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appellant had the requisite interest under art. 55 of the *C.C.P.* to file an appeal.

Appeal allowed.

Re MacKinnon and Government of Prince Edward Island; City of Charlottetown, Intervener

[Indexed as: MacKinnon v. Prince Edward Island]

Court File No. GSC-10569

Prince Edward Island Supreme Court, Trial Division, DesRoches J.
February 16, 1990.

Constitutional law — Charter of Rights — Right to vote — Prince Edward Island legislation imposing mandatory division of electoral districts among three counties — Significant variances in number of voters in some districts from provincial average of voters per district — Legislation contravenes right to vote — Not reasonable limit — Canadian Charter of Rights and Freedoms, s. 3 — Election Act, R.S.P.E.I. 1988, c. E-1, ss. 147 to 151.

Constitutional law — Charter of Rights — Enforcement of rights — Remedies — Provincial election legislation governing distribution of seats contravenes Charter right to vote — Appropriate remedy is declaration of invalidity suspended for reasonable period to allow legislative action — Canadian Charter of Rights and Freedoms, s. 3 — Election Act, R.S.P.E.I. 1988, c. E-1, ss. 147 to 151.

The Prince Edward Island *Election Act*, R.S.P.E.I. 1988, c. E-1, imposes a mandatory division of the 16 provincial electoral districts among the three provincial counties. Each district elects a councillor and assemblyman. The disparities between the number of voters in a district and the provincial average ranged between 115% over the average and 63% under. Twelve districts were in excess of 40% over or under the provincial average.

On an application for a declaration that ss. 147 to 151 of the *Election Act* contravene the *Canadian Charter of Rights and Freedoms* and for other relief,

held, the application should be granted.

Section 3 of the Charter guarantees every citizen the right to vote in a provincial election. The existing electoral distribution in the province provides inadequate representation to a large percentage of the voters because of the significant variances in population in the electoral districts. Factors such as community history, communities of interest and the need to maintain an appropriate urban/rural and regional balance in political representation do not support a conclusion that the existing extreme deviations are necessary to ensure the better government of the populace as a whole. Therefore, ss. 147 to 151 of the Act violate s. 3 of the Charter, and the infringement is not saved by s. 1. While the objectives of ensuring an appropriate urban/rural and regional balance in political representation to ensure better government are pressing and substantial, the means adopted are not proportional or appropriate. The legislative requirement to have electoral districts distributed relatively equally among the three counties is

completely arbitrary and the population variances across districts cannot be justified on the basis of urban/rural and regional considerations.

While the provisions of the Act are contrary to the Charter, they will stay provisionally in place pending necessary legislative action to remedy the defects. If remedial action is not taken within a reasonable period, submissions as to the appropriate period necessary to remedy the legislation may be made to the court. It is not appropriate to grant the remedy sought, which included a request for an order that electoral redistribution be carried out by a non-partisan, independent boundaries commission and that a minimum variance for voter parity be specified.

Reference re: Electoral Boundaries Commission Act, ss. 14, 20 (Sask.) (1991), 81 D.L.R. (4th) 16, [1991] 2 S.C.R. 158, 5 C.R.R. (2d) 1, [1991] 5 W.W.R. 1, 94 Sask. R. 161, 127 N.R. 1, 27 A.C.W.S. (3d) 602; *Dixon v. British Columbia (Attorney-General)* (1989), 59 D.L.R. (4th) 247, [1989] 4 W.W.R. 393, 35 B.C.L.R. (2d) 273, 15 A.C.W.S. (3d) 121; *R. v. Oakes* (1986), 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 19 C.R.R. 308, 65 N.R. 87, 53 O.R. (2d) 719*n*, 16 W.C.B. 73, apld

Other cases referred to

Reference re: Electoral Boundaries Commission Act (Alberta) (1991), 86 D.L.R. (4th) 447, [1992] 1 W.W.R. 481, 8 W.A.C. 70, 120 A.R. 70, 83 Alta. L.R. (2d) 210, 30 A.C.W.S. (3d) 378; *Dixon v. British Columbia (Attorney-General)* (1989), 60 D.L.R. (4th) 445, 37 B.C.L.R. (2d) 231, 16 A.C.W.S. (3d) 12

Statutes referred to

"Act respecting the representation of the people in the Legislature", 1893
Canadian Charter of Rights and Freedoms, ss. 1, 3
Election Act, 1963, S.P.E.I. 1963, c. 11
Election Act, R.S.P.E.I. 1988, c. E-1, ss. 147, 148, 149, 150, 151
Electoral Boundaries Commission Act, S.S. 1986-87-88, c. E-6.1 [repealed by s. 18 of, and replaced by 1990-91, c. E-6.11], s. 20
Electoral Boundaries Readjustment Act, R.S.C. 1985, c. E-3

APPLICATION for a declaration that ss. 147 to 151 of the *Election Act* (P.E.I.) contravenes s. 3 of the *Canadian Charter of Rights and Freedoms*.

Dolores M. Crane, for applicant.
Gordon L. Campbell and *Rosemary Scott*, for respondent.
David W. Hooley and *Karen A. Campbell* for intervener.

DESROCHES J.:—On February 15, 1991, the applicant, Donald MacKinnon, filed an application with the court seeking:

(1) An Order and Declaration that Sections 147, 148, 149, 150 and 151 of the *Election Act* R.S.P.E.I. 1988 Chapter E-1 as amended, (hereinafter referred to as the Act), are null, void and of no force or effect in that they are inconsistent with and contravene the *Canadian Charter of Rights and Freedoms*

(2) Such other remedy as this Honourable Court may deem just and appropriate in all circumstances pursuant to section 24 of the Charter, and the inherent jurisdiction of this Honourable Court, including:

(a) an Order setting the time within which the Government shall enact legislation providing for a redistribution of provincial electoral boundaries conforming to the requirements of the Charter; and

(b) in default of valid legislation being enacted, an Order setting the provincial electoral boundaries for the 16 provincial districts required by Section 147 of the said *Election Act*.

By consent of the parties, the City of Charlottetown has intervened as a party to the application.

I should mention that in the application MacKinnon alleges possible infringement of a number of sections of the *Canadian Charter of Rights and Freedoms*, but the only issue at trial is related to a possible infringement of s. 3.

The impugned distribution

Section 147 of the *Election Act* provides for the creation of 16 provincial electoral districts. According to s. 151 of the Act, each of the 16 districts is to be represented in the Legislative Assembly by two members, one councillor and one assemblyman.

Historically, Prince Edward Island is divided into three counties, Prince, Queens and Kings. The *Election Act* mandates that representation in the Legislative Assembly shall be apportioned by counties. Section 148(1) of the Act divides Prince County into five electoral districts and the composition of each of the five districts is provided in s. 148(2) to (6). Queens County is divided by s. 149(1) into six electoral districts, the composition of which is set by s. 149(2) to (7). Section 150(1) divides Kings County into five electoral districts, the composition of which is detailed in s. 150(2) to (6).

Much as does the *Electoral Boundaries Commission Act*, S.S. 1986-87-88, c. E-6.1, which is subject of the decision of the Supreme Court of Canada in *Reference re Electoral Boundaries Commission Act, ss. 14, 20 (Sask.)* (1991), 81 D.L.R (4th) 16, [1991] 2 S.C.R. 158, 5 C.R.R. (2d) 1 [hereinafter called "*Carter*"], the Prince Edward Island Act imposes a mandatory division of electoral districts among the three counties. It is the perceived effect of this mandatory division on the right to vote enshrined in s. 3 of the Charter that is at issue in this case. I will examine in more detail later in this judgment how the decline in the rural population of this province and the corresponding growth in the population and geographical boundaries of urban areas have resulted in a provincial electoral map which is seen to be, at least by the applicant and the intervener, quite "lop-sided".

The right to vote

The right to vote is of paramount importance. It is one of the most fundamental rights and constitutes the very basis of democratic political systems. However, it was not protected by any direct constitutional guarantee until enshrined in s. 3 of the Charter which reads:

> 3. 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.

I am indeed fortunate that the scope and purpose of s. 3 has been the subject of carefully considered judgments. Therefore, a lengthy review and analysis need not be embarked upon.

In *Dixon v. British Columbia (Attorney-General)* (1989), 59 D.L.R. (4th) 247, [1989] 4 W.W.R. 393, 35 B.C.L.R. (2d) 273, Chief Justice McLachlin of the British Columbia Supreme Court (as she then was) declared invalid the British Columbia legislation establishing electoral districts on the ground that it violated s. 3. She concluded that the historical development of voting rights in Canada, and the view taken of such rights in other democracies, leads inexorably to the conclusion that relative equality of voting power is fundamental to the right to vote enshrined in s. 3. By this she meant that electoral divisions must be relatively equal in population size because, in her view, it has never been questioned in Canada that population must play a dominant role in the establishment of electoral districts. At the same time McLachlin J. accepted the Attorney-General's submission that absolute equality of voting power has never been required in Canada.

According to the Chief Justice, in determining the amount of deviation permissible deference must be accorded to the legislature which is in a better position than the courts to determine whether deviation is required. However, in making that determination, the legislature must act in accordance with the legal principles inherent in the Charter guarantee of the right to vote. She states at pp. 266-7:

> What are these principles?
>
> We must start, as I have already observed, from the proposition that equality of voting power is the single most important factor to be considered in determining electoral boundaries.
>
> The most fundamental function of elected representatives is to represent their constituency. They function in two roles — legislative and what has sometimes been termed the "ombudsman role". Relative equality of the number of voters per representative is essential to the proper conduct of both these roles.

In the legislative role, it is the majority of elected representatives who determine who forms the government and what laws are passed. In principle, the majority of elected representatives should represent the majority of the citizens entitled to vote. Otherwise, one runs the risk of rule by what is in fact a minority. Moreover, party majorities may be small and coalitions or minority governments formed. Governments may stand or fall depending on the division of one or two members of the legislature. If there are significant discrepancies in the numbers of people represented by the members of the legislature, the legitimacy of our system of government may be undermined.

Relative electoral parity is similarly essential to the elected representative's "ombudsman" function which requires the representative and his or her staff to deal with individual problems and complaints of constituents. It is not consistent with good government that one member be grossly overburdened with constituents, as compared with another member.

These considerations lead me to conclude that the dominant consideration in drawing electoral boundaries must be population. Because equality of voting power is so important, it is appropriate to set limits beyond which it cannot be eroded by giving preference to other factors and considerations, such as the 25% limit applied in Canada to federal electoral districts or the 10% limit established recently in Australia.

To this may be added a second proposition: that only such deviations from the ideal of equal representation as are capable of justification on the basis of some other valid factor may be admitted. What considerations are capable of justifying deviation from absolute equality of voting power? I would not wish to lay down an exhaustive list at this point in the development of the jurisprudence under s. 3 of the Charter. However, I am satisfied that the following general proposition may be supported: only those deviations should be admitted which 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. Geographic considerations affecting the servicing of a riding and regional interests meriting representation may fall into this category and hence be justifiable.

I agree with the Attorney-General that it is not the role of the courts to decide which factors and considerations are to be applied to each individual riding and with what degree of relative weight. This task is within the responsibilities of the legislature. However, this court, if called upon, must examine the results of the efforts of the legislature to see whether in individual ridings, the deviation from the electoral quota can be justified.

The consequence of applying the two principles to which I have alluded is that while an outside limit for deviation from equal representation may be appropriate to ensure that equality of voting power maintains the necessary dominance in the setting of local boundaries, it is not alone sufficient, particularly if the outside limit is relatively generous.

More recently in *Carter*, McLachlin J. had an opportunity to revisit the issue as a member of the Supreme Court of Canada. Her majority judgment of the court has resolved a number of substantial issues with respect to the meaning of the right to vote in s. 3.

The complainants in *Carter* argued that the variances in size of voter populations among constituencies established pursuant to the

Electoral Boundaries Commission Act of Saskatchewan infringed their rights under s. 3 of the Charter. They also argued that the legislatively mandated distribution of constituencies among urban, rural and northern areas infringed s. 3. The Saskatchewan Act had set in motion a distribution process which imposed a strict quota of urban and rural ridings. It also required the boundaries of the urban ridings to coincide with the existing municipal boundaries.

Speaking for the majority, McLachlin J. notes that the content of a Charter right must be discovered in a broad and purposive way, having regard to historical and social context; narrow and technical approaches must be avoided. She states that the right to vote, while rooted in and hence to some extent defined by historical and existing practices, cannot be viewed as frozen by particular historical anomalies. She warns that in constitutional interpretation courts must be sensitive to "the practical living facts" to which a legislature must respond. In her view, this is nowhere more true than in considering the right to vote, where practical considerations such as social and physical geography may impact on the value of the citizen's right to vote. She also considers of critical importance the canon that in interpreting the individual rights conferred by the Charter the court must be guided by the ideal of a "free and democratic society" upon which the Charter is founded.

Having focused the debate to the question to what extent, if at all, does the right to vote enshrined in the Charter permit deviation from the "one-person — one vote" rule, McLachlin J. concludes 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". For her, "effective representation" is comprised of a number of aspects. She writes at pp. 35-6:

> 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. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.
>
> But parity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation. Sir John A. Macdonald in introducing the "Act to re-adjust the Representation in the House of Commons", S.C. 1872, c. 13, recognized this fundamental fact:
>
> > ". . . it will be found that . . . while the principle of population was considered to a very great extent, other considerations were also held to have weight; so that different interests, classes and localities should be fairly represented, that the principles of number should not be the only one."

> Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.
>
> First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of votes in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible.
>
> Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. 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.
>
> It emerges therefore that deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced. I adhere to the proposition asserted in *Dixon*, *supra*, at p. 267, that "only those deviations should be admitted which 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".

McLachlin J. concludes her consideration of the meaning of the right to vote as follows at p. 39:

> In summary, I am satisfied that the precepts which govern the interpretation of Charter rights support the conclusion that the right to vote should be defined as guaranteeing the right to effective representation. The concept of absolute voter parity does not accord with the development of the right to vote in the Canadian context and does not permit of sufficient flexibility to meet the practical difficulties inherent in representative government in a country such as Canada. In the end, it is the broader concept of effective representation which best serves the interests of a free and democratic society.

Obviously, McLachlin J. in *Carter* did not simply adopt her earlier decision in *Dixon*. Whereas in the latter case the guiding principle of her opinion appears to be that the dominant consideration in drawing electoral boundaries must be population, in *Carter* she speaks in terms of "relative voter parity" and "effective representation". However, in my opinion, both decisions support the view that relative equality of voting power is fundamental to the right to vote enshrined in s. 3. McLachlin J. does not deny in *Carter* the importance of parity of voting power; indeed she clearly identifies relative parity of voting power as the first condition of effective representation and states that it is ". . . of prime importance". Deviations may be justified only on the grounds of "practical impossibility or the provision of more effective representation".

It is argued on behalf of the respondent in this case that McLachlin J.'s concept of "effective representation" has two
a aspects; having voice in government and having the right to bring one's grievances and concerns to one's representatives. Thus, it is submitted, a person can only establish a denial or infringement of the right to vote under s. 3 by either establishing that his or her representative has an ineffective voice in the Legislative Assembly,
b or that access to his or her representative has been rendered ineffective. In other words, the respondent submits that the only way to truly test whether the constitutional guarantee of effective representation has been denied or infringed is to ask: What impact does the current electoral boundaries have on representation in the
c Legislative Assembly of the province?

I reject this argument. In my opinion, it is inconsistent with the general understanding of the need for a generous and purposive approach to defining the rights and freedoms guaranteed by the Charter. As McLachlin J. states in *Carter* at p. 32: "The doctrine of
d the Constitution as a living tree mandates that narrow technical approaches are to be eschewed . . .".

Moreover the suggested approach simply does not emerge from my reading of *Carter*. I cannot find any indication in the decision of a requirement on the applicant to demonstrate an actual impact on representation or to establish ineffective representation. McLachlin
e J. clearly states that it was the boundaries *themselves* which were at issue in *Carter*. She states at p. 31:

> The questions focus, not on the Act, but on the constitutionality of "the variance in the size of voter populations among [the] constituencies" and "the distribution of those constituencies among urban, rural and northern
f areas" . . . the basic question put to this court is whether the variances and distribution reflected in the constituencies themselves violate the Charter guarantee of the right to vote.

Again, at p. 40 she notes:

> . . . the issue in this appeal concerns the "variance" in voter populations
g among constituencies and the "distribution" of constituencies among urban, rural and northern areas. This wording suggests a focus on the result obtained rather than the process . . .

While *Carter* does not resolve the question of how far electoral districts can be moved away from strict equality before Charter
h problems are encountered, it seems clear that the actual population distribution created by an electoral map is of crucial importance to a constitutional challenge. The electoral map in *Carter* involved actual deviations in the southern ridings ranging from minus 24% to plus 24% from the electoral quotient. McLachlin J. did not comment specifically on the outer limits of variation that could be

constitutionally sustained, but she found the range of variance to be acceptable when balanced against facts like geography, community history, community interests and minority representation. Section 20 of the Saskatchewan *Electoral Boundaries Commission Act* itself required the commission to consider the sparsity, density or relative rate of growth of population, any special geographic features, the community or diversity of interests of the population and other similar or relevant factors.

I conclude, however, that the ideal of fair and effective representation embodies a balance between absolute voter parity and non-population factors such as community history, community of interest, rate of growth, special geographic features and the like where they are present. This, in my view, is what is required by *Carter* and not an examination of the actual "impact" of electoral boundaries on representation. To require an applicant to establish that his or her representative has been rendered ineffective or that he or she has been denied effective access to the representative by a particular electoral distribution scheme would virtually block any successful court challenges, except perhaps in cases of very extreme disparities in the voter populations of electoral districts.

Furthermore, such an approach to s. 3 would effectively frustrate any examination of the appropriate issues raised in a constitutional challenge under that section in those cases where, rare though they might be, an elected representative is actually ineffective because of personal shortcomings and not because of any defect in the electoral distribution scheme.

It is also difficult to imagine how such an approach would be applied in reference cases such as the recent *Reference re: Electoral Boundaries Commission Act (Alberta)* (unreported, November 21, 1991) [since reported 86 D.L.R. (4th) 447, [1992] 1 W.W.R. 481, 8 W.A.C. 70 (Alta. C.A.).

Finally, I am not unmindful of McLachlin J.'s caveat at pp. 39-40:

> It is important at the outset to remind ourselves of the proper role of courts in determining whether a legislative solution to a complex problem runs afoul of the Charter. This court has repeatedly affirmed that the courts must be cautious in interfering unduly in decisions that involve the balancing of conflicting policy considerations, see *Reference re Public Service Employee Relations Act (Alta.)* (1987), 38 D.L.R. (4th) 161, [1987] 1 S.C.R. 313, 28 C.R.R. 305, *per* Le Dain J., at p. 240; *R. v. Schmidt* (1987), 39 D.L.R. (4th) 18, 3 C.C.C. (3d) 193, [1987] 1 S.C.R. 500, *per* La Forest J., at p. 40; *Canada (Minister of Energy, Mines and Resources) v. Canada (Auditor-General)* (1989), 61 D.L.R. (4th) 604, [1989] 2 S.C.R. 49, *per* Dickson C.J.C., at pp. 631-6. These considerations led me to suggest in *Dixon*, *supra*, at p. 271, that "the courts ought not to interfere with the legislature's electoral map

under s. 3 of the Charter unless it appears that reasonable persons applying the appropriate principles . . . could not have set the electoral boundaries as they exist".

A historical snapshot

As noted earlier, the Prince Edward Island *Election Act* imposes a mandatory division of electoral districts among the three provincial counties. It is useful at this point to briefly review the history of electoral division in this province.

In 1764, the British Government deemed it desirable that a general survey of all British territories in North America should be completed at the earliest date possible. The survey of the northern portion of those territories was entrusted to Captain Samuel Holland who arrived on the Island and, according to instructions received from the British Government, began his survey in the summer of 1764. He completed his survey of the Island in 1766. There were no specific instructions provided to Holland as to the number of districts to be set up, and the resulting division of the Island into 67 townships or lots of about 20,000 acres each, 14 parishes and three counties, is the product of his decision as to where appropriate lines should be drawn.

The Legislature of Prince Edward Island was established in 1769 on the basis of instructions issued to the then Governor, Walter Patterson. It was first summoned in 1773. Eighteen members were elected at large, the Island being treated as one constituency having no electoral districts.

The instructions of 1769 also directed the establishment of a council consisting of 12 members appointed on the governor's recommendation. In 1839 this body was divided into an Executive and a Legislative Council.

The first Act dealing specifically with elections to the House of Assembly was passed in 1801 directing an election of 18 members, again from the Island at large. In 1838, an amendment to the *Election Act* provided for an increase from 18 to 24 members and directed that six members be elected from each of Prince, Queens and Kings Counties and two each from Georgetown and Royalty, Charlottetown and Royalty and Princetown and Royalty. Another amendment in 1856 raised the number of elected representatives to 30 by increasing to eight the number of members elected from each of the three counties.

A significant change occurred to the constitution of the Government of Prince Edward Island in 1893. Financial pressure led to the abolition of both the Council and the House of Assembly and the creation of a new body containing elements of both. The

composition of the new assembly closely resembled that of the old. It consisted of 30 members to be elected from the existing 15 constituencies whose boundaries remained almost the same as those already in existence. One member of each electoral district was to be a councillor, the other an assemblyman. One of the last pieces of legislation passed by the old lower house was an "Act respecting the representation of the people in the Legislature" which proposed the division of Kings County into five electoral districts. The debate was heated and centred on the issue of a redistribution to provide a more equitable representation by population, or as it was stated by one member, ". . . to have five districts as nearly as possible equal in the number of their population".

From the point of view of distribution very little has changed since 1856 when the number of seats in the assembly was increased to 30. The reforms that have occurred were attempts to redress population inequities and consisted in either changes to the number of representatives or to the geographical boundaries of electoral districts.

In 1962, a provincial Royal Commission on Electoral Reform concluded, based on ". . . the usual factors involved in distribution: population, geography, taxes paid, trading and marketing convenience, and common interests" that a redistribution of seats ". . . would be desirable, provided the recommendations were not too drastic". It recommended that distribution be amended by creating one additional electoral district in Queens County and reducing the number in Kings County by a like amount. In 1963, an amendment to the *Election Act* was duly presented whereby two additional legislative seats would be established for the City of Charlottetown while keeping the total number of members in the assembly at 30 [S.P.E.I. 1963, c. 11]. The amendment also called for the abolition of the electoral district of Fifth Kings. The amendment passed by a narrow margin, but in 1966, with an election pending, a further amendment increased the total number of electoral districts from 15 to 16 thereby raising the number of members in the assembly to 32. The district of Fifth Kings was re-established. Prince Edward Island is the only jurisdiction in Canada which retains dual member ridings.

Facts relied upon by the applicant

The most recent provincial general election was held in this province on May 29, 1989. The report submitted by the chief electoral officer subsequent to that election reveals the following distribution of enumerated voters among the electoral districts:

	Electoral District	Number of Voters	Number per Elected Member
a	First Kings	3,284	1,642
	Second Kings	2,129	1,064
	Third Kings	2,915	1,457
	Fourth Kings	3,345	1,672
	Fifth Kings	2,042	1,021
b	TOTAL	13,715	
	First Queens	3,452	1,726
	Second Queens	8,260	4,130
	Third Queens	8,905	4,452
	Fourth Queens	3,099	1,549
c	Fifth Queens	11,964	5,982
	Sixth Queens	9,514	4,757
	TOTAL	45,194	
	First Prince	7,520	3,760
	Second Prince	3,188	1,594
d	Third Prince	3,794	1,897
	Fourth Prince	10,273	5,136
	Fifth Prince	5,546	2,773
	TOTAL	30,321	

e The total number of enumerated voters for the 1989 election was 89,230. With a total of 32 elected members, there was an average of 2,788 voters per member, or 5,576 per electoral district. In Sixth Queens, the district in which the applicant resides, there were 9,514 voters, or 4,757 voters per elected member. According
f to the applicant, this represents a disparity of 71% above the provincial average. The applicant submits that the following table demonstrates the disparities between the number of enumerated voters in each electoral district and the provincial average number of voters per elected member:

g	*Electoral District*	*Percentage under or over average*
	First Kings	- 41%
	Second Kings	- 62%
	Third Kings	- 48%
	Fourth Kings	- 40%
h	Fifth Kings	- 63%
	First Queens	- 38%
	Second Queens	+ 48%
	Third Queens	+ 60%
	Fourth Queens	- 44%
	Fifth Queens	+115%

Sixth Queens	-	+ 71%
First Prince	-	+ 35%
Second Prince	-	- 43%
Third Prince	-	- 32%
Fourth Prince	-	+ 84%
Fifth Prince	-	- 1%

In interpreting these figures it is essential to bear in mind that each electoral district elects two members.

At the extremes are the districts of Fifth Kings (63% below the provincial average) and Fifth Queens (115% above). This represents a total variance of 178%. Out of the 16 electoral districts, eight have disparities in excess of 40% under the provincial average and four have disparities in excess of 40% above the average. Of the four remaining districts, First Queens is 38% under the average, First Prince is 35% over the average and Third Prince is 32% under. The total number of enumerated voters in First, Second, Third and Fourth Kings at the time of the 1989 election was less than the total number of voters in Fifth Queens; First, Second, Third and Fourth Kings elected eight members while Fifth Queens elected two.

The magnitude of the deviations tolerated in this province is apparent when compared to the deviation recommended for the Province of Saskatchewan by the Electoral Boundaries Commission 1991. Of the 66 constituencies proposed, apart from the two northern constituencies which have the greatest percentage deviation from the population quotient (Athabasca at −33.67% and Cumberland at −33.30%) the largest percentage deviation above the quotient is in the constituency of Prince Albert Northcote at +7.86%, and the largest percentage deviation below the quotient is in the constituency of Pelly at −7.26%, a total deviation of only 15.12%.

There also has been in this province a demographic revolution. Prince Edward Island, the Garden of the Gulf, the Million Acre Farm, is a rural province. With an average of 38 people per square mile it is the most densely populated province in Canada. Although it can be said the majority of Islanders reside outside the main urban centres, there is no clear urban-rural distinction. The information provided to the court leads to the conclusion that the Charlottetown and Summerside areas have experienced the most dramatic population growth over the last two decades. More importantly perhaps, it appears that the growth of the greater Charlottetown area has been at the expense of the rest of the province. The 1990 Report to the Cabinet Committee of Rural Development concludes that in a demographic sense at least, the

picture of Prince Edward Island as a province of scattered rural settlements and small town is no longer a reflection of reality. The
a 1991 census shows that at the county level the population of Queens County increased by 3,736, while both Kings and Prince Counties lost population. The Queens County growth rate of 5.9% surpassed the province's growth rate of 2.5% by more than double. Indeed, Queens County is the only county to consistently experi-
b ence positive growth rates since the 1920s.

It was no doubt these demographic trends together with the realities of the present electoral distribution which led David A. Milne to observe in "Polities in a Beleaguered Garden", a paper republished in 1992:

c > The electoral system has not been changed since the 1960's and the disparity in the population size of electoral districts is far larger on Prince Edward Island than that in any other province in Canada and far greater than generally accepted norms. Ultimately, it may be the courts and *Charter* that will make the greatest difference to the deeply entrenched Island way of life.

Dr. Milne is Professor of Political Science at the University of
d Prince Edward Island. He was called as an expert witness by the respondent.

The trend of rural depopulation is likely to continue. The Statistics Canada 1991 census figures show that from 1986 to 1991 Kings County experienced a decline in population of 0.9% from
e 19,509 to 19,328. During the same period Prince County's population declined by 1.0% from 43,677 to 43,241, while that of Queens County increased from 63,460 to 67,196. Moreover the growth rate for Queens County has averaged 7.0% over the past 20 years.

Perspective on the extent of the deviation in this province may
f be obtained by comparing the situation here with that prevailing in other jurisdictions.

Under the federal *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E-3, the maximum variance allowed is plus or minus 25% except in circumstances viewed by a commission as
g being extraordinary. In fact, following the 1981 census and redrawing of federal constituencies, nearly 80% of the new constituencies were within plus or minus 10% of their respective electoral quotas. Among the provinces, Ontario, Quebec, British Columbia and Newfoundland generally tolerate variances of plus
h or minus 25%. Manitoba tolerates a variance of only plus or minus 10% south of the 53rd parallel and plus or minus 25% north of that line. It is now well-known that in Saskatchewan there can be no greater variation from the population quotient than plus or minus 25% for urban and rural districts and plus or minus 50% for the two seats in the northern region. Alberta allows a variance of up to

plus or minus 25% from the average population, however, up to 5% of electoral divisions may vary as much as 50% below the average population if certain criteria relating to the vastness of the area, sparsity of population, total highway length, distance from legislature and significant loss of population exist. Both Nova Scotia and New Brunswick have established criteria for determining electoral boundaries but, like Prince Edward Island, there is no fixed limit for deviation or variance.

The position of the intervener

The City of Charlottetown has been attempting for many years to effect an increase in the number of elected provincial members in the legislature representing the residents of the city. Since the very conservative redistribution in 1963 on the recommendation of the Royal Commission on Electoral Reform, the approximately 16,000 residents of Charlottetown share four elected members in the districts of Fifth and Sixth Queens. None of these elected officials represent strictly the citizens of the city. The electoral districts they represent include the city itself, a town, two villages, several community improvement areas and rural areas. The city contends that in the circumstances it is impossible for such elected members to give full support to the city because there are conflicts between the policies or interests of the city and those of neighbouring municipalities or areas within the same electoral districts.

The court heard the testimony of Mr. Harry Gaudet, the city administrator who described the political and financial impact on the city resulting from what is described in its factum as the "ineffective representation" of city constituents under the present electoral boundaries scheme. According to Mr. Gaudet, the city voters and taxpayers are unable to have their fiscal and other government policy interests effectively represented due to their significant under-representation in the provincial legislature. A large mass of documentation was presented detailing the detrimental impact on the city of insufficient funding from the province in comparison with the funding provided to other municipalities.

According to figures provided by Mr. Gaudet, during the period 1977 to 1991, federal equalization payments to the province increased by 273%, the provincial property tax collected within the city increased by 254%, provincial grants to Island communities excluding Charlottetown increased by 278% and provincial grants to the city increased by only 23%. In 1977, the province collected close to $2 million in property tax on city properties and returned 43% in the form of an equalization grant; in 1991, the amount collected was close to $7 million but only 15% was returned as a

grant. Research conducted by the city reveals that residential and commercial property owners in the city are paying as much as 70%
a to 100% more in property tax than owners of similar properties in other areas of the province.

Charlottetown provides its own municipal services in the form of public works and police while the province provides most of these services free of charge to other communities and to the rural areas.
b Almost half of the Island's population lives in the Charlottetown area and many work in the city. This, say Mr. Gaudet, puts substantial additional costs of police services, recreation facilities and road maintenance on the city's 16,000 residents.

In March, 1992, a firm of management consultants provided to
c the city a report of a study on the financial impact on the city of the delivery of education, streets and police services to its residents. The purpose of the study was to consider the financial impact in relation to other areas of the province in order to quantify the degree to which the resident of Charlottetown pay a disproportion-
d ate amount of taxes for the services provided. Based on the information obtained, the following conclusions were reached:

> 1. The provision of school facilities by the City of Charlottetown to Unit 3 in 1972 provided a major benefit to the Unit 3 area at no cost. The loss to the City at that time ranges from $1,300,000 to $3,100,000.
>
> 2. The high funding for education by the residents of the City of Charlotte-
> e town through the provincial property tax is inequitable relative to the estimate cost of education to Charlottetown residents. If education were funded by the Province equivalent to 1971 levels, the tax burden on Charlottetown residents would be less by $135 go $146.50 per capita.
>
> 3. The growth in the Provincial Property Tax has restricted the rate at which the municipal property tax could increase.
>
> f 4. The cost of streets represents a burden to the City of Charlottetown to the extent that the recovery of costs for designated streets is inadequate. This inequity represents about $25 per capita.
>
> 5. The provision of street maintenance in other urban areas by the province represents a further inequity
>
> g 6. The failure to include an adequate level of police cost per capita in the grant formula is inequitable to the City of Charlottetown. A substantial increase in necessary (say $125 per capita).

Even more representation in the provincial legislature would not necessarily mean that all the city's woes would be addressed. I
h observe, however, that according to the chief electoral officer's figures, at the time of the 1989 provincial election there were a total of 21,478 voters in the electoral districts of Fifth and Sixth Queens while all five electoral districts in Kings County contained a total of 13,715 enumerated voters. Fifth and Sixth Queens elected four representatives, the electoral districts in Kings County elected

ten. It would appear that a very strong argument can be made in support of increased representation for Charlottetown residents. One need only consider that the population of all of Kings County in 1991 was 19,328 while that of the city was about 16,000. Ten elected members represent the people of Kings County; in the case of the city, four elected members represent a total combined population of about 28,000.

Dr. Theodore Arrington is a political scientist. He is Chairman of the Department of Political Science at the University of North Carolina and has had extensive experience in advising on election systems, drawing electoral districts and reapportionment of existing districts. He was accepted by the court as an expert on voting rights, district and elections systems generally. He has never before been qualified as an expert before a Canadian court and does not claim any particular expertise in Canadian constitutional law. He admitted being relatively ignorant of Prince Edward Island's history and political progress, but felt he could bring a breadth of knowledge to bear on the questions before the court.

Dr. Arrington proposed, as an illustration only, a districting scheme for the province which achieves a total variation in population from the largest to the smallest district of only 4.9%. According to Dr. Arrington, as a matter of practicality because of the relatively homogeneous population of the Island it is quite possible to draw electoral districts which would not deviate from strict voter parity by more than plus or minus 2.5% while at the same time respecting important communities of interest, municipal and town boundaries, natural geographical dividers, existing roads and federal electoral boundaries. Dr. Arrington's proposed electoral maps do not follow uniformly existing county boundaries. He expressed the opinion that the counties in Prince Edward Island do not constitute a community of interest as such. He acknowledged that there are identifiable communities of interest within each county, but, according to Dr. Arrington, the counties themselves have never evolved into separate administrative or political units in and of themselves. His opinion is summarized in the following passage from the transcript of his evidence:

> In looking at the Island, at the relatively homogeneous population, at an Island that has a very high concentration of population, relative to the other provinces of Canada — this is the most highly concentrated province in the whole federation — the urban areas are not extremely crowded. They would really be called suburban areas in most anyplace else. The rural areas are not, not abandoned of population, for the most part. You've got hydraulic features, but you don't have the kinds of mountainous features that wall people off from each other. You've got a good bridge system across many of those hydraulic features. So drawing boundaries to keep relative voter parity is really much

easier on Prince Edward Island than it would be in most other provinces in Canada. And so, while I wanted to follow communities of interest, I found that I was able to do that, and still get very, very low variation from district to district, much lower than was ever suggested by, by Mr. Hooley's firm, in their instructions to me.

Dr. Arrington suggested that in order to achieve an appropriate redistribution with the least voter inconvenience possible the existing polls be used as building blocks. The polls are all about the same size and could be adjusted so that they reflect population rather than enumerated voters. They could then be used as the building blocks for the new electoral districts.

The position of the respondent

The respondent acknowledges there can be no doubt the deviations from the electoral norm under the existing system (whether voter or total population is used as a base) are significant. However, it maintains that the deviations are justified when the mere number are balanced against other factors which must be taken into account in determining whether the existing system is one that, in the words of McLachlin J., reasonable people applying the proper principles could have established. These factors are:

(1) The history of electoral distribution in the Province;

(2) the health of the existing political system in the Province as reflected in government turnovers and voter participation;

(3) community history and established communities of interest;

(4) the well-established use of counties as basic units of electoral distribution;

(5) existing political and municipal subdivisions;

(6) the need to maintain sufficient representation in the Legislative Assembly for rural areas, and other areas with declining population;

(7) the desirability of preventing urban domination in the Legislative Assembly;

(8) the impact of any sudden and dramatic loss of representation for rural areas;

(9) the importance of the rural economy in the Province;

(10) the difficulties inherent in representing rural districts;

(11) the small population of the Province and the ease with which partisan gerrymandering could occur; and

(12) the financial and other costs, including loss of political stability, voter participation, and member recognition, that would be incurred if frequent redistribution was required.

Before I turn to an examination of these factors, it is useful at this juncture to mention the nature of the evidence presented by the government in support of its case. Four witnesses were called by the respondent and a large number of report, articles and

documents were filed as exhibits. My own distillation of some of the points raised in that evidence follows.

The Honourable Keith Milligan is a Member of the Legislative Assembly (M.L.A.) for the District of Second Prince. He is also the current Minister of Agriculture. Second Prince is basically a rural riding containing only one municipality, a village of approximately 250 inhabitants.

Mr. Milligan testified that the bulk of the provincial bureaucracy is located in Charlottetown and its suburban areas. He acknowledged that while to a large degree government policy is controlled by elected officials, in practical terms the decisions are based on information provided by bureaucracy which is thereby able to have a significant input in government decision. He agreed that the regional service centres provide a useful service to rural residents particularly in the areas of housing and seniors' and welfare programs. He defined himself as a Second Prince M.L.A. but agreed that as a Cabinet Minister he represents all the people of Prince Edward Island. According to Mr. Milligan the role of a rural member of the Legislative Assembly is somewhat unique in that there is more personal contact with constituents. This is not necessarily true of urban M.L.A.s, whose constituents tend to be more transient.

Mr. Milligan stated that any redistribution which would tend to urbanize representation would not be necessarily healthy. He said that the voice of rural interests such as the farming community must be heard and any reduction in the power of that voice would exacerbate already existing problems. In his opinion, the present legislative distribution should remain the same. He indicated he did not know if ignoring county lines would have an effect on representation, but expressed the view that each county takes pride in its own identity.

In cross-examination Mr. Milligan stated that he did not have extra work-load as a rural M.L.A., just closer contact with his constituents. In his view, the distribution system must take into account factors other than just the number of M.L.A.s per district; there must also be a balancing in the provision of government services. He said he was aware that over the years there have been discussions of a need to change the electoral boundaries in this province and he may have even mentioned it himself at times. In his view, the subject of electoral reform is not popular, however, if the distribution of seats is wrong, then a change would have to occur. He acknowledged that there was a trend in North America of population moving to urban areas and this was beyond the control of the government. As far as county boundaries were

concerned, he agreed that school units do not follow county lines; there are five school units spread amongst the three counties and this system has been in place for over 20 years. He also agreed that the regional service centres, which have been established since 1967, cross county lines and Prince Edward Island does not have a tradition of the delivery of government services at the county level.

Mr. Milligan accepted the statement that members who represent mixed urban and rural areas cannot speak with the same force as someone who represents only an urban or a rural area. He is aware of the city's financial problems, but did not think that changing electoral boundaries would necessarily solve the problems facing the City of Charlottetown. He acknowledged that the present electoral map in this province contains some significant deviations; it could be made more equitable in terms of numbers. However, he does not want to see "rep by pop" adopted in its strictest form.

The Hon. Angus MacLean is a retired farmer and politician who at one time represented the federal riding of Queens and, in 1968, the newly formed federal riding of Malpeque. He entered provincial politics in 1976, became leader of the Progressive Conservative Party and was Premier of this province from 1979 to 1981.

Mr. MacLean expressed the view that the demands on members who represent rural areas are greater than their urban counterparts because many facilities which are available in urban areas are not available in rural areas and the elector turns to his member. He did comment, however, than an M.L.A. in Prince Edward Island is not overworked. He was aware of the fairly wide variations in the current distribution system but believed that to ignore balancing county representation would not be fair, equitable or reasonable. According to Mr. MacLean, the protection of rural interests in Prince Edward Island requires that representation for rural areas not be reduced. The Island is almost dependent on farming and fishing, the basic industries on which the Island society exists. It is important, therefore, that these industries be protected and developed. Mr. MacLean felt that if a "little bit" of overrepresentation is required, then it should be allowed. He stated there should not be a wholesale change in boundaries and the matter should be approached with great caution. He acknowledged, however, he was not saying that everything should necessarily remain the same. He thinks, for example, that the City of Charlottetown does have a valid argument that City boundaries should coincide with riding boundaries. He cautioned, however, that effective representation involves more than equality by district.

In cross-examination, he stated that the establishment of the extra riding to accommodate the City of Charlottetown in 1963 was justified. He could not say that everything was perfect at the present time; there may still be room for improvement. He emphasized, however, that this must be done with care. He testified that the boundaries in this province have remained virtually unchanged because Islanders tend to be traditionalists; the notion of complete equality in representation is not considered to be so important here generally speaking. He quickly pointed out that he did not want to leave the impression that nothing should ever change, there are accommodations and concessions to be made. He acknowledged that county lines are indiscriminate and completely arbitrary but stated that they are now historical lines and people do identify with them. He agreed that the regional service centres provide a lot of government services to the rural areas. Commenting on the map prepared as an illustration by Dr. Arrington, Mr. MacLean stated that in his opinion the community of interest of Kings County would not be respected by the proposed electoral districts, however, this may be unavoidable. He stated that there is nothing that is carved in stone; all things have to be considered in the real world.

Dr. David Milne was accepted as an expert in political science and in Canadian constitutional law and practice generally. He did not claim to be an expert in electoral reform or in the process of districting. He expressed the view there is no doubt Prince Edward Island can be redistricted in a way which is very close to voter parity, but he is not convinced that this would result in more effective representation or would be conducive to better government. He provided to the court a report by way of a critique of Dr. Arrington's report. Dr. Milne stated he was trying to illustrate that the arguments made by Dr. Arrington are at least debatable. Dr. Milne commented that at the local level we have not applied the principle of "rep by pop" and there is a Canadian practice of representing place along with population. He stated that to the extent we understand counties as significant, then we should be prepared to accept quite significant variations to give a sense of confidence to the people in Prince and Kings Counties.

During cross-examination, Dr. Milne acknowledged there was a global trend of the movement of population to urban areas. He described how attempts have been made in this province to stop this trend but it is continuing to grow. He agreed that the province has the highest density of people in the rural areas than anywhere else in Canada, and, in general, the province has more M.L.A.s representing the rural areas. He acknowledged that rural repre-

sentation is only one element to be considered in justifying deviation. In the long run, according to Dr. Milne, the process is
a one of balancing factors. Dr. Milne accepted that the deviations on the electoral map on Prince Edward Island are quite significant. He acknowledged that based on the general principles of districting, there is usually an attempt to respect urban boundaries and agreed that one could easily make a case for the City of Charlottetown in
b this respect. He stated that if a decision was made to redraw the electoral boundaries the appropriate way would be an independent electoral boundaries commission. He also agreed that when the process has begun it is prudent to continue it on a regular basis.

Ms Marlene Clark was accepted as an expert in political science
c with particular knowledge of Island politics and government. She provided a report to the court which includes a historical background of the Island system of government, an examination of the characteristics of the electoral system in this province including the over-abundance of representation, its informality and the patterns
d of stability and tradition found in the system. The report also examines the voter participation rates in Prince Edward Island elections which traditionally have been higher than those in other jurisdictions. The report also examines the issue of representation by population. Ms Clark argues in her paper that representation at the provincial level means that elected officials are cast in the role
e of an ombudsman for their constituents. Indeed, she notes that it is significant that Prince Edward Island is reportedly the only jurisdiction in Canada without a provincial ombudsman. She concludes her report by considering potential consequences of redistribution including the potential for gerrymandering, the costs
f involved, and the possible reduction in voter turnout.

During her testimony, Ms Clark stated that effective representation relies on more than simple voter parity. She expressed the opinion that access to rural M.L.A.s would be restricted if the riding sizes were increased; in the rural context, more and more
g there is a need for problem solving resources. She concluded that M.L.A.s of rural ridings have more responsibility than M.L.A.s who represent urban ridings. She acknowledged this burden is eased to some extent by the regional service centres.

On cross-examination, Ms Clark agreed that by North American
h standards we on Prince Edward Island have more than our share of formal government on a per capita and size basis. She noted that the average in Canada is one legislator for every 36,000 voters, while in Fifth Queens, for example, the average is one legislator for every 6,000 voters. She stated if there is some optimum ratio for representation, Prince Edward island is much

over the Canadian norm. Ms Clark foresees some difficulty in fitting into the Prince Edward Island context the plus or minus 25% variation which was accepted by the Supreme Court in the Saskatchewan context; she is concerned as to what this would mean in terms of loss of seats for Kings County. She hastened to add, however, that she was not saying the present system not be changed, but simply pointing out some of the possible pitfalls that might arise from a redistribution. While she stated that she had not thought in terms of whether there was a limit beyond which deviation could not be allowed, she agreed that quite possibly the limit could now have been reached in this province. She further stated that she was not necessarily suggesting that the present electoral system can be legitimized; she was merely suggesting caution in making changes. However, she acknowledged that the numbers appear to speak for themselves and that sooner or later adjustments will have to be made.

Against this background, I turn to an examination of the factors which according to the respondent justify the significant deviations in voter parity in the existing electoral map.

History of electoral distribution

It is convenient under this head to consider not only the history of electoral distribution but also community history, established communities of interest, existing political and municipal subdivision and the use of counties as basic units of electoral distribution.

There is no question that history is an important consideration in the evaluation of an electoral map. Nowhere is that more true, perhaps, than in Prince Edward Island where, as Ian Stewart puts it in his article "Prince Edward Island — A damned queer parliament", political culture has been marked by a pervasive sense of traditionalism, an often unconscious acceptance of established practices. It probably was these traits which led the Royal Commission on Electoral reform to include in its 1962 Report the following telling comments:

> The history of elections on the Island has always featured an intensity of politics and, consequently, it is one of exceptional bitterness, violence, and rivalry in the early days and of difficult maneuvering in modern times. The electoral system of the Province must always be judged in relation to these facts, for many decades of experience lie behind the presence electoral legislation.

However, to argue justification based on practices of the past is not persuasive because while history defines the present, it should not necessarily be allowed to dictate the future. In the words of McLachlin J. at p. 38 of *Carter*, *supra*:

> To return to the metaphor of the living tree, our system is rooted in the tradition of effective representation and not in the tradition of absolute or near absolute voter parity. It is this tradition that defines the general ambit of the right to vote. This is not to suggest, however, that inequities in our voting system are to be accepted merely because they have historical precedent. History is important in so far as it suggests that the philosophy underlying the development of the right to vote in this country is the broad goal of effective representation. It has nothing to do with the specious argument that historical anomalies and abuses can be used to justify continued anomalies and abuses, or to suggest that the right to vote should not be interpreted broadly and remedially as befits Charter rights. Departures from the Canadian ideal of effective representation may exist. Where they do, they will be found to violate s. 3 of the Charter.

The respondent submits that the historical evidence given at the hearing shows that the purpose of distributing seats on a relatively equal basis between the regions of the province as represented by the three counties was to ensure a wider distribution of seats and to preserve regionally sensitive representation in the Legislative Assembly. It is argued that this rule has historically protected Kings County's representation in spite of the fact that, over the years, it has consistently had a smaller population than either Queens or Prince County. There is merit to this argument. The available census figures going back to 1841 do show that after 1861, when the populations of Prince and Kings Counties were about the same (21,220 and 19,884 respectively), the population of Kings County had consistently been somewhat lower than Prince County and much lower than Queens County. Some examples of the population figures arranged in the following table will suffice to illustrate:

Year	*Prince*	*Queens*	*Kings*
1871	28,064	42,574	23,060
1893	36,470	45,975	26,633
1911	32,779	38,313	22,636
1931	31,500	37,398	19,147
1951	37,735	42,751	17,943
1961	40,891	45,842	17,893
1971	42,082	51,135	18,424
1981	42,821	60,470	19,215
1991	43,241	67,196	19,328

Achieving a balance between "rep by pop" and "rep by region" and the protection of areas with declining population levels are legitimate objectives of electoral boundary distribution. However, rate of growth or decline has both negative and positive connotations in the context of the right to effective representation. The fact that Kings County has experienced a gradual depopulation over the last 120 years is widely known and, if electoral boundaries

are meant to have any lasting utility, anticipated population shifts should have been taken into account before now. If relative parity of voter power is of prime importance and the first condition of effective representation, significant differences in the population size of electoral districts must either be reflected in electoral maps or justified by other legitimate factors which exist in a given situation. In *Carter*, the Supreme Court of Canada accepted as legitimate a variance of plus or minus 50% for the two northern Saskatchewan ridings. It is trite to observe that northern Saskatchewan is not rural Prince Edward Island. In my view, the degree of discrepancy actually tolerated in the Prince Edward Island system seems far out of proportion to any legitimate regional concerns.

The matter of community of interest was much discussed at the hearing. It has been said that this concept is a vital component of a healthy redistribution system. According to McLachlin J. in *Carter*, it is one of the factors that may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. But what is a community of interest?

In his article "Community of Interest in Redistricting", Alan Stewart attempts to lay down a definition of the concept, however, it is difficult to extract from that article any generally accepted working definition of community of interest. Stewart does provide a useful table of frequently mentioned *indicia* of community of interest. According to the learned author, the *indicia* most frequently mentioned is existing electoral, county and regional boundaries.

It is all too obvious that existing electoral boundaries will be a significant factor in any redistricting that might take place. After all, that is what redistricting is all about: are the existing electoral boundaries justifiable? What I find most troublesome in the existing system is the concept of the approximate equality of county representation.

The respondent submits that the significance of the counties at a community and political level has been made clear by the evidence of the Hon. Mr. MacLean, the Hon. Mr. Milligan and Dr. Milne. But, with the greatest of respect, I am not convinced that in this province counties are, or were ever meant to be, permanent political communities. It is impossible to know what Samuel Holland had in mind when, some 230 years ago, he drew two lines on the map of the then "Island of St. John" and thereby created the division now known as Kings, Queens and Prince Counties. If Holland expected the three areas thus created to develop into significant individual political entities, as has occurred in other

jurisdictions, then surely he was a much better surveyor than a prognosticator. County government simply has not developed in
a Prince Edward Island. While some county affiliation still exists in the justice system (*e.g.*, each county has its own sheriff), the respondent was hard pressed to identify any other significant government services which are delivered on a county basis. School boards are not organized along county lines. The five regional
b service centres, which deliver both federal and provincial government services to those areas of the Island at some distance from Charlottetown, are not organized along county lines.

At one time the four federal ridings in this province were organized along county lines and carried the names of the counties.
c The riding of Queens was a dual riding. However, as a result of the Report of the Electoral Boundaries Commission for Prince Edward Island, 1965, the county was abandoned as the delineation for the federal electoral districts. It is apparent from the proceedings of the commission that it considered population as the dominant
d factor in redistribution. The following table shows how the rescheduled and renamed electoral districts attempt to address the population imbalance:

Old Electoral Districts	*Population (1961)*
Kings	17,893
e Queens	45,842
Prince	40,894
New Electoral Districts	*Population (1961)*
Cardigan	23,081
Egmont	29,374
Hillsborough	30,050
f Malpeque	22,124

Perhaps most instructive in this context are the reports of the provincial Electoral Boundaries Committee of 1975. In 1974, the committee named to appoint select standing committees for the Legislative Assembly recommended the appointment of a commit-
g tee to consider ". . . such matters as The Election Act, Boundaries of Electoral Districts . . ." and ". . . make recommendations for the most appropriate means of dealing with the same". A subcommittee was duly appointed consisting of two M.L.A.s as co-chairmen, the chief electoral officer for Prince Edward Island, the
h assistant director of the Prince Edward Island Heritage Foundation, and a secretary.

The subcommittee was given the following terms of reference:

(1) To consider and report on the boundaries of the existing electoral districts of the Province as established pursuant to *The Election Act, 1963*, Chapter 11.

(2) If changes appear to be desirable, to recommend the areas which should be contained in, and the boundaries which would delimit, each of the several electoral districts.

(3) The Sub-Committee, in determining the area to be included in and in recommending the boundaries of proposed electoral districts, should take into consideration

(a) the desirability, or otherwise, of having single member ridings throughout the Province;

(b) the community or diversity of interests of the population in the existing electoral district or part thereof;

(c) the sparsity, density and relative rate of growth of the population in the existing electoral district;

(d) the accessibility of and means of communication between the various parts of the existing electoral district or part thereof;

(e) the physical features, including the shape and size of the existing electoral district;

(f) any boundary lines now existing in the present electoral districts; and

(g) other similar factors considered relevant in the opinion of the Committee pertaining to the existing electoral districts.

The subcommittee considered written representations and held seven public hearings. On November 14, 1974, it tabled its interim report which included the following recommendations:

Therefore your Sub-Committee recommends:

(a) The present sixteen provincial electoral districts be replaced by thirty-two provincial electoral districts;

(b) the recommended thirty-two provincial electoral districts be generally bound by the four proposed federal electoral districts;

(c) the present provincial electoral system of numbering by county be replaced by representative community names either singular or two-fold;

(d) the redistribution of provincial polling divisions showing descriptions which may be more properly identified.

The subcommittee's proposed formula for provincial representation was as follows:

PROPOSED FORMULA FOR REPRESENTATION
PROVINCE OF PRINCE EDWARD ISLAND

The majority of the expressions of opinion declared at the public hearings, and from other briefs and communications, generally agreed that some form of representation by population should be applied in returning representatives to the Provincial Legislative Assembly.

Adjustments in representation by population for rural and urban areas were discussed with general agreement that both should be adequately represented while considering such factors as growth areas, community interests, communication, and existing electoral boundaries.

The Sub-Committee recommends that the proposed federal electoral constituency of Hillsborough return five representatives and that the proposed

federal electoral constituencies of Egmont, Malpeque, and Cardigan each return nine representatives.

a The Electoral Boundaries Committee met, discussed the interim report of the subcommittee and prepared a report dated April 16, 1975, which included the following:

> We feel that the changing of the Electoral Boundaries and other proposed changes are vitally important and decisions should not be arrived at without
b proper consideration. Most Members thought that changes Provincially should relate to and follow anticipated changes in the Federal Electoral Boundaries. There are many and rather rapid population changes on the Island. These could be better accommodated after the Federal change occurs. A recommendation is that Federal and Provincial poll boundaries be the same so as to avoid the confusion which is now evident.
>
> c Your Committee recommends that there should not be any change in the number of representatives or in the dual member ridings but does recommend that electoral boundaries be adjusted to provide more equitable representation.
>
> We believe that the present system adequately provides representation for people of varied religious and cultural backgrounds.
>
> d Your committee recommends:
>
> (i) that dual member ridings be retained;
>
> (ii) that the style "Assemblyman" and "Councillor" be retained;
>
> (iii) that present constituency boundaries be rearranged to provide better geographic and population representation.

e The committee's third recommendation is significant. However, no legislative or other government action of any kind has ever been taken as a consequence of those proposals. It is noteworthy that both the subcommittee and the committee appear to have favoured a move away from the apportionment of electoral districts strictly
f along county lines.

It seems to me apparent that the requirement in the *Election Act* for approximate equal county representation is not well founded. It is arbitrary and is not based upon actual population distribution. The requirement of relative parity of representation
g between counties forces significant deviations which do not appear to be justified on the basis of practical necessity or effective representation. In my view, to hold that distinct communities of interest are created by county lines is not realistic. I cannot conclude, for example, that the interests of a resident of Murray
h River, a Kings County community lying some few miles north-east of the boundary line between Kings and Queens Counties, is so significantly different from the interests of a resident of Mount Stewart, a community located in Queens County, a few miles south-west of the boundary, so as to necessitate in the interests of

more effective representation the extreme levels of variation from voter parity present in the existing electoral system.

The health of the existing political system

According to the evidence of Ms Clark, there are discernible patterns of stability and tradition in the Island electoral system. There have been systematic (although somewhat irregular) turnovers of government between the two major parties, there has been a slim margin of victory in many electoral contests, and voter participation rates in Prince Edward Island elections have usually been higher than those in other jurisdictions. Although in her report filed with the court Ms Clark suggests that changes in the political system by way of redistribution *could* produce a decline in voter participation, during her testimony she acknowledged she is not an expert on voter turnout and her concern is more with voter confusion than voter alienation.

Clearly, when changes are made there is always some element of confusion, but there is no evidence to suggest that redistribution will affect voter turnout. Mr. MacLean testified that after the changes to the federal ridings people adjusted to the new situation fairly quickly. Dr. Milne stated it is mere speculation to say that redistricting would cause a decline in voter turnout.

I do not consider the health of the political system would be put to any substantial risk by a redistribution. Voter confusion could be minimized by using existing polls as the building blocks for the redistributed electoral districts.

Representation of rural areas

The importance of the rural economy in the province cannot be overstated and the rural nature of the Island should continue to be reflected in the composition of the legislature. However, it is not entirely accurate to characterize this case as a contest for representation in the Legislative Assembly between urban and rural interests *per se*. As I noted earlier in this judgment, urban/rural distinctions are generally unclear in Prince Edward Island, and while it can be said that 62% of Islanders live outside the main urban centres of the province, it is difficult to determine what percentage of the remainder resides in strictly rural areas. In addition to the one city, Charlottetown, there are in Prince Edward Island eight incorporated towns and 80 incorporated communities, according to the 1992 Department of Community and Cultural Affairs' municipal directory. The Royal Commission on the Land in vol. 1 of its report of October, 1990, "Everything Before Us", reported that of the total population of the Island (129,765 in

1991) some 87,574 residents were represented at the municipal level by 601 elected officials.

a Notwithstanding the above, some deviations could be tolerated to give effect to rural concerns. But in my opinion, major deviations would not be justifiable. In this connection, I note that according to the evidence of Dr. Arrington, using current population figures an electoral map which adhered to the principle of relative voter parity b and allowed for a variance of only plus or minus 2.5% would result in an electoral map that would have "rural" MLAs in "substantial majority".

I now turn to the matter of the inherent difficulties in representing rural districts. In her reasons in *Carter*, *supra*, McLachlin J. c makes the following comments at pp. 43-4:

> Before examining the electoral boundaries to determine if they are justified, it may be useful to mention some of the factors other than equality of voting power which figure in the analysis. One of the most important is the fact that it is more difficult to represent rural ridings than urban. The material before us suggests that not only are rural ridings harder to serve because of difficulty d in transport and communications, but that rural voters make greater demands on their elected representatives, whether because of the absence of alternative resources to be found in urban centres or for other reasons. Thus, the goal of effective representation may justify somewhat lower voter population in rural areas.

It appears to me that McLachlin J.'s thinking in this instance e was controlled by the specific situation in the Province of Saskatchewan, a province of extreme vastness in comparison with Prince Edward Island, in which very large areas are characterized by sparse population and long distances to any population or urban centres. That is not the situation in this province.

f I have already noted that the Island is by far the most densely populated province in the country. It is serviced by an efficient communication system and a road system that is second to none. Compared to Saskatchewan, in the Prince Edward Island context no matter where one is located, the distance to any other point on g the Island cannot be considered great.

Contrary to the respondent's submission, the evidence in this case does not establish that as a *practical reality* it is more difficult to represent rural than urban ridings in this province. Quite the opposite, in fact. Mr. Milligan stated very clearly that h although there were some extra demands made on his time as a rural M.L.A., he did not consider that he had any significant extra work-load. Nor did he consider that he would be required to work much harder if he represented more people. From a practical point of view, in comparison to many of their counterparts in other provinces, Island M.L.A.s do not have large constituencies. The

ratio of provincial representative to population is about 1:4,000. Any additional burden on rural M.L.A.s is eased by the five regional service centres, which provide government services at a local level in Tignish, Wellington (and to the Acadian community), Summerside, Montague and Souris, and the over 600 elected officials at the municipal level.

I conclude that in the Prince Edward Island context, unlike the situation in Saskatchewan, the goal of effective representation does not justify any appreciable lower voter populations in rural areas based on a perceived difficulty to represent rural ridings.

Gerrymandering

A gerrymander refers to a method of arranging electoral districts so that one party will be enabled to elect more representatives than it could on a more fair distribution of districts. In her report, Ms Clark writes:

> One of the most obvious consequences of re-distribution is the potential for gerry-mandering. While there is an inherent risk in any political system, the size of the constituencies, the traditional voting patterns and the high proportion of narrow margins for electoral victories are all factors that predispose the system to a much higher risk than normal.

In her testimony before the court, Ms Clark stated she was not suggesting by this passage that redistribution should not occur, but only that gerrymandering was a *possible* consequence. She noted that it is very difficult to stop gerrymandering and regardless of what is done, some people will view any redistribution as either good or bad gerrymandering.

During the cross-examination of Dr. Arrington, counsel for the respondent asked him to comment on the following passage from an article entitled "Chartering the Electoral Map into the Future" by Kent Roach found at p. 206 of the text *Drawing Boundaries — Legislatures, Courts, and Electoral Values*:

> Even if the Court had enforced equal-population standards within the limits set by enumeration data and the timing of elections, this would not guarantee that the electoral map would not produce partisan advantages. In fact, the requirement that ridings have equal populations in the United States has made partisan gerrymandering easier because it has devalued the significance of natural and political boundaries that mark out communities of interest.

Dr. Arrington did not agree with the statement. He testified that it contradicts, in part, his own personal experience. According to Dr. Arrington, a redistricting scheme that allows for a reasonable standard for deviation from "rep by pop" makes it easier to detect a gerrymander. He did not specifically say what he considered to be a "reasonable standard" in this context, but did state that a

possible variation of plus or minus 25% allows a gerrymander to be drawn quite easily along natural boundaries.

a I am not persuaded by the arguments concerning gerrymandering one way or the other. It is a factor which will concern persons tasked to redraw electoral districts, but is not a consideration which, in my view, could justify significant departure from voter parity in the pursuit of more effective representation.

b *Financial and other costs*

This leads me to consider the respondent's final point. I have already commented upon the issues of political stability and voter participation; member recognition is a non-issue, in my view.

c In so far as financial costs are concerned, I would simply say that the right to effective representation guaranteed by the Charter cannot be sacrificed on the altar of financial repercussions. Given that the electoral districts in this province have not been readjusted to any significant degree in almost 150 years, the initial effort will be long and costly. After that it should be simply a d matter of fine tuning on a more or less regular schedule. I note that every other jurisdiction in this country, including the Yukon and Northwest Territories, conduct redistribution on a regular basis set by either legislation or by custom. The usual frequency is every ten years.

e *Conclusion as to s. 3*

McLachlin J. observes in *Carter*, *supra*, that an electoral system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation f to the citizen whose vote is diluted. I find that the existing electoral distribution in this province provides inadequate representation to a large percentage of the voters because of the significant variances in population in the electoral districts. In my opinion, the evidence presented is not sufficient to justify the existing electoral g boundaries. Factors like community history, communities of interest and the need to maintain an appropriate urban/rural and regional balance in political representation in the province do not support a conclusion that the existing extreme deviations are necessary to ensure the better government of the populace as a h whole. In my opinion, based upon all the evidence presented reasonable persons applying appropriate principles could not have set the electoral boundaries as they exist.

In the light of all of the above, I conclude that the present electoral districts in Prince Edward Island violate the right to vote

guaranteed by s. 3 of the Charter. Accordingly, ss. 147, 148, 149, 150 and 151 of the *Election Act* are invalid unless justified under s. 1 of the Charter.

Is the infringement of s. 3 saved by s. 1?

Having decided that ss. 147, 148, 149, 150 and 151 violate the right to vote guaranteed by s. 3 of the Charter, I must now consider whether the provisions constitute "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

The onus of justifying the infringement of a Charter right is upon the party seeking to uphold the limitation, in this case the Government of Prince Edward Island. The standard is the civil standard, proof by a preponderance of probability, and must be applied rigorously. Because s. 1 is being invoked to justify a violation of a constitutional right the Charter was designed to protect, a very high degree of probability is commensurate with the occasion. Evidence relied upon to justify the infringement must be cogent and persuasive and make clear the consequences of imposing or not imposing the limit: see *R. v. Oakes* (1986), 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103.

The government's position in the instant case is that if it is called upon to justify the population deviations that exist in the electoral map of this province, then those deviations can be justified on the same grounds advanced during the s. 3 inquiry.

The Supreme Court of Canada has enunciated the principle in *Oakes* that to override a Charter right the objective underlying the impugned law must relate to concerns that are "pressing and substantial" in a free and democratic society. If that is found to be the case, then I must decide whether the means chosen to attain the valid objective are proportional or appropriate to the ends to be achieved.

I am satisfied that the objectives of ensuring an appropriate urban/rural and regional balance in political representation in the province to ensure better government are valid and meet the "pressing and substantial" test laid down in *Oakes*. I am not satisfied, however, that the means adopted by the provincial legislature to attain those objectives are proportional or appropriate.

The first condition of effective representation is relative parity of voting power and deviations therefrom will only be justified on the grounds of practical impossibility (not argued in this case) or the provision of more effective representation. I stated earlier in this judgment that the differing representational concerns of urban and

rural areas and regional concerns may properly be considered in determining electoral boundaries, but the extent to which one citizen's vote is diluted as compared with another citizen's vote under the present electoral system appears to be unduly great. In the case of many of the electoral districts the extent of the variances from the population quotient cannot be justified on the basis of urban/rural and regional considerations. Nor can it be said that the existing electoral map affects the rights of urban voters as little as possible. The legislative requirement to have electoral districts distributed relatively equally amongst the three counties is completely arbitrary and not based upon any realistic appreciation of actual population distribution. The results are districts having total deviations which, in some cases, exceed those tolerated in northern Saskatchewan, an area very dissimilar to Prince Edward Island in geography and population distribution. Furthermore, under the legislation of this province there is no limit on the amount of deviation which can be tolerated. As did McLachlin J. in *Dixon*, *supra*, weighing in the balance the objectives of the existing electoral distribution against the serious infringements is causes to one of the most fundamental of our rights, and concluding that the end of more effective representation is not served by existing population inequities. I conclude that the enactments on which these inequities rest cannot be saved by s. 1.

Remedy

I now turn to the matter of the appropriate remedy to be applied in this case. I approach the topic with much caution. Court must not enter the domain of policy underlying legislation. In the words of McLachlin J. in *Dixon* at p. 278:

> There is no question that the process of electoral districting is first and foremost the task of legislature, nor any question that the balancing of the disparate interests and considerations involved in a process that affects the root of one of our most basic political institutions renders it a task best undertaken by our elected representatives. However, the mere fact that the legislature is better suited to weigh the myriad factors involved in electoral apportionment, does not remove from this court the ultimate responsibility of weighing the product of the exercise of the legislature's discretion against the rights and freedoms enshrined in the Charter and from examining the justification for any infringement that the courts are required to undertake under s. 1. This is not merely a question of the separation of powers and the authority of the legislature to act: the right to vote is entrenched in our Constitution and is of such importance that it is above the override powers in Charter, s. 33. If in giving substance to this right to vote, the court interprets s. 3 as granting to citizens the right to a certain degree of proportionate representation, then legislative efforts must be measured against this standard and if they fall short, be declared unconstitutional.

The remedy sought by the applicant in his pleadings is a declaration that the impugned legislative provisions infringe his constitutional right to vote and to are of no force and effect. He acknowledges that the legislation may provisionally stay in place, however submits that this court should require submissions as to what time period may reasonably be required to remedy the legislation. In final arguments the applicant agreed with the submissions of the intervener which seeks much more specific relief. In addition to a declaration that the legislation in question is null and void, the intervener seeks the following order:

> (ii) That the Respondent be ordered to:
>
> (a) immediately and at each ten (10) year interval (which coincides with the 10 year Statistics Canada Census), strike a non-partisan Electoral Boundaries Commission for the purpose of reviewing the electoral boundaries of the province, and recommending the necessary and reasonable changes to the legislature;
>
> (b) that the Commission be guided in its efforts by specific criteria, which at a minimum should include:
>
> (i) adherence to the principle of relative voter parity, which in Prince Edward Island should equate to districts within +/- 5% of the voter parity quotient;
>
> (ii) testing the proposed districts for gerrymandering (i.e., against voter data for past elections); and
>
> (iii) keeping communities of interest together.
>
> (c) that the Commission use as its basic population data, the ten (10) year Census Data from Statistics Canada.
>
> (d) that the Commission be required to hold public hearings on the issue of electoral boundary reform across the Island and report its recommendations for reform back to the legislature within six (6) months of the Statistics Canada Census data becoming available, and that the Report of the Commission be presented and dealt with at the next session of the Legislature (i.e., in this instance, by the end of 1993);
>
> (e) that the Respondent Government be required, in this the first major reform in over 100 hundred years, to report back its progress to the court in six (6) months, and that in any event the Government be required to file its new legislation with the Court no later than by the end of 1993.

In *Dixon*, McLachlin says this at pp. 280-1 about the range of potential remedies for the infringement of the constitutionally guaranteed right to vote:

> It is clear that at a minimum, this court has the power to grant a declaration that the impugned legislation infringes the constitutional right to vote and to the extent of the inconsistency with the Charter, is of no force or effect. Such declaratory relief has already been awarded in cases decided under s. 3 of the Charter and this power has been held to extend to legislative inaction as well as to positive legislative acts: see *Re Haughton and A.-G. B.C.*, *supra*; *Badger v. Manitoba (Attorney-General)* (1986), 30 D.L.R. (4th) 108, 27

C.C.C. (3d) 158, 51 C.R. (3d) 163 (Man. Q.B.) affirmed 32 D.L.R. (4th) 310, 29 C.C.C. (3d) 92, 55 C.R. (3d) 364 (Man. C.A.).

a The effect of a declaration that a law is inconsistent with the Charter is to render it of no force and effect under s. 52 of the Charter. In most cases where a particular provision falls under s. 52, the result is to restore the law in question to the status of conformity with the Charter. The effect in this case is arguably the reverse. If the provisions prescribing electoral districts in British Columbia are set aside, the electoral districts vanish. Should an election be b required before they are restored, it would be impossible to conduct it. The result would be the disenfranchisement of the citizens of the province.

If the existing electoral boundary system is struck out because it violates the Charter, how can the orderly democratic processes on which our system is founded by maintained?

c The first answer is that the court must proceed on the premise that, just as the court does what it must do under the Constitution, so will the legislature. This proposition has repeatedly been affirmed by our courts.

Against this background I turn to the order sought.

There is no question in my mind it is preferable that electoral distribution should be carried out by a non-partisan, independent d boundaries commission. All the witnesses called by the respondent agreed on this point. However, as Sopinka J. points out in *Carter*, *supra*, there is no constitutional guarantee for the process by which electoral boundaries are drawn. Maps need not be drawn by fully independent commissions.

e The court has also been requested to provide mandatory guidance as to the minimum variance from voter parity that should be tolerated. This would involve the court in the process of the balancing of the disparate interests and considerations of the citizens of this province, a process best undertaken by our elected f representatives. In *Dixon* McLachlin J. suggested that the plus or minus 25% deviation set by the Fisher Commission would appear to be within a tolerable limit, given the vast and sparsely populated regions to be found in British Columbia. I note, as an observation only, that the situation in Prince Edward Island in terms of g geographic and demographic considerations and population density is very different from that in British Columbia and Saskatchewan. Therefore, it may well be that a deviation of plus or minus 25% will not be justified in this province. Based on the evidence presented during this hearing, I consider that a variance of plus or minus h 10%, as in Manitoba south of the 53rd parallel, might well be a more appropriate limit. However, no predetermination can be made without the most complete information. That information can only be obtained by going through the electoral distribution process including the public hearings that likely would be an integral part of that process.

I would suggest it is now clear that as a general rule redistribution must be based on the first condition of effective representation which the Supreme Court of Canada in *Carter* has recognized as relative parity of voting power. There are limits on the extent to which deviations are permitted from equality of voting power among electoral districts. Only those deviations should be admitted which can be justified on the ground that they contribute to the better government of the populace as a whole, giving due weight to regional issues. The process involves balancing equality of voting power with such countervailing features as geography, community of interest, existing municipal boundaries, sparsity of population and growth patterns, appropriate urban/rural representation and regional concerns. In terms of effective representation, the real issue in this province may not be whether adequate representation is provided to the less populated areas, but rather whether the more populated areas are underrepresented. In the words of the Court of Appeal of Alberta in *Reference re: Electoral Boundaries Commission Act*, *supra* [at p. 456]: "No argument for effective representation of one group legitimizes under-representation of another group."

As to the frequency of redistribution, I agree with Dr. Milne's view that it is prudent to redistribute on a regular basis. I accept that Prince Edward Island is not a quickly growing community and whether redistribution is required at any given time will depend on many factors including population growth and movement within the province. However, in order to avoid in the future the situation which exists at present, I consider it expedient that the government give consideration to putting into place specific legislation concerning electoral boundaries which would include, at the very least, a requirement to review on a regular basis the electoral districts in order to ensure that any percentage variation is appropriate and justified. If inappropriate and unjustified variations are present, the necessary redistribution should take place.

I have also been urged to require the government to file new legislation with the court no later than the end of 1993. It would be highly inappropriate to assume that the legislature will not ". . . promptly enter on the question of what remedial steps should be taken to remedy the deficiencies in the existing legislation" : McLachlin J. in *Dixon*, *supra*, at p. 282. A similar issue was considered by Meredith J. in *Dixon v. British Columbia (Attorney-General)* (1989), 60 D.L.R. (4th) 445, 37 B.C.L.R. (2d) 231, 16 A.C.W.S. (3d) 12 (S.C.), in which he was requested to fix a date beyond which the legislation in British Columbia would not "stay in place". The learned justice made the following comments at p. 448:

> To establish a deadline beyond which the legislation will not be "in place" would be to require that the majority of the members of the Legislative Assembly agree on a course of action. I consider it quite beyond the inherent power of the court to compel agreement. In any case, to do so would be to effectively legislate. That must also be beyond the remedial powers that are reposed in the court.
>
> So I conclude that the establishment of a deadline would be in direct violation of the rights and obligations of the members of the Legislative Assembly, would threaten the violation of the right of the people of British Columbia to the existence of a Legislative Assembly, and would threaten the violation of the right of citizens of Canada to vote for members of a Legislative Assembly, to say nothing of eradicating the right to vote, whether equal or not.
>
> I think it must be left to the legislature to do what is right in its own time.

For the same reasons, I refuse *at this time* to set a time-limit for the passing of new legislation. At the same time, however, as McLachlin J. remarked in *Dixon* [at pp. 283-4] ". . . just as the courts have a duty to measure the constitutionality of legislative acts against the Charter guarantees, so they are under an obligation to fashion effective remedies in order to give true substance to these rights". Therefore, in my view, the legislature should be allowed a reasonable period of time to remedy the unconstitutional distribution, failing which the parties may seek further direction from the court. Strictly as a guide and without having heard submissions on the matter, I would say that a period of one year from the date of the release of this judgment should be sufficient time for the respondent to take appropriate remedial action.

Conclusion

I declare ss. 147, 148, 149, 150 and 151 of the *Election Act*, to be contrary to the *Canadian Charter of Rights and Freedoms*. Pending the necessary legislative action to remedy the legislation, it will stay provisionally in place to avoid any constitutional crisis. If remedial action is not taken within a reasonable period of time, submissions as to the appropriate period necessary to remedy the legislation may be made to the court.

I make no order as to costs. Should any of the parties wish to make submissions to the court on the matter of costs, they may do so.

Application granted.