Part 4 – The Legal Framework

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In proposing electoral boundaries for British Columbia's Legislative Assembly, an electoral boundaries commission is governed by:

- the provincial *Electoral Boundaries Commission Act*,[24]: and
- the *Canadian Charter of Rights and Freedoms,* and Canadian court decisions interpreting various *Charter* provisions.

In this part of the report we will discuss both, since they articulate the legal principles and other factors that must be taken into account when drawing electoral boundaries.

A. British Columbia Legislation

The relevant B.C. legislation is set out in Appendices A and B of this report.

1. The current single member plurality (SMP) system[25]

The legislation[26] identifies two functions for our commission:

- make proposals to the Legislative Assembly as to the area, boundaries and names of the electoral districts; and,
- make proposals to the Legislative Assembly to increase the number of

[24] RSBC 1996, c. 107. See also the *Electoral Boundaries Commission Amendment Act, 2005*, SBC 2005, c. 30

[25] The current B.C. electoral system is commonly described as a "single member plurality" system – "single member" because multi-member districts were abolished in B.C. in 1988, following the report of the Hon. Judge Thomas K. Fisher, and "plurality" because it is a first-past-the-post system in which the candidate receiving the most votes is elected, even if he or she receives less than 50 percent of the votes cast.

[26] RSBC 1996, c. 107, s. 3.

electoral districts up to a maximum of 85, if the commission considers that the number of electoral districts should be increased.

We will discuss each of these functions separately, because the factors that we must consider vary with each function.

a. The area, boundaries and names of the electoral districts

Under section 9(1) of the *Electoral Boundaries Commission Act*, the Commission must be governed by three principles when determining the area to be included in, and fixing the boundaries of, proposed electoral districts:

- that the principle of representation by population be achieved, recognizing the imperatives imposed by:
  - geographical realities;
  - demographic realities;
  - the legacy of our history; and,
  - the need to balance the community interests of the people of British Columbia;
- to achieve the principle of representation by population, the commission is permitted to deviate from a common statistical provincial electoral quota[27] by no more than 25 percent, plus or minus; and,
- the commission is permitted to exceed the 25 percent deviation principle where it considers that very special circumstances exist.

The legislation does not define the term "very special circumstances," and we have found no other Canadian legislation in which this term is used. However, federal and New Brunswick legislation uses the term "extraordinary" circumstances, Quebec refers to "exceptional reasons," and Newfoundland and Labrador uses the term "special geographical considerations." Later in this report[28] we will discuss how the notion of an "outside the normal limits" category has been used across Canada, and how we have interpreted and applied the phrase "very special circumstances" in the B.C. context.

b. Increasing the number of electoral districts

Under s. 9(2) of the *Electoral Boundaries Commission Act,* the commission may propose an increase in the number of electoral districts (from the current 79 up to 85) if the commission considers that the number of electoral districts should be increased. In deciding whether to propose an increase, we must take two matters into account:

- geographic and demographic considerations, including:
  - the sparsity, density or rate of growth of the population of any part of British Columbia;
  - the accessibility, size or physical configuration of any part of British Columbia; and,
- the availability of means of communication and transportation between various parts of British Columbia.

2. The proposed single transferable vote (BC-STV) system

The *Electoral Boundaries Commission Amendment Act*[29] instructs the commission to make proposals to the Legislative Assembly based on the single transferable vote system recommended by the British Columbia Citizens' Assembly on Electoral Reform in its December 10, 2004 final report and its December 20, 2004 technical report. The commission must make proposals on:

- the areas, boundaries and names of the electoral districts under the BC-STV system; and,
- the number of MLAs for each of those electoral districts.

The legislation states that, when making our BC-STV proposals:

- we must propose the same number

[27] For reasons of simplicity and clarity, we will use the term "provincial electoral quotient" throughout this report, instead of the statutory "common statistical provincial electoral quota." The provincial electoral quotient is calculated by dividing the British Columbia population by the number of MLAs.

[28] See Part 5 (" 'Effective Representation' and 'Very Special Circumstances' ") on p. 42.

[29] *Electoral Boundaries Commission Amendment Act, 2005*, SBC 2005, c. 30, s. 4.

of MLAs as we propose under the single member plurality system; and,
- if we file an amendment to our report, and in that amendment we propose an increase in the number of MLAs under the current single member plurality system, we must also make the same increase in MLAs under our BC-STV proposals.[30]

3. Our commission only proposes

The legislation is clear that our commission's only power is to propose, and that the Legislative Assembly determines whether our proposals will become law. We submit our report and any amendments to the Speaker of the Legislative Assembly. In February 2008, our *Final Report*, (which will include any amendments) will be laid before the Assembly. Section 14 of the *Electoral Boundaries Commission Act* provides that:

> If the Legislative Assembly, by resolution, approves or approves with alterations the proposals of the commission, the government must, at the same session, introduce a Bill to establish new electoral districts in accordance with the resolution.[31]

B. Legislation in Other Canadian Jurisdictions

There is legislation federally and in every other province and territory establishing a process for the creation of electoral boundaries. The most common scheme is the appointment of an independent electoral boundaries commission, as we have in British Columbia.

In most cases, the legislation sets out the principles and other factors that must be taken into account when determining the number of electoral districts, and the area, boundaries and names of electoral districts. In brief:
- 10 Canadian jurisdictions set a statutory limit on allowable deviation from the provincial average (ranging from plus or minus 5 percent to plus or minus 25 percent); and,
- nine Canadian jurisdictions permit greater deviations in some circumstances.

C. Court Decisions

Section 3 of the *Charter of Rights and Freedoms* states:

> Every 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.

Sweeping in its simplicity and apparently unqualified in its scope, the "right to vote" has been the subject of much judicial interpretation over the past two decades. A clear understanding of this constitutional guarantee is crucial to our boundary setting exercise.

1. The Supreme Court of Canada's interpretation of the right to vote

In the context of setting electoral boundaries, the leading Canadian judicial authority on the meaning of the right to vote is the Supreme Court of Canada's 1991 decision in the ***Saskatchewan Reference*** case.[32] The Saskatchewan *Electoral Boundaries Commission Act* had given the commission very specific instructions, including the following:

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[30] Section 4(4) of the *Electoral Boundaries Commission Amendment Act* directs that sections 11 – 15 of the *Electoral Boundaries Commission Act* apply, in relation to the commission's BC-STV proposals. Sections 11–15 deal with public and MLA hearings, the filing of amendments to the commission's report, tabling of the commission's report in the Legislative Assembly and tabling a bill to establish new electoral districts.

Significantly, the *Electoral Boundaries Commission Amendment Act* does not explicitly incorporate s. 9(1) of the *Electoral Boundaries Commission Act,* which sets out the principles and other factors that the commission must take into account in determining the number of electoral districts, and the area, boundary and name of each district. However, we are satisfied that we should apply the s. 9(1) criteria when engaged in the BC-STV boundary setting exercise, subject of course to the overriding constitutional imperative of ensuring effective representation.

[31] For the legislation enacted by the Legislative Assembly following the 1999 Wood Commission, see the *Electoral Districts Act*, SBC 1999, c. 31.

[32] ***Ref. re Electoral Boundaries Commission Act (Sask.)*** (1991), 81 D.L.R. (4th) 16 (S.C.C.).

"Every 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."

Section 3 *Canadian Charter of Rights and Freedoms*

- create two electoral districts north of a "dividing line" (about half of the province);
- south of that dividing line, create 29 urban electoral districts and 35 rural electoral districts;
- urban electoral districts should not extend beyond municipal boundaries;
- no northern electoral district should vary by more than 50 percent from the provincial average;
- no southern district should vary by more than 25 percent from the provincial average; and,
- in setting boundaries, the commission should consider sparsity, density or relative rate of growth, special geographic features, community or diversity of interests and other similar factors.

Speaking for a majority of the Court, Justice McLachlin concluded that the electoral boundaries created under these rules did not violate s. 3 of the *Charter*. For our commission's purposes, this decision is important primarily because of its thorough examination of the meaning of the "right to vote" under s. 3. Justice McLachlin characterized the issue before the Court as a contest between two competing values – equality of voting power and effective representation. She concluded that: "the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to 'effective representation' " (p. 35). In her view, "effective representation" meant two things:

- **Relative parity of voting power:** a system which dilutes one citizen's vote unduly as compared to another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted.
- **Countervailing factors:** it is a practical fact that effective representation often cannot be achieved without taking into account other factors. Justice McLachlin identified two:
  - absolute parity is impossible, because voters die and voters move; and,
  - even relative parity may prove undesirable, because it has the effect of detracting from the primary goal of effective representation. She stated:

> Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.

Justice McLachlin then referred to her earlier decision in ***Dixon.***[33] In that case she had, as Chief Justice of the B.C. Supreme Court, struck down legislation that had classified electoral districts into two broad groups – the Mainland and Vancouver Island. Each group was further subdivided into metropolitan, suburban, urban-rural, interior-coastal and remote categories, and each of these categories was assigned a specific population quota, which resulted in relatively greater weight to non-urban votes. The scheme produced deviations ranging from minus 86.8 percent to plus 63.2 percent. Nineteen of the 69 electoral districts had deviations exceeding plus or minus 25 percent.

[33] ***Dixon v. British Columbia (A.G.)*** (1989), 59 D.L.R. (4th) 247 (B.C.S.C.).

Chief Justice McLachlin decided that only those deviations should be admitted that can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed. With respect to under-populated areas, she stated in the ***Saskatchewan Reference***, at p. 38:

> [E]ffective representation and good government in this country compel those charged with setting electoral boundaries sometimes to take into account factors other than voter parity, such as geography and community interests. The problems of representing vast, sparsely populated territories, for example, may dictate somewhat lower voter populations in these districts; to insist on voter parity might deprive citizens with distinct interests of an effective voice in the legislative process as well as of effective assistance from their representatives in their "ombudsman" role. This is only one of a number of factors which may necessitate deviation from the "one person – one vote" rule in the interests of effective representation.

Turning to the Saskatchewan legislation and the boundaries drawn by the commission, Justice McLachlin decided that the constraints placed upon the commission by the legislation did not result in the commission acting arbitrarily. The allocation of seats between urban and rural districts was very close to the population distribution between those areas, and any deviations were relatively small.

She also found that the distribution of electoral districts itself did not violate s. 3. Variances between southern districts fell within plus or minus 25 percent, which was reasonable in this case for several reasons:

- The evidence before the Court suggested that rural districts are more difficult to service because of difficulty in transport and communications, and rural voters place greater demands on their elected representatives.
- Rivers and municipal boundaries form natural community dividing lines and hence natural electoral boundaries.
- Projected population changes over the life of the commission's boundaries may justify deviation from strict equality.

Two subsequent Supreme Court of Canada decisions assist in the interpretation of the right to vote. In ***Haig***,[34] the applicant argued that his right to vote under s. 3 of the *Charter* had been infringed. The federal government had directed that a referendum be held but Haig, who had recently moved from Ontario to Quebec, did not meet the Quebec residency requirement, and was no longer eligible to vote in Ontario. The Court ruled that the right to vote under s. 3 did not extend to voting in a referendum. For a majority of the Court, Justice LaForest cited with approval the Court's decision in the ***Saskatchewan Reference***, and then added:

> 63 The purpose of s. 3 of the *Charter* is, then, to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate.

In ***Figueroa***,[35] the leader of the Communist Party challenged provisions in the *Canada Elections Act* that denied benefits to political parties that did not nominate at least 50 candidates in a federal election. For a majority of the Court, Justice Iacobucci struck down several sections of the *Act*, finding that they had infringed Figueroa's s. 3 rights. He stated:

> 30 In the final analysis, I believe that the Court was correct in ***Haig***, supra, to define s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process. Democracy, of course, is a form of government in which sovereign power resides in the people as a whole. In our system of democracy, this means that each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of

[34] ***Haig v. Canada (Chief Electoral Officer)***, [1993] 2 S.C.R. 995 (S.C.C.).
[35] ***Figueroa v. Canada (Attorney General)*** (2003), 227 D.L.R. (4th) 1 (S.C.C.).

> elected representatives. The fundamental purpose of s. 3, in my view, is to promote and protect the right of each citizen to play a meaningful role in the political life of the country. Absent such a right, ours would not be a true democracy.

2. Applying the Supreme Court of Canada's interpretation provincially

Several provincial trial and appellate courts have been faced with legal challenges to electoral boundaries legislation, or to boundaries drawn by commissions, and so have been called upon to apply the Supreme Court of Canada's general interpretation of s. 3. We have summarized these decisions in Appendix C, as they provide some insight into how the courts have applied the Supreme Court of Canada's interpretation of the right to vote to specific fact situations.

D. Summary of Legal Principles Governing Us

From our review of the legislation and court decisions referred to above, we have identified several legal principles that guide us as we embark on our boundary setting task.

We must start with the Supreme Court of Canada's discussion about the right of citizens to "effective representation," and their right to play a meaningful role in the selection of elected representatives. Effective representation begins with relative equality of voting power – a system that dilutes one citizen's vote unduly as compared to another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted.

However, there may be circumstances in which relative equality of voting power must yield to other factors to ensure effective representation of voters in a particular geographic area. Factors that may warrant deviation from the provincial electoral quotient include (but are not necessarily limited to) geography, community history, community interests and minority representation. Those notions are captured in the B.C. legislation, albeit with slightly different language: geographical and demographic realities, the legacy of our history, and the need to balance the community interests of the people of British Columbia.

We are permitted to deviate from the provincial electoral quotient by up to plus or minus 25 percent. That does not mean, however, that any deviation within this range is automatically acceptable. Any deviation must be justified, and our view is that the closer we get to the maximum deviation, the more persuasive the justification should be. Having said that, we should not arbitrarily limit ourselves to some lesser deviation.

We may exceed the plus or minus 25 percent deviation principle in "very special circumstances." We find no difference in substance between the

B.C. legislative language, and the "extraordinary" or "exceptional" standard adopted in several other Canadian jurisdictions. The challenge comes, of course, in deciding when to apply this concept to a specific geographical area.

We should respect the existence of community interests, but they do not, of themselves, justify deviation from voter parity. If constituents with a community interest can achieve effective representation without deviation, then no deviation is justified.

Constituents in an area of lower population density do not have an automatic right to expect greater electoral representation; the case for greater electoral representation must be justified on a case-by-case basis. For example, if it is contended that it is more difficult for an MLA to service a particular type of electoral district (rural or urban), that contention must be supported by evidence. Even if some degree of over-representation of rural voters is required in order for those voters to receive effective representation, we must ensure that such over-representation does not result in the gross under-representation of voters in some urban areas. In other words, we cannot permit the violation of urban voters' *Charter* rights, in order to ensure that rural voters' *Charter* rights are not violated.

When considering whether to increase the number of electoral districts, we must consider the criteria set out in the legislation:

- geographic and demographic considerations, including:
  - the sparsity, density or rate of growth of the population of any part of British Columbia;
  - the accessibility, size or physical configuration of any part of British Columbia; and,
- the availability of means of communication and transportation between various parts of British Columbia.

In addition to the legal principles that govern us, we will discuss in the pages ahead several other tools that we can rely on, to assist in our boundary setting activities. For example, we will refer occasionally to population projections (provided by BC Stats), when we consider it prudent to do so. We will also combine individual electoral districts into regional groupings to assist in our analysis. All previous electoral boundaries commissions did so, and in the ***Dixon*** decision discussed earlier, Chief Justice McLachlin talked about "giving due weight to regional issues."