declined to use section 3 of the *Charter* to limit the discretion that

governments have in varying the number of voters in electoral districts as long as there was a measure of 'effective representation'.⁴ But this process of judicial review is likely to become increasingly important as the courts are invited by litigants to modify the increasingly complex set of rules which regulate elections, the registration of parties, and election finance.

Aside from these constitutional limitations, electoral law is the exclusive concern of the legislative process and under the control of the government of the day in federal and provincial parliaments. There is, in other words, no ambiguity about the legal status of electoral law. But there is an increasing sense that electoral law is too important to be left solely to the legislature and the party in power. Reference to other institutions is increasingly accepted as a prerequisite for electoral change, whether this reference is to commissions of inquiry or citizens' assemblies, whose recommendations should be referred to the public at a referendum. From this perspective, the place of electoral law in the Canadian governmental structure is becoming increasingly ambiguous as it moves towards having a quasi-constitutional status. This raises the issue of how this development can be squared with the Canadian tradition of constitutionalism which stresses the dominance of a parliamentary executive in any matter requiring legislative change.

Canadian constitutionalism, elections and electoral reform

Before 1982, Canadian democracy could be seen as reflecting a balanced tension between polarized consensus and majoritarian elements. The extensive decentralization of power in the federal system was a strong consensus element offset by the concentration of governmental authority in an executive dominated parliamentary government supported by plurality voting and the prevalence of single party majority governments (note Sharman 1990). In the middle, the party system was subject to the demands of both region and parliamentary government. While there was some scope for judicial review of governmental action, most elements of the governmental process were not subject to constitutionally based checks through the courts.

The adoption of the *Canadian Charter of Rights and Freedoms* in 1982 radically changed the balance, moving Canada towards a larger component of consensus politics in the sense of an the increasing scope for minority veto of government action and the increasing requirement for judicial sanction for a wide range of public policy issues. After more than twenty years

⁴ A similar conclusion has been reached by the High Court of Australia (see Robinson 2003).

experience with the Charter, it is clear that Canadian constitutionalism now provides a more limited scope for mass politics and those institutions which rely on public endorsement through elections. It is hard not to see the Charter and the extensive judicial involvement in public policy as major contributors to a steady loss of legitimacy felt by governments and parliaments. Where it can be deployed, the politics of individual rights has trumped the politics of collective choice.

After a long delay, a response from the elected component of government is now emerging. It can be no accident that since 2004, five provinces have been considering the possibility of electoral reform, and the only direction of reform is to move away from plurality voting. By broadening the representative basis of legislatures through amendment to the electoral system, governments could be seen as having a stronger claim to speak for their communities and to 're-establish the trust of the public for their public institutions' (Premier Gordon Campbell, *Debates of the Legislative Assembly of British Columbia*, Wednesday 30 May 2005, vol. 14 (12) p.6356).

But there is some irony in the fact that any amendment of the electoral system in the interests of enhanced responsiveness must cross the hurdle of an executive dominated parliament. Since any move away from plurality voting is likely to cause major changes in the pattern of representation in the legislature, the governing party caucus is likely to view any such change with great apprehension. The life of governments is at stake not to mention the career aspirations of members of parliament. The divisive nature of the issue among parliamentarians explains why there is increased interest in the referendum; it has the double advantage of supplying public endorsement for change, should the referendum pass, and appearing to shunt the issue away from partisan politics. A cynic might also add, that a referendum also provides the opportunity to prevent change, particularly if the threshold for success is set sufficiently high.

But, to date the Canadian parliamentary and partisan traditions have trumped moves to change the status of electoral rules. There has yet to be a suggestion that the voters should make a choice at a referendum which would bind the government to accept a previously specified set of new electoral rules. Even if the recent BC referendum on BC-STV had passed the required 60 percent threshold, there was no requirement that the government accept it, only that it would introduce legislation along the lines of the recommendations of the Citizens' Assembly, and consider it. The conclusion is clear; electoral change to achieve a more responsive governmental

system requires more than just a change to electoral rules. It requires acceptance of changes to the pattern of Canadian constitutionalism.

In a country sated with issues of constitutional change, it would be a brave person who suggested that electoral change in the Canadian context implies constitutional change. And yet the strongest argument of those who support the current plurality system is essentially a constitutional one; that the nature of the choice offered to voters under proportional electoral systems will fundamentally alter the way in which governments are formed and operate. In a perverse way, this constitutional aspect may explain why the issue of electoral reform has appealed to those who want change to the style of politics; it is a way of achieving constitutional reform without appearing to engage in constitutional change.

Whatever the outcome of the current moves to consider electoral change, Canada remains an exemplar for the evolution of fair and impartial rules for the administration of elections, even if not for its adventurousness with electoral systems. Somewhat to the surprise of Canadians, it may now also be seen as an example of the tensions generated by the effects of rights based politics on the role of majoritarian representative institutions and parliamentary government. Sorting out its electoral systems may be one way in which Canada can harmonize these changes within its strong unicameral parliamentary tradition.

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