



# Policy Paper

## **Fair and Equal Representation**

**NOVA SCOTIA'S ELECTORAL BOUNDARIES DISPUTE**

**By Ross Haynes, QC**

*Halifax, Nova Scotia,*

*December 2018*






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# Fair and Equal Representation

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## About the Author



### **ROSS HAYNES, QC**

Throughout his legal career, Ross Haynes, QC, combined a successful litigation practice with active community involvement. A fiscal conservative and staunch social liberal, Ross is well known to CBC audiences for his three-year stint on the weekly TV news panel, *Canada Now: Politics Now*, and his regular radio commentaries. He has been a frequent speaker, panelist and lecturer on a broad variety of legal and insurance matters. Ross is a Senior Fellow with Atlantic Institute for Market Studies (AIMS). He has held executive roles in many community groups, ranging from the Canadian Red Cross Society to the Nova Scotia Legal Aid Commission. He is also an avid cyclist, raising hundreds of thousands of dollars for the MS Society during its annual cycling events. He was a member of the cross-Nova Scotia cycling team for the 2007 and 2008 HeartLand Tours to raise heart health awareness and was a founding member of the Cardiac Cycle Society of Nova Scotia. Ross has been active with the Conservative Party of Canada and the Progressive Conservative Party of Nova Scotia. In 2012, Ross received the Queen Elizabeth II Diamond Jubilee Medal in recognition of his community service. Before attending Saint Mary's University and the Weldon School of Law, Dalhousie University, Ross served for five years in the Royal Canadian Navy. He has three daughters and a son, two step-sons, and eight young grandchildren. Ross and his wife, Kathryn, live in Fergusons Cove, Nova Scotia.

## Introduction

Democratic reform is a persistent topic of debate in Canada. At the provincial and federal levels, governments have looked at numerous ways to improve how public institutions reflect the populations they serve, including changes to the representative structure of all branches of government. Advocates of reform argue from established, though at times conflicting principles: e.g. the concept that votes and overall democratic representation should be blind to differences in demographic make-up (thus reflecting the principle of “one person, one vote”) versus the idea that representative institutions should include special accommodations for historically disadvantaged minority groups, or alternatively regions of the country or provinces that would stand to lose political influence on account of system changes. Opponents of reform often point to the stability afforded by existing institutional arrangements and uncertainty in proposed changes for the future workings of governmental bodies including legislatures.

This paper includes the text of a formal presentation made to the Nova Scotia Electoral Boundaries Commission regarding democratic reform, specifically concerning the redrawing of districts for the provincial legislature. The presentation deals at length with the balancing of equality between all electors in the boundary-drawing process, versus the allocation of seats based on minority representation. It is prompted by debate over scheduled redistricting in 2019, including a spirited public argument about the inclusion of demographic considerations in boundary drawing; namely, the belief that francophone communities ought to have districts drawn in such a way that their members will form a majority and be ensured representation in the legislature. Ultimately, the paper that follows argues against such special districting practices. This introductory section gives a brief overview to various democratic reform movements and issues in the country to situate the presentation in a wider context.

Across Canada, by far the most common subject of possible reform is the voting system, specifically changes to the so-called “electoral formula.” The two main alternatives that have been advanced in Canada are proportional representation and ranked voting. These correspond to two separate complaints about the plurality voting (or “first-past-the-post”) system, the incumbent model at the federal level and in all 10 provinces at the time of writing. The first complaint is that there are times great disparities between a political party’s share of the popular vote and its share of the seats in the federal parliament or a provincial legislature. This could be remedied by apportioning some seats on the basis of the popular vote; but as critics point out, this would come at some expense to direct constituency representation and would make it more difficult for a political party to form a majority government.

The second complaint is that candidates need not receive a majority of votes in a district to win, but only to win a plurality. With a ranked ballot, in which voters choose their first, second, third choices and so on, a candidate could receive a majority of support on the basis on being a non-primary choice for some voters, but a higher choice than others. However, critics point out this system would not address the disparity between seats and the popular vote, and that it would provide a natural advantage to parties occupying the centre of the political spectrum.

At the federal level, the opportunity to alter the voting formula from first-past-the-post was mooted during the most recent election campaign, and was followed by a national consultation period about the available alternatives. Though the current government ultimately abandoned the project of electoral changes, it must be noted that several provinces have gone further by putting the question of reforming electoral models to the people directly. British Columbia has held three plebiscites on proportional representation; the first two failed to meet the threshold to overturn the status quo, while the province is currently conducting the third such vote via a mail-in ballot. Ontario held a referendum on the issue in 2007, in which first-past-the-post won by a wide margin at 63 percent. Prince Edward Island held plebiscites in 2005 and 2016; in the first, plurality voting took 64 percent of the vote. In the second plebiscite, which employed a run-off voting system, mixed-member proportional representation won with 52 percent of the vote, but the government deemed turnout too low. Instead, a binding referendum on the electoral system will be part of the 2019 provincial election.

Possible changes to electoral formulas, however, is far from the only democratic reform proposal that governments have considered. At the national level, two non-electoral examples are prominent. The first is reforming the Senate to the end of making the upper chamber more accountable, more democratic, more representative and more equal as a body that represents the country's regions. The idea of a "Triple-E Senate" – i.e. equal, elected and effective – was included in the constitutional reform package of the Charlottetown Accord, which ultimately failed. Subsequent efforts to change the Senate's make-up have gained little traction, with the Supreme Court deciding in *Reference Re Senate Reform* in 2014 that the Parliament of Canada did not have the ability to legislate such reforms as term limits for senators or creating a framework for "consultative elections," which would take the power of appointment out of the hands of the prime minister.<sup>1</sup> The second national-level reform consideration is to the selection criteria of justices to the Supreme Court vis-à-vis representation of minority groups on this powerful decision-making body. There is a formal requirement in the *Supreme Court Act* that three of the nine justices be from Quebec<sup>2</sup>; but there has also been a historical convention that regional representation be maintained. The Justin

1. Reference re Senate Reform: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13614/index.do>.

2. Supreme Court Act: <https://laws-lois.justice.gc.ca/eng/acts/s-26/page-1.html#h-4>.

Trudeau government put this convention to doubt when, in 2016, it proposed to widen the search beyond Atlantic Canada for a justice to replace retiring Nova Scotia judge Thomas Cromwell. This would have allowed the government to nominate a candidate from a minority community that had not previously seen representation on the high court, or be more assured it could find a justice who could work in both official languages, but left the Atlantic region without a voice on the court. In the end, the government elected to appoint Newfoundland and Labrador's Malcolm Rowe, but the question remains whether a federal government could eschew the conventional regional representation to the end of satisfying other ideals.

Finally we will discuss two further democratic reform issues that bring us closer to the narrow subject of the following paper. These issues are the disparity in constituents across representative districts and the making of special accommodations for minority groups.

Across the country there is a great disparity in the number of people represented by a single parliamentarian, depending on province of origin. The territories and the Atlantic provinces tend to be over-represented on average, while larger provinces and especially Ontario under-represented. The widest range is between the riding of Labrador, with a population of 27,000 and just 20,000 electors, and the Ontario riding of Brantford–Brant, with more than 132,000 people and 95,000 electors. Prince Edward Island as a province has 27,235 electors per riding, while Quebec has 81,290. These disparities at the national level owe in large part to the requirement the provinces receive no fewer seats in the House of Commons than they do in the Senate, which benefits small provinces in the Maritimes who were afforded generous Senate representation as founding members of Confederation. But the disparity does not occur at the national level alone. Within Nova Scotia, the subject of the following paper, the most-populous of the 51 districts includes more than double the electors of the least-populous.

The problems of these significant differences have arisen before. For example, in 1993 the government of Prince Edward Island found itself constructing arguments in favour of electoral boundaries that had been in place for nearly a century in *MacKinnon v. Prince Edward Island*, which alleged that disparities in representation violated the plaintiff's democratic rights under section 3 the Charter of Rights and Freedoms. The provincial supreme court agreed, saying "significant deviations from relative voter parity" were "not justified on the basis of practical impossibility or the provision of more effective representation,"<sup>3</sup> following the 1991 *Reference Re Provincial Electoral Boundaries* case at the national Supreme Courts which outlined acceptable reasons for disparities.<sup>4</sup> The P.E.I. court ruling was a basis of the overhaul of the province's electoral map before the 1996 election.

3. *MacKinnon v. Prince Edward Island*: <https://www.canlii.org/en/pe/pesctd/doc/1993/1993canlii2906/1993canlii2906.html?searchUrlHash=AAAAQA2TWFJS2lubm9uIHUyIFByaW5jZSBFZHdcmQgSXNsYW5kiGF0IGFsLCBGZjYdWFYeSAxOTkzAAAAAE&resultIndex=7>.

4. *Reference re Prov. Electoral Boundaries (Sask)*: <https://www.canlii.org/en/ca/scc/doc/1991/1991canlii61/1991canlii61.html>.

In Nova Scotia, the disparities in representation by riding is complicated by demands to further arrange districts along other variables, namely those of ethnic minority representation. In 2012, the riding map in the province was redrawn such that Acadian districts from the previous map had been merged into neighbouring ones. Francophone interest groups filed court action, ultimately resulting in a decision by the provincial court of appeal, which found the change to have violated their charter rights.<sup>5</sup> The court did not have the power to order a change, however, and the decision of what how to proceed with the next riding map ultimately lies with the elected government and its redistricting commission.

A policy paper by the Commission on Effective Electoral Representation of Acadian and African Nova Scotians recommends that the government reinstate guaranteed districts for minority groups, namely Clare, Argyle and Richmond for the Acadian minority and Preston for the African Nova Scotian minority,<sup>6</sup> using the previously-cited provincial boundaries reference case as a basis for justifying a “tolerance of deviation.” Yet this consideration, according to some critics (including the authors of the following presentation), would elevate ethnic identity politics too highly in determining electoral boundaries.

How to strike the right balance between effective representation and accommodation of minority interests and the fundamental right to equality remains a dominant theme in all aspects of the debate on democratic reform. The following presentation makes the case that equal representation for all citizens as *citizens* is the most rational and straightforward ideal. This brief introduction has sought to place the presentation’s subject and importance into context.

5. CBC News, “Nova Scotia electoral map violates charter, says province’s highest court”: <https://www.cbc.ca/news/canada/nova-scotia/electoral-boundaries-map-acadians-challenge-appeal-court-1.3949834>.

6. Toward More Effective Representation for Acadian and African Nova Scotians, p. 159: <https://novascotia.ca/representation/Representation-Toward-More-Effective-Representation-For-Acadian-and-African-Nova-Scotians-Report-and-Recommendation.pdf>.



## Electoral Boundaries Commission Submission

TO:

The Nova Scotia Electoral Boundaries Commission

FROM:

The Atlantic Institute for Market Studies (AIMS)

-and-

Ross Haynes, QC, AIMS Senior Fellow

This submission is in addition to an oral presentation to the Commission on the evening of September 13th, 2018 at Cole Harbour Place.

The Charter of Rights and Freedoms (The Charter) guides our legislative action and I submit should govern the recommendations of this Commission. The applicable sections of The Charter are as follows in section 15:

*15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

*Affirmative action programs*

*(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

The commission is asking for citizen input on questions: of the redistribution of the electoral boundaries, the need to have protected constituencies based on race or ethnic origin and the possibility of "At Large" elected province wide constituencies.

We suggest that Nova Scotia has too many constituencies arguing that "Never have so few been governed by so many." With a population of just over 950,000 we have one MLA for every 18,700+- citizens, or from your own 2018 statistics one MLA for every 14,825 electors.

We submit:

1. There should not be identity allocated constituency/seats such as: by race, by colour, by ethnicity, by religion, by clan, by indigenous identity or by any community identity.

While The Charter suggests programs etc. for those “individuals or groups” that have been disadvantaged, we argue that a constituency allocated by some race or ethnic origin is in effect suggesting that all those in that geographic area are of an identifiable group and no others. We cannot relegate parts of our Province to be populated by only one group to be the beneficiaries of such an electoral plan. Clearly government can have programs for individuals or groups, *but* a voting geographic constituency of electors is not what The Charter contemplated. We argue that we cannot have acceptance or inclusion or a sense of community in the Province of Nova Scotia if the participation in the democratic electoral process is divisive and based on identity politics or a version of hyphenated citizenship. Government programs are for the assisting of those so detrimentally affected as contemplated by The Charter but not the electoral process which is where the equality of the citizen must prevail as mandated in The Charter.

2. We argue for the consideration in the reduction of constituency/seats to no more than 40 members of the Legislative Assembly. We argue that there are too many MLAs and suggest it is better to attempt to have every constituency with as equal a number of electors as possible which is with 40 constituency/seats at 18,000 per.

While it may be a reach to contemplate a reduction in constituencies we suggest the consideration of a population-only allocation of constituencies, with the geographic boundaries determined by having an equal number of electors in every constituency in a modern redrawing of boundaries. As we live in an electronic, instant-communication era and as we have a robust municipal government system, we no longer need MLAs so tied to historical boundaries and no longer need these divisions of competing community to community issues that required the past boundary allocations. Our submission is: no matter how many constituencies you determine are needed, The province should be divided such that every constituency has (as much as possible) an equal number of electors. This is the equality among and between citizens that The Charter contemplates. There can be no equality if there is inequality at the ballot box and voting influence is unequal from one constituency to another and one citizen to another.

## AIMS Submission to the NS Electoral Boundaries Commission / October 10, 2018

3. The creation of "At Large" constituencies would be to enter into the most divisive form of electoral representation. We would all become lesser citizens and have to be identified by some genetic entitlement to vote for these "At Large" MLA's. We can only begin to imagine the eugenic horror or genetic tracking and identification carding needed so as to accomplish such a regime. The less said on this abhorrent suggestion, the better!

Here are the NS Constituency by elector numbers (voter per constituency 2017 stats from the Financial Information Statistics Vol III Published April 2018 of the NS Electoral Commission) from low to high and colour added to more easily group the voter distribution/disparity:

1. Guysborough-Eastern Shore-Tracadie: 10,292	29. Halifax Atlantic: 15,250
2. Cumberland South: 11,066	30. Kings West: 15,312
3. Cape Breton Richmond: 11,233	31. Chester-St Margaret's: 15,447
4. Pictou West: 11,225	32. Sackville-Cobequid: 15,457
5. Preston-Dartmouth: 11,404	33. Sydney River-Mira-Louisbourg: 15,572
6. Inverness: 11,489	34. Hants West: 15,573
7. Pictou East: 11,976	35. Kings North: 16,006
8. Halifax Armdale: 12,467	36. Timberlea-Prospect: 16,047
9. Argyle-Barrington: 12,508	37. Lunenburg West: 16,227
10. Glace Bay: 12,510	38. Truro-Bible Hill-Millbrook-Salmon River: 16,350
11. Eastern Shore: 12,526	39. Halifax Needham: 16,558
12. Victoria-The Lakes: 12,610	40. Dartmouth North: 16,587
13. Hammonds Plains-Lucasville: 12,905	41. Northside-Westmount: 16,679
14. Pictou Centre: 13,003	42. Annapolis: 16,888
15. Cape Breton Centre: 13,178	43. Kings South: 17,542
16. Cumberland North: 13,259	44. Fairview-Clayton Park: 17,566
17. Yarmouth: 13,862	45. Halifax Chebucto: 17,588
18. Sackville-Beaver Bank: 13,866	46. Clayton Park West: 17,712
19. Queens-Shelburne: 14,099	47. Dartmouth South: 17,720
20. Colchester-Musquodoboit Valley: 14,225	48. Sidney-Whitney Pier: 18,061
21. Lunenburg: 14,333	49. Cole Harbour-Portland Valley: 18,097
22. Antigonish: 14,455	50. Hants East: 18,782
23. Colchester North: 14,476	51. Bedford: 21,547
24. Clare-Digby: 14,486	
25. Dartmouth East: 14,901	
26. Halifax Citadel-Sable Island: 14,968	TOTAL:
27. Waverley-Fall River-Beaver Bank: 15,089	756,113 electors, or an average of
28. Cole Harbour-Eastern Passage: 15,107	14,825.75 per constituency

## AIMS Submission to the NS Electoral Boundaries Commission / October 10, 2018

As suggested an approach to this unequal distribution would be to have an overall reduction in the number of seats in our legislature. Clearly as so far as possible the Commission wants every voter to have an equal impact on the election results. Looking at the statistics shows we have electoral disparity.

- 1 constituency with over 21K voters
- 3 constituencies with between 18K - 19K voters,
- 5 constituencies with between 17K - 18K voters,
- 8 constituencies with between 16K - 17K voters
- 8 constituencies with between 15K - 16K voters
- 8 constituencies with between 14K - 15K voters
- 5 constituencies with between 13K - 14K voters
- 6 constituencies with between 12K - 13K voters
- 6 constituencies with between 11K - 12K voters
- 1 constituency with between 10K - 11K voters

Summarized another way:

Eight (8) constituencies that have between 14K – 15K voters, then 18 with fewer and 25 with more. This distribution is clearly unfair and contrary to the equality mandated in The Charter.

We argue that this disparity cannot continue and/or be made worse with special identity constituencies.

Again we suggest the Commission consider a real change including our submission of “our burden of being over governed” which is to say: we have too many elected representatives. With seven constituencies with under 12,000 voters and four with over 18,000 voters and at the extreme of this reality where one constituency has half of the voters of the largest constituency: this all represents, by any measure, a significant disparity in per voter influence. Adding more seats with *identity politics* adds to an already unfair, unequal and unjust condition making matters worse. Clearly to have any special interest constituencies with far fewer electors is unfair to all and that does not consider any need for redistribution of the existing disparity.

We propose that, in keeping with the admonition for *change* of the “Ivany Report”, we shake up the provincial malaise of resisting *change* and have a reduction to fewer than 51 constituencies. Using the 2017 Elections NS statistics we would aim to have every constituency at 19,000 electors. The result in a reduction would have fewer MLAs that a reduction from 51 would save money and bring fairness to our current unfair unequal system. A good beginning to real change.

AIMS Submission to the NS Electoral Boundaries Commission / October 10, 2018

In closing, the most important action for the Commission is to restore fairness and equality to our electoral process and bring every elector closer to the equality mandated by The Charter of Rights and Freedoms.

Sincerely,

Ross Haynes, QC

Member of Halifax-Atlantic Constituency

Senior Fellow, Atlantic Institute for Market Studies (AIMS)



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