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Municipal Ward Boundaries

The Legal Parameters

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Note: 1) The opinions expressed in this paper are those of the author and are not to be seen as representing the views of the City of Ottawa.

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A. INTRODUCTION

Revising ward boundaries is always a vexing issue for Councillors. Next to establishing their own salaries, the issue of revising ward boundaries is one of the most difficult debates for a municipal council to undertake. Consequently, many councils prefer to live with antiquated ward boundaries rather than opening up what inevitably becomes a hot political issue.

When they do agree to review ward boundaries, most councils attempt to establish some form of arms-length review panel in order to attempt to avoid allegations of "gerrymandering"[1] and "protecting their own turf". Ultimately, however, the issue of ward boundaries falls back into their arms for decision. The output of their deliberations inevitably antagonizes a large part of the electorate and often results in challenges before administrative tribunals or the courts.

After briefly addressing the options available to municipalities in choosing an electoral system, this paper will review the judicial and administrative tribunal decisions affecting electoral boundaries. It will then discuss the process and guidelines used in developing ward boundaries once the ward system has been selected and will conclude by suggesting an appropriate legislative framework to

[1] "Gerrymandering": This term originated with Massachusetts Governor Elbridge Gerry's 1812 attempt to create an electoral district that favoured his party. The district was shaped like a salamander.

assist municipal councils in dealing with the sensitive and complex issue of passing ward boundary by-laws.

B. MUNICIPAL ELECTORAL SYSTEMS

In Canada there are essentially only two forms of electoral systems at the municipal level – an “at large” or “ward” system. In an “at large” system, all eligible voters within a city boundary vote on the entire list of candidates running for City Council. Under a “ward” system, the city is broken down into smaller areas (wards) and voters choose only among the list of candidates running in their particular ward. Anecdotal evidence would seem to suggest that most large municipalities have opted for a “ward” system with an “at large” system conversely being the more prevalent system in smaller municipalities. However, there are always exceptions to the rule and if one looks for exceptions to any municipal “rule”, one normally looks west of the Rockies to British Columbia.

The City of Vancouver, British Columbia, remains unique among the larger municipalities in Canada in retaining an “at large” system. Voters in Vancouver have had five opportunities since 1973 to change to a “ward” system[2], but they have consistently voted to retain their “at large” system. Most recently, in November 2004, Vancouverites voted 46% to 54% against a recommendation by

[2] Referendums have been held in Vancouver in 1973, 1978, 1988, 1996 and more recently in 2004 on a change to their electoral system.

the Vancouver Electoral Reform Commission headed by former Justice Thomas Berger to switch to a "ward" system.[3]

"At large" systems generally work best in smaller municipalities where the population tends to be more homogeneous and where municipal-wide campaigning is not an economic deterrent for candidates. Wards, on the other hand, are the dominant electoral system in larger municipalities where they help to ensure that all geographic areas and communities are represented on Council. The cost of a city-wide "at large" campaign in a large municipality would be prohibitive for many candidates. A "ward" system, it is argued, brings politics "closer to the people".[4]

The remainder of this paper will focus on the "ward" system and particularly the process and guidelines used to determine appropriate ward boundaries.

[3] For a good review of the "pros" and "cons" of an "at large" system versus a ward system, see Berger, T., "A City of Neighbourhoods – Report of the 2004 Vancouver Electoral Reform Commission", pp 24-49. Berger concluded that "from the point of view of civic democracy", the ward system was the "superior" system (p. 83).

[4] Although not used in any large Canadian city, a mixed or partial ward system is a third form of electoral system. Used in some American cities (e.g. Boston, Atlanta, Nashville), this system sees Council composed of a combination of Councillors elected "at large" and Councillors elected from individual wards. Those Councillors elected "at large" with their claim to a city-wide constituency tend to have more power and prestige.

C. THE JUDICIAL AND STATUTORY BASIS FOR WARD BOUNDARY REVIEWS

C.1. *CARTER* – THE SUPREME COURT OF CANADA ESTABLISHES JUDICIAL GUIDELINES

"One person, one vote" is ingrained in American jurisprudence as one of the pillars of democracy. In 1991, the Supreme Court of Canada had the opportunity of confirming this principle as a basic tenet in the philosophy of Canadian democracy, but instead chose to develop a somewhat different principle and labeled the Canadian variant "effective representation".

In *Re Provincial Electoral Boundaries* (also known as *Province of Saskatchewan v. Carter* or simply the "Carter" decision), the Supreme Court of Canada was called upon to review a revision to provincial constituencies in Saskatchewan which had resulted in greater weight being given to rural ridings – the average elector population in the 29 urban ridings was 11,000 while the average elector population in the 35 rural ridings was only 9,600. The value of the urban vote, the plaintiffs had argued, was debased in comparison to the rural vote.

The majority decision in the Supreme Court of Canada was written by Chief Justice Beverly McLauchlin who had first set out her philosophy of electoral representation in a judgment she had written when she sat on the British

Columbia Supreme Court.[5] In that 1989 decision (*Dixon v. British Columbia*), Mme. Justice McLachlin (as she then was) accepted the proposition that deviations from the principle of voter parity were tolerable if, through these departures, factors such as population shifts, geographic considerations, communities of interest, and communication issues were weighed into riding distributions.

Three years later, Mme. Chief Justice McLachlin was given the opportunity to more fully elaborate on her earlier views in the 1991 *Carter* decision where she labeled her electoral philosophy "effective representation". In determining whether the variations in voter parity that favoured rural ridings in Saskatchewan violated the right to vote enshrined in s. 3 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), she concluded:

> … the purpose of the right to vote in s. 3 of the Charter is not equality of voting power *per se*, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government.[6]

She then began to outline the meaning of "effective representation":

> What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted.[7]

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[5] *Dixon v. British Columbia* (A.G.) (1989) 59 D.L.R. (4th) 247.
[6] [1991] 2 S.C.R. 158 at p. 183.
[7] *Ibid*, at p. 184.

However, Chief Justice McLachlin argued that absolute parity is not only "impossible", but also "undesirable" because it has "the effect of detracting from the primary goal of effective representation".[8] Factors such as "geography, community history, community interests and minority representation" had to be taken into account "to ensure that our legislative assemblies effectively represent the diversity of our social mosaic".[9] Recognizing that her philosophy was deviating from the American "one person, one vote" electoral model, she argued that the framers of the *Charter* chose to espouse "a more pragmatic approach" which was more in keeping with the Canadian "tradition of evolutionary democracy".[10]

Mme. Chief Justice McLachlin's reframing of the philosophy of "one person, one vote" has come under severe academic criticism. "By giving constitutional weight to other factors such as geography, access to communication, minority representation and communities of interest," David Johnson wrote in the McGill Law Journal, the Chief Justice "provided legitimacy to factors which are questionable at best and unprincipled at worst".[11] Notwithstanding such criticism,

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[8] *Ibid*, at p. 184.
[9] *Ibid*, at p. 184.
[10] *Ibid*, p. 186.
[11] Johnson, David, (1994) 39 McGill L. J. 224. In rejecting "the egalitarian" approach taken by the Saskatchewan Court of Appeal which had found that the constituency boundaries had violated s. 3 of the Charter in favour of an "unconvincing" pluralist approach, the decision of the Supreme Court, the author concluded, "does damage to the working of democracy within this country." (p. 247). See also Carter, M. "Reconsidering the Charter and Electoral Boundaries", (1999) 22 Dalhousie L. J. 53.

however, the *Carter* principles are now entrenched in Canadian jurisprudence as the basis of electoral boundary adjustments at every governmental level.

In an interesting *obiter* comment in a 1993 decision (*Haig v. R*.), the Supreme Court of Canada stated that the "right to vote" guarantee in s. 3 of the *Charter* is confined to elections "for Parliament and the legislatures" and is therefore not strictly applicable to municipal elections.[12] Despite this comment, the *Carter* principles have been accepted as the basis for electoral changes even at the municipal level. Consistently, *Carter* is referred to in municipal electoral commission reports and municipal board decisions to justify the ward boundary changes under consideration.[13]

C.2 POST-*CARTER*

Since the 1991, Supreme Court of Canada ruling, three Court of Appeal decisions and a series of municipal board decisions have all attempted to put the *Carter* principles into practice.

[12] *Haig v. R.* [1993] 2 S.C.R. 995 (S.C.C.) at p. 997.

[13] Although s. 3 was the basis of the *Charter* challenge in *Carter*, it has been argued that the "freedom of expression" provision in s. 2(b) of the *Charter* and the equality rights provision in s.15 of the *Charter* could be used in a Charter challenge of vote dilution at the municipal level. See *East York (Borough) v. A.G. Ontario* (1997) 43 M.P.L.R. (2d) 155. See also Epstein, H., "Electoral Boundaries and the Problem of Vote Dilution in Municipal Elections", 48 M.P.L.R. (3d) 259 at p. 273.

Lac la Biche v. Alberta

In *Lac la Biche v. Alberta*[14] the largely francophone Town of Lac la Biche objected to the proposed electoral severance of Lac la Biche from its former provincial constituency of St. Paul-Lac la Biche and sought an interim injunction to prevent any provincial election from being called until there was a judicial determination of whether a *Charter* violation existed. In its 1993 ruling, the Court of Appeal refused the request for an interim injunction on the "balance of convenience" test although it acknowledged that "the question of community of interests is an integral part of the rights guaranteed by *Charter* s. 3".[15]

East York v. Ontario

In 1997, the Ontario Court of Appeal also considered a challenge brought by the Borough of East York to their incorporation into the amalgamated City of Toronto.[16] The Borough raised the unique argument that in the new City of Toronto, the wards were too large – that the ratio between the number of voters and elected representatives was too high thereby diminishing citizen access to their elected representative.

[14] *Lac la Biche (Town) v. Alberta* (1993) 102 D.L.R. (4th) 499. A similar application for an injunction to postpone an election pending determination of a constituency boundary challenge also was rejected by the Nova Scotia Court of Appeal. See *Bedford v. Nova Scotia* (1993) 123 N.S.R. (2d) 355.
[15] *Ibid*, at p. 506.
[16] *East York (Borough) v. A.G. Ontario* (1997) 43 M.P.L.R. (2d) 155.

Recognizing that the Supreme Court of Canada in *Haig* had already confirmed that the "right to vote" provision in s. 3 of the *Charter* did not apply to municipalities, the Borough therefore based its challenge on the "freedom of expression" provision in s. 2(b) and on the "equality rights" provision in s.15 of the *Charter*. The Ontario Court of Appeal acknowledged the borough's right to raise a s. 2(b) and s.15 challenge to the proposed ward boundaries, but gave short shrift to their argument stating simply that there "is no reliable evidence that the particular ratios in this case fall below constitutional standards".[17] Further, the Court relied on the *Carter* case in stating that, "the issue is not equality of voting power *per se*, but the right to "effective representation".[18]

Charlottetown v. Prince Edward Island

In 1998, a municipality again took the lead in bringing a judicial challenge to provincial constituency changes. And, once again, the provincial Court of Appeal rejected the challenge.

In *Charlottetown v. Prince Edward Island,*[19] the plaintiff-municipality argued that the permitted legislated variance of ±25% was too great for a province with a small population like Prince Edward Island and that the mixture of urban and rural voters in many electoral districts violated the community of interest principle.

[17] *Ibid*, at p. 158.
[18] *Ibid*, at p. 158.
[19] *Charlottetown (City) v. Prince Edward Island* (1998) 168 D.L.R. (4th) 79.

In a split 2-1 decision, the appellate court rejected the challenge and fell back on the principle of judicial deference in stating that the legislative process "must be allowed to operate without undue judicial interference"[20]. On the specific issue of the permitted variance however, the Court commented that there "is considerable acceptance in Canada for a variance of ±25%.[21]

In considering the issue of the mixed urban-rural ridings, the Court concluded that, "there is no evidence to establish that any of the mixed districts in this Province affect any citizen's right to effective representation.[22] This conclusion, however, seems to be at variance with how the same court framed the issue at the commencement of their decision:

> This appeal and cross-appeal involves an old chestnut which has been aptly described by scholars as being how to accommodate the urbanization of society and the concept of representation by population while at the same time providing an adequate voice and service to rural residents by their elected representatives.[23]

The answer to this conundrum, the majority decision seemed to say, was to simply not deal with it.

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[20] *Ibid*, at pp 97-98.
[21] *Ibid*, at p. 98.
[22] *Ibid*, at p. 101.
[23] Ibid, at p. 82.

C.3 ADMINISTRATIVE TRIBUNAL DECISIONS

In both Ontario and Nova Scotia, ward boundary decisions are subject to final approval by an administrative tribunal – the Ontario Municipal Board and the Nova Scotia Utility and Review Board respectively. In the last fifteen years a wave of provincially-mandated amalgamations in both provinces have precipitated a need for ward boundary reviews and these reviews in turn have led to dispute resolution decisions by these boards. Four decisions have been particularly noteworthy in advancing a philosophy on municipal ward boundary changes.

Re Mississauga

In a pre-*Carter* decision issued by the Ontario Municipal Board in February 1991, the Board upheld a City of Mississauga ward re-distribution by-law which attempted to bring about a more equitable distribution of the electorate among nine existing wards.[24] A period of unprecedented development had substantially skewered the relative size of wards. The Board accepted as a reasonable approach the weight given to the four criteria that guided the ward re-distribution program:

[24] *Re Mississauga (City) By-law 272-90* (1991) O.M.B.D. 252.

- population – 60%;
- communities of interest – 20%;
- physical features – 10%; and
- geographic form – 10%.

Electors of Miliken v. Markham

Another municipality that had experienced major growth in the early 1990s was the Town of Markham. In reviewing the Town Council's ward boundary changes introduced to recognize the changing patterns of development, the Ontario Municipal Board outlined three criteria which they intended to use to determine the appropriateness of the ward boundary by-law:

- equitable representation with population levels that are reasonably equivalent between (*sic*) wards;
- a sense of community that defines boundaries; and
- a compact and contiguous shape in the ward configurations.[25]

Although these criteria led the Board to make some minor adjustments to the proposed ward boundaries, the substance of the proposed by-law was upheld. Notably, in approving the ward re-alignments, the Board accepted a proposal that saw "rural sections for the four northern wards, rather than a stand-alone rural ward".[26]

[25] *Electors of Miliken v. Markham (Town)* (1996) O.M.B.D. 157.
[26] *Ibid*, at p. 4.

Osgoode Rural Community Association et al. v. Ottawa

Contrast the acceptance of the splintering of a rural electorate in the Markham case with the Board's 2003 decision in *Osgoode Rural Community Association et al. v. Ottawa (City).*[27] In that case, the Board refused to approve a ward boundary by-law which, by use of a "radial system", mixed rural and suburban voters and therefore "did not properly take into consideration the concerns of the rural community" and ignored the obligation to preserve "rural communities with historical economic and social differences".[28]

Recognizing that in overturning a Council by-law this decision was an anomaly, the Board justified its decision by stating that it was "loathed to interfere with a decision made by a duly elected Council unless, of course, there are clear and compelling reasons to do so".[29] The fact that the Conservative provincial government intervened in the proceedings in support of the rural appellants, after the courts overturned a ministerial notice to stay the proceedings, may also have been a factor in the decision.

[27] *Osgoode Rural Community Association et al. v. Ottawa (City)* 39 M.P.L.R. (3d) 131.
[28] *Ibid*, at p. 148.
[29] *Ibid*, at p. 146.

Re Halifax

Finally, in a 2004 decision by the Nova Scotia Utility and Review Board,[30] the Council of the Regional Municipality of Halifax came in for harsh criticism for its process failures in passing a ward boundary by-law, particularly for its lack of public debate. The process followed, the Board stated bluntly, was "unacceptable".[31] Notwithstanding these comments, the Board ultimately did approve a Council size of 23 Councillors as per the Region's application for approval. However the Board did order some significant changes to the proposed ward boundaries in order to more closely meet the Board's target of a ±10% variance. Although it was recognized that a 25% variance "has come to be regarded by some municipalities as the normal target variance" as a result of the *Carter* decision, the Board nevertheless concluded that a return to the principle of "one person, one vote" justified a lower variance target for *all* Nova Scotian municipalities.[32]

Both the *Ottawa* and *Halifax* decisions must be considered as anomalies to the general acceptance of the principle of judicial deference by both the courts and

[30] *Re Halifax (Regional Municipality)* 2004 48 M.P.L.R. (3d) 203.
[31] *Ibid*, at p. 232.
[32] *Ibid*, at p. 232-233. For a review of this decision, see Epstein, H., "Electoral Boundaries and the Problem of Vote Dilution in Municipal Elections", 48 M.P.L.R. (3d) 259. Mr. Epstein was also a witness at the Board hearing.

administrative tribunals in reviewing governmental decisions on electoral boundaries. As early as the 1989 *Dixon* decision, the courts have accepted that deference must be shown to the decisions made by elected bodies on electoral boundary issues.[33] Even in *Carter*, McLachlin noted that "the courts must be cautious in interfering unduly in decisions that involve the balancing of conflicting policy considerations."[34]

The implementation of new municipal ward boundaries involves complex and difficult policy decisions when one attempts to incorporate factors such as communities of interest, geographic barriers and population trends into the mix while remaining faithful to the principle of voter parity. The courts and municipal boards generally have recognized that Councils have chosen new ward boundaries after lengthy research and debate. This acknowledgement has encouraged adherence to the principle of deference.[35]

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[33] *Ibid*, at pp. 97-98.
[34] *Ibid*, at p. 189.
[35] Deference was also shown by the Ontario Municipal Board in four consecutive decisions, all issued in December 2002 on applications to determine whether there should be a shift from a ward system to an "at large" system (Niagara Falls; and Lakeshore) or from an "at large" system to a "ward" system (North Grenville; and Blind River). In all four cases, the Ontario Municipal Board upheld the option chosen by the elected Council. See *Niagara Falls v. Savage et al.* (2002) 45 O.M.B.R. 56; *North Grenville v. Gooch* (2002) O.M.B.D. M020082; *Blind River v. Simoneau* (2002) 45 O.M.B.R. 371; *Lakeshore v. Strba* (2002) 45 O.M.B.R. 228. For a review of these four decisions, see "Mixed Signals: The OMB and Municipal Electoral Systems", Municipal World, September, 2003.

C.4 A REVIEW OF PROVINCIAL ENABLING LEGISLATION

A comparison of provincial legislation on municipal ward boundaries reveals very little consistency in their approach to revising ward boundaries. (see Appendix "A").

In terms of a choice of electoral systems, nine of the ten provinces permit Councils a choice between an "at large" system and a ward system but in seven of those nine the "at large" system is the default system unless Council specifically elects to adopt a ward system. Québec mandates a ward-only system of electoral representation for municipalities with a municipal population exceeding 20,000 unless a Council opts for an "at large" system by a two-thirds vote.[36]

In terms of a process to select a municipal electoral system most provincial legislation is silent except for a common requirement for public notice. Saskatchewan and Québec are exceptions to this minimalist approach. Both provinces apply fairly detailed process requirements. Saskatchewan requires that prior to passing or amending a ward boundaries by-law Council must first establish a "municipal wards commission" whose responsibilities include:

[36] *Elections and Referendums in Municipalities Act*, s.7.

- determining the number of wards
- naming the wards;
- determining the number of councillors to be elected from each ward; and
- holdings public hearings.[37]

Québec has the most detailed legislation relating to municipal ward systems. Their legislation goes so far as to dictate, within a range, the number of wards required based on the population size of the municipality.[38] In 41 statutory sections, the legislation spells out very specific requirements for notice, public meetings and appeals to a "Commission de la représentation".

Four of the ten provinces also provide some guidelines that must be followed by municipal councils in establishing ward boundaries. Saskatchewan mandates a maximum 25% variance in population among wards and Québec a 15% variance. Manitoba and Nova Scotia require "approximately equal" wards and "relative voter parity" respectively.[39] These two provinces also specify a requirement to consider such factors as:

- communities of interest (Manitoba; Nova Scotia);
- geography (Manitoba);
- population density (Nova Scotia); and
- population trends (Manitoba).

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[37] *Urban Municipality Act*, s.27.
[38] *Elections and Referendums in Municipalities Act*, s.9.
[39] See Appendix "A".

The remaining six provinces, including Ontario and British Columbia, offer no statutory guidelines on the process of establishing ward boundaries. These provinces rely on public notice and hearings and the right of appeal to a municipal board as the means to attempt to ensure that municipal councils are not entirely self-serving in their ward boundary revisions. Whether this is a sufficient control mechanism is highly questionable.

D. ESTABLISHING WARD BOUNDARIES

D.1. ESTABLISHING THE SIZE OF COUNCILS

Having reviewed the legislative and judicial basis for undertaking ward boundary reviews, I now turn to the practicalities in venturing down this path.

The first issue to be addressed in any ward boundaries review is the size of wards – how many wards should the municipality have, or to phrase it differently how large should the municipal council be. Québec is the only province that has legislated a range based upon the population of the municipality.[40] All other

[40] S.9 of *The Elections and Referendums in Municipalities Act* of Québec establishes the following ranges:
Population under 20,000 – 6 to 8 wards
20,000 to 50,000 – 8 to 12 wards
50,000 to 100,000 – 10 to 16 wards
100,000 to 250,000 – 14 to 24 wards
250,000 to 500,000 – 18 to 36 wards
over 500,000 – 30 to 90 wards
With the consent of the Minister, a municipality can establish a number outside the range.

provinces leave the issue of the size of council to the discretion of Council. In determining an appropriate size, the following factors are usually considered:

- ratepayer access to Councillors;
- representation of distinct communities; and
- civic administration costs.

The first two factors would generally encourage a larger Council whereas the third would dictate as small a Council as possible.

As well, most reviews include a survey of the size of Councils in comparable municipalities. This benchmarking exercise assists in justifying the selected size.

For example, listed below are the populations and Council sizes of some of the major Canadian municipalities:

Municipality	Population	Council Size (Includes Mayor)	Ratio of Councillors to Population
Montréal	1,775,788	74	1:23,997
Toronto	2,480,000	45	1:55,111
Ottawa	825,000	22	1:37,500
Winnipeg	684,800	16	1:42,800
Hamilton	490,270	16	1:30,642
Calgary	922,315	15	1:61,488
Edmonton	938,000	13	1:72,154
Mississauga	680,000	10	1:68,000

The average ratio among these municipalities is one Councillor per 48,672 residents.

Notably, both Toronto and Montréal have significantly larger Councils than all other Canadian municipalities and some critics see a relationship between the size of Councils and the effectiveness of Councils.[41] Aside from the above two municipalities, all other Councils in the above list fall into the 10 to 22 range.

If one accepts the frequently used analogy of a Council as a board of directors of a municipal corporation, it is not surprising that most Councils are relatively small. Good governance is not dependent upon a large Council. As Councils increase in size, individual Councillors lose influence and, arguably, their effectiveness.

In his 2004 report on proposed electoral reforms for the City of Vancouver, former Justice Thomas Berger determined that wards of between 30,000 and 60,000 residents are the norm, but that a ward not exceeding 40,000 best represents "a manageable constituency".[42]

[41] See Sancton, A, "Affidavit prepared in the Supreme Court of Canada challenge to the amalgamation of Toronto-area municipalities, 1999", available at www.localgovernment.ca/show_library.
[42] *Supra*, note 3 at p. 66.

D.2 IMPLEMENTING THE KEY PRINCIPLES OF REPRESENTATION

After establishing the size of Council or at least a range within which the drafters are to operate, the next step in a ward boundaries review is to attempt to apply the key principles of electoral representation as enunciated by *Carter* and amplified by subsequent judicial and administrative tribunal decisions.

a) Voter Parity – Permitted Variance

Although the Supreme Court of Canada in *Carter* recognized that voter parity was of "prime importance" in the portfolio of "effective representation" factors, it also recognized that absolute parity was "impossible". This observation merely begs the question: what is a permitted variance from the "absolute parity quotient" that still maintains the parity principle? (The "absolute parity quotient" is obtained by dividing the entire population by the total number of elected representatives.)

In *Carter*, the Court was considering a 25% variance from the average size of constituencies that was permitted under the *Saskatchewan Electoral Representation Act*. Carter and the other challengers to the legislation had argued that this legislated variance devalued the worth of votes held by citizens in the larger constituencies. In her earlier decision - *Dixon* - while sitting as the Chief Justice in British Columbia, McLachlin had held that the British Columbia constituency boundary system violated s. 3 of the *Charter* since 19 of the 52 ridings had electorates above or below the 25% variance standard. Such

anomalies, she had concluded, were a “gross violation of the fundamental concept of representation by population”.[43]

Two years after *Dixon*, now sitting on the Supreme Court of Canada, McLachlin found that the Saskatchewan legislation which mandated a maximum 25% variance, was a tolerable range of deviation. Subsequently, this 25% variance has become the benchmark against which boundary adjustments have been constitutionally reviewed.[44]

Some judges and legislators however have suggested a more restrictive variance. Arguing in dissent in *Carter*, Cory J. argued that a 15% deviation should have been the maximum acceptable figure to ensure compliance with s. 3 of the *Charter*.[45] An even more restrictive approach was taken by the Nova Scotia Utility and Review Board in its recent decision on the redistribution of wards in the Regional Municipality of Halifax.[46] In that decision, the Board “determined that the target variance for parity should be ±10, provided community of interest issues are generally satisfied”.[47] Further, the Board went on to state that it “will expect [Halifax] and *other councils* to likewise address themselves to this goal in future applications of this type”.[48] Accordingly, for Nova Scotia at least, the bar has been substantially lowered.

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[43] *Supra*, note 5 at pp. 267-268.
[44] See Epstein, pp. 261-264; Johnson, p. 244.
[45] *Supra*, note? at pp. 172-174.
[46] *Re Halifax (Regional Municipality)* (2004) 48 M.P.L.R. (3d), 203.
[47] *Ibid*, at para. 82.
[48] *Ibid*, at para. 124.

b) Community of Interest

In *Carter*, the Supreme Court of Canada acknowledged that deviations from equal riding populations were required to accommodate communities of interest – "to ensure that our legislative assemblies effectively represent the diversity of our social mosaic".[49]

A review of the judicial and administrative tribunal decisions that address this concept, however, reveals that in practice the "community of interest" that is the focus of debate is the *rural* community of interest. The ongoing evolution in both Canada and the United States from a rural to an urban society has been well documented. With this change has come a transfer of political power to the urban electorate. But drafters of electoral boundaries have hesitated to fully recognize this transfer in terms of elected representatives.

There are other "communities of interest" that can be identified – religious, racial and cultural – but these communities of interest can rarely be distinguished geographically. Ethnic and racial groups, for example, spatially merge into one another in the urban community. Unless one is prepared to accept a dramatic departure from our geographic-based system of electoral representation to a system based on representation by ethnic, racial, religious and cultural groups, one cannot accommodate most "communities of interest" in our current electoral

[49] *Ibid*, at p. 184.

system. The only community of interest that is geographically based – almost by definition – is the rural community of interest.

Accordingly, both for geographic and historical reasons, it is only to this community of interest that our courts and legislators have attempted to give special status. Certainly there are arguments that can and have been made that preference should be given to the rural community, but the advocates of rural representation should be prepared to acknowledge that the electoral preference granted to them is not available to other communities of interest in our "social mosaic".

c) Geographic/Communications Factors

Drafters of municipal ward boundaries also have to consider the practicalities of geographic features and "man-made" boundaries (e.g. major highways) in the development of their work. These boundaries often distinguish traditional neighbourhoods and consequently form natural candidates for ward boundaries.

As well, in the municipal context, the issues of geography and communications are usually intermingled with discussion of the rural community of interest. The argument is made that there has to be rural "over-representation" to compensate for the difficulties of travel and communication among rural residents and between rural representatives and their constituents. I suggest, however, that this is an historical-based argument and lacks relevance today with

improvements to our road infrastructure and the availability of modern communication services.

d) Population Trends

All municipalities, but particularly those undergoing significant development pressures, will see shifts in ward populations over a period of time. Since ward boundaries are intended to provide stability, they are usually drafted with the understanding that they remain unchanged for a minimum of two to three election cycles. To accomplish this intent, drafters of ward boundaries must have regard to population trends in doing their work.

Predicting population growth is not an exact science. However, with the assistance of municipal Official Plan data and G.I.S. technology, it is possible to develop population projections over a 10 or 15 year time period with a reasonable degree of accuracy. These population projections can be used to justify the drawing of specific ward boundaries that presently fail to meet the targeted variance from the average size, but will, with reasonable probability, do so within a relatively short timeframe.

Finally, in examining population projections, one must be careful to distinguish between growth in population and growth in the electorate. For example, suburban areas generally have more children than central areas and this reality

must be factored into any attempt to predict growth in the electorate in various parts of a municipality.

E. IMPLEMENTATING WARD BOUNDARY CHANGES – A NEED FOR A COHERENT LEGISLATIVE FRAMEWORK

At the federal and provincial levels electoral boundaries are regularly adjusted through the intervention of a statutory based independent commission. As a condition precedent to finalizing their work, these commissions are required to hold public hearings. At the federal level the decision of the commission is implemented without recourse to Parliament. At the provincial level the more common approach is for the electoral commission to make recommendations to the Legislature but there is a generally accepted convention that these recommendations are to be adopted without significant amendment.[50] This impartial, third-party approach avoids allegations of modern day gerrymandering and seems to have worked well if the lack of any academic or widespread electorate criticism is any basis for judgment.

Only at the municipal level is there a lack of any consistent legislative framework. As indicated in the previous section of this paper, four provinces (Saskatchewan, Manitoba, Québec and Nova Scotia) have attempted to address this issue although their approaches vary somewhat in both philosophy and complexity. In

[50] See Epstein, 2776; Williams, p.31.

the remaining six provinces municipal councils are left to grapple periodically with the always contentious issue of electoral adjustments without the benefit of any legislative framework. In the absence of any coherent legislative guidelines any decision of a municipal council remains subject to allegations of self-serving electoral engineering and inevitably results in challenges before the courts or before appellate boards.

It is suggested that a legislative framework based on the following requirements would go a long way to making municipal electoral adjustments more open, transparent and accepted.

1. The Establishment of a Third-Party Municipal Electoral Commission. Even where there is currently no legislative framework in place, the need for an "independent" third-party review is generally acknowledged to be the appropriate first step. Both Vancouver and Ottawa recently established third-party commissions to undertake their respective electoral system and ward boundary reviews[51] although in both cases their recommendations were never fully implemented.

2. Public Notice and Public Hearings. To ensure that the views, concerns and suggestions of all groups or individuals are heard, the electoral commission should be required to hold public hearings after proper notice is given.

[51] See "A City of Neighbourhoods – Report of the 2004 Vancouver Electoral Reform Commission" (the "Berger" Report); "Building Consensus …".

Incumbent politicians would be entitled to make representations before the commission in an open and transparent manner.

3. Size of Council. The electoral commission should also be mandated to determine the size of the council. Legislation should however require that the number be within a wide range based upon population size. Five is generally accepted as the minimum size for a representative council and convincing arguments have been made that councils larger than twenty-five become dysfunctional and ineffective.[52]

4. Establishment of Criteria. The electoral commission should be required to undertake their deliberations in accordance with specific criteria. The four basic criteria would be:

- voter parity with a maximum ±25% variance from the average ward size.[53] This variance has judicial sanction as indicated previously and would permit the electoral commission the flexibility to address the other criteria noted below;
- communities of interest. The commission would be required to make adjustments to the principle of voter parity to address settlement patterns that recognize the rural electorate and racial or cultural groups;
- geographic or topographic features. Rivers, escarpments and even major highways form "natural" boundaries that divide electoral communities; and

[52] See Sancton, paragraphs 60 to 70 inclusive.
[53] Legislatively this criteria would be framed as follows: "The population of each ward shall not vary by more than 25% from the quotient obtained by dividing the total population of the municipality by the total number of councilors to be elected."

- population trends. The establishment of ward boundaries should be undertaken within a relatively stable time horizon. Accordingly, the electoral commission should consider population projections in making their decisions. This would particularly be an important factor in municipalities undergoing rapid growth. [54]

5. A Requirement for Periodic Review. A requirement of a periodic review of electoral boundaries should not be necessary in stable, usually smaller municipalities but in larger municipalities experiencing dynamic growth it should be a necessity. As Berger commented in his report for the City of Vancouver, "Communities themselves are organic - growing, shrinking, merging or splitting over time". [55]

Since the federal census figures are produced every ten years it makes sense that the requirement for periodic review follow the publication of the census figures. Only those municipalities that have undergone a population increase of higher than a certain percentage since the last census – perhaps 10% - would automatically trigger the need for the establishment of an electoral commission to review ward boundaries. For those municipalities that had experienced a population increase less than the prescribed percentage, the establishment of a commission would be at the discretion of Council.

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[54] The P.E.I. Court of Appeal commented on this necessity in their Charlottetown v. P.E.I. decision: "… it does not make much sense to be constantly changing the boundaries of the electoral districts just to accommodate the ever-changing numbers … . There needs to be some reasonable period of time elapse between redistributions so the boundaries fixed at redistribution will govern for a number of years." (Ibid, at p. 92)

[55] *Ibid*, at p.76.

With the above legislated framework in place the municipal electorate would be ensured of a system of equitable and “effective” representation achieved through an equitable and effective process. It would end the current system which is inconsistent, inherently politically distressing, and almost always subject to allegations of self-serving bias.

The municipal electoral system forms a vital component of a “free and democratic” society. It requires a legislative framework to ensure that the right to vote and equity obligations enshrined in the Charter are discharged. The Courts have given guidance on how this framework can be drafted. Some provinces have accepted the judicial challenge. It behooves the other provinces to follow suit.

APPENDIX "A"

Comparison of Provincial Legislation Relating to Electoral Systems

Province	Electoral System	Process	Appeal	Guidelines	Act
British Columbia	"at large" unless Council chooses ward system	notice requirement	none	none	Local Government Act, s.36
Alberta	either "at large" or "ward" system or combination thereof	none	none	none	Municipal Government Act, ss. 148-149
Saskatchewan	"at large" unless Council chooses "ward" system	Municipal Ward Commission to be established	none	• 25% maximum variance • communities of interest • public hearings	Urban Municipality Act, ss. 25-27
Manitoba	"at large" unless Council chooses "ward" system	none	to Municipal Board	• "approximately equal" population • communities of interest • topography • settlement patterns • population trends	Municipal Act, ss. 87-89
Ontario	either "at large" or "ward" or combination thereof	notice requirement	to Municipal Board	none	Municipal Act, ss. 222-223
Québec	wards if population over 20,000	detailed process with oversight by Commission de la répresentation	to "Commission de la répresentation"	• 15% maximum variance • public hearings	Elections and Referendums in Municipalities Act, ss. 4-41
Nova Scotia	either "at large" or "ward" system	approval of Nova Scotia Utility and Review Board required	to Nova Scotia Utility and Review Board	• relative voter parity • population density • communities of interest • geographic size	Municipal Government Act

Province	Electoral System	Process	Appeal	Guidelines	Act
New Brunswick	“at large” unless Council chooses “ward” system	notice requirement	none	none	Municipalities Act, s. 31
Newfoundland	“at large” unless Council elects “ward” system by 2/3 vote	none	none	none	Municipalities Act, s. 14
Prince Edward Island	“at large” unless Council chooses “ward” system	ward by-law to be filed with Minister	none	none	Municipalities Act, s. 19