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# Constitutional Constraints on Electoral Reform in Canada: Why Parliament is (Mostly) Free to Implement a New Voting System

Emmett Macfarlane\*

## I. INTRODUCTION

Having promised that the 2015 national election would be the last conducted under the first-past-the-post (“FPTP”) electoral system, the federal government has initiated efforts to find a replacement.<sup>1</sup> A national debate about the various alternatives to FPTP will undoubtedly continue, but a fundamental issue concerns whether Parliament faces any constraints on its authority to implement electoral reform. Two distinct concerns present themselves. First, does a change to the electoral system require a constitutional amendment, and if so, would such an amendment require provincial consent under the general amending procedure in Part V of the *Constitution Act, 1982*?<sup>2</sup> Second, would certain electoral systems violate the *Canadian Charter of Rights and Freedoms*?<sup>3</sup>

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<sup>1</sup> The Liberal Party of Canada made electoral reform a key plank in its 2015 election campaign platform. The precise wording was as follows:

We are committed to ensuring that 2015 will be the last federal election conducted under the first-past-the-post voting system.

We will convene an all-party Parliamentary committee to review a wide variety of reforms, such as ranked ballots, proportional representation, mandatory voting, and online voting.

This committee will deliver its recommendations to Parliament. Within 18 months of forming government, we will introduce legislation to enact electoral reform.

Liberal Party of Canada, *A New Plan for a Strong Middle Class* (2015), at 27.

<sup>2</sup> Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “*Constitution Act, 1982*”].

<sup>3</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “*Charter*”].

These questions are important not only for the prospects of federal electoral reform, but also for their implications for the nature of constitutional change in Canada. On the one hand, if Parliament does not have the ability to alter the electoral system without provincial consent, it would only further cement the degree to which the country suffers from a constitutional paralysis, wherein both legal and political factors stifle the prospects for any major constitutional reform.<sup>4</sup> On the other hand, in its reference opinion on Senate reform, the Supreme Court has recently elaborated on the importance of changes to Canada's "constitutional architecture" and the federal principle embedded in the general amending procedure that major changes affecting provincial interests ought to require provincial consent.<sup>5</sup> Similarly, democratic rights under the Charter may be implicated by certain changes, not only in the event particular electoral systems might affect the right to vote but also in relation to the right "to be qualified" for membership in the House of Commons or a provincial legislature under section 3. Existing jurisprudence indicates that important rights — including the right to effective representation and the right to meaningful participation in the electoral process — are embedded within section 3. How might these rights be implicated by electoral reform?

This article proposes to examine and answer these questions. I argue in Part II of this article that while electoral reform might be regarded as a change of a constitutional nature, Parliament is well within its authority under section 44 of the amending formula to effect changes excepting ones that directly implicate provincial interests — specifically, the principle of proportional provincial representation in the House and the guarantees of the minimum number of seats to which each province is entitled. A key factor in considering electoral reform's implications for the constitutional architecture, I argue, is the distinct role of the House as an institution representing the national will in contrast to the regionally-composed Senate. Any analysis of provincial interests in the functioning of the House must consider the limits of those interests given the distinct nature of representation within a bicameral legislature.

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<sup>4</sup> For more on this, see: Emmett Macfarlane, ed., *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016); Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53(1) *Alberta L. Rev.* 85; Richard Albert, "Constructive Unamendability in Canada and the United States" (2014) 67 *S.C.L.R.* (2d) 181.

<sup>5</sup> *Reference re Senate Reform*, [2014] S.C.J. No. 32, [2014] 1 *S.C.R.* 704, 2014 SCC 32 (S.C.C.) [hereinafter "*Reference re Senate Reform*"].

Part III examines the implications of electoral reform for democratic rights under the Charter. While certain changes might implicate democratic rights under the Charter, I argue that none of the electoral systems likely to be considered would violate rights in an unreasonable manner. The most relevant section 3 jurisprudence explicitly acknowledges the multiple values and purposes that Parliament might consider in designing laws of democracy, including in relation to the electoral system itself. While extreme reform options might run up against democratic rights guarantees, Parliament should expect considerable latitude to implement electoral reform. I then briefly discuss the implications of this analysis in Part IV.

## II. ELECTORAL REFORM AND CONSTITUTIONAL AMENDMENT

### 1. Does Electoral Reform Count as Constitutional Change?

The constitutional amending formula is contained in Part V of the *Constitution Act, 1982*, and it sets out no fewer than five procedures for changes to the Constitution.<sup>6</sup> Amendments under the general procedure of section 38 require resolutions of the House of Commons and the Senate and at least seven provinces representing at least 50 per cent of the population. In addition to this default procedure, the formula includes: the unanimity procedure (section 41), which lists a set of matters requiring the support of all 10 provinces; the bilateral procedure (section 43), where changes affecting certain provinces but not others may be made by resolutions of the House and Senate and the legislative assembly of each province to which the amendment applies; section 44, which allows Parliament to exclusively make laws in relation to the federal executive or the Senate and House of Commons; and section 45, which allows provinces to amend their own provincial constitutions.

Electoral reform is not specifically mentioned in Part V, although a couple of its provisions relate to the electoral system. Section 41(b) mandates unanimity for any changes affecting the right of a province to a number of members in the House not less than the number of Senators by

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<sup>6</sup> In addition to the five listed above, there are provisions allowing provinces to dissent from amendments on certain issues and to receive compensation in certain cases (section 40). Further, the Senate enjoys a suspensive veto for amendments made under s. 38, 41, 42 or 43, which the House can override by adopting the resolution a second time 180 days after adopting the initial resolution (s. 47).

which the province is entitled to be represented at the time Part V came into force. Section 42, which lists specific matters that may only be made in accordance with the general procedure, includes section 42(a), specifying changes relating to the principle of proportionate representation of the provinces in the House. As will be discussed in this section, until recent jurisprudence that narrowed the apparent scope of section 44, it was widely assumed that electoral reform would generally fall under section 44.

The structure and rules relating to, or governing, Canada's electoral system are found in a mix of constitutional and statutory provisions. Relevant constitutional provisions include sections 37, 51 and 52 of the *Constitution Act, 1867*,<sup>7</sup> which set out the number of electoral districts (ridings) in each province or territory, detail the rules for readjusting the representation of seats in the House, and permit Parliament to increase the number of seats in the House, respectively. Voting rights and the right to be qualified for membership in Parliament and provincial legislatures are entrenched in section 3 of the Charter. Many of the more specific and comprehensive rules pertaining to the electoral system are established *via* ordinary statute. Detailed rules relating to the process and administration of elections are set out in the *Canada Elections Act*,<sup>8</sup> electoral districts are established by proclamations issued under the *Electoral Boundaries Readjustment Act*<sup>9</sup> and qualifications and disqualifications of members of the House of Commons are set out in the *Parliament of Canada Act*.<sup>10</sup>

Given this legal context, it might be thought that certain types of electoral reform — particularly those that do not alter provincial seat distribution in the House — are possible without recourse to constitutional amendment at all. A move from FPTP to preferential balloting (where voters rank candidates in their order of preference, also known as alternative vote or instant run-off), for example, would not necessitate any change to existing ridings, only to the rules about how votes are tabulated. It is not clear why recourse to formal constitutional amendment would be necessary to effect such a change, nor have many commentators expressed an opinion to the contrary, at least until recently.

The Supreme Court's two 2014 reference opinions pertaining to constitutional amendment complicate this issue. In *Reference re Supreme*

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<sup>7</sup> 30 & 31 Vict., c. 3.

<sup>8</sup> S.C. 2000, c. 9.

<sup>9</sup> R.S.C. 1985, c. E-3.

<sup>10</sup> R.S.C. 1985, c. P-1.

*Court Act, ss. 5 and 6*,<sup>11</sup> a 6-1 majority of the Court determined that the eligibility requirements for Supreme Court justices as set out in the *Supreme Court Act*<sup>12</sup> were part of the “composition of the Supreme Court”, changes to which are listed in section 41(d) as a matter requiring unanimity. In effect, the Court constitutionalized parts of an ordinary statute. Controversially, the Court’s opinion outlined a history in which the Court’s existence and functioning engaged the interests of both Parliament and the provinces *before* the institution was even entrenched *via* Part V in 1982.<sup>13</sup> Prior to 2014, the extant academic debate regarding the Court’s constitutional status does not even entertain this notion, as it largely concerned whether the Court was even entrenched *after* being mentioned in the amending formula, given that Parliament created the Court *via* ordinary statute under section 101 of the *Constitution Act, 1867*. Some scholars believed references to the Court in Part V were limited by the fact that the “Constitution of Canada” as defined in section 52(2) of the *Constitution Act, 1982* did not include the *Supreme Court Act*. Peter Hogg noted that the “amending procedures are not required for the amendment of statutes or instruments that are not part of the Constitution of Canada; anything that is not part of the Constitution of Canada can be amended by the ordinary action of the competent legislative body”.<sup>14</sup> Other scholars disagreed.<sup>15</sup>

It is unclear what other parts of the *Supreme Court Act* remain normal statutory law or are now, in fact, part of the Constitution. Moreover, it is not clear whether other statutes, such as the *Canada Elections Act*, might be deemed constitutionally entrenched in the future because they are implicated by the amending formula.

The Court’s opinion in *Reference re Senate Reform*, issued one month later, arguably means that certain provisions in the *Canada Elections Act*

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<sup>11</sup> [2014] S.C.J. No. 21, [2014] 1 S.C.R. 433, 2014 SCC 21 (S.C.C.) [hereinafter “*Reference re Supreme Court Act*”].

<sup>12</sup> R.S.C. 1985, c. S-26.

<sup>13</sup> *Reference re Supreme Court Act, supra*, note 11. The majority suggested this occurred with the abolition of appeals to the Judicial Committee of the Privy Council in 1949, at para. 85, and was further cemented by the end of appeals as of right to the Court in civil cases, at para. 86, writing “Increasingly, those concerned with constitutional reform accepted that future reforms would have to recognize the Supreme Court’s position within the architecture of the Constitution”, at para. 87. This, according to the Court, was “confirmed” by the *Constitution Act, 1982*, at para. 76.

<sup>14</sup> Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson Canada Limited, 2003), at 73.

<sup>15</sup> Patrick J. Monahan & Byron Shaw, *Constitutional Law*, 4th ed. (Toronto: Irwin Law, 2013), at 191; Stephen A. Scott, “Pussycat, Pussycat or Patriation and the New Constitutional Amendment Process” (1982) 20(2) U.W.O. L. Rev. 247, at 272-73.

are entrenched, or at least that the electoral system is fundamental to the House of Commons as an institution and should therefore be regarded as having a constitutional nature. In the Senate reference, the Court elaborated on the Constitution's "architecture", a concept it had invoked in previous cases,<sup>16</sup> and which it described as "the principle that '[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole'".<sup>17</sup> Constitutional amendments, the Court explained, "are not confined to textual changes. They include changes to the Constitution's architecture."<sup>18</sup> The Court found that the government's proposed consultative elections for senators and senatorial term limits both require provincial consent under the general amending procedure. Rather than limiting their reasons on consultative elections to the fact that they would constitute a change to the "method of selecting Senators" under section 42(1)(b), therefore requiring recourse to the general amending procedure, the majority also found that implementing consultative elections would alter the constitutional architecture by changing the essential functioning of the Senate and the role of senators.

The Court applied similar reasoning to its analysis of whether enacting term limits for senators (notably, not mentioned in the amending formula) could be accomplished by Parliament alone under section 44 or required use of the general amending procedure. On the dividing line between the two procedures, the justices emphasized that section 44, "as an exception to the general procedure, encompasses measures that maintain or change the Senate without altering its fundamental nature and role."<sup>19</sup> The justices determined that existing senatorial tenure — an appointment until the age of 75, or "the duration of their active professional lives" is linked to the conception of the Senate as a complementary legislative body of sober second thought.<sup>20</sup> Therefore, a significant change to senatorial tenure would alter the Senate's role, and can only be achieved under the general amending procedure.

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<sup>16</sup> *Ontario Public Service Employees' Union v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2, at 57 (S.C.C.); *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.) [hereinafter "*Reference re Secession of Quebec*"].

<sup>17</sup> *Reference re Senate Reform*, *supra*, note 5, at para. 26 citing *Reference re Secession of Quebec*, *supra*, note 16, at para. 50.

<sup>18</sup> *Id.*, at para. 27.

<sup>19</sup> *Id.*, at para. 75.

<sup>20</sup> *Id.*, at para. 79.

It is clear from the Court's articulation of the constitutional architecture concept that electoral reform could be regarded as a change of a constitutional nature. The question then becomes whether Parliament has the authority to make major changes to the electoral system without provincial consent.

## 2. Does Federal Electoral Reform Require Provincial Consent?

The constitutional architecture concept generates considerable uncertainty regarding the dividing line between the general amending procedure and section 44, which allows Parliament alone to make institutional changes to the executive or the House of Commons and the Senate.<sup>21</sup> One major problem with the Court's approach is evident in the example of senatorial term limits. In *Reference re Senate Reform*, the Court explicitly refused to consider whether there might be a point at which differently prescribed term limits — lengthy, non-renewable terms, for example — would not fundamentally alter the Senate's role. "It may be possible", the Court noted, "to devise a fixed term so lengthy that it provides a security of tenure which is functionally equivalent to that provided by life tenure. However, it is difficult to objectively identify the precise term duration that guarantees an equivalent degree of security of tenure."<sup>22</sup> By refusing to engage in line-drawing (which was precisely what was being asked of it),<sup>23</sup> the Court, even by its own standard, risked unreasonably narrowing the scope of section 44.

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<sup>21</sup> For a more detailed critique of the Court's logic in the Senate reference, see: Emmett Macfarlane, "Unsteady Architecture: Ambiguity, the Senate Reference, and the Future of Constitutional Amendment in Canada" (2015) 60(4) McGill L.J. 883.

<sup>22</sup> *Reference re Senate Reform*, *supra*, note 5, at para. 81.

<sup>23</sup> The reference question posed by the Governor in Council clearly contemplates that certain term limits might be short enough to require provincial consent while others might be long enough that their impact on the Senate would be relatively minor such that Parliament could implement them unilaterally. In other words, the government was asking the Court to draw a line. The question was written as follows:

1. In relation to each of the following proposed limits to the tenure of Senators, is it within the legislative authority of the Parliament of Canada, acting pursuant to section 44 of the *Constitution Act*, 1982, to make amendments to section 29 of the *Constitution Act*, 1867 providing for:
  - (a) a fixed term of nine years for Senators, as set out in clause 5 of Bill C-7, the *Senate Reform Act*;
  - (b) a fixed term of ten years or more for Senators;
  - (c) a fixed term of eight years or less for Senators;
  - (d) a fixed term of the life of two or three Parliaments for Senators;

A consequence of the constitutional architecture approach is a lack of clarity over when provincial consent is implicated. The approach effectively requires that the Court accurately describe the different animating features of the various institutions and processes that make up the constitutional architecture beyond the constitutional text. As a result of this lack of clarity, some commentators have argued that the constitutional architecture concept means that electoral reform can only be accomplished *via* the general amending procedure.<sup>24</sup> Michael Pal writes that provincial interests in the federal electoral system might be regarded as similar to their interest in Senate reform. He describes provincial interests as follows:

Moving away from FPTP would affect provincial interests. The federal government and the provinces have been fighting about provincial representation in the House since its creation. Introducing pure proportional representation, or a mixed-member system of the type used in Germany, would dramatically alter Canadian politics. Moving from the electoral system in place since 1867 would constitute a fundamental change to the House and to the Constitution. The implication is that Parliament likely can't act alone.<sup>25</sup>

Pal concludes that major electoral reform, including changes to proportional representation<sup>26</sup> ("PR") or mixed-member proportional<sup>27</sup> ("MMP") systems, likely requires the general amending procedure, but

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(e) a renewable term for Senators, as set out in clause 2 of Bill S-4, *Constitution Act, 2006 (Senate tenure)*;

(f) limits to the terms for Senators appointed after October 14, 2008 as set out in subclause 4(1) of Bill C-7, the *Senate Reform Act*; and

(g) retrospective limits to the terms for Senators appointed before October 14, 2008?

<sup>24</sup> Michael Pal, "Why Canada's top court must weigh in on electoral reform", *The Globe and Mail* (January 15, 2016), online: <<http://www.theglobeandmail.com/opinion/why-canadas-top-court-must-weigh-in-on-electoral-reform/article28198932/>>; Yaakov M. Roth & Jonathan E. Roth, "Liberals' electoral reform plan is legally futile", *The Toronto Star* (January 18, 2016), online: <<http://www.thestar.com/opinion/commentary/2016/01/18/liberals-electoral-reform-plan-is-legally-futile.html>>. See also: Michael Pal, "Constitutional Amendment After the *Senate Reference* and the Prospects for Electoral Reform" (2016) presented at Osgoode Hall Law School Annual Constitutional Cases Conference.

<sup>25</sup> *Id.*

<sup>26</sup> Proportional representation includes a variety of systems that allocate seats based on the percentage of seats cast. They include party list systems, which includes seat allocations from party lists, or the single transferable vote ("STV"), which uses ranked-balloting in multi-member constituencies to arrive at a proportional outcome.

<sup>27</sup> Mixed-member proportional systems are a hybrid of district-based systems like FPTP and party lists, where a portion of a legislature's seats are allocated on a list basis as a top up to ensure a more proportional outcome overall. Under MMP voters typically have two votes: one for a local riding representative and one for the party list.

that certain changes — such as preferential balloting — might be interpreted as only trivially affecting provincial interests and could possibly be achieved by Parliament alone.

It is clear that any electoral reform that departs from the basic principle of proportionate representation for seats by province in the House would require provincial consent under section 42(a). Similarly, any electoral reform that would reduce the number of any province's seats below their constitutional guarantee under section 41(b) would require unanimous consent of the provinces. Given the Court's constitutional architecture approach, even if these provisions were not explicitly listed in Part V it is clear that provincial interests in their proportionate representation in the House would be implicated by any reform to the electoral system that seriously altered seat distribution.

Indeed, one significant reason that section 44 is the appropriate procedure for federal electoral reform is the fact that Parliament has previously used that procedure to modify the formula for apportioning seats in the House of Commons, in 1985 with the *Representation Act, 1985*,<sup>28</sup> and again in 2011 with the *Fair Representation Act*.<sup>29</sup> Since the apportionment of seats is directly relevant to provincial interests *vis-à-vis* the House of Commons, it is notable that these amendments were made by Parliament alone with little controversy. Any change, however, that dramatically departs from the basic principle of proportionality, is something that would implicate provincial interests and require their consent. Therefore, assessing which amending procedure is implicated depends not just on the matter at issue but the substance of the proposed amendment and whether it directly affects provincial interests.

Pal has written that the 2011 *Fair Representation Act* does implicate provincial interests and that, in light of the *Reference re Senate Reform* reasoning, it may have been an unconstitutional amendment.<sup>30</sup> He writes that it “is hard to see how altering the formula for representation in the House by province engages purely federal interests. The provinces are keenly and directly interested in the number of seats they hold, the proportion of the House this represents, and the impact of any relative or absolute change in provincial population on their seat complement.”<sup>31</sup> Importantly, Pal views the application of *Reference re Senate Reform*

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<sup>28</sup> S.C. 1986, c. 8.

<sup>29</sup> S.C. 2011, c. 26.

<sup>30</sup> Michael Pal, “Fair Representation in the House of Commons?” (2015) J.P.P.L. 35 [hereinafter “Pal, ‘Fair Representation’”].

<sup>31</sup> *Id.*, at 47.

logic to this context as an “unintended impact”, noting that the likely effect would be to freeze the formula for representation — as provincial consensus about a new formula would be difficult to achieve — and the House would grow increasingly unrepresentative.<sup>32</sup>

Yet I would argue that this is precisely why a contextualist reading of the Constitution’s protections for seat proportionality are fittingly within Parliament’s amending authority under section 44, something Pal notes was upheld in the 1988 case *Campbell v. Canada (Attorney General)*.<sup>33</sup> That decision affirmed that the principle of seat proportionality was broadly defined to allow for deviations from absolute proportionality given that smaller provinces enjoy guaranteed representation greater than their populations would otherwise allow. Under a narrow or absolutist understanding of the principle of proportionality, the constitutional guarantee of four seats for Prince Edward Island, for example, would simply not be possible without a massive (and arguably ludicrous) increase in the number of seats in the House. A broader interpretation of the principle is therefore consistent with the constitutional architecture concept itself, given that assessing the underlying structure of the Constitution in light of the amending formula requires a contextualist understanding of its written and unwritten components and how they interact and operate together. Provincial consent for changes to the formula for apportioning seats in the House should thus only be required when a proposed change departs significantly from historical margins or constitutionally-mandated norms.

Further, provided that the principle of proportional representation for the provinces is not disturbed, Parliament is given unequivocal authority under section 52 of the *Constitution Act, 1867* to increase the number of seats in the House. Pal suggests section 52 might itself be regarded as the basis for unilateral amendment by Parliament of the authority to redistribute seats under section 51.<sup>34</sup>

More significantly, it is not clear that provincial interests in federal electoral reform extends beyond the proportion of seats they are afforded. As in many bicameral federations, the very nature of representation as it relates to the two houses, the House and the Senate, are functionally different, with the lower house emphasizing representation of the national

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<sup>32</sup> *Id.*, at 46.

<sup>33</sup> [1988] B.C.J. No. 442, 49 D.L.R. (4th) 321 (B.C.C.A.), affg [1987] B.C.J. No. 3152, 21 B.C.L.R. (2d) 130 (B.C.S.C.).

<sup>34</sup> Pal, “Fair Representation”, *supra*, note 30, at 49.

will by population and the upper house representation by state, province or region. Indeed, in *Reference re Senate Reform*, the Court emphasized regional representation as an essential feature of the Senate, and as a key aspect of provincial interests in the Senate.<sup>35</sup>

Provincial interest in electoral reform of the House, aside from seat proportionality and seat floor guarantees as reflected in the constitutional text, is much more tenuous. Pal is undoubtedly correct that major electoral reform could dramatically alter Canadian politics and the outcomes generated in the House. A move from a FPTP system to some variant of PR would inevitably result in more minority governments or the development of a culture of coalition governments, and changes to the party system itself. However, as Leonid Sirota writes, electoral reform would not affect the “nature” of the House of Commons as the representative part of the national legislature, or its primary role of holding the government to account under responsible government.<sup>36</sup>

Moreover, it is not obvious why changes to party distribution or an increase in minority or coalition governments, however significant they would be, implicate provincial interests in the same way changes to the nature of Senate representation might. The role of the House is premised on popular representation of the national will, just as the Senate’s role is, in part, to ensure regional (provincial) representation at the national level.<sup>37</sup> These different roles and natures of representation reflect the very function of bicameralism in a federation like Canada. If the Court is to assess the constitutional architecture in light of a contextualist analysis of the role and purpose of the central institutions — as it did in both 2014 reference opinions — then it needs to pay heed to not only when provincial interests are at stake, but also when they are not.

If the provinces have a constitutional interest in any other aspects of House of Commons representation, one might be the existence of electoral districts assigned on a provincial basis, which are explicitly contemplated by several provisions of the *Constitution Act, 1867*,

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<sup>35</sup> *Reference re Senate Reform*, *supra*, note 5, at para. 15.

<sup>36</sup> Leonid Sirota, “Yes, They Can”, Double Aspect blog (January 19, 2016), online: <<https://doubleaspectblog.wordpress.com/2016/01/19/yes-they-can/>>. For more on the distinct roles of the House and Senate and their relevance for the amending formula, see also: Yasmin Dawood, “The Process of Electoral Reform in Canada: Democratic and Constitutional Constraints” (2016) presented at Osgoode Hall Law School’s Annual Constitutional Cases Conference.

<sup>37</sup> It is worth noting the Senate has arguably performed very poorly as a body that functions to provide regional or provincial representation, but if anything that empirical reality undermines the Court’s reasoning in the Senate reference rather than serves to apply it to the context of electoral reform *vis-à-vis* the House.

including sections 40 and 41, and arguably by the constitutional preamble, which ascribes to Canada “a Constitution similar in Principle to that of the United Kingdom”. Attempts to change the electoral system to one that is not solely based on geographic electoral districts might constitute an amendment that affects provincial interests.<sup>38</sup>

One problem with this suggestion is that sections 40 and 41 explicitly provide Parliament with the authority to make changes in this area. For example, section 40 reads as follows: “Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the Purposes of the Election of Members to serve in the House of Commons, be divided into Electoral Districts as follows: . . . .” Importantly, these provisions are regarded as spent. The dissenting judgment in the 1965 case *R. v. McKay*<sup>39</sup> describes section 41 as “an interim provision” that was exhausted after Parliament passed legislation to replace then-existing provincial laws.<sup>40</sup> The majority in *McKay*, however, approvingly cited the 1879 case *Valin v. Langlois*,<sup>41</sup> which held that “the Parliament of Canada has the exclusive power of legislation over Dominion controverted elections. By the *lex Parliamentarium* as well as by the 41st, 91st, and 92nd sections of the *British North America Act*, this power is as complete as if it was specially and by name contained in the enumeration of the federal powers of section 91.” Even if altering electoral districts is now thought to require constitutional amendment because parts of the relevant statutes are deemed part of the Constitution, these provisions, coupled with this historical context and jurisprudence, lend much weight to the argument that such changes can be accomplished by Parliament alone under section 44.

### III. ELECTORAL REFORM AND THE CHARTER OF RIGHTS AND FREEDOMS

The democratic rights of Canadian citizens are listed in sections 3, 4 and 5 of the Charter. Sections 4 and 5 mandate that elections be held at least every five years,<sup>42</sup> and that there be a sitting of Parliament (and each

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<sup>38</sup> My thanks to B. Thomas Hall for proposing this argument in e-mail and on Twitter.

<sup>39</sup> [1965] S.C.J. No. 51, [1965] S.C.R. 798 (S.C.C.) [hereinafter “*McKay*”].

<sup>40</sup> Presumably a similar logic explains why s. 40 is also regarded as spent. My thanks to James Sprague for alerting me to this jurisprudence.

<sup>41</sup> [1879] S.C.J. No. 2, 3 S.C.R. 1, at 71 (S.C.C.).

<sup>42</sup> Section 4(2) provides an exception in time of real or apprehended war, invasion or insurrection, so long as a continuation of the House of Commons or legislative assembly is not opposed by more than one-third of the members.

provincial legislature) at least once every 12 months, respectively. As these are long-standing and uncontroversial rules, most relevant jurisprudence pertaining to democratic rights takes place in relation to section 3, which states that “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.”

The courts have dealt with a variety of issues implicating section 3 since the Charter’s enactment. They have invalidated restrictions that prohibit certain categories of people from voting, including judges<sup>43</sup> and prisoners,<sup>44</sup> but have upheld residency requirements.<sup>45</sup> The Supreme Court has also upheld laws that advance equality of participation in the electoral process in challenges to federal third party advertising legislation<sup>46</sup> and a ban on the dissemination of election results before polls in other parts of the country closed.<sup>47</sup> The jurisprudence under section 3 has been the subject of much commentary, which I do not have room to examine here. As Yasmin Dawood writes, the Court’s approach to section 3 reveals “a bundle of democratic rights” that combine institutional and individual dimensions.<sup>48</sup> These various democratic rights have arguably been applied inconsistently across cases, making it difficult to derive much predictive capacity from the jurisprudence. Nevertheless, in this section I will argue that the jurisprudence is sufficiently clear to conclude that, broadly speaking, Parliament has wide latitude to implement electoral reform.

Three cases that are perhaps the most relevant for considering the constitutionality of electoral reform involve electoral boundaries,<sup>49</sup> restrictions on benefits for political parties<sup>50</sup> and a challenge to the FPTP

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<sup>43</sup> *Muldoon v. Canada*, [1988] F.C.J. No. 1003, [1988] 3 F.C. 628 (F.C.T.D.).

<sup>44</sup> *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 (S.C.C.).

<sup>45</sup> *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.) [hereinafter “*Haig*”]; *Reference re Yukon Election Residency Requirement*, [1986] Y.J. No. 14, 27 D.L.R. (4th) 146 (Y.T.C.A.); *Storey v. Zazelenchuk*, [1984] S.J. No. 800, 36 Sask. R. 103, 12 C.R.R. 261 (Sask. C.A.); *Arnold v. Attorney-General of Ontario*, [1987] O.J. No. 889, 61 O.R. (2d) 481 (Ont. H.C.J.).

<sup>46</sup> *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 (S.C.C.).

<sup>47</sup> *R. v. Bryan*, [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527 (S.C.C.).

<sup>48</sup> Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2015) 51(1) *Osgoode Hall L.J.* 251.

<sup>49</sup> *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158 (S.C.C.) [hereinafter “*Reference re Prov. Electoral Boundaries (Sask.)*”].

<sup>50</sup> *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, [2003] 1 S.C.R. 912, 2003 SCC 37 (S.C.C.) [hereinafter “*Figueroa*”].

system in Quebec.<sup>51</sup> At issue in *Reference re Prov. Electoral Boundaries (Sask.)* were changes to electoral boundaries in Saskatchewan that introduced quotas for urban and rural seats, resulting in significant variation in the size and population of the ridings (ridings were permitted to vary by up to 25 per cent of a “provincial quotient”, with the two northern ridings varying by up to 50 per cent). A 5-3 majority of the Supreme Court eschewed a “one person, one vote” rule, finding that the right to vote “is not equality of voting power *per se*, but the right to ‘effective representation’”. The majority noted that while effective representation includes parity of voting power as one of its principles, absolute parity is impossible in practice, and that other factors, including geography, community history and 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”. In this context, the variance in riding sizes did not amount to a violation of section 3. Importantly, the Court’s recognition of the legitimacy of legislative consideration of other factors would no doubt apply to electoral reform as well.

In *Figueroa* the Court struck down federal restrictions on benefits to political parties that do not nominate 50 candidates to run in an election.<sup>52</sup> Writing for the majority, Iacobucci J. determined that in addition to effective representation, section 3 also encapsulates a right to meaningful participation in the electoral process.<sup>53</sup> In so doing, Iacobucci J. rejected the government’s argument that parties that run fewer than 50 candidates do not advance the objective of effective representation. Instead, he characterized section 3 as “participatory in nature”,<sup>54</sup> stating further that “the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections”.<sup>55</sup> Justice Iacobucci stated that members and supporters of political parties that put forward fewer than 50 candidates do play a meaningful role in the election process, something which is not limited to a party’s ability to provide a genuine “government option”.<sup>56</sup>

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<sup>51</sup> *Daoust v. Quebec (Chief Electoral Officer)*, [2011] Q.J. No. 12526, 2011 QCCA 1634 (Que. C.A.) [hereinafter “*Daoust*”].

<sup>52</sup> The Court was unanimous on the outcome but three justices wrote concurring reasons.

<sup>53</sup> *Figueroa*, *supra*, note 50, at para. 25. The concept was first recognized in *Haig*, *supra*, note 45.

<sup>54</sup> *Id.*, at para. 26.

<sup>55</sup> *Id.*, at para. 29.

<sup>56</sup> *Id.*, at para. 39.

A concurring judgment written by LeBel J. agreed with the general thrust of Iacobucci J.'s reasons, but disagreed with how meaningful participation is defined. Specifically, LeBel J. disagreed with Iacobucci J.'s emphasis on the individual aspects of meaningful participation, arguing that communitarian features, such as national representation and inter-group alliances, were relevant.<sup>57</sup> Justice LeBel argued that other values relevant to the electoral process, including cohesiveness and aggregation, ought to be recognized in the section 3 analysis.<sup>58</sup>

Justice LeBel cited the existing FPTP electoral system as “perhaps the most significant example” of the constitutional relevance of these values.<sup>59</sup> He noted that while FPTP creates biases in favour of larger, mainstream parties and “distorts” the translation of votes into seats, it possesses virtues of representing broad communities of diverse interests and creating stable majorities connected to the Canadian tradition of responsible government, thereby fostering a strong political centre and reducing factionalism.<sup>60</sup> Importantly, especially in light of the question of the electoral system’s consistency with section 3, LeBel J. wrote:

It should be emphasized that I do not intend to express any opinion about the consistency of our FPTP electoral system with s. 3 of the *Charter*. Any challenge to that system will have to be evaluated on its own merits. Nor would I wish to give the impression that I consider stability, majority governments or aggregation to be more important than fair participation. Nevertheless, within the boundaries set by the Constitution, it is the legislature’s prerogative to choose whether to enhance these values over other democratic values, or not. Still less should I be taken as suggesting that FPTP or any feature of the electoral system that favours larger parties is constitutionally mandated. On the contrary, I would argue that *the government has a fairly wide latitude in choosing how to design the electoral system and how to combine the various competing values at play*.<sup>61</sup>

Justice Iacobucci did not agree that it followed that the values encapsulated in FPTP are necessarily embedded in the Charter or that they ought to be balanced against the individual right to meaningful

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<sup>57</sup> *Id.*, at para. 101.

<sup>58</sup> *Id.*, at para. 153.

<sup>59</sup> *Id.*, at para. 154.

<sup>60</sup> *Id.*, at paras. 154-157. Justice LeBel acknowledges the highly contested nature of these virtues.

<sup>61</sup> *Id.*, at para. 158 [emphasis in italics is mine].

participation.<sup>62</sup> He noted that “the Charter is entirely neutral as to the type of electoral system in which the right to vote or to run for office is to be exercised. This suggests that the purpose of s. 3 is not to protect the values or objectives that might be embedded in our current electoral system, but, rather, to protect the right of each citizen to play a meaningful role in the electoral process, whatever that process might be.”<sup>63</sup> Instead, the relevance of those values are, in Iacobucci J.’s view, a matter to be addressed in reasonable limits analysis under section 1.<sup>64</sup>

Despite the disagreement over whether these competing values should be balanced within the definition limits of section 3 or within a section 1 analysis, there is much to commend LeBel J.’s viewpoint that Parliament would have wide latitude over the design of the electoral system. Indeed, Iacobucci J.’s analysis would seem to support the same conclusion.

Although some have suggested that the FPTP system itself may infringe section 3 rights,<sup>65</sup> others believe that the existing jurisprudence would generally tend towards deference to Parliament as it relates to the design of the electoral system.<sup>66</sup> This was precisely the result in a 2011 constitutional challenge to the FPTP system in *Daoust*.<sup>67</sup> Drawing on Iacobucci J.’s analysis in *Figueroa*, the Quebec Court of Appeal, upholding the lower court judgment, rejected the claimants’ arguments that the FPTP system prevented effective representation and meaningful participation.<sup>68</sup> Noting that no electoral system is perfect, Dufresne J.A. concluded that “effective representation is not dependent on the electoral system, and the evidence does not justify asserting that the first-past-the-post system that prevails in Quebec makes the representation of citizens ineffective. On the contrary, the expert evidence tends to demonstrate that every system has shortcomings. Therefore, it cannot be concluded that the principle of effective representation is violated solely as a

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<sup>62</sup> *Id.*, at para. 37.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*, at para. 31.

<sup>65</sup> Trevor Knight, “Unconstitutional Democracy? A Charter Challenge to Canada’s Electoral System” (1999) 57 U.T. Fac. L. Rev. 1; David Beatty, “Making Democracy Constitutional”, *Policy Options* (July 1, 2001), online: <<http://policyoptions.irpp.org/magazines/votes-and-seats/making-democracy-constitutional/>>.

<sup>66</sup> Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution* (Markham, ON: LexisNexis Canada, 2013), at 730; Greg Flynn & Tanya Kuzman, “Meaningful Participation? The Judicialization of Electoral Reform in Canada Post-*Figueroa v. Canada*” (2013) 7(1) *Canadian Political Science Rev.* 37.

<sup>67</sup> *Daoust*, *supra*, note 51.

<sup>68</sup> *Id.*

function of the electoral system.”<sup>69</sup> For an electoral system to be valid, it “must confer on the electorate or assure it of a minimal, albeit significant, degree of representation”.<sup>70</sup>

While current judicial reasoning relating to democratic rights ultimately leads to the conclusion that the FPTP system is compatible with section 3, it does not constitutionally mandate that system. Indeed, the logic articulated by the Supreme Court in *Reference re Prov. Electoral Boundaries* and *Figuroa*, and by the Quebec Court of Appeal in *Daoust* would clearly apply to alternative electoral systems. To unreasonably infringe democratic rights, changes to the electoral system would have to hinder the right to vote by placing substantive or procedural obstacles on the ability of individuals or particular classes of people to meaningfully participate in elections; depart significantly from the principle of voter parity (with variances more stark than permitted under the current system); or substantially alter, in a manner that departs from basic principles of democratic representation, the individual voter’s relationship with his or her elected official(s).

Barring radical proposals that undermine effective representation or meaningful participation — and it is difficult to identify any as it relates to the most commonly cited alternatives to FPTP in the Canadian context, including preferential balloting, MMP, or single-transferable vote (“STV”) — Parliament should be free to implement electoral reform. Party-list PR systems are not typically proposed for Canadian electoral reform, in part due to the country’s regional diversity. It is possible certain forms of PR could have implications for section 3’s right “to be qualified for membership” in a legislature, given that a system employing party lists would require candidates to run under party banners for those seats.<sup>71</sup> In a pure list system that included no seats for geographically-based ridings, independent candidates would effectively be shut out of the electoral process and would likely have a strong section 3 claim. But in a hybrid system like MMP, independent candidates would be free to run for riding-based seats while only being shut out of the seats drawn up by party lists. This latter system might still constitute a (marginal) limitation on eligibility, as it would restrict independent candidates’ ability to run for office in relation to a specific set of seats. Yet given the government’s likely articulation of its objectives in reforming

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<sup>69</sup> *Id.*, at para. 57.

<sup>70</sup> *Id.*, at para. 44.

<sup>71</sup> Credit to B. Thomas Hall for articulating this argument.

the system — proportionality being at the top of the list, which would be designed at least in part to improve vote parity — it is difficult to see such a limitation not being upheld as reasonable under section 1.

#### IV. CONCLUSION

The authority of Parliament to implement electoral reform is arguably cast in doubt by recent jurisprudence pertaining to the amending formula. The Court's elaboration of the scope of the general procedure relative to section 44 in the context of amendments affecting the Senate creates uncertainty and risks unintended consequences. In this article, I have argued why Parliament's authority to make changes to the electoral system is, for the most part, in fact consistent with the constitutional architecture concept and an understanding of the role of the House of Commons as it relates to provincial interests. This argument is grounded in an attempt to approach the issue of constitutional amendment from the perspective of this recent jurisprudence and placing it in the context of the Court's own reasoning.

Nonetheless, the article has also briefly raised normative reasons why a requirement for provincial consent under the general procedure would be constitutionally inappropriate and undesirable.<sup>72</sup> To briefly expand on this normative dimension, I will address two key points. First, interpreting the role or fundamental nature of the House of Commons in a manner that imbues the provinces with a legitimate interest in the way in which its members are elected arguably undermines federalism itself. This argument may seem, at first blush, counter-intuitive. Despite my criticism of the Court's reasoning in *Reference re Senate Reform*, that decision is properly hailed as supporting the federal character of the country.<sup>73</sup> Yet, as noted above, the upper chamber expressly provides for regional (or provincial) representation as part of its core function. The House is meant to provide for popular representation of the national will.

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<sup>72</sup> It is worth noting that arguments about the feasibility of electoral reform or the ability of Parliament to implement it without provincial consent might correlate to individual's normative opinion about the desirability of electoral reform generally. In the interests of disclosure, while I would be happy to see preferential balloting introduced, I would generally prefer to keep the FPTP system over any of the other alternatives. Despite this normative view, I believe the government enjoys a mandate to enact electoral reform and that Parliament enjoys the authority to implement it without provincial consent.

<sup>73</sup> For a good discussion on this point, see Carissima Mathen, "The Federal Principle: Constitutional Amendment and Intergovernmental Relations" in *Constitutional Amendment in Canada*, Emmett Macfarlane, ed. (Toronto: University of Toronto Press, 2016).

Although aspects of the House's composition relate to regional representation — the regional composition of cabinet is influenced by the available members of the government caucus in the House, for example — electoral reform will not in itself alter existing conventions governing those features. This is in stark contrast to the impact proposed consultative elections would have on the essential functioning of the Senate.

Second, interpreting section 44 so narrowly as to exclude electoral reform from its ambit would only cement the degree to which the Canadian Constitution suffers from a paralysis. If provincial interests extend so far as to negate Parliament's authority in this context, it is difficult to imagine a role for section 44 at all but for the most superficial of changes. Such a reading, in my view, would also be inconsistent with the history of constitutional amendment in Canada generally and the plain meaning of section 44 specifically. The dangers of constitutional stasis are obvious, but worth emphasizing. While core features of a constitution should not be subject to the changing whims of ordinary majoritarian politics, it should certainly not be so difficult to change that its continued relevance and vitality for the functioning of good governance stagnates over time. The inability to enact meaningful Senate reform, despite the archaic nature of that institution, is a testament to this. While clearly a product of both the amending formula itself and the politics of constitutional change in Canada, the inability to enact reform even in cases of deep and broad consensus is deeply problematic. The courts must be cautious about further exacerbating this problem, particularly when the amending formula itself embeds features designed to provide for flexibility in relation to changes to central institutions.

A similar normative underpinning substantiates my argument that the Charter's democratic rights do not provide serious impediments to most reasonable electoral reform options. As the courts have recognized, no electoral system is perfect, and each balances different and competing values and objectives. While the jurisprudence surrounding section 3 evinces an arguably piecemeal, rather than coherent, articulation and application of the various democratic rights, the courts have appropriately read those rights, including effective representation and meaningful participation, as generally permitting a range of structural alternatives in different aspects of the law of democracy. As it relates to electoral reform, the courts owe due deference to Parliament's weighing of those competing values.

