Constitutional Boundaries to Federal Electoral Reform

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The Government of Canada has been elected using the "first past the post" (FPTP) system for nearly 150 years, but that does not mean it must be forever so. The Liberal Party promised that the 2016 election would be the last under this system.[1] Newly elected Prime Minister Trudeau seems set to fulfill this promise, and has assembled a committee to consider alternatives. However, the *Constitution* sets out some electoral ground rules. If the federal government wishes to change the electoral system on its own without significant provincial support – which it has shown no indication of seeking – it must conform to these rules.

Proposed Electoral Systems

Under the current FPTP system, the country is divided into ridings, with a winner-take-all election held in each to select a representative to send to Parliament. The Conservative Party favours this system, as it benefits parties with consistent, substantial support across the country.[2]

There are two proposed alternative electoral systems:

> **Ranked balloting**. The country would remain divided into ridings, but voters would rank their choices for an MP on their ballots rather than simply selecting one. If no candidate receives a majority of first-choice votes, the least popular candidate would be eliminated from the competition and a second count undertaken. In the second count voters who selected the eliminated candidate as their first-choice would have their second-choice votes counted. This process of elimination and recounting continues until one candidate has over 50% of voter support. The Liberal Party favours this approach, as their centrist orientation means that they are the second choice of many Canadians.[3]
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> **Proportional representation**. Citizens would vote for political parties rather than for an individual representative. The proportion of votes cast for each party would determine the number of seats they receive in Parliament. In the simplest form of this system the proportions match perfectly: one third of the vote translates to one third of the seats. This could be calculated on a national level, or on either a regional or a provincial scale. MPs would then be assigned to represent provinces or ridings. The New Democratic and Green Parties favour this system, as the national popular vote in their favour is usually higher than their seat count.[4]

Constitutional Issues

Amendment Formulas

The *Constitution* does not explicitly refer to any of these electoral systems. Nevertheless, the *Constitution* does contain details on electoral boundaries, the House of Commons, and the number and distribution of MPs. A reform to the electoral system, will require a constitutional amendment if it affects these provisions.

The federal government may *unilaterally* make some constitutional amendments.[5] For example, it has made changes to the method of calculating riding boundaries and to the number of members in the House of Commons on its own several times.[6] However, amendments to important aspects of the *Constitution*, such as the composition of the Supreme Court or of the Senate,require substantial[7] or unanimous provincial consent.[8]

The federal government, if it does not wish to involve the provinces in electoral reform, will have confine itself to matters within its *unilateral* amendment power. There are two sections of the *Constitution* that it will need to work around:

> Section 42(1)(a)
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> Constitutional changes relating to the "principle of proportionate representation of the provinces in the House of Commons"[9] require the consent of seven provinces with 50% of the population of Canada—the so-called "*general* amendment formula."
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> The *Constitution* divides seats in the House of Commons on a provincial basis.[10] Section 42(1)(a) protects the proportion of seats allocated to each province. The federal government can unilaterally make minor changes to riding boundaries or MP numbers,[11] but any major shift in the proportion of MPs per province will require substantial provincial consent.
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> Section 41(b)
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> Furthermore, the right of a province to at least as many MPs as it had Senators when the *Constitution Act, 1982* came into force[12] can only be modified by *unanimous* consent of the provinces. This rule further protects the provincial and regional balance of power.

While the *Constitution* does not overtly protect any electoral system, it does strongly protect the current balance of provincial and regional power reflected in the composition of the House of Commons. If the federal government wishes to avoid obtaining provincial consent, then any proposed electoral system will have to find a way to preserve this balance.

The *Charter*

The *Charter* does not apply to constitutional amendments made by both the federal and provincial governments under the *general* or *unanimou*s amending formulas.[13] However, if the federal government passes a reform on its own, it must conform to the *Charter*.[14]

Section 3 of the *Charter*[15] protects the right to vote in Canada. The courts have defined

this as the right to effective representation[16] – which has two components.[17] First, citizens have the right to select a representative in a lawmaking or "legislative" capacity. Second, citizens have the right to select a representative to intercede and negotiate with the government on their behalf—the "ombudsman" role.[18] Canadians have the right to elect MPs both to create law, and to communicate their specific needs to government. A *unilaterally* reformed electoral system would have to retain both these elements of representation.

Effective representation protects and encourages equality of voting power, that is, the principle that everyone's vote should be worth the same.[19] However, it also protects the enhanced representation of minorities and sparsely populated areas, whose interests may go unheard in a system with strict voter equality.[20] For example, the Supreme Court found a Saskatchewan elections law that caused urban ridings to contain more people than rural ridings to be constitutional despite the consequent inequality between rural and urban voters. This was in part due in part to the greater difficulty of representing rural ridings.[21] A proposed reform will have to take into account the imperatives of both rough equality of voting power and representation of minority and geographic interests.

Finally, even if a court initially finds that a proposed reform violates section 3, the government may be able to justify the intrusion through section 1 of the *Charter*.[22] This would be the appropriate time to weigh the relative values of equality of voting power, minority representation, and the legislative and ombudsperson roles of effective representation.[23]

Conclusion

The exact nature of Canada's electoral system is not written in the *Constitution,* and was left out of the *Charter*.[24] However, a reformed electoral system would still have to conform to constitutional rules, at least if the federal government wishes to make those reforms without provincial consent. A *unilaterally* reformed system would have to retain roughly the current number of MPs representing each province. As well, MPs would need to retain their ombudsman as well as legislative functions, meaning that they must be bound to a specific community in some fashion. Finally, a reformed system would have to preserve minority voices, and prevent a tyranny of the majority.

Either of the proposed reformed systems could probably be made to comply with the *Constitution*. However, the federal government must be careful, as it sets out to reform a nearly 150-year-old system, that it does not infringe similarly venerable constitutional principles.

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[1] Liberal Party of Canada, "Electoral Reform" (accessed June 22, 2016) *2015 Liberal Electoral Platform* online: <https://www.liberal.ca/realchange/electoral-reform/>.

[2] Daniel LeBlanc, "Tories Reject Plans from Opposition Parties to Change Voting System" (June 21 2015) *The Globe and Mail* onine: <http://www.theglobeandmail.com/news/politics/tories-reject-plans-from-opposition-parties-to-change-voting-system/article25051883/>.

[3] Council of Canadians, "Ranked Ballots Would Have Given The Liberals 224 Seats this Past Election" (November 20 2015) *Council of Canadians* online: <http://canadians.org/blog/ranked-ballots-would-have-given-liberals-224-seats-past-election>.

[4] New Democratic Party, "Demand that your Vote Count" (accessed June 22, 2016) *Petition NDP* online: <http://petition.ndp.ca/demand-that-your-vote-count>.

[5] *Constitution Act, 1982,* s 44, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 .

[6] *Campbell v Canada (Attorney General),* [1988] 49 DLR (4th) 321 at 333-334, 4 WWR 441 .

[7] *Ibid,* s 38(1).

[8] *Ibid,* s 41.

[9] *Ibid,* s 42(1)(a).

[10] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 37, reprinted in RSC 1985, Appendix II, No 5 .

[11] *Campbell, supra* note 6, *ibid.*

[12] *Constitution Act, 1982*, *supra* note 5, s 41(b).

[13] Peter Hogg, *Constitutional Law of Canada* 5th ed, vol 1 (Toronto: Thomson Carswell, 2007) (loose-leaf revision 2010-1) 4:14.

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

[15] *Ibid*, s 3.

[16] *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 183, 81 DLR (4th) 16 .

[17] *Ibid.*

[18] *Dixon v British Columbia (Attorney General),* [1989] 59 DLR (4th) 247 at 266, 4 WWR 393.

[19] *Electoral Boundaries, supra* note 16 at 183.

[20] *Ibid*, 183-186.

[21] *Ibid* at 197.

[22] *Charter, supra* note 14, s 1.

[23] *Electoral Boundaries, supra* note 16, 187-188.

[24] *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 37.