

**Time for a Second Electoral Boundary Revolution? Institutional Design and the *Fair Representation Act***

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I. Introduction

In December, 2011, Parliament passed the *Fair Representation Act* altering the formula for distributing seats in the House of Commons to the provinces. The new law adds 30 seats to the House, with 27 going to Ontario, Alberta and British Columbia to account for population growth and 3 to Quebec to ensure its proportionate representation is not diluted. The legislation was the fifth and final version of a new representation formula proposed by the Conservative government since coming to power in 2006. Its various iterations attracted significant political controversy along the way, with the government House Leader notably calling the Premier of Ontario the “small man of Confederation” for objecting to Ontario’s treatment in an earlier bill (CBC 2007). Canada’s decennial process of redistributing electoral districts among the provinces will proceed under this new formula. Boundary commissions have been struck to determine the new electoral map slated to be in place for elections from early 2014 onwards.

Given the redistribution and readjustment of electoral boundaries that is underway, and the new electoral map that will result,<sup>2</sup> it is an appropriate juncture to consider the Canadian approach to redistributing seats among the provinces. This paper has two main goals. The first is to investigate the implications of the *Fair Representation Act* for representation in the House of Commons. The second is to take a step back and to ask whether the current set of rules and institutions governing electoral boundary redistribution is working.

First, in examining the *Fair Representation Act* in light of demographic trends, the paper concludes that while it takes an important step toward voter equality the *Act* makes large deviations from the fundamental principle of representation by population not just possible, but likely in future redistributions. The politics surrounding the *Act* also indicates that partisan considerations may have played a role in the development of the eventual representation formula.

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<sup>2</sup> A note on terminology: Redistribution and electoral boundary readjustment are traditional Canadian terms. Redistribution means the allocation of the number of electoral districts to which each province and territory is entitled. Electoral boundary readjustment, or redistricting, refers to the establishment of specific geographic boundaries for electoral districts within a province.

Second, the paper considers whether it is time for a second electoral boundary revolution (Carty 1985). In 1964, Parliament's power to set electoral boundaries was removed and given to non-partisan, independent electoral boundary commissions, in order to end partisan gerrymandering. The electoral boundary revolution removed Parliamentary power over drawing district lines, but left it control over the representation formula. This section of the paper asks whether the institutional reform agenda launched by the electoral boundary revolution remains unfinished (Courtney 1988). Analysis of the history of redistribution as well as the *Fair Representation Act* indicates that Parliament's extensive discretion over the distribution of seats to the provinces generates a series of problems that undermine the fairness of the Canadian approach to designing electoral districts. Given the failings of the *Fair Representation Act* and the process of setting a new representation formula in Parliament, the paper considers whether institutional changes are necessary to complete the work that began in 1964. Moving Parliament's control over redistribution to an independent, non-partisan body, as was done for redistricting in 1964, is a possible reform that would create a veritable second electoral boundary revolution.

The paper proceeds as follows. Section II outlines the representation formula replaced by the *Fair Representation Act*, in order to show the genesis of the *Act*. Section III details the particulars of the *Act* and charts the implications of the new representation formula in future redistributions. Section IV engages with earlier versions of the *Act*, and the partisanship that surrounded them. Section V asks whether Parliament is the proper institution to hold power to set the representation formula in light of the *Act*, but also the history of electoral boundary redistribution. Section VI begins a preliminary sketch of a possible institutional alternative to Parliamentary discretion over redistribution.

## II. The 1985 Representation Formula

The *Fair Representation Act* replaced the so-called "279 formula" (Williams 2005) that had been in place since 1985. The *Act* is a response to the perceived flaws of the 279 formula as demographic shifts undermined the assumptions behind it. The 279 formula set a baseline of 282 seats, with three for the territories and the remaining 279 to be allocated to the provinces on the basis of population. Two special clauses were then applied to set floors on provincial representation. The Senate clause (s.51A of the *Constitution Act, 1867*), first introduced in 1915, guaranteed that no province could have fewer MPs than it had Senators, to the current benefit of Atlantic Canada. A second minimum guarantee of seats, the "Grandfather clause", was introduced in 1985. The Grandfather clause ensures that no province may have fewer seats than it had in 1976 or the 33<sup>rd</sup> Parliament and aids primarily Saskatchewan, Manitoba, and Quebec, with Nova Scotia and Newfoundland and Labrador also benefitting slightly.

The broad contours of the 1985 formula were modest increases to the size of the House of Commons every ten years to the fastest-growing provinces, while the

provinces with decreasing relative population were protected from losing seats. The limits of the 1985 formula were exposed by uneven population growth across the country (Courtney 2001: 172-183; Pal and Choudhry 2007; Sancton 1990; 2010; Williams 2005), which spurred the *Fair Representation Act*. Ontario, Alberta and British Columbia grew much faster than the Canadian average and several provinces experienced not just relative but absolute population decline between Censuses. The practical impact of the 1985 formula was that a minimum number of seats were guaranteed to the seven provinces other than Ontario, Alberta and British Columbia through the application of the special clauses. The House grew in size at each redistribution of seats under the formula (1987, 1996, and 2004), but not at a sufficient rate to account for population growth in the three fastest growing provinces. As a result, Ontario, Alberta and British Columbia grew increasingly under-represented in the House relative to their proportionate share of the Canadian population. The under-representation was concentrated in the fastest-growing regions within these provinces, namely urban and suburban areas such as the “905” belt surrounding Toronto, greater Calgary and Edmonton, and Vancouver and its suburbs, with a negative impact on visible minority voting power (Pal and Choudhry 2007; Mendelsohn and Choudhry 2011).

### III. The *Fair Representation Act*

The *Fair Representation Act* replaced the 279 formula, but the new procedure for allotting seats in the House operates along similar lines. The *Act* leaves untouched the seat complements of the less populous provinces propped up by the special clauses, but will increase the size of the House more dramatically than would have occurred under the 279 formula to keep up with population growth in Ontario, Alberta and British Columbia. The baseline of 279 seats for the provinces was removed, under the logic that it artificially capped the size of the House of Commons. The *Act* then adds seats to those provinces that were under-represented under the 1985 formula. Ontario receives fifteen new seats, British Columbia six seats and Alberta six as well. The additional seats bring the two western provinces to almost pure representation by population, with Ontario remaining marginally under-represented with 38.91% of the population and 36.12% of the seats. Eighteen new seats for Ontario would have been sufficient to reach population equality. Three new ridings were distributed to Quebec, as the increased size of the House meant that the province had a lower proportion of representatives than it did of the national population. The three new seats ensure proportionate representation for Quebec, with 23.22% of the population and 23.28% of the House.

**Table 1: Provincial Representation After 2011 Redistribution**

Province	# of Seats	% of Population	% of House ( <i>Fair Representation Act</i> )
Ontario	121	38.91	36.12
Quebec	78	23.22	23.28
British Columbia	42	13.31	12.54
Alberta	34	11.00	10.15
Manitoba	14	3.64	4.18
Saskatchewan	14	3.08	4.18
Nova Scotia	11	2.75	3.28
New Brunswick	10	2.20	2.99
Newfoundland and Labrador	7	1.49	2.09
Prince Edward Island	4	0.42	1.19

Source: Minister of State for Democratic Reform. 2011. "Backgrounder: *Fair Representation Act*."

The *Act* put in place a representation formula that harkened back to some extent to the amalgam method, which was in place from 1974 to 1985 (Courtney 2001: 25-26). Under the amalgam method, provinces were categorized according to their size (small, medium and large) and a different formula was applied to determine the representational entitlement of each sub-set of provinces. Quebec was given a fixed entitlement. Under the *Fair Representation Act*, there will be in effect three categories once again (Flanagan 2011).<sup>3</sup> Quebec will be proportionately represented, while the fast-growing provinces of Ontario, Alberta and British Columbia will be slightly under-represented, while the other six less populous or slower growing provinces would be over-represented due to the special clauses.

The assumption behind the new seats is that the independent, non-partisan electoral boundary commissions in charge of setting district lines within provinces will assign them to the fastest-growing, most populous regions where district size far outstrips the provincial average. According to the 2011 Census, for example, Oak Ridges-Markham has a population of over 228,000, far outstripping the national and Ontario averages. By adding districts to these areas, the commissions will be able to address the under-representation of the urban and visible minority voters that reside in these regions (Pal and Choudhry 2007).

The provisions of the failed Charlottetown Accord (Consensus Report on the Constitution 1992) having to do with representation have several similarities to the *Fair Representation Act*. Like the *Act*, the Accord would have kept minimum guarantees of representation for the less populous provinces, but increased the size of the House to keep up with uneven population growth concentrated in the three or

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<sup>3</sup> Flanagan refers to "three classes of provinces" but not does make explicit reference to the amalgam method.

four most populous provinces. Unlike the *Act*, the Accord would have ensured not just proportionate representation for Quebec, but a guarantee of 25% of the seats in the House. The Accord was incomplete on the subject of representation in the House, however, as it explicitly required further political negotiations on what it termed a “permanent formula” for electoral boundary redistribution (s. 21).

The search for an elusive “permanent formula” unfortunately did not end with the *Fair Representation Act*. While the *Act* moved much closer to representation by population for the redistribution based on the 2011 Census that is underway, the same demographic reality of uneven population growth concentrated in the largest provinces that undermined the fairness of the 1985 formula appears likely to hamper the new formula in future redistributions as well. The overall problem is that demographic projections indicate the size of the House will have to increase significantly in order to ensure representation by population if the guarantees of a minimum number of seats to the less populous provinces are to be maintained. In future redistributions, the formula implemented by the *Act* will not add a sufficient number of seats to ensure representation by population for the fastest-growing provinces.

The *Act* uses 111,166 as the quotient for determining provincial representation in the House (s. 6 (a)), rather than starting with a baseline of 279 seats as the earlier formula did. This population quotient is what is responsible for the added seats that were assigned to Ontario, British Columbia and Alberta. The result of using this quotient for the 2011 redistribution will be relatively close adherence to representation by population. For future redistributions, however, the quotient increases by the average rate of provincial population growth over the decade (s. 6 (b)). As the quotient increases, the fastest-growing provinces become entitled to fewer seats than they would if the quotient remained at 111,166. Using Statistics Canada medium-growth population projections, the House would increase by six seats in 2021. Ontario would receive two additional seats and British Columbia four, which would not be enough to keep up with population growth in those provinces. Ontario and British Columbia will be in short order under-represented once again. The average riding population size in Ontario, British Columbia and Alberta would expand in comparison to the other provinces.

A proposal by the Mowat Centre relating to an earlier version of the bill that became the *Fair Representation Act* suggested a permanent quotient of approximately 108,000 (the quotient under the bill at the time) would be preferable, as it would allow the House to increase sufficiently to keep pace with population growth in future redistributions (Mendelsohn and Choudhry 2011). The table below compares average riding sizes in 2021 between the *Fair Representation Act*'s formula and the alternative of adopting a permanent quotient of 111,166.

The table indicates that if our standard is the adoption of a “permanent formula”, then despite its important moves forward the *Act* has not succeeded. The average riding population in Ontario, British Columbia and Alberta is projected to be over 120,000 in 2021, and 110,000 in Quebec, compared to much lower averages in all other provinces. Making the quotient applied in the 2011 redistribution

permanent would alleviate some of these inequalities across provinces, as the four most populous provinces would all be around 110,000 per riding, on average. The tradeoff would be a larger House of Commons, as the permanent quotient would add twelve more seats to Ontario in the 2021 redistribution for example than the *Fair Representation Act* in its current form.

**Table 2: Redistribution in 2021 by Alternative Formulas**

2021	Redistribution by <i>Fair Representation Act</i>		Redistribution with Permanent Quotient of 111,166	
	Seats	Avg Riding Pop	Seats	Avg Riding Pop
CA	344	111,631	365	105,208
NFLD	7	74,871	7	74,871
PEI	4	39,750	4	39,750
NS	11	91,455	11	91,455
NB	10	79,970	10	79,970
QC	78	110,028	78	110,028
ON	123	121,698	135	110,881
MB	14	96,986	14	96,986
SK	14	76,729	14	76,729
AB	34	122,803	38	109,876
BC	46	122,335	51	110,341
NU	1	36,500	1	36,500
NWT	1	50,900	1	50,900
YK	1	38,700	1	38,700

Source: Statistics Canada, Medium Growth Scenario (M3), Year 2021/2022: “Population Projections for Canada, Provinces and Territories: 2009-2036” (2010).

The formula in the *Fair Representation Act* therefore will very likely lead to unsatisfactory results in the near future. The fairness of the distribution of seats to the provinces from 2021 onwards is in doubt. Further, the *Act* did not address the inequalities among urban and rural voters within provinces that result from the *Electoral Boundaries Readjustment Act* (the “EBRA”) (1985). The *EBRA* permits commissions to deviation by 25% above or below the provincial population average or even more in extraordinary circumstances (s. 15). Viewed in this light, the *Fair Representation Act* looks like a necessary step forward, but far from a permanent solution.

The *Act* also did not address the special clauses. In the 1982 package of reforms, the Senate clause was placed beyond the reach of the normal amending formula and unanimous consent between Parliament and the provinces is now necessary to alter it (*Constitution Act, 1982*, s. 41). Amending the Senate clause was therefore beyond the realistic reach of Parliament. The Grandfather clause,

however, can be repealed by ordinary legislation, as it was passed pursuant to s. 44 of the *Constitution Act, 1982*, which permits Parliament to unilaterally amend the representation formula contained in s. 51 of the *Constitution Act, 1867*. Seats granted by the Grandfather clause could have been redistributed from Quebec, Manitoba, Saskatchewan, Nova Scotia, and Newfoundland and Labrador to the more populous provinces. The legislation left the clause untouched, though expert testimony by Professor Andrew Sancton and the Liberal Party both proposed that it be repealed (Kirkup 2011; Dion 2011).<sup>4</sup>

Not addressing the Grandfather clause had some justification as its removal would have meant that some provinces that deserved to lose seats on a population basis would have, while those protected by the Senate clause would not, thus generating unequal treatment among the less populous provinces. Further, the redistribution of Grandfather seats was proposed by the Liberal Party in conjunction with a limit on the size of the House of Commons at 308. Once the Grandfather seats were redistributed in 2012, there would have been an insufficient number of other seats to redistribute in 2021 to ensure representation by population if the size of the House was capped and the Senate clause remained in place. The politics of taking seats from Quebec and directly giving them to Alberta, British Columbia and Ontario were also likely prohibitive, even if Quebec's proportionate share of seats in a 308-Member House without the Grandfather clause would be the same as in the larger House that will result from the *Fair Representation Act*.

The *Fair Representation Act* also did not reconsider the frequency of redistributions as a means of addressing uneven population growth. The decennial redistribution cycle undermines representation by population given current demographic trends. Populations may grow significantly over the ten-year period between redistributions, especially in the fast expanding suburbs surrounding the largest metropolitan areas. Concentrated growth of this kind is predictable and has troubling consequences for voter equality. Ridings in Brampton, Mississauga, and Markham around Toronto, for example, began as under-represented after the 2004 redistribution, but became even more so as their populations blossomed from around 110,000 to more than 200,000 in some cases. The result is that elections toward the end of the redistribution cycle are conducted with significantly less fair electoral districts than those that occurred earlier. The removal of anticipated population growth as a factor to be considered in redistricting in 1974 compounds this problem, as it is unclear if commissions may still take into account the likelihood of rapid population growth in a particular district (Courtney 2001: 66). The table below illustrates the rate of growth in the most populous ridings, which are concentrated around Toronto and Calgary.

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<sup>4</sup> The Liberal proposal would have redistributed the seats assigned by the Grandfather clause to the most populous provinces.

**Table 3: Most Populous Ridings, with Population Growth from 2001 to 2011 Census**

Riding	Riding Pop 2001	Riding Pop 2006	Riding Pop 2011	% Growth '01-'11
Brampton West (ON)	113,650	170,420	204,146	80%
Oak Ridges-Markham (ON)	111,275	169,645	228,997	106%
Vaughan (ON)	112,050	154,215	196,068	75%
Bramalea-Gore-Malton (ON)	119,890	152,700	192,020	60%
Halton (ON)	100,060	151,940	203,437	103%
Mississauga-Erindale (ON)	120,355	143,360	160,663	34%
Peace River (AB)	123,880	138,009	150,925	22%
Mississauga-Brampton South (ON)	120,355	136,470	147,096	22%
Whitby-Oshawa (ON)	112,805	135,890	146,307	30%
Nepean-Carleton (ON)	109,305	133,250	159,032	46%
Calgary West (AB)	103,900	132,155	149,593	44%
Thornhill (ON)	116,840	131,970	140,265	20%
Brampton-Springdale (ON)	116,770	131,795	149,130	28%
Scarborough-Rouge River (ON)	115,430	130,980	135,102	17%
Calgary-Nose Hill (AB)	100,030	130,945	152,363	52%

Source: Statistics Canada, 2001 Census, 2006 Census, 2011 Census.

More frequent redistributions are one way to address this problem. Redistributions every five years have been proposed as an alternative in Canada (Kerr and Mellon 2010) and been adopted in the United Kingdom (*Parliamentary Voting and Constituencies Act: s. 10*). Mandating redistributions twice per decade, however, would add greater instability for elected representatives and, most importantly, for voters. Canada's move to commissions was built on the Australian model (Courtney 2001: 57-73) and there are potentially new lessons to be learnt. Australia moved from ten year to seven-year redistribution cycles, but has additional provisions to trigger redistributions more frequently under specific conditions (69). If population growth requires the apportionment of further seats to an Australian state or if a third of the electoral districts in a state surpass a ten per



cent variance standard for more than two months, redistribution occurs earlier than every seven years. The Australian approach would appear to be a fair compromise between redistributions only every ten years or every five. Federal electoral districts could be scheduled for redistribution on a seven or ten-year cycle, but if particular conditions are met within a province or across the country, redistribution could occur more frequently. The *Fair Representation Act* unfortunately did not enter into this debate.

#### IV. Partisanship and the *Fair Representation Act*

The move to independent, non-partisan boundary commissions in 1964 was designed to end the practice of partisan gerrymandering by self-interested elected representatives. The commissions system has achieved that goal in the drawing of electoral boundaries within provinces. Redistricting by commissions, however, did not prevent the possibility that the distribution of seats among the provinces by Parliament could be subject to partisan calculations. The passage of the *Fair Representation Act* unfortunately furnishes some reason to be concerned that partisanship may remain influential at times in the establishment of representation formulas by Parliament.

The *Fair Representation Act* was the culmination of a series of bills placed before Parliament purporting to amend the representation formula. The government in 2007 in the 39<sup>th</sup> Parliament tabled Bill C-22, which operated under similar general principles to those eventually adopted by the *Act*. C-22 would have kept the entitlement of the smaller provinces constant, while redistributing additional seats to British Columbia (seven) and Alberta (five) sufficient for those two provinces to achieve representation by population. Ontario would have gained seats under C-22, but alone among the provinces would have been singled out to remain substantially under-represented. Ontario was to receive ten new seats, not the approximately twenty to which it was entitled by population. Liberal Premier Dalton McGuinty of Ontario requested twenty-one seats for the province (Delacourt and Benzie 2007).

The central argument offered for Ontario's continued under-representation by the government was that the size of the House would grow too large if more MPs were added to Ontario. This rationale was difficult to sustain, given the relatively small number of new seats that would have been required to achieve representation by population for Ontario. It also did not explain why Ontario alone was to have its representation below its proportionate share of the population. The relatively small size of membership in the Canadian House of Commons (308 prior to C-22) compared to other lower houses, such as the American House of Representatives (435 though this is fewer representatives per capita) or British House of Commons (650), further undermined the federal argument that there was a principled reason to treat Ontario as it did.<sup>5</sup> House Leader Peter Van Loan also indicated that Ontario had the most seats already, and therefore did not need more (Urquhart 2007), but

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<sup>5</sup> See Courtney 1985 for a discussion of the size of legislative bodies.

this flew in the face of the logic of representation by population that animated the bill in the first place.

There were arguably partisan motivations behind the electoral map proposed in C-22, as the Harper government was electorally less formidable in Ontario relative to British Columbia and Alberta in 2007. A partisan dimension to the bill was alleged by media commentators, including Ian Urquhart of the *Toronto Star* who wrote: “It is pretty obvious that the federal Conservatives are proposing to give relatively more seats to Alberta and B.C. in Bill C-22 because they fare well in those provinces while they continue to trail in the polls in Ontario” (2007).

While the Conservatives have performed better electorally in Ontario in subsequent elections, under-representing Ontario had potential partisan benefits for the government in 2007 and 2008. Any seat gains for Alberta were nearly automatic additions to the Conservative column. New seats added to urban British Columbia would not have been Conservative locks by any means, but the government would have been competitive in these races especially with Liberals, Greens and the NDP splitting the left of centre vote in the province. The Conservatives to that point had experienced much less electoral success in Ontario where distrust of the merged Conservative Party’s roots in the Western-populist Reform Party ran deep.

Further, provincial allies of the federal government governed British Columbia and Alberta, while former partisan opponents of several federal cabinet ministers led Ontario. Gordon Campbell’s conservative-leaning Liberal Party governed British Columbia and was friendly to the Harper government. With no provincial Conservative Party and the NDP as their major provincial opposition, the provincial Liberals under Campbell were conservative in orientation and linked politically to the federal Conservatives. The Progressive Conservative dynasty at the time was strongly supported by the federal Conservatives, who have deep roots in Alberta, the Prime Minister’s home province. The situation in Ontario was very different. Ontario’s Liberal Premier, Dalton McGuinty, was a frequent critic of the government and supporter of the federal Liberal Party, in which his brother was a prominent federal caucus member.

Unsurprisingly when faced with C-22, the Ontario Premier argued that the under-representation of Ontario alone among all the provinces would have been politically infeasible and constitutionally unjust (Delacourt and Benzie 2007). The federal government eventually relented, though not before the infamous “small man of Confederation” comment by the government House Leader in reference to the Premier. C-22 was withdrawn and replaced by new legislation ensuring representation by population for Ontario as well as British Columbia and Alberta. C-12 replaced the representation formula in C-22 with one that ensured representation by population for all three under-represented provinces in the upcoming redistribution. Parliament was dissolved before C-12’s passage, but C-20, the *Fair Representation Act*, introduced a formula that was fairer to Ontario. While the partisan excesses of C-22 did not make their way into the *Fair Representation*

*Act*, the debates surrounding the Act reveal the continuing danger of partisan gamesmanship around the representation formula.

#### V. Institutional Design and the *Fair Representation Act*

The *Fair Representation Act* amended the rules for distributing seats to the provinces, but did not address the underlying institutional structure that determines representation in the House of Commons. While the power to gerrymander specific electoral boundaries was taken away from Parliament in 1964, it retained the authority to redistribute seats among the provinces and to amend the legislation overseeing redistricting by the commissions. Despite the changes ushered in by the *Fair Representation Act*, the broad contours of the Canadian system remain consistent with those from 1964. Parliament designs the formula for assigning seats in the House, with the specific boundaries of districts decided by a commission in each province on an independent, non-partisan basis.

In this section I take a step back from immediate debates and ask whether this institutional division of labour has served us well? The reforms ushered in by the electoral boundary revolution of 1964 eliminated the worst forms of gerrymandering and have been justifiably lauded for doing so (Courtney 2001: 74). Parliamentary discretion over the representation formula, however, has been less satisfactory. Leaving Parliament the constitutional discretion to determine the representation formula raises two potential problems that came to light with the enactment of the *Fair Representation Act*: lack of adherence to representation by population, especially in future redistributions, and partisan influences on setting the particulars of the formula. A review of the history of redistributions suggests that these are not passing concerns, but enduring problems that stem from the fact of Parliamentary control over the representation formula.

Parliament has controlled the distribution of the number of seats in the House to each province since Confederation. The various representation formulas establishing the number of seats to which each province is entitled have generally followed an established pattern. Each representation formula has deviated from strict adherence to representation by population to favour the less populous provinces or those losing population. Accommodations have also been made with regard to Quebec, to ensure some minimum or proportionate representation. The shift from one formula to another has occurred along consistent lines. Uneven population growth and/or the prospect of certain provinces losing seats create pressure to reform the formula. A new formula is then adopted with specific outcomes in mind, which addresses demands for greater population equality, but also concerns for regional representation. The political exigencies of the day have generally taken precedence over the equality of voters in striking the balance (Courtney 1985: 686). Representation by population has often been attenuated in the face of other representational goals.

The *Constitution Act, 1867* created a bicameral Parliament with the lower house containing 181 members.<sup>6</sup> Section 51 established the principle of the proportionate representation of the provinces. Section 51 provided that the provincial seat counts would be redistributed following the 1871 Census and with each decennial census after that date. As with other approaches to redistribution that followed, the original representation formula used Quebec as a baseline for calculating future entitlements. Even in the original formula, there were compromises aiding those provinces with absolute population decline. The “one-twentieth” rule provided that no province could lose seats unless it had suffered at least a five per cent population drop.

The original formula was in place from 1867 to 1946, with the Senate clause being introduced in 1915. The immediate impact of the clause in 1915 was to aid Prince Edward Island, by locking in four MPs for a province whose entitlement had declined from six in 1873 to three in 1914 (Courtney 2001: 27 “Table 2.2”). The rule was developed for a specific purpose – protecting the entitlement of one province in the face of population decline. It has now become a general rule, however, that hinders the redistribution of seats from provinces with low population growth, stagnation or decline to those with expanding populations.

The 1867 bargain was altered fundamentally for the first time 1946. The new formula rejected the use of a Quebec baseline. The size of the House was set at 255, instead of a floating number that grows with provincial populations. The new rules were adopted because of the unfairness that some provinces with declining shares of the national population lost seats, while others did not, because of the operation of the one-twentieth rule. A significant imbalance between Ontario and Quebec’s seat counts would have resulted despite relatively equal populations if the 1867 formula remained in place over the decades (Courtney 2001: 24; Ward 1963: 53).

Just as the Senate floor modified the 1867 formula so as to over-represent the less populous provinces, uneven population growth across the country led quickly to the creation of a similar rule. The 1951 Census would have caused seats to be redistributed from the slower growing to the faster growing provinces. Harkening back to the “one-twentieth rule” from the first formula, the “fifteen per cent rule” was implemented to prevent provinces from losing more than fifteen per cent of its seat complement in one redistribution. Longer-term population patterns meant that despite these accommodations several provinces lost seats in the 1951 and 1961 redistributions and would have again in 1971.

Parliament’s response was to institute the “amalgam” method, the third formula since Confederation. The amalgam method went much further than earlier versions as it barred any province from losing seats, whereas previous rules had simply managed the threshold for losing seats or the extent of the decline. The provinces were divided into three categories based on their populations – large, medium and small. Quebec was guaranteed 75 seats regardless of population

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<sup>6</sup> For historical detail, I rely extensively here on Elections Canada 2007a and 2007b, and the summary of the history of redistributions in Courtney 2001: 23-28.

growth or decline. The large provinces would receive seats in proportion to Quebec's entitlement. The small and medium categories of provinces were governed by different rules entirely.

The result was differential treatment of the provinces based on arbitrary grounds. In particular, decoupling Quebec's entitlement from its actual population growth or decline between Censuses undermined the proportionate representation of the provinces. The amalgam method was the most obvious instance of a representation formula deviating from sound principles of redistribution in order to achieve political consensus at the time and reward political allies. Perhaps unsurprisingly, the amalgam method was in place only for the redistribution following the 1971 Census, before being replaced by the "279 formula" in 1985.

Redistribution formulas have been discarded and replaced generally whenever the less populous provinces would have lost a sufficient number of seats that their representatives in Parliament objected. The move to the amalgam method, for example, was made purely to prevent several provinces from losing seats as representation by population required. The one-twentieth rule and the fifteen per cent rule protected the entitlements of provinces that should have lost seats, while the Senate floor and the Grandfather clause continue to do so. At times other factors have intervened, notably the goal accommodating Quebec. Generally, however, revising the formula to reflect demographic shifts while preventing the full brunt of representation by population from being felt has been the norm.

The history of redistribution suggests that Parliament will be under significant pressure to favour the less populous provinces when amending representation formulas. Some of these are undoubtedly public-minded attempts to balance competing interests in a large, diverse federation, while at other times MPs from over-represented provinces have fought tooth and nail to ensure that their seats are not redistributed to under-represented provinces. Where governments and elected representatives maintain control over determining how seats are assigned, representation by population is at risk of being left by the wayside in the political battle.

The danger of partisanship infecting the representation formula, as appears to have been the case with C-22, is also not foreign to the history of redistributions. Redistricting was beset by the most naked and crass partisan gerrymanders prior to the introduction of commissions in 1964. There is little reason to believe that while the drawing of district lines was tainted by partisanship, the distribution of seats to the provinces was not. They were two sides of the same coin. The leading Canadian expert on electoral boundaries of the time, Norman Ward, wrote in the 1950s, "...the eight redistributions effected by the House of Commons since 1876 provide eight forceful arguments for having the work performed outside Parliament" (Ward 1949: 492). Ward's conclusion was based in large part on the back-room deals and partisan disputes that characterized both redistricting and redistribution. The narrative surrounding C-22 indicates that this history of partisanship remains relevant to today's politics of electoral boundary redistribution.

## VI. A Second Electoral Boundary Revolution?

Pressure to deviate from representation by population and potential partisanship seem to be ever-present in Parliamentary control over the representation formula and redistribution. The *Fair Representation Act* and the process surrounding it reflect this reality. Given these deficiencies, a number of questions present themselves. Are there alternatives to largely unconstrained Parliamentary discretion over the representation formula? What would an independent or non-partisan process look like? Moving away from the tradition of direct Parliamentary control over the representation formula would constitute a veritable second electoral boundary revolution to complement the adoption of commissions in 1964.

One option that requires no institutional re-arrangement is for the courts to constrain Parliament's discretion by ensuring greater adherence to proportionate representation in distributing seats among the provinces. Such a possibility presented itself in *Campbell v Canada (Attorney General)* (1987), in a constitutional challenge to the first redistribution under the 1985 formula. The representation formula was challenged pursuant to the guarantee in s. 52 of the *Constitution Act, 1867*, that, "The number of Members of the House of Commons may from time to time be increased by the Parliament of Canada, provided the proportionate representation of the Provinces prescribed by this Act is not thereby disturbed." The then-Mayor of Vancouver, Gordon Campbell, argued that the formula resulted in disproportionate representation of the provinces, including of British Columbia, and consequently ridings in Vancouver. Vancouver's representation was decreased from five to four MPs and the Mayor claimed that the city and province would have been entitled to more seats under the previous formula. The city claimed that the 1985 formula violated the guarantee of the proportionate representation of the provinces, thereby amending s. 52. The plaintiffs claimed that doing so required provincial consent through the amending formula and that Parliament had acted unconstitutionally in unilaterally adopting a new formula.

The British Columbia Supreme Court found that the Constitution requires "adherence to the principle but not the strict numbers of proportionate representation" (para. 51). The court concluded that looking at the history of redistributions, representation by population was not the Canadian tradition and that it was practically impossible. The Court of Appeal upheld the result in brief reasons and leave to appeal was denied to the Supreme Court (*Campbell v Canada* 1988). The Court of Appeal explicitly concluded that the Grandfather clause was not a violation of proportionate representation, even though it provides seats to provinces in excess of what their populations would otherwise warrant.

*Campbell* therefore stands for the dubious proposition that an explicit constitutional guarantee of "proportionate representation" does not prevent large deviations from provincial population equality. The result of *Campbell* is that Parliament's discretion to set the representation formula and distribute seats is largely unconstrained even by the requirement of the proportionate representation

of the provinces. There is no reason to believe that a court today would view a challenge to the *Fair Representation Act* on the same grounds any more favourably.

Absent changes in legal doctrine regarding proportionate representation, we should begin to consider whether there are alternative institutional arrangements that would be better at insulating the process from partisanship and upholding the value of representation by population. Rather than simply structuring or constraining Parliament's discretion, it may be time to consider removing redistribution from Parliamentary control, as was done for redistricting in the move to boundary commissions. One question is which institution could be delegated by Parliament with setting a representation formula.

A non-partisan, independent representation commission designed along lines similar to the electoral boundary commissions could be struck to achieve the same task that is currently carried out by Parliament. The commission could engage in public consultation across the country, produce a draft report, hear objections from MPs, and then generate a final report outlining the new representation formula and how it complies with existing constitutional standards overseeing redistribution, such as the proportionate representation of the provinces. A representation commission able to decide how or whether to update the formula distributing seats to the provinces, subject of course to constitutional constraints, would likely minimize the role of partisanship in the process. It is also less likely to be subject to the political constraints that throughout Canadian political history have compelled Parliament to deviate from representation by population. The necessary updates to any representation formula could be regularized on a ten year cycle, as it is for electoral boundaries, rather than being left to Parliament's whim to decide whether it will address the problem or not. While we can know with relative certainty that the increases in the size of the House after the 2021 Census will be insufficient, it will be up to Parliament then whether to amend the formula or not. It would be preferable for this reassessment to be mandated after each decennial Census.

Some power would remain in Parliament's hands under this proposal, as it does for redistricting. Parliament would still set framework legislation similar to the *EBRA* that would outline procedures to be followed and principles to be balanced in setting the representation formula. Parliament would still retain residual powers to alter the framework legislation or to legislate to delay the implementation of a new formula. Room for partisan mischief and deviations from representation by population would remain, but would be drastically minimized in comparison to the current approach. An improved process is likely to lead to preferable substantive outcomes.

One could object that redistribution and representation are fundamental considerations in a democracy that should be left to the elected representatives accountable to voters at elections. Yet the same argument could have been made about boundary commissions. The debate surrounding the *Fair Representation Act*, its impact on representation, and the history of redistribution suggest that Parliamentary control over the distribution of seats to the provinces is flawed. The

boundary commission system operates in a timely and efficient manner. A non-partisan, independent representation commission modeled on that process would seem able to be similarly useful.

A second objection to this proposal could be that partisan interference in redistribution is only a minor irritant now, in comparison to the excesses of gerrymandering eliminated by the move to commissions. It is correct that the partisan implications of C-22 were resolved in the *Fair Representation Act*. Given the incentives involved for elected representatives to distribute seats where it is politically advantageous to do so, however, the risk of expanded partisan interference remains a live one in future Parliaments.

A third objection could be that the deviations from representation by population in the various representation formulas over the decades are positive reflections of typically Canadian compromises between the values of regional representation and individual voter equality. This is the story animating the decision in *Campbell v Canada*. The *Campbell* version of Canadian political history, however, is overly rosy. It leaves out the tradition of gerrymandering prior to 1964, the self-interested role of elected representatives in redistribution, and the inequalities in individual voting power that have resulted from deviating from representation by population.

This paper has only begun to preliminarily sketch the contours of alternative institutional arrangements. The first electoral boundary revolution removed power over redistricting from Parliament. It may be time to consider whether Parliamentary discretion over redistribution should suffer the same fate.

## VII. Conclusion

The *Fair Representation Act* offered a modest move toward representation by population, but not one that will be enduring given continued uneven population growth and the missed opportunity to carry out other reforms. The partisanship displayed in earlier versions of the *Act* also raise troubling questions regarding the integrity of the process. A second electoral boundary revolution removing exclusive power over the representation formula from Parliament offers the possibility of a fairer democratic process. The first electoral boundary revolution diminished partisanship but also led to greater adherence to representation by population than the electoral maps gerrymandered by Parliament. The solution used in 1964 – devising a new institutional structure to perform a task that was formerly within Parliament’s ambit - would appear to have lessons for us today.

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