
Electoral Justice for Aboriginal People in Canada

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This article argues that legislative action is required to redress the chronic under-representation of Aboriginal people in Parliament. After drawing on the existing scholarship and attempts in the United States and New Zealand to modify electoral systems to improve minority group representation, the author advocates the creation of guaranteed electoral districts for Canada's Aboriginal peoples. Significant benefits would result, particularly the achievement of policy results that would better reflect Aboriginal values and goals. He responds to the principal critiques of Aboriginal electoral districts, that (1) the anticipated benefits would not occur, (2) Aboriginal electoral districts are inconsistent with Canada's individualist political culture, and (3) guaranteed representation is incompatible with Aboriginal self-government. In considering the constitutionality of the proposal, he notes the American experience of affirmative districting struck down by courts. Due to constitutional and jurisprudential differences, however, guaranteed Aboriginal representation would be constitutional in Canada; specifically, potential challenges under sections 3 and 15 of the *Canadian Charter of Rights and Freedoms* would fail. Finally, he addresses the possibility that Parliament could be constitutionally compelled to enact legislation creating guaranteed Aboriginal representation, particularly by section 35 of the *Constitution Act, 1982* and sections 3 and 15 of the *Charter*, and canvasses appropriate remedies. He concludes that Canada will have failed to live up to the promise of democracy until Canada's Aboriginal peoples obtain more effective representation in Parliament.

L'auteur soutient qu'une action législative est nécessaire afin de remédier à la sous-représentation parlementaire chronique des peuples autochtones. Après considération des études antérieures et des tentatives de modifier les systèmes électoraux pour améliorer la représentation des minorités aux États-Unis et en Nouvelle-Zélande, l'auteur suggère la création de circonscriptions électorales garanties aux peuples autochtones canadiens. Parmi les avantages d'une telle formule, on retrouverait en particulier l'atteinte d'objectifs politiques reflétant davantage les intérêts et les valeurs autochtones. Selon l'auteur, les principaux arguments contre une telle proposition — soit que les avantages recherchés ne seraient pas atteints, que les circonscriptions autochtones sont incompatibles avec la culture politique individualiste canadienne, et que la représentation garantie est incompatible avec l'autonomie gouvernementale autochtone — ne sont pas fondés. D'autre part, bien que les cours américaines aient déclaré inconstitutionnelles certaines tentatives similaires, la représentation autochtone garantie serait valide dans le contexte constitutionnel et jurisprudentiel canadien. En particulier, selon l'auteur, des contestations potentielles en vertu des articles 3 et 15 de la *Charte canadienne des droits et libertés* échoueraient. Finalement, il est possible que le parlement canadien ait l'obligation constitutionnelle de garantir la représentation autochtone, en vertu de l'article 35 de la *Loi constitutionnelle de 1982* et des articles 3 et 15 de la *Charte*; l'auteur fait état des réparations pertinentes, le cas échéant. Quoi qu'il en soit, le Canada continuera à échouer à réaliser l'objectif démocratique jusqu'à ce que ses peuples autochtones obtiennent une représentation parlementaire plus effective.

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Introduction

In January 1999 Premier Camille Thériault of New Brunswick proposed reserving two seats in the provincial legislature for Aboriginal people. Although the province's Aboriginal people have since rejected this proposal,¹ it would have met a long-standing representational deficit. There has never been an Aboriginal M.L.A. in New Brunswick. In fact, Aboriginal people are under-represented in democratic institutions across Canada, notably the House of Commons. Guaranteed representation for Aboriginal people has been proposed a number of times as a means of remedying this problem. Indeed, such proposals were made when Aboriginal people living on reserves first achieved the right to vote, and were made during the round of constitutional talks in 1983 held to deal with Aboriginal issues. The most recent comprehensive proposal surfaced in 1991, when the Royal Commission on Electoral Reform and Party Financing ("Lortie Commission") proposed a system by which a number of Aboriginal representatives could be elected in province-wide special Aboriginal-only constituencies. Within the last decade a number of authors have considered these proposals and the arguments made for and against guaranteed representation for Aboriginal people.² This article seeks to build on this literature and consider the constitutional issues surrounding the creation of guaranteed Aboriginal seats in the House of Commons.

Although there are many identifiable groups that are under-represented in Parliament in comparison to their numbers in the Canadian population as a whole, with women and visible minorities being well-known examples, this article focusses on the under-representation of Aboriginal people. As will be discussed throughout, Aboriginal people have a unique claim to guaranteed representation as a result of their ancestors' having been the original inhabitants of the land, their status as identifiable nations, and their treaty relationships with the federal government. Although other identifiable groups in society may have legitimate political claims for guaranteed representation in Parliament, the claim of Aboriginal people is the strongest.

The theme underlying this article is that guaranteed seats would play a role in improving the lives of Aboriginal people, and for that reason should be supported. Abo-

¹ See G. Hamilton, "Chiefs Reject Offer of Guaranteed Seats in N.B. Legislature: Unanimous in Opposition" *National Post* (25 March 1999) A5 [hereinafter "Chiefs Reject Offer"].

² See R. Gibbins, "Electoral Reform and Canada's Aboriginal Population: An Assessment of Aboriginal Electoral Districts" in Canada, Royal Commission on Electoral Reform and Party Financing, *Aboriginal Peoples and Electoral Reform in Canada*, ed. by R.A. Milen (Toronto: Dundurn Press, 1991) 153; R.A. Milen, "Aboriginal Constitutional and Electoral Reform" in *ibid.*, 3; T. Schouls, "Aboriginal Peoples and Electoral Reform in Canada: Differentiated Representation versus Voter Equality" (1996) 29 Can. J. Pol. Sci. 729.

iginal people are rightly suspicious of a Canadian state that has for so long ignored and undermined their most fundamental rights. Greater representation for Aboriginal people in Parliament would not undo the wrongs of the past, but it would provide both short-term benefits and another avenue of dialogue and deliberation to be used in an effort to improve the future of Canada's Aboriginal people.

Part I considers the under-representation of Aboriginal people in Canada's democratic institutions. This under-representation ought to concern Canadians because it represents a disjunction between the political order and Canada's First Nations. Aboriginal people in particular ought to be concerned, because representation in Parliament is a necessary condition for accessing the full practical benefits of participation in that political order. This part also looks at the effect of the electoral system on the geographically dispersed Aboriginal population and claims that this is in large part responsible for the under-representation of Aboriginal people in Parliament. Part II looks to ways that minority representation has been improved in the United States and New Zealand and considers proposals for guaranteed representation of Aboriginal people that have been made in Canada. Part III seeks to refute the arguments most commonly raised against guaranteed Aboriginal representation. I argue that Aboriginal people would have a positive effect on the policy outcomes of Parliament, even though Aboriginal members could sometimes be ignored and outvoted. Although this positive effect could happen through direct influence, the most likely positive results would stem from the legislative learning process that other M.P.'s would go through when faced with a larger number of Aboriginal colleagues. Part IV surveys possible constitutional challenges to guaranteed representation for Aboriginal people, and the reasons such challenges would fail. In Part V various ways in which a government could be induced through the *Canadian Charter of Rights and Freedoms*³ to set up guaranteed seats for Aboriginal people are considered. I argue that both sections 3 and 15 of the *Charter* provide possible avenues through which Aboriginal people could utilize the courts to ensure that they are able to elect representatives of their choice.

I. The Under-representation of Aboriginal People in Parliament

Until 1960 status Indians living on reserves did not have the right to vote in Canadian elections unless they gave up their treaty status and any rights and privileges associated with that status.⁴ The stated reasoning behind this denial of suffrage was

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

⁴ Canada, Royal Commission on Electoral Reform, *Summary of Issues from Hearings* (Working Document 33: Aboriginal Issues), looseleaf (Royal Commission on Electoral Reform) at 1 [hereinafter Working Document].

that Aboriginal people on reserves did not pay tax, and as such should not have a voice in how taxes were collected and spent.⁵

Since 1960 Aboriginal people have had the right to vote. Between the expansion of the franchise and 1993, however, only nine self-identifying Aboriginal people were elected to the House of Commons.⁶ In the years between 1867 and 1993 only twelve self-identifying Aboriginal people have been elected to the House. Of the nine Aboriginal people elected in the twentieth century before 1993, only three have been in districts in which Aboriginal people do not constitute a majority of constituents. In early 2000, there were only five self-identifying Aboriginal members of the House of Commons.⁷ Of those five, however, only one was self-identified as a "North American Indian", despite this group's making up the vast majority of Aboriginal people in Canada.⁸ Thus, Aboriginal people have, throughout history, consistently been under-represented in the House of Commons. As of 1990 Aboriginal people were under-represented in all provincial legislatures as well, but did constitute a quarter of the legislature in the Yukon and a majority of the legislature in the Northwest Territories.⁹

The serious under-representation of a significant national minority¹⁰ within Parliament represents a *prima facie* cause for concern for the Canadian state because of what it says about the disconnection between Aboriginal people and the Canadian political order. Roger Gibbins has stated that "there is little question that the existing electoral system does not provide an effective bridge between Aboriginal communi-

⁵ See Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2, part 1 (Ottawa: Minister of Supply and Services Canada, 1996) at 375 [hereinafter *RCAP Report*].

⁶ See also Canada, Committee for Aboriginal Electoral Reform, "The Path to Electoral Equality" in Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: What Canadians Told Us*, vol. 4 (Ottawa: Minister of Supply and Services Canada, 1991) 229 at 241 [hereinafter *Reforming Electoral Democracy Vol. 4.*].

⁷ See online: Parliament of Canada <<http://www.parl.gc.ca/information/about/people/key/Aboriginal.asp?Language=E&Hist=N&Sourc=hoc>> (date accessed: 26 March 2001).

⁸ Three of the members are identified as Metis, while one is identified as Inuit. The 1996 census reports the following: Aboriginal Ethnic Origin: 1,101,955; North American Indian Origin: 867,225; Metis Origin: 220,735; Inuit Origin: 49,845. These statistics will reflect to some extent the incomplete enumeration of certain Indian reserves and Indian settlements in 1996 (CD-ROM: *Dimensions Series: Portrait of Aboriginal Population in Canada: 96 Census* (Statistics Canada)). These figures reflect multiple responses, i.e. individuals self-identifying with more than one category. The methodology for surveying the Aboriginal population was changed for 1996. See Statistics Canada, *1996 Census Dictionary: Final Statistics Edition* (Ottawa: Statistics Canada, 1999) at 5-8.

⁹ See Working Document, *supra* note 4 at 2.

¹⁰ Although the term "minority" is resisted as a way of describing Aboriginal people, it can be seen, for the purposes of the present problem, that the barriers faced by minorities in other political communities and Aboriginal people are similar.

ties and the broader political community.”¹¹ As he noted, elections play an important symbolic role within a community.¹² He further asserted, “Electoral participation ... serves as a measure of health for the political community, or at least for its electoral components. In the case of Canada’s Aboriginal peoples, the vital signs are often distressingly weak.”¹³ The Royal Commission on Aboriginal Peoples, reporting in 1996, stated that “Canadian political institutions often lack legitimacy in the eyes of Aboriginal people.”¹⁴

The under-representation of Aboriginal people in Parliament should concern Aboriginal people as well. Katherine Swinton has observed that Parliamentary representatives serve two functions. First, representatives seek to “voice their constituents’ perspective and to reflect their needs in the policy process.” Second, a representative acts as an “ombuds, assisting the constituent who has problems with the government apparatus.”¹⁵ An unrepresented, or under-represented, community will have no one to perform these functions on its behalf. Anne Phillips has noted that some political scientists consider it “almost as axiomatic” that inequality of participation in democratic politics leads to an inequality in political influence.¹⁶ Given the centrality of Parliament within our democratic system, Aboriginal people should be concerned that under-representation in this institution will inevitably result in fewer benefits for them from the political order. While other institutions are involved with policy-making, the legislature is where resources are allocated and government policies scrutinized.¹⁷ Thus, the under-representation of Aboriginal people in Parliament is of concern to the extent that such under-representation prevents Aboriginal people from fully accessing the benefits of the democratic system. The election of a greater number of Aboriginal representatives would allow Aboriginal people to more fully access those benefits.

The primary factor responsible for this under-representation of Aboriginal people in Parliament is the operation of the Canadian electoral system. This system divides the country into 301 geographic constituencies. In each constituency the candidate who polls a plurality of votes is elected to Parliament.¹⁸ Canada thus has a single-member plurality (“SMP”) electoral system. Such a system can be contrasted with

¹¹ Gibbins, *supra* note 2 at 153.

¹² *Ibid.* at 154.

¹³ *Ibid.*

¹⁴ RCAP Report, *supra* note 5 at 374.

¹⁵ See K. Swinton, “Federalism, Representation, and Rights” in J.C. Courtney, P. MacKinnon & D.E. Smith, eds., *Drawing Boundaries: Legislatures, Courts, and Electoral Values* (Saskatoon: Fifth House, 1992) 17 at 18 [footnote omitted].

¹⁶ See A. Phillips, *The Politics of Presence* (Oxford: Clarendon Press, 1995) at 32.

¹⁷ New Zealand, *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Wellington, N.Z.: V.R. Ward, Government Printer, 1986) at 86.

¹⁸ See *Elections Act*, R.S.C. 1985, c. E-2, s. 189.

proportional representation (“PR”) electoral systems, which are “specifically designed to allocate seats in proportion to votes, in the hope that assemblies and governments will accurately reflect the preferences of the electorate.”¹⁹

A number of authors have observed that the logic of the SMP system causes geographically dispersed minorities, such as Aboriginal people and ethnic minorities, to be under-represented relative to their proportion of the population as a whole. Gibbins wrote that “[a]lthough groups which enjoy substantial geographic concentration may exercise significant leverage in specific ridings, as do Aboriginal voters in the Northwest Territories, the population size of federal ridings (approximately 90 000 individuals) precludes minority-group control in most cases.”²⁰ The Committee for Aboriginal Electoral Reform noted that “[w]hile Aboriginal peoples constitute upward of 4% of the overall Canadian population, their population distribution across the country has left them numerical minorities in all but the two territorial ridings. As a result, it makes it difficult for Aboriginal people to influence the outcome of an election.”²¹ The committee stated that

[w]hile current electoral law allows for group interests to be taken into account in the drawing of electoral boundaries and has worked to the benefit of official language minority groups and geographically concentrated ethnic communities, the existing law is not capable of accommodating the broad geographic distribution of Aboriginal peoples.²²

As indicated by the Lortie Commission, the administrators of existing laws do not go out of their way to accommodate Aboriginal interests. For example, many northern ridings are drawn so as to include southern cities and towns, ensuring that Aboriginal people are consistently outvoted in these ridings.²³ Thus, the electoral authorities have not sought to improve Aboriginal representation through boundary drawing. Even if they pursued this goal, however, the geographic dispersal of Aboriginal people would probably prevent them from achieving anything close to proportionate representation. The logic of the SMP system pushes parties to select candidates who have the characteristics of the majority of the riding.²⁴ Given that Aboriginal people are dispersed across the country, few Aboriginal candidates are selected to run, and even fewer elected.

¹⁹ Library of Parliament, *Electoral Systems* (Background Paper) by B. O’Neal (Ottawa: Library of Parliament, 1994) at 5.

²⁰ Gibbins, *supra* note 2 at 157.

²¹ “The Path to Electoral Equality”, *supra* note 6 at 243.

²² *Ibid.* at 242.

²³ *Reforming Electoral Democracy Vol. 4*, *supra* note 6 at 48.

²⁴ See L. Young, *Electoral Systems and Representative Legislatures: Consideration of Alternative Electoral Systems* (Ottawa: Canadian Advisory Council on the Status of Women, 1994) at 11.

II. Working around the Bias Inherent in the SMP System

All democratic countries face the challenge of ensuring fair representation of geographically dispersed communities in their central democratic institutions. In 1995 Will Kymlicka remarked that although African-Americans represented 12.4 percent of the population of the United States, they held only 1.4 percent of the total elected offices in that country.²⁵ Similarly, he noted that Hispanic-Americans represented 8 percent of the population, but held 0.8 percent of the elected offices.²⁶ In New Zealand, prior to the adoption in 1996 of a more proportional electoral system, the Maori people were also chronically under-represented in Parliament.²⁷ Thus, the under-representation of Aboriginal people is a problem that is not unique to Canada.

A. *Proposals in Other Countries*

1. Proportional Representation

The most common, and perhaps most obvious, way to avoid the biases of the SMP electoral system against groups that are not geographically concentrated is to replace the SMP system with a PR electoral system. Kenneth Benoit and Kenneth Shepsle, in their study of the effects of different electoral systems on the election of minority candidates, found that PR provides minorities with far better representation than does SMP.²⁸ They stated, "The most robust empirical regularity across all this electoral experience is the positive relationship between large-district, proportional-representation systems and success by electoral minorities in gaining seats."²⁹ They pointed to a number of examples from around the world where minorities have achieved representation nearly proportionate to their share of the population as a whole through a PR system.³⁰

²⁵ See W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 132 [hereinafter *Multicultural Citizenship*].

²⁶ *Ibid.*

²⁷ See M.P.K. Sorrenson, "A History of Maori Representation in Parliament" in New Zealand, *supra* note 17, Appendix B.

²⁸ K. Benoit & K.A. Shepsle, "Electoral Systems and Minority Representation" in P.E. Peterson, ed., *Classifying by Race* (Princeton, N.J.: Princeton University Press, 1995) 50.

²⁹ *Ibid.* at 66.

³⁰ *Ibid.* at 69. E.g. in Finland the Swedish minority constitutes about 6 percent of the total population, and the Swedish People's Party has achieved levels of support of 4.5 to 5.5 percent, receiving between ten and twelve seats in the two-hundred-seat Finnish Parliament throughout the 1970s and 1980s. They also noted that Catalan and Basque parties have achieved proportionate representation in Spain, and that African-Americans have achieved increased representation in Chilton County, Ala., through the use of proportional representation electoral systems. Benoit & Shepsle observed that

Although PR would likely improve the representation of Aboriginal people in Canada, it is unlikely that it is on the horizon. Electoral systems are notoriously difficult to change, primarily because those people most able to make such reforms are the beneficiaries of the status quo and thus unlikely to push for a new system. In such circumstances it is wise to consider other options for improving the representation of Aboriginal people within the general framework of the current electoral system.

Benoit and Shepsle observed that a number of techniques have been used to ensure more proportionate representation of minorities within SMP systems. One such technique used in the United States is the drawing of districts so as to include a majority of a minority ethnic group. A second example, in use in New Zealand for the Maori people, is guaranteed representation. Benoit and Shepsle referred to such solutions as “workarounds” because they are designed to evade the logic of the SMP system so as to ensure minority representation. They stated that “[w]ithout such workarounds ... experience indicates that the [SMP] system is ill-suited for providing seats to electoral minorities.”³¹ This article now turns to a consideration of such devices.

2. Affirmative Districting in the United States

To understand fully the history of race-conscious or affirmative districting in the United States, it is useful to consider the context in which this solution to minority under-representation was developed. The *Voting Rights Act*³² of 1965 was initially implemented to increase African-American participation in elections in the south. State officials had put in place a number of impediments to African-American voter registration. As of 1965 only 35.5 percent of voting-age African-Americans in the south were registered to vote, as compared with 73.4 percent of whites.³³ The *Voting Rights Act* was fairly successful in achieving its initial objective. African-American voter

these results hold for situations where a more direct comparison can be made between SMP and PR systems. In New Zealand's first election under a more proportional system in 1996, sixteen Maori M.P.'s were elected, providing representation roughly proportional to the Maori share of the total population. This contrasted with Maoris' traditional under-representation in Parliament in comparison with their representation in the population. Benoit & Shepsle also noted the 1970 New York City municipal elections, in which African-Americans constituted more than 20 percent of the electorate and Puerto Ricans approximately 12 percent. Of the thirty-seven city council members elected through SMP, none was Puerto Rican and just two were African-American (5.4 percent). In contrast, of the 279 community school board members elected through PR, nearly 28 percent were Puerto Rican or African-American (*ibid.* at 73 [footnote omitted]).

³¹ *Ibid.* at 78.

³² 42 U.S.C. § 1973.

³³ See B. Grofman, L. Handley & R.G. Niemi, *Minority Representation and the Quest for Voting Equality* (Cambridge: Cambridge University Press, 1992) at 21.

participation is fairly high today.³⁴ Once the restrictions on the right to vote were removed, however, “[j]urisdictions that wished to continue to discriminate against blacks simply moved from denying them access to the ballot to more sophisticated schemes developed to dilute the impact of their new voting strength.”³⁵

Often jurisdictions were able to do this by implementing at-large electoral systems.³⁶ These electoral systems would ensure that a bare majority of whites, voting as a bloc, would be able to continue to elect all the members of the legislature or city council. For example, if there is a particular council of ten members in a city with a voting population that is 60 percent white and 40 percent African-American, using single-member districts, African-Americans may form a majority in a number of these seats, although probably not four. But if the entire city is treated as one district, voters are given ten votes as in an at-large system, and assuming voting is racially polarized, whites can easily elect ten members of their choosing.

In judgments starting in the early 1970s, the U.S. courts increasingly found such electoral systems to be illegal under the *Voting Rights Act*.³⁷ The courts and the U.S. Justice Department, which became involved in state redistricting through the provisions of the *Voting Rights Act*, sought to draw single-member districts with African-American majorities as remedies for these violations of the legislation.³⁸ Due to the operation of the SMP electoral system, however, African-American and Hispanic candidates were still not elected in numbers that came close to reflecting their representation in the population as a whole. As with Aboriginal people in Canada, African-American and Hispanic voters were dispersed over a number of constituencies, and thus formed the majority in relatively few districts. To remedy this situation, legislatures began to redraw boundaries so as to ensure that African-Americans and Hispanics made up the controlling majority in a greater number of districts.³⁹ Prior to the 1992 congressional election, many boundaries were redrawn so as to create a number of majority-minority districts.⁴⁰ This remedy is referred to as “affirmative gerrymandering” or “affirmative districting”.

³⁴ *Ibid.* at 23.

³⁵ *Ibid.* at 23-24.

³⁶ See Phillips, *supra* note 16 at 86.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ See K.J. Bybee, *Mistaken Identity: The Supreme Court and the Politics of Minority Representation* (Princeton, N.J.: Princeton University Press, 1998) at 99, and his discussion of *UJO*, *infra* note 178, for the litigation surrounding one such case in which black voters spread across a number of districts in New York City were consolidated into one “majority-minority” district.

⁴⁰ See E. Daly, “Idealists, Pragmatists, and Textualists: Judging Electoral Districts in America, Canada, and Australia” (1998) 21 B.C. Int. & Comp. L. Rev. 261 at 289.

As noted, African-Americans and Hispanics still have nothing close to proportionate representation in the legislatures, and there are signs that what achievements there have been may be rolled back by the courts.⁴¹ Minorities have, nonetheless, achieved far better representation with affirmative districting than they have had at any other time in American history.⁴²

The American effort to work around the effects of the SMP electoral system using affirmative districting has thus had mixed results. African-American and Hispanic candidates are increasingly elected at all levels of American government, but the representation of these groups still lags far behind their proportion in the population. Part of this is the result of the fact that at a certain point the desire to draw districts in a race-conscious way runs into the realities of geography. For congressional districting, at least, the U.S. Supreme Court has stuck to a strict rule of absolute equality of population between districts.⁴³ In many states it is impossible to draw a district that has a majority of minority voters, is reasonably geographically contiguous, and also conforms to the equal population requirements.⁴⁴ For this reason, drawing new single-member districts to increase minority representation can only ever be partially effective, and affirmative districting can only ever be a partial solution.

3. Guaranteed Maori Seats in New Zealand

Since 1867 New Zealand has had guaranteed separate representation for its Maori people. This system was meant to be a temporary expedient until Maori people entered the general voting roll.⁴⁵ Initially the Maori were guaranteed four seats and whites were guaranteed seventy-two, although whites outnumbered Maori in the general population by only five to one.⁴⁶ The Maori seats covered the whole of New Zea-

⁴¹ See Part IV.A, below.

⁴² Phillips noted that in absolute terms African-American representatives at all levels of government jumped from 500 in the early 1970s to over 6,800 by 1988 (*supra* note 16 at 87). While there were only 3 African-Americans in eleven southern legislatures in 1965, by 1985 this number was 176, equivalent to almost 10 percent of the members of these legislatures (*ibid.*). Further, the results of the congressional redistricting have been equally dramatic. E.g. in South Carolina 30 percent of the electorate is African-American, and African-American voters, when given the option, vote almost unanimously for African-American candidates. Until 1992, however, South Carolina never had an African-American member of Congress. In 1992 two African-American candidates were elected to South Carolina's twelve-person congressional delegation—both from newly created majority-minority districts. See G. King, J. Bruce & A. Gelman, "Racial Fairness in Legislative Redistricting" in Peterson, *supra* note 28, 85 at 87-88.

⁴³ See *Karcher v. Daggett*, 462 U.S. 725, 103 S. Ct. 2653 (1983) [hereinafter *Karcher* cited to U.S.].

⁴⁴ The district at issue in *ibid.* at 742 had been drawn so as to ensure greater minority representation.

⁴⁵ See Sorrenson, *supra* note 27 at B-58.

⁴⁶ New Zealand, *supra* note 17 at 83.

land and thus overlapped with the white constituency seats. For many years the number of Maori seats remained constant, while the number of white constituency seats increased to ninety-seven by the early 1990s. Until 1967 the Maori were not allowed to participate as candidates or voters in the election for the general seats, but after that date, Maori voters could choose the voting roll on which to register.⁴⁷

For a number of reasons it has been argued that the separate Maori seats are problematic. Certainly, when first conceived of these seats were as much a method of social control as a way of ensuring Maori participation in Parliament.⁴⁸ Maori representatives have often been treated with disdain, and the freezing of their number at four has meant that they have had difficulty influencing public policy.⁴⁹ Augie Fleras stated, "To put it bluntly, Maori seats were established and perpetuated for the wrong reasons, and growing Maori indifference toward involvement in the system is the price that is now being paid."⁵⁰

In 1986 the New Zealand Royal Commission on the Electoral System argued that the system of separate representation should be abolished and a proportional representation electoral system put into place.⁵¹ The commission reasoned that a PR system "would produce more effective Maori representation than is possible under plurality with separate seats."⁵² For a number of years the commission's recommendations were ignored, but by the early 1990s there was a substantial push for electoral reform. The government of the day proposed moving to a system of mixed-member proportionality ("MMP"),⁵³ and pursuant to the suggestions of the commission, abandoning separate representation for the Maori people.⁵⁴ Maori opposition to the abolition of separate representation was, however, very strong.⁵⁵ Fleras remarked that the Maori defend guaranteed representation for its "symbolic value" and because of its centrality to

⁴⁷ See *ibid.* at 83-84. This amendment also allowed Europeans to stand as candidates in Maori districts.

⁴⁸ See A. Fleras, "Aboriginal Electoral Districts for Canada: Lessons from New Zealand" in *Aboriginal Peoples and Electoral Reform in Canada*, *supra* note 2, 67 at 72-73.

⁴⁹ See *ibid.* at 72-77. Participation on the Maori roll lagged so that, by 1984, of 209,600 eligible Maori, only 77,564 were registered on the Maori roll, leaving 132,000 registered on the general roll or not registered at all (Sorrenson, *supra* note 27 at B-62 to B-63.)

⁵⁰ Fleras, *ibid.* at 88.

⁵¹ New Zealand, *supra* note 17 at 101-106.

⁵² *Ibid.* at 105.

⁵³ Under MMP voters would have two votes, one for one of sixty-five representatives who would be elected from constituencies, and one for one of the parties in a separate election to choose fifty-five M.P.'s from a party list.

⁵⁴ See K. Jackson & A. McRobie, *New Zealand Adopts Proportional Representation: Accident? Design? Evolution?* (Aldershot, U.K.: Ashgate, 1998) at 220-21.

⁵⁵ See *ibid.* at 217.

their “identity and survival”.⁵⁵ As a result of the opposition, it was decided that the guaranteed seats would be retained, and when an MMP system was implemented in 1996, Maori were allowed to vote either for a general constituency seat or for one of five separate Maori seats. In this election the Maori achieved representation in Parliament that was for the first time equivalent to their representation in the population as a whole.⁵⁷ Five Maori were elected through separate seats, while ten others were elected, primarily through party lists.⁵⁸

The New Zealand experience indicates that separate representation is a useful means of achieving a certain minimum guaranteed level of representation for Aboriginal people. As well, guaranteed separate representation can clearly play a positive role in affirming a community’s political distinctiveness. The experience also shows, however, that proposals for guaranteed representation that are not motivated by fairness and justice can quickly lose legitimacy in the eyes of the very people they are meant to assist.

B. Proposals for Guaranteed Aboriginal Representation In Canada

Proposals for Aboriginal electoral districts (“AED’s”) have a long history in Canada. The first proposal for special Aboriginal representation in Canada’s Parliament came from George Manuel, the leader of the then National Indian Brotherhood (now the Assembly of First Nations) about the time of the extension of the franchise to all Aboriginal people in 1960.⁵⁹ Proposals in support of such reform, however, became increasingly common in the years immediately following the patriation of the constitution. At the 1983 constitutional conference for first ministers and Aboriginal people, a number of groups, including the Metis National Council and the Native Council of Canada, proposed that Aboriginal people have guaranteed representation in Parliament and the provincial legislatures.⁶⁰ Appearing before the Special Joint Committee of the Senate and the House of Commons in 1983, the Native Council of Canada stated that it viewed guaranteed representation of Aboriginal people as a mechanism

⁵⁵ *Supra* note 48 at 76.

⁵⁷ See T. Arseneau, “The Representation of Women and Aboriginals under PR: Lessons from New Zealand” (1997) 18 Policy Options 9 at 11.

⁵⁸ *Ibid.*

⁵⁹ See Elections Canada, *A History of the Vote in Canada* (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 86.

⁶⁰ “Aboriginal Constitutional and Electoral Reform”, *supra* note 2 at 15.

that would "foster effective participation of all Aboriginal people in the decision-making process that structures daily life in Canada."⁶¹

These proposals gained momentum at the hearings of the Lortie Commission in 1989 and 1990. At these hearings the creation of special electoral districts, based on the First Nations representation in Canada's population as a whole, was advocated by Aboriginal representatives.⁶²

In response, the Lortie Commission's final report set out comprehensive proposals to establish a number of AEDs. The commission recommended that these seats not be guaranteed in the way that the Maori seats are guaranteed, but that they should depend upon Aboriginal people's registering in sufficient numbers on separate voter lists. The Lortie Commission proposed that in any province where 85 percent or more of the provincial quotient⁶³ registered on Aboriginal voting lists, an AED should be created.⁶⁴ Following their creation, these constituencies would function in the same way as normal constituencies, except that they would encompass the entire province.⁶⁵ To ensure that creation of the AEDs did not require a constitutional amendment, the Committee for Aboriginal Electoral Reform suggested that the new constituencies be limited by provincial boundaries. Further, it was recommended that the creation of an additional seat for Aboriginal people in a province not increase that province's complement in the House of Commons.⁶⁶ This committee, which proposed the AEDs that the Lortie Commission eventually came to accept, had high hopes for the additional seats that would be created by the implementation of AEDs.⁶⁷ Despite the hopes of its proponents, however, the proposal for AEDs was shelved, along with much of the rest

⁶¹ Canada, Parliament, Special Joint Committee on Senate Reform, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform* (27 September 1983) at 20:51.

⁶² "Aboriginal Constitutional and Electoral Reform", *supra* note 2 at 38.

⁶³ The provincial quotient is established by dividing the province's total population by its number of seats. Thus, in a province with one million voters and one hundred seats, the provincial quotient would be ten thousand.

⁶⁴ Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, vol. 2 (Ottawa: Minister of Supply and Services Canada, 1991) at 139 [hereinafter *Reforming Electoral Democracy Vol. 2*].

⁶⁵ *Ibid.* Interestingly, the commission's proposals imply that if more than one constituency were created within a province, these would be drawn on territorial lines.

⁶⁶ "The Path to Electoral Equality", *supra* note 6 at 251; *Reforming Electoral Democracy Vol. 2*, *supra* note 64 at 142.

⁶⁷ The committee stated that Aboriginal M.P.'s would be able to press the case for self-government, promote the Aboriginal position on issues beyond the boundaries of Aboriginal lands but affecting Aboriginal people, and increase the participation of qualified Aboriginal people amongst the three thousand Order in Council appointments made through parliamentary institutions ("The Path to Electoral Equality", *ibid.* at 256).

of the Lortie Commission's report. Throughout the 1990s there were provincial proposals for the creation of special Aboriginal electoral representation, from Quebec, Nova Scotia, and New Brunswick. The predominant position taken by Aboriginal leaders in the latter half of the 1990s, however, was that special representation in Parliament and legislatures should be put aside as a goal so that Aboriginal communities could focus on self-government. For example, the Royal Commission on Aboriginal Peoples mentioned, but quickly discounted, the possibility of pursuing special Aboriginal representation within Parliament.⁶⁸ Recently New Brunswick chiefs unanimously rejected the proposal for the creation of two separate constituencies for Aboriginal people in the provincial legislature.⁶⁹ In a sense, this resistance to guaranteed representation may seem surprising, considering the problems of under-representation that Aboriginal people face in Parliament and the provincial legislatures.

III. Arguments against Aboriginal Electoral Districts

It is an important premise of this article that proportionate representation for Aboriginal people within Parliament is a desirable goal *per se* due to the instrumental benefits that are likely to accrue from such a change. It is presumed that an increased number of Aboriginal representatives, chosen by Aboriginal people to reflect their concerns, will have a beneficial effect on the policy results from Parliament. As already noted, political scientists see such a result as "paradigmatic".

Proposals for guaranteed representation have nonetheless met with criticism. Three common lines of critique are identifiable in the literature. The first attacks the underlying premise, arguing that it is far from certain that the election of a handful of additional Aboriginal representatives will yield beneficial policy results. The second claims that guaranteed representation for any group is inconsistent with our individualist political culture and thus would be an incoherent addition to our current electoral system. The third suggests that guaranteed representation in a central Parliament is theoretically inconsistent with the achievement of self-government, and is therefore undesirable in displacing the focus from that which is Aboriginal peoples' top priority.

These concerns are important, and must be considered respecting any specific proposal for Aboriginal electoral districts. As will be shown, however, none of the critiques provides a basis to outweigh the *prima facie* benefits that would flow from more proportionate representation of Aboriginal people in Parliament. Although greater Aboriginal representation would not be an immediate cure for all the social and economic problems facing Canada's Aboriginal population, it would have long-term beneficial effects in terms of educating other M.P.'s about the concerns and aspi-

⁶⁸ See *RCAP Report*, *supra* note 5 at 374-77. See also Schouls, *supra* note 2 at 744, n. 39.

⁶⁹ See *supra* note 1.

rations of Aboriginal people. It will also be shown that Canada's tradition of representation is not that of untrammeled individualism. Rather, the concerns of groups and communities of interest have always been considered in the districting process. Guaranteed representation for Aboriginal people is merely an extension of this tradition. Finally, although guaranteed representation in Parliament is theoretically inconsistent with a conception of Aboriginal self-government that contemplates independence or absolute sovereignty, it can be seen as an appropriate, even necessary, complement to the more commonly contemplated forms of self-government, by which Aboriginal people would maintain some ties to the Canadian state.

A. *The Benefits Would Not Occur*

The strongest claim that can be made for AEDs is that they would lead to policy results that would better reflect the values or goals of Aboriginal people. As such, the strongest argument against guaranteed representation for Aboriginal people is that it would not have this effect.

1. The Hypothesized Beneficial Results

Many who have made or studied proposals for guaranteed representation argue that beneficial policy outcomes would flow from greater Aboriginal representation. John Weinstein wrote that "[p]roposals for guaranteed representation are designed to ensure that aboriginal people fully participate in the decisions of public institutions such as legislative assemblies and regional governments which impact directly on their collective interests."⁷⁰ Ovide Mercredi, appearing before the Lortie Commission as vice-chair of the Manitoba Region of the Assembly of First Nations, declared, "We do participate in the electoral process with the expectation and anticipation that we may be able to influence the better treatment of our people and the full enjoyment of our collective rights and freedoms."⁷¹

The relationship between a community's representation and political influence is so well accepted that it is almost trite to note. Swinton argued that the reason that provinces have been concerned to keep a critical mass of M.P.'s in Parliament is that the House, cabinet, and caucus are important avenues through which to convey regional concerns in policy-making.⁷² Obviously, the best way to influence these bodies is through the election of M.P.'s sympathetic to, and understanding of, one's interests.

⁷⁰ J. Weinstein, *Aboriginal Self-Determination off a Land Base* (Kingston, Ont.: Institute of Inter-governmental Relations, 1986) at 7. See also Gibbins, *supra* note 2 at 157.

⁷¹ Quoted in "Aboriginal Constitutional and Electoral Reform", *supra* note 2 at 41.

⁷² *Supra* note 15 at 23.

Some commentators have also noted that Aboriginal participation has made a difference in policy formation in the past. Robert Milen argued that Elijah Harper's action in the Manitoba Legislature in 1990 was "a powerful symbol of the impact of electing Aboriginal legislators."⁷³ The Committee for Aboriginal Electoral Reform observed that several Aboriginal leaders from western Canada claimed that Aboriginal M.L.A.'s have been effective in communicating their views and advancing their concerns in western legislatures.⁷⁴ Fleras noted evidence from New Zealand that Maori M.P.'s have been successful in transforming Maori activism into "politically acceptable programs".⁷⁵

Others have argued that the true power of an increased number of minority representatives is in ensuring that issues of concern to minorities stay on the political agenda. This view also holds that representatives of minority communities can serve as a sort of early warning for governments in ensuring that their policies are sensitive to the goals and needs of the entire community. Fleras has maintained that the Maori seats have provided the Labour Party, which consistently captures all of them, with "a coordinated and reliable mechanism of communication in planning public policy."⁷⁶ He further suggested that the principal advantage of the Maori seats for the Labour Party has been that "Maori members identify relevant issues for the party, as well as alert party officials to trends in Maoridom that would otherwise escape the attention or interests of party strategists."⁷⁷ Phillips argued that because a minority will be consistently outvoted, the advantage of presence in a legislature must be the moral force of having representatives there.⁷⁸ She thus suggested that minority candidates will be able to influence public policy by their ability to remind governments to act in a way sensitive to the concerns of the minority.

2. The Counter-argument—Beneficial Results Would Not Occur

While an increased presence in a legislature may be a necessary condition to influence policy outcomes, it is not in itself sufficient. Moreover, evidence on the ability of minority representatives beneficially to affect legislative outcomes is mixed. Fleras indicated that there is much debate as to how much impact Maori M.P.'s have really

⁷³ "Aboriginal Constitutional and Electoral Reform", *supra* note 2 at 33.

⁷⁴ "The Path to Electoral Equality", *supra* note 6 at 263.

⁷⁵ *Supra* note 48 at 84. See also the comments of Ian Cowie at the hearings of the Lortie Commission, as noted in Working Document, *supra* note 4 at 5.

⁷⁶ Fleras, *ibid.* at 77.

⁷⁷ *Ibid.* [reference omitted].

⁷⁸ *Supra* note 16 at 110.

had on the policies of the New Zealand government.⁷⁹ Kent Roach has reminded us that guaranteed seats in the legislature do nothing to ensure that a government will be more responsive to those members.⁸⁰ This is especially so in our system, where a government elected with a majority of the seats can control the legislative agenda for up to five years. If a government unsympathetic to Aboriginal views were elected, it is unclear that it would make any difference that Aboriginal people were proportionately represented in Parliament.

Further, while in many cases the presence of more minority M.P.'s would provide a method of screening government policies, which may in turn ensure that governments do not implement policies particularly offensive to minority communities, the effectiveness of this is limited to the extent that governments remain free to disregard the advice and opinions of minority members of their cabinet or caucus. Moreover, parties in which minorities are not represented will not have the advantage of internal consultations at the Parliamentary level, and thus, when such parties are in power, minority representation in other parties will be of little assistance.⁸¹

There is the potential for something deeply problematic in the election of representatives who in the end can be outvoted or ignored on any given issue. Keith Bybee noted that "progressives see the promise of equitable power sharing belied by the elevation of token minority representatives."⁸² These considerations form the backbone of this critique of guaranteed Aboriginal representation. That is, such representation may not, in fact, achieve the beneficial policy outcomes that are supposed to follow paradigmatically from increased representation. David Lublin wrote that the "descriptive representation" of minorities in the United States has been improved through affirmative districting. He contended, however, that this gain has come at the loss of "substantive representation" in the form of policy choices preferred by African-Americans.⁸³

Related to this argument is the concern that if Aboriginal people are guaranteed representation, representatives in other districts may not feel obliged to take into account a minority's political views. The New Zealand Royal Commission saw this as

⁷⁹ *Supra* note 48 at 74. See also the comments of Don Scott at the hearings of the Lortie Commission, as noted in Working Document, *supra* note 4 at 5.

⁸⁰ See K. Roach, "Chartering the Electoral Map into the Future" in Courtney, MacKinnon & Smith, *supra* note 15, 200 at 213. See also P. Aucoin & J. Smith, "Proportional Representation: Misrepresenting Equality" (1997) 18:9 Policy Options 30.

⁸¹ E.g. the National Party in New Zealand has never elected an M.P. from a Maori constituency; see Fleras, *supra* note 48 at 77.

⁸² Bybee, *supra* note 39 at 56.

⁸³ See D.I. Lublin, "Race, Representation, and Redistricting" in Peterson, *supra* note 28, 111 at 121-22.

the most significant problem with guaranteed Maori representation.⁸⁴ Lublin remarked that critics of affirmative districting in the United States often complain that it leads to the “ghettoization” or political marginalization of minorities.⁸⁵ The Committee for Aboriginal Electoral Reform agreed that there was a danger that guaranteed representation for Aboriginal people might give other M.P.’s an excuse to ignore Aboriginal concerns.⁸⁶

3. The Long-Term View

Although there is a certain surface logic to these concerns, it is far from clear that they outweigh the significant benefits that would result from the election of more Aboriginal M.P.’s. It is true that if Aboriginal people are not included on the general electoral roll to the same extent, non-Aboriginal M.P.’s may ignore their concerns. Aboriginal M.P.’s might be frequently outvoted on issues of concern to Aboriginal people. Yet the same could be said of any group within Parliament, be it a regional interest or party. Manitobans are represented in Parliament by fourteen M.P.’s. On any given issue these M.P.’s can be easily outvoted. Nor are any other M.P.’s from across the country accountable to Manitobans. This hardly suggests, however, that Manitobans should be indifferent as to whether they continue to be represented in Parliament by these fourteen M.P.’s. This is because on many policy issues, these M.P.’s can make a difference. That a political minority’s M.P.’s may be outvoted on a given issue is not a reason to oppose guaranteed representation. The likelihood remains that on many issues increased representation can make a positive difference.

Furthermore, critics focussing on the indisputable fact that on any given issue Aboriginal M.P.’s may be outvoted or ignored fail to consider the long-term benefits of increased Aboriginal representation to the policy output of Parliament. This benefit is that other M.P.’s would become more sensitive to the goals and aspirations of Aboriginal communities through contact and dialogue with their increased number of Aboriginal colleagues. The Committee for Aboriginal Electoral Reform, composed of five Aboriginal people who had served as M.P.’s, was confident that a larger body of Aboriginal people in Parliament would sensitize other M.P.’s to the political beliefs and goals of Aboriginal people.⁸⁷ The committee stated that “Parliament is a place to exchange information and ideas, to learn from one another.”⁸⁸ It further argued that

⁸⁴ New Zealand, *supra* note 17 at 90-91.

⁸⁵ *Supra* note 83 at 111.

⁸⁶ “The Path to Electoral Equality”, *supra* note 6 at 263.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* at 271.

"MPs from AEDs would help to educate non-Aboriginal MPs and the Canadian public on issues of direct concern to Aboriginal people."⁸⁹

Experience suggests that this is the case. The Inuit argued before the Special Joint Committee of the Senate and of the House of Commons on Senate Reform that their ability to elect a member from the riding of Nunatsiaq has made parliamentarians more aware of their community's point of view. Their submission stated, "Inuit political participation has had, and will continue to have, a useful function of two-way political accommodation."⁹⁰

Political scientists have asserted that the presence of members of a particular group in a parliamentary or legislative caucus can sensitize the majority of party members to the viewpoint of that minority. Phillips has observed that feminist groups have been represented at all levels of the Parti québécois, and this has ensured that the party has remained sensitive to the concerns of women.⁹¹ In contrast, a lack of members of a particular group can cause a party to act in ways that are insensitive to the goals of that group. George Perlin has commented that "because of the weakness of Quebec representation in the Conservative caucus [prior to 1984], more moderate anglophones at the elite level have been deprived of the contacts with French Canadians which might have helped them acquire a better appreciation of French Canadian concerns."⁹² A lack of French-Canadian members has also made the NDP less responsive to patterns of public opinion in Quebec.⁹³ All this suggests that the presence of members of a community or group within the ranks of a political party can play a role in educating other members of that party.

A number of theorists have suggested that this process of "legislative learning" is the greatest advantage that can result from the increased representation of different groups in Parliament. Bybee has argued against the position that politics is simply instrumental or "a passive medium configured to express political identities as they naturally are."⁹⁴ Instead, he contended that a process of legislative learning can indeed occur: "Legislatures can be a site of deliberation about the interests that all hold in

⁸⁹ *Ibid.* at 247.

⁹⁰ Canada, Parliament, Special Joint Committee on Senate Reform, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform* (25 October 1983) at 31:20.

⁹¹ *Supra* note 16 at 134-35.

⁹² G.C. Perlin, *The Tory Syndrome: Leadership Politics in the Progressive Conservative Party* (Montreal & Kingston: McGill-Queen's University Press, 1980) at 191.

⁹³ See A. Whitehorn, "The CCF-NDP and the End of the Broadbent Era" in H.G. Thorburn, ed., *Party Politics in Canada*, 6th ed. (Scarborough, Ont.: Prentice-Hall, 1991) 324 at 332-33.

⁹⁴ Bybee, *supra* note 39 at 148.

common as well as the policies best suited to serve those interests.”⁹⁵ Phillips also argued that politics is about deliberation and that for deliberation to work, it is necessary to have a certain threshold number of members from important groups in society.⁹⁶ Guaranteed representation for Aboriginal people will make it more likely that they have sufficient numbers in Parliament to participate in the process of deliberation. While it may take time, greater representation would ensure that in the longer term legislative outcomes are more sensitive to Aboriginal points of view. The impact of these benefits should not be underestimated. A greater influence over the policy process and thus the allocation of public resources could make a significant improvement in the lives of Aboriginal people in this country. Although it would be impossible to be certain that on any given issue Aboriginal M.P.’s could make a difference, the criticism of lack of efficacy is not borne out when looking to the long-term impact of more Aboriginal M.P.’s.

B. Canada’s Individualist Political Culture

1. The Individualist Critique

Another argument levelled against guaranteed representation is based on an individualist conception of our political culture. Opponents of group representation see racial redistricting as perpetuating racial distinctions in society.⁹⁷ Sometimes the effort to ensure special representation for ethnic or racial groups is compared to a form of political apartheid.⁹⁸ Opponents of racial districting may argue that it leads to the “balkanization” of politics.⁹⁹ Many authors have argued, or noted arguments, that group representation is incompatible with our political culture.¹⁰⁰ Often, those who support this position see group-based representation as incompatible with what is described as “politics as usual”.¹⁰¹ Politics as usual, according to these critics, is pluralism, where shifting coalitions of individuals throw their weight behind different policies, ensuring that there is no permanent majority able to dominate the legislature. This position thus

⁹⁵ *Ibid.* at 154.

⁹⁶ *Supra* note 16 at 151.

⁹⁷ Lublin, *supra* note 83 at 111.

⁹⁸ See e.g. New Zealand, *supra* note 17, where the royal commission critiqued this point of view at 94 by observing that there is no relation to apartheid, since the Maori candidates are then represented in the general Parliament. But see text accompanying note 183.

⁹⁹ See Phillips, *supra* note 16 at 22.

¹⁰⁰ See e.g. Fleras, *supra* note 48 at 75. See also Gibbins, *supra* note 2 at 168; Swinton, *supra* note 15, arguing at 17 that the implementation of the *Charter* seems to have made our political culture more individualist.

¹⁰¹ Bybee, *supra* note 39 at 64.

views the opportunity for equal participation as the key to political equality.¹⁰² Guaranteed, separate group representation is thus not a necessary condition for minority representation.¹⁰³ Once able to participate, one will, depending upon the issue, be in the majority at least as often as in the minority.

A related argument against group representation is that it is impossible to essentialize individuals to one identity, be it race, gender, or language. Accordingly, individuals have many identities, and it is impossible to say which will be most politically salient on any given issue.¹⁰⁴ At its root, this argument asks whether we can talk logically about “group” representation at all. If we are all composed of multiple identities, how can we determine which of those identities represents the group to which we belong and which is most important for political representation?

This argument is related to debates over the meaning of representation and a critique of the idea of “mirror” representation. Tim Schouls has written that the idea of mirror representation “presupposes that citizens can only be represented by those who share the same perspective by virtue of sharing similar ethnic, religious, gender or class experiences.”¹⁰⁵ This contrasts with the more individualist conception that has been called “procedural” or “virtual” representation, by which “representation derives meaning from the procedural mechanisms by which representatives are elected.”¹⁰⁶

Two arguments are generally made in favour of mirror representation. First, people must share certain characteristics to understand fully the perspectives of others with those characteristics.¹⁰⁷ On this view, “no amount of thought or sympathy, no matter how careful or honest, can jump the barriers of experience.”¹⁰⁸ Second, even if it were possible for some members of the majority to jump the barriers of experience, they could not be trusted to do so to promote minority interests.¹⁰⁹ Schouls maintained that “[t]he proposal for AEDs is a response to the lack of actual Aboriginal representatives within Parliament and is based upon the acceptance of the principle of mirror representation.”¹¹⁰

¹⁰² *Ibid.* at 52.

¹⁰³ Gibbins, *supra* note 2 at 170.

¹⁰⁴ Swinton puts this claim eloquently, noting that despite feminist claims of an essential nature shared by women, women and members of other groups will not agree on political solutions, also dividing on issues such as region, class, or occupation (*supra* note 15 at 31).

¹⁰⁵ Schouls, *supra* note 2 at 734.

¹⁰⁶ *Ibid.*

¹⁰⁷ See *Multicultural Citizenship*, *supra* note 25 at 138.

¹⁰⁸ Phillips, *supra* note 16 at 52.

¹⁰⁹ See *Multicultural Citizenship*, *supra* note 25 at 139.

¹¹⁰ Schouls, *supra* note 2 at 734.

Many theorists have argued against mirror representation because it does not reflect what are seen to be our democratic traditions, or because it would be impossible to realize.¹¹¹ Phillips similarly rejected the idea that shared experience guarantees shared ideas.¹¹² Kymlicka noted that within every group are subgroups, none of which, on this theory, could truly understand or be trusted to advocate for the views of any other subgroup's members.¹¹³ As such, “[t]aken to its conclusion, the principle of mirror representation seems to undermine the very possibility of representation itself.”¹¹⁴

2. The Role of the Group in Canada's Electoral Laws

A rejection of mirror representation, however, does not inexorably lead to the commonly viewed alternative of “procedural representation”. The underlying assumption of procedural representation is that democratic legitimacy comes from the method by which representatives are chosen, that is, through a franchise of equal individuals. But representation in our political tradition has never taken the primacy of the individual as its only starting point.

Canada has a long history of considering the representation of groups in districting. The most obvious example is that territorial constituencies are not drawn randomly. Alan Stewart has contended that “[p]olitical representation in Anglo-Canadian theory and practice has always been of communities—territorial units sharing, insofar as possible, some unity of interest.”¹¹⁵ He noted that the importance of community is recognized in Canadian districting by districts’ not being based solely on population size.¹¹⁶ Indeed, many authors have commented on the differing population sizes between districts, and that this reflects a concern for community as opposed to individual representation.¹¹⁷ Swinton has observed that six of the ten provinces have more seats than they would by a strict population standard.¹¹⁸

Canada’s electoral laws allow the consideration of communities of interest in redistricting. For example, the *Electoral Boundaries Readjustment Act* states that the

¹¹¹ Swinton wrote that although she sees diversity in legislatures as a positive thing, fixed seats for groups would ignore the complexity of individual experience and identity, emphasizing distance rather than dialogue and consensus (*supra* note 15 at 31).

¹¹² *Supra* note 16 at 53.

¹¹³ *Multicultural Citizenship*, *supra* note 25 at 140.

¹¹⁴ *Ibid.*

¹¹⁵ A. Stewart, “Community of Interest in Redistricting” in Canada, Royal Commission on Electoral Reform and Party Financing, *Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral Boundary Reform*, ed. by D. Small (Toronto: Dundurn Press, 1991) 117 at 117.

¹¹⁶ *Ibid.* at 118.

¹¹⁷ See e.g. Roach, *supra* note 80; Swinton, *supra* note 15.

¹¹⁸ Swinton, *ibid.* at 22.

commissioners engaged in the drawing of boundaries may deviate from the equal population standard where necessary or desirable “in order to respect the community of interest or community of identity in or the historical pattern of an electoral district in the province.”¹¹⁹ Swinton pointed out that this legislation also directs the commissioners to consider the needs of northern or sparsely populated rural areas when drawing boundaries.¹²⁰ Kymlicka indicated that there are many examples of boundary commissions’ “drawing boundaries to correspond with ‘communities of interest’, such as farmers, workers, immigrant groups, and religious sects.”¹²¹ Since districting continues to take into account group interests under the label of “communities of interest”, it is incorrect to suggest that procedural representation has ever been the Canadian reality or ideal. Instead, what we have is procedural representation tempered by mirror considerations.¹²²

3. The Normative Advantages of Tempered Individualism

Many theorists of representation defend this tempered view as preferable. It is important to have representatives of different groups in Parliament. Procedural representation can theoretically work to the extent that candidates run on a platform that is clearly set out. Voters can determine which candidate best represents their political perspective, and can thus decide who to vote for. If the candidate does not follow through on these stated promises, individuals can vote him or her out of office. Phillips noted, however, that on issues that are not campaigned upon—that were not anticipated or discussed during an election—the representative has no choice but to fall back on his or her own experiences and prejudices.¹²³ According to Phillips, ideas only take one so far. At a certain point there is a need for those who hold different world views due to their different life experiences to be present in the legislature.¹²⁴ To make her point that groups do matter, she remarked that “in querying the notion that *only* the members of particular disadvantaged groups can understand or represent their interests [one] might usefully turn this question round and ask whether such understanding is possible without the presence of *any* members of the disadvantaged groups.”¹²⁵ Bernard Grofman has maintained that “the proper use of affirmative gerrymandering is to guarantee that important groups in the population will not be sub-

¹¹⁹ R.S.C. 1985, c. E-3, s. 15(2)(a), as am. by R.S.C. 1985 (2d Supp.), c. 6, s. 2(2) [hereinafter EBRA].

¹²⁰ *Supra* note 15 at 19.

¹²¹ *Multicultural Citizenship*, *supra* note 25 at 135.

¹²² Swinton, *supra* note 15 at 19.

¹²³ *Supra* note 16 at 43.

¹²⁴ *Ibid.* at 156-57.

¹²⁵ *Ibid.* at 89, n. 12.

stantially impaired in their ability to elect representatives *of their choice*.¹²⁵ Phillips noted that arguments for group representation can be seen as a logical extension of the classical liberal view of procedural representation: "If no one is to be excluded by virtue of gender, ethnicity, or language, and no one group is to be privileged over another, then certain guarantees have to be set in place to ensure that the politics is indeed evenhanded."¹²⁶ Kymlicka observed that few proponents of group representation argue for legislatures that mirror the community. Group representation is instead defended by considering the context of a certain group within a particular situation.¹²⁷ He stated that "[t]he point here is not that the legislature should mirror society, but rather that the historical domination of some groups by other groups has left a trail of barriers and prejudices that makes it difficult for historically disadvantaged groups to participate effectively in the political process."¹²⁸ These theorists thus seek to balance the need of certain groups for representation with the knowledge that at some point mirror representation is impossible to achieve.

4. Aboriginal People as a Group for Representation

It may legitimately be asked whether Aboriginal people in Canada constitute a group warranting separate representation. Do Aboriginal people have a sufficient political coherence to be considered a "group" that can be accorded separate representation? Schouls raised this concern, noting that if AEDs were to adhere to the generally accepted representation by population rule of staying within plus/minus 25 percent of the provincial quotient, this would "[result] in too few AEDs to represent adequately the plurality of differences internal to the Aboriginal population itself."¹²⁹ He argued that the sheer "diversity of Aboriginal differences simply cannot be represented adequately if AEDs are constrained by the principle of representation in proportion to population."¹³⁰ The Committee for Aboriginal Electoral Reform acknowledged this problem. On the Prairies Metis and Indian leaders sought guarantees of separate seats, presumably because of the divergent interests of these peoples.¹³¹ In New Brunswick one chief cast doubt on the idea that a single AED for the entire Atlantic region would be sufficient.¹³² Given the cleavages between different bands and nations, between status and non-status Indians, and between Indian, Inuit, and Metis, any proposal that

¹²⁵ B. Grofman, "Should Representatives Be Typical of Their Constituents?" in B. Grofman *et al.*, eds., *Representation and Redistricting Issues* (Lexington, Mass.: Lexington Books, 1982) 97 at 98.

¹²⁶ *Supra* note 16 at 121.

¹²⁸ *Multicultural Citizenship*, *supra* note 25 at 141.

¹²⁹ *Ibid.*

¹³⁰ Schouls, *supra* note 2 at 742.

¹³¹ *Ibid.* at 743. See also Gibbins, *supra* note 2 at 164.

¹³² "The Path to Electoral Equality", *supra* note 6 at 259.

¹³³ *Ibid.*

seeks to provide a proportionate number of guaranteed Aboriginal seats will end up subsuming a number of salient political differences within any one district.

It can, of course, be argued that this could be remedied by allowing for more seats through permitting greater deviations from the provincial quotient.¹³⁴ Yet even with a greater number of seats, AEDs must necessarily subsume a number of important differences. Kymlicka suggested that this is the case with all proposals for minority representation. He remarked that in Britain "the category of 'black' people obscures deep divisions between the Asian and Afro-Caribbean communities, each of which in turn comprises a wide variety of ethnic groups."¹³⁵

Of course, as has been noted, the product of representational democracy is always the subsuming of many political identities under a broader, usually territorial, identity. As such, it is not as if the project of guaranteeing minority representation is different in kind from what already occurs. The question here is why a particular identity—race in the United States, Aboriginal origin in Canada—warrants special representation. What is it about these political identities that makes them sufficiently salient that they ought to be guaranteed a measure of representation? Kymlicka likely provided part of the answer when he observed that "the problem of identifying disadvantaged groups is not unique to issues of political representation, and it may not be avoidable in a country committed to redressing injustice."¹³⁶ The histories of racism and discrimination faced by Aboriginal people in Canada and African-Americans in the U.S. have created politically salient identities centred on these characteristics, and the same factors that create the political identity often prevent that identity from finding proportionate expression in the present system.

An immense amount of evidence from the United States shows that race is a salient and coherent category of political identity. In Canada, in contrast, little empirical work has been done to determine the salience of Aboriginal identity in defining political ideas. Nor has a great deal of empirical work been done that would allow the easy assertion that Aboriginal people have a sufficiently coherent political identity to justify considering them as a "group" worthy of special political representation. The evidence that does exist in Canada, however, combined with the evidence of the importance of race in the United States, suggests that groups that have been the subject of systemic racial discrimination have legitimate claims to separate representation.

Bybee emphasized that those who argue for guaranteed representation for minorities in the United States rely on the "long history of racial discrimination in the United States—a history which they claim has created a cluster of minority group

¹³⁴ Gibbins, *supra* note 2, noted this possibility at 164.

¹³⁵ *Multicultural Citizenship*, *supra* note 25 at 145.

¹³⁶ *Ibid.* at 146.

identities unshared by the white majority.”¹³⁷ Phillips maintained that the best evidence that African-Americans are not electing the candidates they want can be seen from studies of racially polarized voting.¹³⁸ There are many examples of racially polarized voting in the U.S.¹³⁹ Without a doubt the history of discrimination in the U.S. has given political significance to racial divisions in that country, and thus provides a powerful justification for efforts to ensure greater minority representation in Congress.

Can there be a similar justification for guaranteed representation in Canada? Certainly Aboriginal people in this country have faced a history of discrimination similar in its invidiousness to that faced by African-Americans. Indeed, at one level, it is arguable that Aboriginal people in Canada have a stronger claim to separate representation than African-Americans, given that through the *Indian Act*¹⁴⁰ and treaty relationships they have a unique relationship with the Canadian state, and may also claim a right to self-government.¹⁴¹ These factors provide reasons to consider Aboriginal identity as possessing a degree of political coherence.

The coherence of Aboriginal political identity can also be seen from a consideration of Aboriginal and non-Aboriginal voting patterns, and a comparison with the results of American studies. It is extremely rare for an Aboriginal person to be elected in a riding where there is a non-Aboriginal majority. At the same time, in recent elections at least, the only two ridings with Aboriginal majorities have consistently elected Aboriginal M.P.’s. Although it is on a smaller scale, this evidence parallels that seen in the United States. Some evidence on voter turnout also suggests that Aboriginal identity is a politically salient factor. Gibbins noted that between the 1984 and 1988 elections, turnout more than tripled on two Alberta reserves. The reason for this, he asserted, was the nomination by the Progressive Conservatives of Wilton Littlechild, a

¹³⁷ Bybee, *supra* note 39 at 66. See L. Guinier, “[E]racing Democracy: The Voting Rights Cases” (1994) 108 Harv. L. Rev. 109.

¹³⁸ *Supra* note 16 at 88.

¹³⁹ Lublin noted that in the history of that country, only six African-American members of Congress have been elected from districts that do not have an African-American or African-American/Latino majority (*supra* note 83 at 112). He also noted other evidence indicating racially polarized voting in the United States: “[E]mpirical evidence indicates that the racial composition of the electorate overwhelms all other factors in determining the race of a district’s representative. The protection of majority black and majority-minority districts remains vital to the election of more than token numbers of blacks to Congress” (*ibid.* at 112-13).

¹⁴⁰ R.S.C. 1985, c. I-5.

¹⁴¹ See P. MacKlem, “Normative Dimensions of the Right of Aboriginal Self-Government” in Canada, Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Canada Communication Group, 1995) 1 at 34-35. See also *Multicultural Citizenship*, *supra* note 25 at 142.

Cree, in the riding of Wetaskiwin.¹⁴² All this indicates that Aboriginal people respond to Aboriginal candidates and feel that they share with them a politically salient identity. As well, evidence indicates that Aboriginal people themselves feel that there is a coherent, distinct identity to be protected through the election of Aboriginal candidates. In hearings before the Lortie Commission, the New Brunswick Aboriginal People's Council stated that Aboriginal turnout has traditionally been low because, for many reasons, native people feel that the process is not their process.¹⁴³ A group of twenty-three Manitoba Cree bands asserted, "We need members of Parliament who do not have to be taught who we are, what we want, and why we are important to this country."¹⁴⁴ The Committee for Aboriginal Electoral Reform argued that M.P.'s from AEDs would be beneficial because they could pursue claims of interest to Aboriginal people "without fear of alienating non-Aboriginal constituents, a problem that sometimes arises for Aboriginal people elected under the current system."¹⁴⁵

To Canadians accustomed to thinking of distinctions based on race as troubling, the claim that Aboriginal people share a political identity coherent enough to ground separate representation may seem problematic. This political identity, however, comes from a history of systemic discrimination and a unique relationship to the Canadian state. It is reflected in the voting patterns of Aboriginal people, and it has been identified by Aboriginal groups and individuals in claims for separate representation in the past. For those who are still concerned about "political apartheid", comfort can be taken from the choice of participation that would belong to Aboriginal people. AEDs thus give even less cause for concern than affirmative districting, since under the former individual Aboriginal voters choose their most salient political identity and register accordingly, while under the latter voters cannot choose whether to participate in a "majority" or "minority" district.

5. Setting a Precedent for Other Groups

A final aspect of this critique is the claim that if representation is guaranteed for one group, it should also be guaranteed for other groups. Swinton stressed that the claim for Aboriginal seats "inevitably generates echoes from other groups for equivalent rights."¹⁴⁶ Gibbins also saw this as a concern. As the *Charter* recognizes a number of groups, guaranteed representation for Aboriginal people would lead to a requirement for similar representation for these other groups.¹⁴⁷ Kymlicka noted Iris

¹⁴² Gibbins, *supra* note 2 at 160.

¹⁴³ *Reforming Electoral Democracy Vol. 4*, *supra* note 6 at 47.

¹⁴⁴ Quoted in "Aboriginal Constitutional and Electoral Reform", *supra* note 2 at 40.

¹⁴⁵ "The Path to Electoral Equality", *supra* note 6 at 247.

¹⁴⁶ *Supra* note 15 at 30 [footnote omitted].

¹⁴⁷ Gibbins, *supra* note 2 at 168.

Young's suggestion that guaranteed group representation be restricted to oppressed groups. He indicated, however, that Young's "list of 'oppressed groups' in the United States would seem to include 80 per cent of the population."¹⁴⁸ Thus, there is the concern that recognizing guaranteed representation would inevitably lead to claims for representation from innumerable other groups.

At one level this critique appears to hold some truth. If separate representation is justified on the basis of systemic disadvantage, there are likely a number of groups—women, visible minorities, and political minorities—who could claim a right to separate representation. One solution is that if all these groups need special representation to be proportionately present within our democratic institutions because of the result of systemic disadvantage, perhaps there should be provisions for separate representation. Practically, of course, such a proposition is problematic and would meet stiff resistance.

Aboriginal people, however, present a unique case for guaranteed representation. Several authors have drawn a distinction between Aboriginal people and other groups on the grounds that while others have joined this political order voluntarily through immigration, Aboriginal people are first peoples and thus represent an entirely different case.¹⁴⁹ Patrick Macklem has argued that there are a number of factors that speak to Aboriginal difference in the constitutional order which suggest that acceding Aboriginal peoples rights not accorded to ethnic minorities, for example, would not be normatively or constitutionally inconsistent.¹⁵⁰ He noted that Aboriginal people are prior occupants of the land, they exercised sovereignty over the territory before the exertion of European sovereignty, and they are in treaty relationships with the federal government—all of which distinguish them from minority cultures.¹⁵¹ Aboriginal peoples are not in the same situation as minority cultures or other groups that have arrived in Canada as part of, or since, European colonization.

6. Conclusion

The argument that guaranteed representation for Aboriginal people would be inconsistent with our individualist political culture fails to recognize that Canada's districting tradition is not one of uncompromised individualism. Instead, districting in Canada has always taken into account groups and communities of interest. Guaranteed representation for Aboriginal people would thus be entirely consistent with Can-

¹⁴⁸ *Multicultural Citizenship*, *supra* note 25 at 145.

¹⁴⁹ See e.g. Fleras, *supra* note 48 at 90; Macklem, *supra* note 141 at 19; W. Kymlicka, *Liberalism, Community, and Culture* (New York: Oxford University Press, 1989).

¹⁵⁰ Macklem, *ibid.*

¹⁵¹ *Ibid.* at 35.

ada's political tradition. Nor can it be said that guaranteed representation for Aboriginal people would inevitably open the floodgates to similar claims from other disadvantaged groups. As the original inhabitants of this land, First Nations have a unique claim to separate representation in Parliament. This claim is bolstered by the unique relationship of First Nations to the federal government, their status as identifiable nations or peoples, and their apparent political coherence. These factors are sufficient to differentiate the claim of Aboriginal peoples from those of other groups.

C. *The Incompatibility of Guaranteed Representation and Self-Government*

Many Aboriginal people argue that even if there is a normative justification for guaranteed Aboriginal representation, it is not a goal worth achieving. Some maintain that it is inconsistent with self-government, and should be resisted. Yet while the extension of representation in Parliament is a means of integrating Aboriginal people into a broader political community, it need not be incompatible with self-government. Such integration is incompatible with self-government akin to independence, but not with self-government as it is more commonly conceived and by which Aboriginal peoples would maintain relationships with the Canadian state. Indeed, it can be argued that representation in Parliament is a useful and necessary complement to this latter form of self-government.

Part of the negative reception that AEDs have received in some quarters likely relates to legitimate concerns Aboriginal people have about the central institutions of Canadian democracy. Many Aboriginal people resisted the extension of the franchise in 1960 as an attack on their treaty rights.¹⁵² The Committee for Aboriginal Electoral Reform commented that the historical failure of the federal government to accommodate the goals of Aboriginal people has "had an adverse impact on Aboriginal perceptions of Parliament and the value of participating within it."¹⁵³ Further, the Royal Commission on Aboriginal Peoples denounced guaranteed representation because of this lack of legitimacy of Canadian political institutions amongst Aboriginal peoples.¹⁵⁴

Many Aboriginal people do not participate in elections precisely because they do not recognize the authority of the Canadian state, and it is felt that exercising the franchise would constitute such a recognition. This argument was used against the proposal for guaranteed representation in New Brunswick. In rejecting the proposal, Darrell Paul, the executive director of the Union of New Brunswick Indians, stated,

¹⁵² "Aboriginal Constitutional and Electoral Reform", *supra* note 2 at 46. See also "The Path to Electoral Equality", *supra* note 6 at 241.

¹⁵³ "The Path to Electoral Equality", *ibid.* at 242.

¹⁵⁴ *RCAP Report*, *supra* note 5 at 374.

“What it boils down to is we are saying, we are a nation and, by becoming part of someone else’s system, we are going to give that up.”¹⁵⁵ Thus, it is argued that working towards self-government cannot be made consistent with guaranteed representation within the Canadian state.

It is unnecessary, however, to see arguments for guaranteed representation as incompatible with most claims for self-government. The Maori people see guaranteed representation as being in accord with their goal of political autonomy.¹⁵⁶ Advocates for AEDs in the 1980s certainly felt that working simultaneously towards both these goals was not inconsistent. Before the 1983 constitutional conference, the Native Council of Canada stressed that guaranteed representation in the House of Commons could be seen as an extension of self-government and not an impediment to it.¹⁵⁷ Similarly, in consultations before the Committee for Aboriginal Electoral Reform, some Aboriginal leaders claimed that guaranteed representation would complement self-government.¹⁵⁸ The committee itself took this position, arguing that Aboriginal M.P.’s would be in a position to push for greater Aboriginal self-government.¹⁵⁹

As Milen noted, though, the committee’s position that Aboriginal peoples are citizens of this country is not universally held, and representation in Parliament may be seen as inconsistent with nation-to-nation relations.¹⁶⁰ For better or worse, however, Aboriginal people do have the right to participate in Canadian elections, and many take advantage of that right.¹⁶¹ Given this situation, it may be argued that a nation-to-nation conception is better preserved through the use of guaranteed Aboriginal representation than through an undifferentiated universal franchise. Indeed, Schouls stated that advocates of guaranteed Aboriginal representation see it as a way of ensuring continued differentiated citizenship. He drew attention to a concern that the undifferentiated universal citizenship of procedural representation could potentially lead to assimilation. In contrast, “AEDs are offered as an electoral device to draw the experience of Aboriginal differentiated citizenship into full participatory status in Canadian state institutions.”¹⁶² In this sense guaranteed representation for Aboriginal people, through emphasizing political difference, may in fact complement self-government. Indeed, the Committee for Aboriginal Electoral Reform made an analogy to the European Union.¹⁶³ Although the circumstances in which the EU was created are ob-

¹⁵⁵ “Chiefs Reject Offer”, *supra* note 1.

¹⁵⁶ Sorrenson, *supra* note 27 at B-61.

¹⁵⁷ “Aboriginal Constitutional and Electoral Reform”, *supra* note 2 at 19.

¹⁵⁸ “The Path to Electoral Equality”, *supra* note 6 at 255.

¹⁵⁹ *Ibid.* at 256.

¹⁶⁰ “Aboriginal Constitutional and Electoral Reform”, *supra* note 2 at 47.

¹⁶¹ See Gibbins, *supra* note 2 at 160.

¹⁶² Schouls, *supra* note 2 at 735.

¹⁶³ “The Path to Electoral Equality”, *supra* note 6 at 255.

viously different from the emergence of self-governing Aboriginal nations within Canada, the importance of this example is that it demonstrates that the surrender of some sovereignty to a supranational body does not necessitate the surrender of self-government. Although France accepts the authority of the EU to legislate in some areas, and French citizens elect members to the European Parliament, one could hardly argue that France is not self-governing.

Further support for guaranteed representation stems from the likelihood that it would still be necessary once self-government is achieved. Most conceptions of Aboriginal self-government do not contemplate full independence from the Canadian state. Schouls observed that "numerous Aboriginal nations remain content to have the federal government involved in the provision of some services."¹⁶⁴ Macklem also noted that regardless of what one thinks of the moral justification of the initial assertion of Canadian sovereignty, important Aboriginal interests have developed out of it that may require protection.¹⁶⁵

Assuming that the most likely form of self-government is one where Aboriginal governments occupy something of a third level of government, representation within Parliament may in fact be increasingly necessary. The powers that the federal government exercises under the *Constitution Act, 1867*¹⁶⁶ suggest that it is important for Aboriginal people to be involved in the institution in which their "particular legal and legislative interests are addressed."¹⁶⁷ Further, the history of Canadian federalism indicates that we should not be confident that under self-government there will not be disputes about jurisdiction between an Aboriginal level of government and the provincial and federal levels.¹⁶⁸ This suggests that even following the achievement of self-government there will be a number of pragmatic reasons for Aboriginal people to continue to participate in Parliament and provincial legislatures.

There are still other reasons that representation in Parliament will continue to be valuable following the achievement of self-government. Aboriginal people living off-reserve may be better able to access their M.P.'s than a distant band council that may have little ability to help its members who have left for urban centres.¹⁶⁹ This will become increasingly important as more Aboriginal people move to cities. As well, Aboriginal people have perspectives on issues such as free trade, immigration, and environmental policy that may affect them as individuals, but not be within the control of

¹⁶⁴ Schouls, *supra* note 2 at 740-41.

¹⁶⁵ Macklem, *supra* note 141 at 16.

¹⁶⁶ (U.K.), 30 & 31 Vict., c. 3, s. 91(24), reprinted in R.S.C. 1985, App. II, No. 5.

¹⁶⁷ Schouls, *supra* note 2 at 741.

¹⁶⁸ See *ibid.* at 742. See also Gibbins, *supra* note 2 at 181.

¹⁶⁹ "Aboriginal Constitutional and Electoral Reform", *supra* note 2 at 47.

an Aboriginal government.¹⁷⁰ Indeed, it must be noted that as long as there is some interdependence between the Canadian government and Aboriginal governments, Aboriginal people will have an interest in determining the allocation of resources within the Canadian state. It would be a rare federal policy that did not have an impact, directly or indirectly, on an Aboriginal government.

The suggestion that Aboriginal people should have guaranteed representation in a situation of self-government is disputed by some theorists who argue that the establishment of Aboriginal self-government should be accompanied by a reduction in representation in the central institutions of the Canadian state. Kymlicka, for example, has maintained that “the logical consequence of self-government is reduced representation, not increased representation. The right to self-government is a right against the authority of the federal government, not a right to share in the exercise of that authority.”¹⁷¹

While this argument initially seems to make sense on a theoretical level, it is not consistent with the reality of Canadian federalism. Depending on where one lives, one has a different relationship with the federal government from individuals in other provinces or territories. There is no suggestion, however, that simply because one is not from the Northwest Territories or the Yukon one’s representative should not have a say in government policy regarding these territories. Nor do we feel that when powers over training or immigration are shifted to a province from the federal government that that province’s M.P.’s should no longer have a say over federal policies in these areas. It is true that Kymlicka’s argument is only that this *should* be the case.¹⁷² Even this is doubtful, however, given that we continue to share a general political community, and we all have a stake in the choices that community makes. This is so even if those decisions do not directly impact upon us.

Guaranteed representation in Parliament can thus be defended as being compatible with the assertion of self-government by Aboriginal peoples. Indeed, by ensuring separate representation within the broader community’s central political institution, AEDs support self-government. Guaranteed representation can also be defended as being beneficial to Aboriginal people even after self-government is achieved. Moreover, the argument that the pursuit of self-government ought to detract from participation in the community’s political institutions cannot be sustained. It does not reflect the reality of contemporary Canadian federalism, and would seem to threaten the existence of a shared political community. The point of guaranteed representation for

¹⁷⁰ Schouls, *supra* note 2 at 747.

¹⁷¹ *Multicultural Citizenship*, *supra* note 25 at 143.

¹⁷² *Ibid.*

Aboriginal people would be to strengthen that broader community, while at the same time re-enforcing self-government.

IV. The Constitutionality of Guaranteed Aboriginal Representation

Given the individualist thrust of the *Charter*, it may be appropriate to ask whether guaranteed Aboriginal representation through AEDs would be constitutional. At least one political scientist has suggested that ethnically defined constituencies might not be valid under the *Charter*.¹⁷³ Certainly in the United States the constitutionality of affirmative districting has been cast into doubt. In Canada, however, there is reason to believe that a challenge to AEDs of the general sort proposed by the Lortie Commission would not be successful.¹⁷⁴ Neither the right to vote¹⁷⁵ nor the right to equality¹⁷⁶ provides a fruitful ground for a *Charter* challenge to guaranteed Aboriginal representation. This section will consider the American jurisprudence that has found affirmative districting to be unconstitutional. It will then argue that similar challenges to AEDs in Canada would not be successful, due to the differences in structure between the *Charter* and the U.S. Constitution, as well as in jurisprudential development north of the border.

A. Affirmative Districting

American courts have thoroughly canvassed the constitutionality of districts drawn to improve the representation of various minorities. Although one must always keep in mind the different legal and political settings of Canada and the United States, the American jurisprudence provides a starting point for analyzing the constitutionality of AEDs such as those proposed by the Lortie Commission. For instance, in other cases where the constitutionality of electoral laws has been examined, Canadian

¹⁷³ See Gibbins, *supra* note 2 at 168.

¹⁷⁴ It should be noted that I do not seek to restrict this discussion to the specific proposal made by the Lortie Commission. My point is that a proposal with the same general framework—voluntary participation, with districts not overlapping provinces—would pass constitutional scrutiny.

¹⁷⁵ *Charter*, *supra* note 3, s. 3.

¹⁷⁶ The *Charter*, *ibid.*, states:

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

courts have considered the U.S. experience, if only to illustrate why the Canadian situation is different.¹⁷⁷

The constitutionality of affirmative districting was first tested in the 1977 case of *United Jewish Organizations of Williamsburgh v. Carey*, in which a New York electoral map was challenged as violating the Equal Protection clause.¹⁷⁸ This relatively early case suggested that the U.S. Supreme Court would be deferential to the right of the legislature to seek to improve the representational position of minorities through affirmative districting. The New York legislature had drawn a district line to ensure that African-Americans made up the substantial majority of two state Senate districts.¹⁷⁹ The law was challenged by a group of Hasidic Jews whose neighbourhood had been split by the new district. White J., writing for the majority, found that racial bloc voting existed, and that there was nothing in the constitution which prevented the legislature from recognizing this fact in its districting as a way to combat past discrimination.¹⁸⁰ The seeds of later decisions were, however, sown in the dissent, in which the judges suggested that allowing such a policy violated the goals of America's "melting pot" and thus the guarantee of equal protection in the Fourteenth Amendment.¹⁸¹

The more recent case of *Shaw v. Reno*¹⁸² demonstrated that in little over a decade the Supreme Court's attitude to such legislative efforts had changed considerably. This case concerned a challenge by voters to the creation of two oddly shaped electoral districts drawn by the electoral boundary commission of North Carolina. These districts were created to ensure that the widely dispersed African-American minority constituted a majority in two congressional seats. In finding the districting unconstitutional, the majority of the court formulated a test for constitutionally valid redistricting that severely restricted the ability of legislatures to engage in this sort of action. O'Connor J., writing for the majority, held that "[a] reapportionment plan that includes in one district individuals ... who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."¹⁸³ The court held that a district could be challenged under the equality pro-

¹⁷⁷ See e.g. *Reference Re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, (*sub nom. Ref. re: Electoral Boundaries Commission Act, ss. 14, 20 (Sask.)*) 81 D.L.R. (4th) 16 [hereinafter Saskatchewan Reference cited to S.C.R.]. See also *Somerville v. Canada (A.G.)* (1996), 184 A.R. 241, 136 D.L.R. (4th) 205 (C.A.).

¹⁷⁸ 430 U.S. 144, 97 S. Ct. 996 (1977) [hereinafter *UJO* cited to U.S.]. At issue was U.S. Const. amend. XIV.

¹⁷⁹ *UJO*, *ibid.* at 151-52.

¹⁸⁰ *Ibid.* at 165-68.

¹⁸¹ *Ibid.* at 187.

¹⁸² 509 U.S. 630 at 647, 113 S. Ct. 2816 (1993) [hereinafter *Shaw* cited to U.S.].

¹⁸³ *Ibid.* at 647.

visions of the Fourteenth Amendment if it “rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.”¹⁸⁴ In this situation the districting scheme must be subjected to the same strict scrutiny as any other law that divided people on the basis of race.¹⁸⁵ The court distinguished *UJO* on the basis that there the district had not been bizarrely shaped, as was the case in *Shaw*. O’Connor J. stated that the facts in *UJO* “would not have supported such a claim ... precisely because [the statute in question] adhered to traditional districting principles [such as compactness and population equality].”¹⁸⁶ Thus, the majority held that boundaries would violate the Fourteenth Amendment where their bizarre shape suggested that racial considerations had been predominant.

The difficulty that *Shaw* presents to legislators is that it does not permit them to design minority-majority districts where the minority population is not geographically concentrated. O’Connor J. stated that compactness and population equality are traditional districting considerations, and that *UJO* only suggests that it is acceptable to create majority-minority districts where the “residential patterns” of a sufficiently numerous minority so permit.¹⁸⁷ This, however, does little to assist in a situation such as that in North Carolina, where the 20 percent African-American population was described by the Court as “dispersed”.¹⁸⁸

*Miller v. Johnson*¹⁸⁹ brings into doubt the possibility that even geographically compact affirmative gerrymanders are permissible under the Fourteenth Amendment. In *Miller* the government accepted that a particular district had been drawn so as to create an affirmative gerrymander, but argued that it was necessary under the *Shaw* test to show that the district’s shape “is so bizarre that it is unexplainable other than on the basis of race.”¹⁹⁰ The U.S. Supreme Court, however, found that the bizarreness of the shape was merely relevant as evidence “that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines.”¹⁹¹ Kennedy J., writing for the majority, held that to successfully challenge affirmative districting a plaintiff must demonstrate “that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”¹⁹² To do this, a plaintiff must show

¹⁸⁴ *Ibid.* at 649.

¹⁸⁵ *Ibid.* at 644.

¹⁸⁶ *Ibid.* at 651.

¹⁸⁷ *Ibid.* at 651-52.

¹⁸⁸ *Ibid.* at 634.

¹⁸⁹ 515 U.S. 900, 115 S. Ct. 2475 (1995) [hereinafter *Miller* cited to U.S.].

¹⁹⁰ *Ibid.* at 910.

¹⁹¹ *Ibid.* at 913.

¹⁹² *Ibid.* at 916.

that the legislature placed considerations of race above “traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests.”¹⁹³ Thus, Kennedy J. found that a state was permitted to consider race if it utilized these traditional districting principles, but it was not permitted to subordinate the traditional factors to racial considerations.¹⁹⁴

Together *Shaw* and *Miller* seem to put an end to the practice of affirmative districting. In a cruel piece of historical irony, the U.S. Supreme Court has essentially suggested that the only community of interest or identity that states cannot make primary in districting is race. The court understands traditional principles of districting to be “racially neutral”, and suggests race is not the basis of “actual” shared political identities. A reading of the history of American voting rights legislation and litigation, however, shows that this is simply not the case.

B. Aboriginal Electoral Districts

What is important for present purposes is whether Canadian courts would use similar reasoning to find AEDs to be unconstitutional. When special electoral districts were proposed for New Brunswick’s Aboriginal people, Julius Grey, a law professor at McGill University, questioned whether the scheme would be constitutional under section 15 of the *Charter*.¹⁹⁵

1. Section 15

Unlike in the United States, where challenges have been brought by voters who have been included in majority-minority constituencies against their will, a challenge in Canada would be brought by a plaintiff from outside the constituency, since registration to vote in an AED would be voluntary. Two sorts of plaintiffs can be imagined: members of the majority group who would challenge the constitutionality of AEDs on the ground that they created a distinction between Aboriginal and non-Aboriginal voters on the basis of race, and members of other disadvantaged groups who might argue that legislation creating AEDs is unconstitutionally underinclusive.

The Supreme Court of Canada has restated and elaborated upon the test for determining whether a distinction constitutes discrimination for the purposes of section

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ See G. Hamilton, “N.B. Offers Aboriginals Guaranteed Seats: Expert Questions Whether Premier’s Proposal Is Legal” *National Post* (26 January 1999) A1.

15.¹⁹⁶ Writing for the Court Iacobucci J. held that in determining whether a particular provision was discriminatory, a court must look to the context in which the distinction is made and whether the differential treatment demeans the dignity of the claimant.¹⁹⁷ Thus, in seeking to determine whether AEDs could be found unconstitutional under section 15, the perspective of potential plaintiffs must be considered in light of the contextual factors relevant to their claim. When Iacobucci J.'s four contextual factors are considered,¹⁹⁸ it can be seen that neither a challenge from a majority group plaintiff, nor one by a member of a disadvantaged group, would succeed in overturning carefully crafted legislation creating AEDs.

The main barrier to a challenge on the grounds of discrimination by a member of the majority group would be the first contextual factor, whether the claimant group suffers from "pre-existing disadvantage, vulnerability, stereotyping, or prejudice".¹⁹⁹ Iacobucci J.'s emphasis clearly established that the purpose of section 15 is to remedy pre-existing disadvantage, and not to roll back the legislative gains of the very people that section 15 was intended to benefit. Although not determinative, his language suggests that the Court will be hesitant to allow such challenges to legislation meant to benefit those who suffer from pre-existing disadvantage. The difficulty of a challenge to AEDs by a member of the majority group is reinforced by Iacobucci J.'s third contextual factor, whether the law in question seeks to ameliorate the situation of disadvantaged persons in society.²⁰⁰

A successful challenge by a member of the majority group to AEDs would not be in accordance with the existing equality jurisprudence, or the way that the Court has interpreted the *Charter* in general,²⁰¹ as it would require the Court to use section 15 to reverse a legislative gain achieved by a disadvantaged group because of a minimal burden placed by that gain on members of the majority. The Court has made it clear that section 15 is meant to enforce substantive equality.²⁰² This appears to be exactly what AEDs seek to achieve. AEDs would be designed to deal with the problem of the inequality in representation suffered by geographically dispersed Aboriginal people in Parliament by treating them differently from the rest of the electorate.

¹⁹⁶ See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [hereinafter *Law*].

¹⁹⁷ *Ibid.* at para. 75.

¹⁹⁸ See *ibid.* at paras. 62ff.

¹⁹⁹ *Ibid.* at para. 63.

²⁰⁰ *Ibid.* at para. 72.

²⁰¹ See especially *R. v. Edwards Books*, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1.

²⁰² See e.g. *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 188 D.L.R. (4th) 193 [hereinafter *Lovelace* (S.C.C.)].

A further possible challenge to AEDs might come from others in society who also suffer pre-existing disadvantage, on the basis that their omission from the benefits of the law detract from their human dignity. Such potential plaintiffs include not only minority groups and others disadvantaged by the existing electoral system, but also Aboriginal people who, because of the particular design of a system of AEDs, may not benefit from its operation. Iacobucci J. acknowledged this possibility in *Law*, stating he would not foreclose the possibility that someone could be discriminated against by laws seeking to ameliorate the situation of others, necessitating justification under section 1 or the operation of subsection 15(2).²⁰³ The object of AEDs would clearly be to ameliorate the disadvantage imposed upon Aboriginal people by the electoral system, and thus even if their creation were found to violate subsection 15(1), they would seem on their face to fall within the ambit of subsection 15(2). Despite Iacobucci J.'s express reference to this provision in *Law*, however, *Lovelace* (S.C.C.) suggests that the analysis of whether the equality rights of other disadvantaged groups are adversely affected by AEDs would occur within the framework of the test under subsection 15(1).²⁰⁴

In *Lovelace* the plaintiffs were Metis and non-status Indians who sought a declaration that Ontario's plan to distribute profits from a casino project among the province's Indian Bands violated their section 15 rights because they did not benefit from the plan as well. The motions judge found that the project violated section 15; the Ontario Court of Appeal held that the project fell within the ambit of subsection 15(2), and thus did not violate section 15.²⁰⁵ The Court of Appeal reviewed the history of subsection 15(2) and determined that it was "undoubtedly" included in the *Charter* to preclude the possibility of affirmative action laws' being struck down as violations of equality, as had occurred in the United States. It held, however, that subsection 15(2) is not an exception to the guarantee of equality in subsection 15(1), but furthers it, because achieving equality may require positive government action to improve the conditions of historically and socially disadvantaged individuals and groups.²⁰⁶ As such, subsection 15(2) should be considered as part of the subsection 15(1) analysis.

²⁰³ *Law*, *supra* note 196 at para. 73. The *Charter*, *supra* note 3, provides as follows:

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

²⁰⁴ *Supra* note 202.

²⁰⁵ See *Lovelace v. Ontario* (1996), 38 C.R.R. (2d) 297, [1997] 1 C.N.L.R. 66 (Ont. Gen. Div.), rev'd (1997), 33 O.R. (3d) 735, 148 D.L.R. (4th) 126 (C.A.) [hereinafter *Lovelace* (C.A.) cited to O.R.].

²⁰⁶ *Lovelace* (C.A.), *ibid.* at 752.

The court further held that ameliorative programs would violate section 15 only where their operation excluded certain individuals that the program was designed to benefit. The government would then have to justify that exclusion under section 1. The court distinguished this need for justification from a claim of underinclusiveness by a disadvantaged group outside the object of the program. Subsection 15(2) permits governments to provide benefits to a specific disadvantaged group without justifying the exclusion even of other groups suffering similar disadvantage.²⁰⁷ The issue was not whether one group was “more disadvantaged” than another, but rather whether the project was consistent with the purpose of the law, and whether that purpose was consistent with the goals of subsection 15(2).²⁰⁸

On appeal, however, the Supreme Court of Canada agreed with the conclusion of the Ontario Court of Appeal, but not with its reasoning regarding subsection 15(2). Iacobucci J., while not foreclosing the possibility that subsection 15(2) may be independently applicable in the future, held that, in general, subsection (2) could be seen as “confirming the substantive equality approach of s. 15(1).”²⁰⁹ He noted that the *Law* test embraced the concept of ameliorative purposes of legislation, and as a result, subsection 15(2) is not a “defence”, but rather an interpretive aid. He also rejected the claim of relative disadvantage put forth by the appellants as part of their argument that the legislation was unconstitutionally underinclusive. He held that the relative disadvantage approach, which pits one disadvantaged group against another, is too narrow to be consistent with the fullness of substantive equality analysis.²¹⁰ As such, the same factors would be considered where AED legislation is challenged by a relatively disadvantaged group as by a member of the majority. Given that AEDs would be designed to remedy a pre-existing disadvantage, that they would be targeted to the needs of Aboriginal people (presumably after consultation with Aboriginal people themselves), and that this legislation would be in place to ameliorate the situation of Aboriginal people, it is unlikely that a court would find such legislation violated section 15. Moreover, such ameliorative legislation would not undermine the human dignity of claimants, even if they were members of other disadvantaged groups.

These factors drove the Court’s finding in *Lovelace* (S.C.C.) that the omission of various Aboriginal people from the legislation did not violate section 15. Targeted ameliorative legislation that is underinclusive will be much less likely to be associated with “stereotyping or stigmatization” than underinclusive general legislation.²¹¹ Here AEDs would be designed to deal with a specific problem suffered especially by a

²⁰⁷ *Ibid.* at 756-57.

²⁰⁸ *Ibid.* at 760.

²⁰⁹ *Lovelace* (S.C.C.), *supra* note 202 at para. 100.

²¹⁰ *Ibid.* at para. 59.

²¹¹ *Ibid.* at para. 86.

unique community. The government's choice to deal with this problem in a specific manner would not undermine the human dignity of applicants excluded from the benefits of the legislation in the same way as if they were excluded from a comprehensive program.

As such, it is unlikely that a carefully designed system of AEDs, which sought to eliminate the problem of under-representation of Aboriginal people in Parliament, would be found unconstitutional under the equality provisions of the *Charter*.²¹² Indeed, such a scheme would seem to advance, not undermine, the goal of substantive equality sought by section 15.

Even if such a scheme were found to violate section 15, it would likely be upheld under section 1.²¹³ The objective of ensuring greater Aboriginal representation is "pressing and substantial" and the creation of AEDs is rationally connected to that goal. Given the minimal effect a scheme of AEDs would have on other Canadians' relative voting power, such a scheme only minimally impairs the rights of other voters. In light of the important value that more proportionate representation would have for Aboriginal people, it seems clear that an AED scheme would pass the proportionality test.

2. Section 3

Perhaps a more likely challenge to AEDs could be brought under section 3 of the *Charter*, which guarantees the right to vote. This right has been used by a number of plaintiffs to challenge electoral maps that have created disparities between the sizes of electoral districts.²¹⁴ In several of these cases plaintiffs were successful in having

²¹² This conclusion is reinforced by the existence of the *Charter*, *supra* note 3, s. 25. Hogg & Turpel argue that the main purpose of s. 25 is to clarify that the prohibition of racial discrimination in s. 15 is not to abrogate Aboriginal or treaty rights. Although the participation of Aboriginal people in Parliament may not be considered to be an existing Aboriginal right, the existence of the provision sends a further signal to judges that the *Charter* should not be used as an instrument to roll back the gains of Aboriginal people. See P.W. Hogg & M.E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 Can. Bar Rev. 187 at 214.

²¹³ The *Charter*, *ibid.*, states:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

See the test in *R. v. Oakes*, [1986] 1 S.C.R. 103 at 135-42, 26 D.L.R. (4th) 200.

²¹⁴ See *Saskatchewan Reference*, *supra* note 177 at 179, McLachlin J.; *Dixon v. British Columbia* (A.G.) (1989), 59 D.L.R. (4th) 247, [1989] 4 W.W.R. 393 (B.C. S.C.) [hereinafter *Dixon* cited to D.L.R.]; *MacKinnon v. Prince Edward Island* (1993), 104 Nfld. & P.E.I.R. 232, 101 D.L.R. (4th) 362 (P.E.I. S.C.) [hereinafter *MacKinnon*]; *Reference Re Electoral Boundaries Commission Act (Alberta)*

electoral maps struck down where disparities were so great as to be said to violate the right to vote.²¹⁵ As noted, the Lortie Commission proposed that AEDs could be created if the number of Aboriginal voters registered on the list in any given province were 85 percent or more of the provincial quotient.²¹⁶ Although this would appear to be well within the limits placed on variations in size between electoral districts by the jurisprudence that has considered section 3, there remains the question of how large that variation from the provincial quotient could become before AEDs were found to be unconstitutional. This question could arise if governments wanted to create additional AEDs or if the registration in an existing AED fell below 85 percent but the government was unwilling to eliminate the district. Given low voter turnout among Aboriginal people, it may be necessary to allow large deviations from the provincial quotient to ensure the continuing existence of Aboriginal constituencies.

Nonetheless, it appears that AEDs would be permitted quite large deviations from the provincial quotient under section 3. The right to vote has been interpreted by the Supreme Court as guaranteeing the right to effective representation.²¹⁷ In the leading case on this question, McLachlin J. (as she then was) held that although "relative parity of voting power" is of primary importance in assuring effective representation, this relative parity could be deviated from "on the grounds of practical impossibility or the provision of more effective representation."²¹⁸ The practical considerations that allowed for deviations from equality of voting power derived partly from the fact that, due to population mobility and fluctuation, achieving parity is impossible. More important, even the relative parity that is achievable may be undesirable if it detracts from the primary goal of effective representation.²¹⁹ McLachlin J. held that effective representation of "the diversity of our social mosaic" may require consideration of factors such as geography, community history, community interests, and minority representation.²²⁰

The *Saskatchewan Reference* involved a claim by urban voters that their right to vote had been violated by the 1986 Saskatchewan electoral map, which permitted de-

(1992), 120 A.R. 70, 86 D.L.R. (4th) 447 (C.A.) [hereinafter *Alberta Reference*]; *Reference Re Electoral Divisions Statutes Amendment Act (Alberta)* (1995), 157 A.R. 241, 119 D.L.R. (4th) 1 (C.A.); *Friends of Democracy v. Northwest Territories* (A.G.) (1999), 171 D.L.R. (4th) 551 (N.W.T. S.C.), leave to appeal to C.A. refused (1999), 176 D.L.R. (4th) 661 (N.W.T. C.A.) [hereinafter *Friends*]; *Charlottetown (City of) v. Prince Edward Island* (1998), 169 Nfld. & P.E.I.R. 188, 168 D.L.R. (4th) 79 (P.E.I. C.A.), leave to appeal to S.C.C. refused (1999), 251 N.R. 399 (note) (S.C.C.).

²¹⁵ See *Dixon, ibid.; MacKinnon, ibid.; Friends, ibid.*

²¹⁶ *Reforming Electoral Democracy Vol. 2, supra note 64 at 139.*

²¹⁷ See *Saskatchewan Reference, supra note 177 at 183-89.*

²¹⁸ *Ibid.* at 185.

²¹⁹ *Ibid.* at 184.

²²⁰ *Ibid.*

viations from the provincial quotient of 25 percent in southern ridings and 50 percent in two northern ridings.²¹ The urban voters claimed that their right to vote was violated because urban ridings were generally more populous than rural ridings, and thus rural voters' ballots were worth more. McLachlin J., however, found that the map did not violate the *Charter*, because of the other factors set out above. Specifically, rural ridings are harder to represent than urban ridings because of difficulties in transportation and communications, and growth projections and geographic factors justified deviations from the provincial quotient.²²

This judgment thus suggests that courts will allow future AEDs very generous deviations from the provincial quotient. McLachlin J. held that deviations from the provincial quotient of up to 25 percent would be permitted in the rural south due to the difficulties of transportation and communications. AED M.P.'s would undoubtedly be beset by great difficulties of transportation and communication. These M.P.'s would be responsible for serving a geographic area as big as a province, including many isolated communities. Furthermore, there was also agreement at both levels of the courts in the *Saskatchewan Reference* that deviations of 50 percent for northern ridings were constitutionally permissible due to their sparse population.²³ Indeed, there is observable a more general Canadian "consensus" that sparsely populated and remote northern territories require special treatment effectively deviating from one person, one vote.²⁴ Given that much of an AED M.P.'s work would take place in the northern and remote parts of a province, and that their constituents would be scattered throughout the district, the analysis that the Court in the *Saskatchewan Reference* applied to northern ridings should also be applied to AEDs.

The Court's analysis of section 3 suggests that governments will have a great deal of room in designing AEDs in the future. Governments certainly need not be bound to the 15 percent maximum deviation proposed by the Lortie Commission. In view of the difficulties of representing such a diverse, widespread, and remote population, governments would likely be justified in creating AEDs with populations that are much smaller than the provincial quotient. This may also allow governments to better ensure that the diversity of Aboriginal people is met by creating more districts. For example, districts could be designed so that if Metis and Indian voters on the Prairies wished to elect separate representatives they could do so.

The main difficulty, of course, is that creating AEDs would require legislative action on the part of a government. Given the probable criticisms of AEDs from both

²¹ *Ibid.* at 158-59.

²² *Ibid.* at 194-95.

²³ See *Reference Re Electoral Boundaries Commission Act (Sask.)*, ss. 14, 20 (1991), 90 Sask. R. 174, 78 D.L.R. (4th) 449 (C.A.).

²⁴ See Roach, *supra* note 80 at 207.

Aboriginal and non-Aboriginal sources, it is unlikely that governments would find the political will to act. The next section will consider whether the government can be forced to act under the constitution.

V. Guaranteed Aboriginal Representation via the Constitution

Perhaps more interesting than the constitutionality of AEDs, once established, is whether the constitution could be used to mandate a government to amend the electoral laws so as to ensure guaranteed Aboriginal representation. The federal government has proved itself unwilling to follow through on the recommendations of the Lortie Commission. Although several Aboriginal groups have been hesitant about pushing for guaranteed representation in Parliament using the political process, it could be argued that the judicial process presents an entirely different situation. If guaranteed representation is seen not as a political concession from the state, but as a constitutional entitlement, some of the opposition from Aboriginal groups may fall away. It is worth gauging the potential success of such a challenge if Aboriginal people chose to seek guaranteed representation, but were met with an intransigent government.

In a number of well-known recent cases the Supreme Court has required positive action of a government to remedy the breach of *Charter* rights.²²⁵ As such, there is no merit to the claim that a court could not require a government to take positive measures to remedy a *Charter* violation created by the operation of the electoral system.

A. The United States

In the United States plaintiffs have been able to bring “vote-dilution” suits under the federal *Voting Rights Act* where minority voters have had their votes rendered ineffective by the design of the electoral map or system. As noted above, following the implementation of the *Voting Rights Act*, many southern states and municipalities sought to design institutions that continued to ensure the domination of whites. The courts struck down several such schemes in the 1970s.²²⁶ In *Mobile v. Bolden*,²²⁷ however, the U.S. Supreme Court refused to find an electoral system systematically excluding African-Americans from office to be in violation of the constitution unless discriminatory intent could be found. Congress overturned this decision in 1982 by

²²⁵ See *Eldridge v. British Columbia* (A.G.), [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 (provision of sign-language interpreters in a hospital); *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 [hereinafter *Vriend*] (reading protection for gays and lesbians into human rights legislation).

²²⁶ See J.R. Low-Ber, “The Constitutional Imperative of Proportional Representation” (1984) 94 Yale L.J. 163.

²²⁷ 446 U.S. 55, 100 S. Ct. 1490 (1980).

amending the *Voting Rights Act* so that discriminatory effects caused by an electoral system would be sufficient to find it in violation of the law.²²⁸ In *Thornburg v. Gingles*²²⁹ the court set out the standard that would be used to evaluate whether a minority's voting power had been illegally diluted by the electoral map or system used in the particular jurisdiction. The court held that an electoral system only diluted votes where a minority group was (1) politically cohesive; (2) sufficiently large and geographically compact to form a majority in a single-member district; and (3) opposed by white majority bloc voting so that the minority candidate usually lost.²³⁰ The U.S. Supreme Court therefore has experience with striking down electoral systems and maps where they do not conform to the *Thornburg* standards. This is based on a statutory scheme, however, and the standard of proof required is very high.

In Canada there is no equivalent to the *Voting Rights Act*. Nonetheless, it would appear that sections 3 and 15 of the *Charter* allow Aboriginal people to challenge the electoral map or system.²³¹ Under both these provisions Aboriginal people may be able to argue that the current electoral system unconstitutionally dilutes their voting power. Utilizing the language of the Canadian jurisprudence, it could be argued that the current electoral system denies Aboriginal people effective representation under section 3 and creates adverse effects discrimination under subsection 15(1).

B. Section 35

The *Constitution Act, 1982* states that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”²³² The jurisprudence interpreting this section does not provide a clear path to requiring Aboriginal participation in Parliament. In determining if sections 3 and 15 do provide such a path, however, it is worth considering at least one aspect of the jurisprudence interpreting section 35. In *R. v. Sparrow*²³³ the Supreme Court held that while British policy sought to respect the right of Aboriginal people to occupy their traditional lands, there was never doubt that “sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.”²³⁴ The transfer of sovereignty at that time produced no reciprocal obligations because of the doctrine of discovery upon which it

²²⁸ 42 U.S.C. § 1973(b) (1988).

²²⁹ 478 U.S. 30, 106 S. Ct. 2752 (1986) [hereinafter *Thornburg* cited to U.S.].

²³⁰ *Ibid.* at 56.

²³¹ See Roach, *supra* note 80, suggesting this possibility at 201, 211-13. See also Swinton, *supra* note 15 at 30.

²³² *Supra* note 3, s. 35(1).

²³³ [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter cited to S.C.R.].

²³⁴ *Ibid.* at 1103.

was based.²³⁵ Today, however, a cession of sovereignty would involve a guarantee of representation in the central institutions of the remaining sovereign state. Thus, when entities such as British Columbia or Newfoundland joined Canada, it was on the understanding that in ceding sovereignty to Canada, they would be guaranteed representation in Parliament. In considering whether the *Charter* mandates guaranteed representation for Aboriginal people, it is worth keeping in mind that to the extent the law claims that Aboriginal people have ceded sovereignty, a modern understanding of such transfers suggests that in so doing they ought to have been accorded some form of guaranteed representation in the democratic institutions of Canada.

C. Section 3

Section 3 jurisprudence provides a more promising route for litigants who seek to mandate a government to provide guaranteed Aboriginal representation. It is clear that the *Saskatchewan Reference* can be read as permitting deviations from the principle of voter equality to take into account the “other factors” listed by McLachlin J. What remains unanswered is whether her judgment can be read as requiring governments to deviate from the principle of voter equality to achieve effective representation.²³⁶ In a reference the year following the *Saskatchewan Reference*, the Alberta Court of Appeal foresaw in the Supreme Court’s decision the possibility of minority claims that might affect not only the boundaries of specific districts, but also the total number of districts and the very idea of single-seat constituencies and contiguous boundaries.²³⁷ In the *Saskatchewan Reference*, McLachlin J. clearly had in mind the American model of absolute voter parity.²³⁸ She noted that this was not the Canadian tradition, and that in Canada, while equality of voting power is of “prime importance”, it is not the only factor in ensuring effective representation.²³⁹ Indeed, she also suggested that other factors must be considered.²⁴⁰

The *Saskatchewan Reference* indicates that the standard of effective representation in section 3 not only permits governments to act to protect minority interests, but that it “necessitates” or “requires” that they do so.²⁴¹ If the electoral system does not

²³⁵ See Macklem, *supra* note 141 at 14.

²³⁶ See R.G. Richards & T. Irvine, “Reference Re Provincial Electoral Boundaries: An Analysis” in Courtney, MacKinnon & Smith, *supra* note 15, 48 at 62.

²³⁷ *Alberta Reference*, *supra* note 214 at para. 17.

²³⁸ See text accompanying note 43.

²³⁹ *Saskatchewan Reference*, *supra* note 177 at 184.

²⁴⁰ Insisting on voter parity might deprive citizens with distinct interests of effective representation. Individual dignity and social equality require that votes not be unduly diluted, but recognizing group identity may demand the accommodation of other concerns (*ibid.* at 188).

²⁴¹ *Ibid.*

recognize cultural or group identity, or fails to take account of factors such as community interests, it cannot be said to effectively represent all Canadians. The evidence above suggests that the current electoral map does not effectively represent Aboriginal people. The SMP system, with its large, geographically contiguous districts, is simply not capable of recognizing or giving effective representation to geographically dispersed groups. To meet the standard of providing effective representation to Aboriginal people, the electoral system would have to be modified by the sort of “work-around” seen in the United States or New Zealand. Without such a workaround the current electoral map is subject to challenge by Aboriginal voters under section 3 of the *Charter*.

Moreover, it is difficult to see how a government may justify a violation of section 3 under section 1. Given the internal balancing that occurs within section 3, the *Oakes* test does not seem to have much of a role to play. Indeed, it is arguable that the *Saskatchewan Reference* has incorporated section 1 considerations into the right to vote in section 3.²⁴² Essentially, the “other factors” on which a government may rely to justify deviations from voter parity resemble the sort of factors that a government may otherwise rely on under section 1.

The government may argue that the need to keep geographic contiguity in districting is itself a pressing and substantial concern. Given that there are many examples around the world of electoral systems that do not utilize geographic districts, however, it would be difficult to find this argument convincing. This is especially so when one considers the examples of non-geographic districting used in New Zealand and proposed by the Lortie Commission.

The government might also seek to justify the lack of effective representation for Aboriginal people by claiming that the SMP system is necessary to aggregate interests and that it is preferable to have pluralistic rather than race-based electoral districts. This would be convincing if not for the evidence demonstrating that Canada already districts on the basis of communities of interest. Ultimately, this argument relies on the belief that while rural Canadians or linguistic minority communities constitute communities of interest worth protecting, the same cannot be said for Aboriginal people. This obviously cannot be sustained, especially in light of the normative arguments relating to the cession of Aboriginal sovereignty.

As a result, the law as it stands does not achieve the result mandated by section 3 of the *Charter*. That is, it does not ensure the effective representation of Aboriginal people. This cannot be justified under section 1, and as such, the operation of the electoral system is unconstitutional due to its effects on Aboriginal people.

²⁴² See R.E. Charney, “*Saskatchewan Election Boundary Reference: ‘One Person—Half a Vote’*” (1992) 1 N.J.C.L. 225 at 225.

D. Section 15

Aboriginal voters could also seek to force the government to improve Aboriginal representation by using section 15 of the *Charter*. A Canadian voter would be able to bring a *Charter* claim similar to the vote dilution claims under the American *Voting Rights Act*. Similarly, there would be no need for plaintiffs in Canada to show that they were the victims of intentional discrimination. Instead, all that would have to be shown is that the effect of the electoral districting was to reduce a minority's voting strength.²⁴³ A challenge mirroring the American jurisprudence, however, could be brought only by a group that was sufficiently geographically concentrated so as to suggest that an electoral boundaries commission should have drawn the districting lines differently.

Groups such as Aboriginal people that are not geographically concentrated would also, however, be able to make a claim under section 15. This claim would be based on the argument that the *EBRA* is unconstitutionally underinclusive. This act allows commissioners engaged in the redrawing of federal electoral boundaries to deviate from the principle of equality of voting power to respect a community of interests.²⁴⁴ This provision allows commissioners to deviate from the principle of equality of district size by plus/minus 25 percent. Commissioners can thus draw boundaries to ensure the representation of communities of interest such as ethnic groups in cities, rural Canadians, or linguistic groups. The act permits deviation from equality of voting power because representation of communities of interest serves the effective representation of Canadians.

The constraints of the SMP system, however, ensure that commissioners can only deviate from the principle of equality of voting power where a community of interest is concentrated in significant numbers in a particular part of a province. In a province where a group such as Aboriginal people represents a significant proportion of the population, and might otherwise be considered a community of interest, these constraints of the SMP system mean that the commissioners cannot draw a boundary that allows representation of such a community.

As such, groups that are not geographically concentrated are denied the equal benefit of paragraph 15(2)(a) of the *EBRA*. Commissioners can draw boundaries that take into account the need for greater representation of rural or urban Canadians, middle- or working-class Canadians, and the interests of other geographically concentrated groups. Aboriginal people, however, who are dispersed throughout the country and throughout any given province, derive no benefit from this law. Although

²⁴³ Roach, *supra* note 80, argues at 212 that the anglophone minority in Quebec would have a strong s. 15 claim that ridings should not dilute their voting strength.

²⁴⁴ *Supra* note 119, s. 15(2)(a).

what is being challenged here is an omission from a law as opposed to something expressed in the law, unconstitutional omissions are subject to *Charter* scrutiny.²⁴⁵

As noted above, a violation of section 15 requires a law that both draws a distinction and is discriminatory. The *EBRA* draws a distinction in its effect. For example, many communities of interest are well represented in legislatures because the boundaries commissioners are able to take their interests into account, but Aboriginal people are chronically under-represented. In this sense, the distinction created by the *EBRA* is much like that in *Vriend*. In *Vriend* the Court noted that the legislation created two distinctions: one between homosexuals and those groups protected by the act, and the other between homosexuals and heterosexuals.²⁴⁶ Here it can be seen that allowing for the protection of the interests of concentrated groups distinguishes between Aboriginal people and those groups that are not concentrated in any part of the province. The act also distinguishes between Aboriginal people and non-Aboriginal people, since the latter group does not suffer from the lack of geographic concentration the way Aboriginal people do.

There are two steps to showing that a distinction is discriminatory.²⁴⁷ First, it must be determined that the distinction is drawn on an enumerated or analogous ground. Here, that is clearly the case. Second, it must be determined that that distinction imposes a burden not imposed on others or withholds benefits or advantages available to others.²⁴⁸ This entire analysis is to be conducted flexibly from a concern to prevent the violation of “essential human dignity”, seeking to “promote a society in which all persons enjoy equal recognition at law.”²⁴⁹ Determining that a particular distinction leads to discrimination requires demonstrating that the differential treatment results in a loss of human dignity for the plaintiff. The appropriate perspective is that of a reasonable plaintiff in the context surrounding the distinction.

Given the relationship between Aboriginal people and the Canadian state it would appear clear, from the perspective of a reasonable Aboriginal person, that the under-representation of Aboriginal people in Canada’s democratic institutions leads to a loss of human dignity. The first, most compelling, contextual factor, “pre-existing disadvantage”, is present.²⁵⁰ Just as this contextual factor suggests that Aboriginal constituencies would not be vulnerable to challenge by majority group Canadians, it would also seem to weigh in favour of finding the distinction created by current electoral legislation to be discriminatory. Certainly the continued under-representation of Abo-

²⁴⁵ See *Vriend*, *supra* note 225 at paras. 59-61.

²⁴⁶ *Ibid.* at paras. 81, 82.

²⁴⁷ See e.g. *ibid.* at para. 89. See also *Law*, *supra* note 196 at para. 39.

²⁴⁸ See *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 131, 124 D.L.R. (4th) 609.

²⁴⁹ *Law*, *supra* note 196 at para. 51.

²⁵⁰ *Ibid.* at para. 63.

riginal people in Parliament has the potential to perpetuate or increase the disadvantage already suffered by Aboriginal people in Canadian society.²⁵¹

The second contextual factor in *Law*, the relationship between the ground on which the claim is based and the differential treatment,²⁵² further reinforces the claim that the operation of the electoral system on the representation of the geographically dispersed Aboriginal population discriminates. The Court pointed to factors such as the need to provide different treatment in some circumstances for Canadians with disabilities, women, or elderly persons to permit them to take full advantage of the benefits of legislation. The chance of establishing discrimination is inversely proportional to the extent to which legislation takes into account the claimant's needs, capacities, and circumstances.²⁵³ The current electoral boundaries laws do little to take into account the actual situation of Aboriginal people. As noted above, while the laws are well suited to the circumstances of regionally concentrated communities of interest, they do little to assist dispersed groups such as Aboriginal people.

The Court's fourth contextual factor is also persuasive here. This is the "nature and scope" of the interest affected.²⁵⁴ Here the interest affected by the legislation clearly relates to a "fundamental social institution" and a "basic aspect of full membership in Canadian society",²⁵⁵ indeed, arguably the paradigmatic "fundamental social institution". That the law's underinclusiveness prevents Aboriginal people from participating in this institution in numbers equivalent to their representation in the population as a whole is extremely problematic. The continued under-representation of Aboriginal people in the central democratic institutions of this country undermines their dignity and worth as citizens, and "reinforces existing inaccurate understandings" of their worth as a particular group within Canadian society.²⁵⁶

As noted, Iacobucci J. indicated that some legislation may have ameliorative purposes or effects, and this may save it from being characterized as discriminatory. Paragraph 15(2)(a) of the *EBRA* is clearly designed to ameliorate the position of individuals who share interests with others, although its benefit is confined to those groups that are concentrated geographically. Some of these groups, such as linguistic and ethnic minorities, are clearly within the contemplation of section 15 of the *Charter*. In this sense a challenge to that provision may be seen as a challenge to a piece of legislation that seeks to ameliorate the position of disadvantaged groups who have suffered exclu-

²⁵¹ See *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 70, 173 D.L.R. (4th) 1, L'Heureux-Dubé J. [hereinafter *Corbière*].

²⁵² *Supra* note 196 at para. 69.

²⁵³ *Ibid.* at para. 70.

²⁵⁴ *Ibid.* at para. 74.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.* at para. 64.

sion from mainstream society.²⁵⁷ Iacobucci J. stated, however, that “[u]nderinclusive ameliorative legislation that excludes from its scope the members of an historically disadvantaged group will rarely escape the charge of discrimination.”²⁵⁸ In *Vriend* the Court was concerned that excluding sexual orientation from the human rights code suggested that “‘all persons are equal in dignity and rights,’ except gay men and lesbians.”²⁵⁹ Similarly, the legislative scheme here suggests that all Canadians deserve effective representation, except those communities and interests that are not geographically contiguous.

Consideration of the appropriate factors indicates that the omission constitutes discrimination under the *Law* test. The issues surrounding the cession of Aboriginal sovereignty reinforce this conclusion. Parliament is the face of Canadian democracy, and the exclusion of Aboriginal people from that body undermines their human dignity and threatens to perpetuate stereotypes about that group held by other members of society.

Turning to section 1, it must be recognized that it is difficult to determine the objective of an impugned omission. In *Vriend* Iacobucci J. argued that consideration must be given to both the purposes of the act and the specific impugned provisions in context.²⁶⁰ He found that the objective of the legislation was to protect “the dignity and rights of all persons living in Alberta”, but that the exclusion of sexual orientation denied this protection to gay men and lesbians.²⁶¹ As the omission was the very antithesis of the principle underlying the act, there was no pressing and substantial objective.²⁶²

The *EBRA* seeks to ensure that electoral boundaries are drawn to give all Canadians the right to effective representation. Subsection 15(2) of the *EBRA* seeks to provide that communities of interest and identity have their rights to effective representation protected. By excluding Aboriginal people from the protection of the act, this omission, like that in *Vriend*, acts as the very antithesis of the principles in the legislation. There can therefore be no discernible objective that the omission is seeking to achieve, and it should be found to be unconstitutional.

²⁵⁷ See *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 66, 142 D.L.R. (4th) 385.

²⁵⁸ *Law*, *supra* note 196 at para. 72.

²⁵⁹ *Vriend*, *supra* note 225 at para. 103.

²⁶⁰ *Ibid.* at para. 111.

²⁶¹ *Ibid.* at para. 116.

²⁶² *Ibid.*

E. Remedy

Unlike *Vriend*, however, the omission in the *EBRA* cannot be remedied by “reading in”. It is not entirely clear what would be read in, or at least, what the result would be for boundary commissioners. It is possible that boundary commissioners could draw non-geographically contiguous AEDs, but these constituencies would then lack the rest of the infrastructure that properly constructed AEDs would require. Similarly, a court is not well equipped to impose a remedy upon a finding that section 3 has been violated. Many issues about how to effectively represent Aboriginal people would remain, and would not be amenable to a court’s adjudication.

Instead, the sort of remedy that should be imposed is that suggested by McLachlin J. in *Dixon*.²⁶³ In that case she found the electoral map of B.C. violated section 3 because the disparities between district populations were too large to be justified by other considerations of effective representation. She was then faced with the question of what remedy to invoke. Striking down the law would leave British Columbians disenfranchised. As such, she proposed striking down the law, but specifying an interval during which the existing legislation would remain valid.²⁶⁴ If the government did not act within the period, the Court would impose a remedy. She reminded the government, however, that just as courts have a duty to measure the constitutionality of legislative acts against the *Charter*, so they are obligated to fashion effective remedies to give substance to these rights.²⁶⁵ A similar approach to the remedy of an unconstitutional voting system was used in *Corbière*, where the Supreme Court eliminated words from the statute that prevented off-reserve band members from voting in band elections, but suspended the declaration for eighteen months to give Parliament an opportunity to consult with the affected group and to redesign the voting provisions of the *Indian Act* in a nuanced way respecting all affected interests and equality rights.²⁶⁶

An equivalent remedy in this case would allow the legislature to debate how to ensure effective representation for Aboriginal people. There are two clear ways that this could be achieved: the creation of a number of AEDs, or a move to proportional representation. PR would allow voters from across the province or country to combine their votes behind specific candidates or lists of candidates. This would eliminate the geographic bias of the SMP system and thus eliminate the need to work around that system. This option has been suggested by John Low-Beer as a more appropriate way

²⁶³ *Supra* note 214.

²⁶⁴ *Ibid.* at 282-83, following *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1.

²⁶⁵ *Dixon*, *ibid.* at 283-84.

²⁶⁶ *Supra* note 251.

to solve the problem of minority under-representation in the United States.²⁵⁷ The New Zealand Royal Commission also suggested scrapping the existing electoral system, including the guaranteed seats for the Maori people, and replacing it with a system of PR. The royal commission stated that a PR system would be preferable for a number of reasons, including that parties would no longer have an excuse to ignore Maori issues.²⁵⁸ It emphasized that it was certain that Maori representation under PR would be better than under the SMP system, with or without separate Maori electorates.²⁵⁹

In evaluating the comparative advantages and disadvantages of guaranteed separate representation as opposed to PR, it should be noted that PR in many ways plays a more integrative function, whereas separate representation would ensure that Aboriginal people were clearly a community apart from the electoral mainstream. The choice should be made by Aboriginal people. Thus, the best option would be a move to PR with the possibility of AEDs if Aboriginal people so desired. In the end the specific way that effective representation for Aboriginal people should be assured is a decision to be made by Parliament, not the courts.

Conclusion

Since Confederation Aboriginal people have been denied effective representation in Canadian central democratic institutions. This was first caused by a denial of the franchise, but today is the result of the workings of the SMP electoral system. Proposals have been made to work around the failings of this system by providing guaranteed representation to Aboriginal people. These proposals are similar to actions taken by the United States and New Zealand to provide greater representation for minority groups there. Although such proposals are resisted as being contrary to Canada's individualist culture, it can be seen that democracy in this country has always been concerned with the representation of groups and communities. Proposals for guaranteed representation are also attacked as detracting from the right to self-government. It has been shown, however, that guaranteed representation may in fact be a necessary and useful complement to self-government in the future.

Although schemes of affirmative districting have been struck down in the United States, the test developed by the Supreme Court of Canada under section 15 of the *Charter* would not pose a similar threat if a system of guaranteed seats were created for Aboriginal people in this country. Further, the test under section 3 suggests that governments would have substantial leeway in designing any system of guaranteed seats. If a government proved unwilling to design such a system, the *Charter* would

²⁵⁷ *Supra* note 226.

²⁵⁸ New Zealand, *supra* note 17 at 102.

²⁵⁹ *Ibid.* at 103.

allow Aboriginal people to mandate the design of a system of guaranteed representation. Aboriginal people could bring a claim that effective representation had been denied to them under section 3, and that they were suffering adverse effects discrimination based on the workings of the *Electoral Boundaries Readjustment Act* and the electoral system. If such a claim were advanced, a court should declare the current system unconstitutional, but suspend the imposition of a remedy to allow Aboriginal people and all Canadians to debate how best to improve the constitutionality of the electoral system.

For too long Aboriginal people have been denied participation in the central democratic institutions of our society. It does not speak well of our political community that the first peoples of this country have been denied a proportionate place in Parliament. If reconciliation between the various peoples that now occupy this land is to come about, the most logical place for it to begin is at the heart of our democracy. Indeed, until Aboriginal people are included in reasonable numbers in the body that chooses governments and shapes policies, it is not inappropriate to suggest that, for many, Canada will have failed to live up to the promise of democracy.
