SURPRISING AND DISTURBING? THE SASKATCHEWAN BOUNDARIES DECISION

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The Supreme Court's decision to uphold Saskatchewan's electoral boundaries was for the nation's editorial writers "surprising and disturbing".[1] In this short comment, I will argue that the decision is not surprising in light of recent developments in the Supreme Court's approach to *Charter* adjudication. Moreover, I will suggest that the Court's unwillingness to enforce strict equal population standards for electoral districts is not overly disturbing.

The majority decision of Justice McLachlin to uphold the boundaries that gave rural residents more ridings than required on the basis of population alone reflects a tendency for the Court in the past few years both to interpret some *Charter* rights more narrowly and to defer to the legislature's balancing of competing policy interests. In interpreting the right to vote in section 3 of the *Charter* only to protect relative parity of voting power, Justice McLachlin relied on a decision that excluded the right of unions to strike from the right to freedom of association on the basis of the Court's perception of the historical understanding of that right.[2] As the Court has sought to impose definitional limits on at least some *Charter* rights, the question of the intent of the framers of the *Charter* has, in some contexts, become as important as the interpretative edict of giving constitutional rights a broad and generous interpretation.[3] Thus, both Justice McLachlin's majority judgment and the concurring opinion of Justice Sopinka stressed the fact that there was no evidence, either in the wording of section 3 or in the relevant debates surrounding its enactment, that it was intended to alter the modified form of representation of population that Canadians had before the enactment of the *Charter*.[4]

Although the majority judgment never reaches the question of whether Saskatchewan could justify its boundaries under section 1, it is clear that Justice McLachlin was influenced by the increased deference the Court has demonstrated in its scrutiny of government's justifications for infringing *Charter* rights. Invoking the Court's approach to section 1 in *Irwin Toy*[5], the Attorney General of Saskatchewan successfully argued that the allocation of electoral boundaries "concerns questions about the entitlements of one group of electors *vis-à-vis* those of other electors" and as such did not involve either "a confrontation between the state and individuals" or a situation "where there are demonstrably right or wrong answers".[6] Justice McLachlin appeared to accept this logic and fused section 1 and section 3 considerations in reasoning that: "[t]his Court has repeatedly affirmed that the courts must be cautious in interfering unduly in decisions that involve the balancing of conflicting policy considerations."[7] Thus, her judgment stands as an example of both the recent tendency to place definitional limits on *Charter* rights and to defer to the state's balancing of interests under section 1.

If the majority's judgment is representative of a new more deferential approach to the *Charter*, the dissenting judgment is also typical of an older tradition of *Charter* activism. Justice Cory's dissent does not spend much time interpreting the right to vote or attempting to define and place limits on the equality of voting power that is protected by that right. Instead, the judgment moves quickly to the question of justification and, in particular, to the question of whether the impugned provision infringes equality of voting power as little as possible. Justice Cory points to the fact that both the predecessor and successor of the impugned legislation allowed the boundary commission greater scope to pursue the goal of equality of voting power. Nullification of legislation under the *Charter* follows from the Court's ability to envision the government pursuing its objectives in a less intrusive manner. Thus, for Justice Cory, "a comparison of the 1981 map to that of 1989 convinces me that there has been such an infringement."[8]

In short, the editorial writers who were surprised with the Supreme Court's decision to uphold Saskatchewan's boundaries had not been closely watching the evolution of *Charter* adjudication. Still, the question remains whether the decision is disturbing.

One development which, in my view, places the Court's new approach to *Charter* adjudication in its best light was

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1. *Reference re Electoral Boundaries Commission Act, ss.14, 20 (Sask)* (1991), 81 D.L.R. (4th) 16 (S.C.C.); "What Your Vote's Worth" *The Globe and Mail* (7 June 1991) A14. See also "Power Politics Still in Force" Saskatoon *Star Phoenix* (8 June 1991) C-9; "A Sparkling Dissent" *The Toronto Star* (12 June 1991) A24.
2. *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 403-404.
3. In other contexts, particularly in relation to criminal law, this has not been the case. See *Reference Re B.C. Motor Vehicles Act*, [1985] 2 S.C.R. 486.
4. *Supra*, note 1 at 20-21, 36-37.
5. [1989] 1 S.C.R. 927.
6. Factum of the Appellant Attorney General of Saskatchewan, para. 138, p.56 (Supreme Court of Canada file 22345).
7. *Supra*, note 1 at 39 (S.C.C.)
8. *Ibid.* at 26.

their decision in *Andrews*[9] not to interpret the equality rights in section 15 of the *Charter* as a general guarantee of equal treatment in law for all individuals. The Court in *Andrews* rejected the view, popular among the Courts of Appeal until that time, that equality rights were designed to ensure that similarly situated entities were treated the same. Rather, the Court held that equality rights were designed to protect enumerated and analogous groups from suffering further discrimination and disadvantage. Thus, the Court placed definitional limits on the broad equality rights but retained their anti-majoritarian commitment to protect disadvantaged groups from laws and programs that in their purpose or effect discriminate against those groups.

It is strange that section 15 did not play more of an explicit role in the Saskatchewan case. The reference to the Court of Appeal simply asked whether the boundaries were consistent with the *Charter*. The parties limited their submission to the right to vote and freedom of expression but their time would have been well spent researching the section 15 jurisprudence. It appears that those who forget the struggle over the interpretation of equality rights are bound to repeat it. The decisions of the Court of Appeal and the Supreme Court played out at an unconscious level the previous struggle that ended with *Andrews*. The Court of Appeal stressed the value of the formal equality of each individual stating that "no person's portion of sovereign power exceeds that of another."[10] Equality is achieved through the equal treatment of individuals; there is no room for group rights except as an anonymous aggregation of individuals and their rights.[11] In contrast, Justice McLachlin's judgment shares much of the same group and sociological approach to equality that characterised *Andrews*. Thus, she mentions the legitimacy of respecting cultural and group identity in the districting process and concludes:

> Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic.[12]

This approach means that an individual's right to vote is not violated by simply demonstrating unequal treatment in the districting process. As in *Andrews*, it is recognized that sometimes genuine equality will require differential treatment.

Section 15 also helps to explain a curious consensus between the Court of Appeal and the Supreme Court that most of the editorial writers neglected to mention. Despite the support it gave to the one person-one vote principle, the Court of Appeal held that the two largest deviations from equal population standards in the electoral map were, in fact, justified because, in these northern areas, the realities of geography and sparse population justified robust departures from equal population standards. This consensus about the need for special treatment of the north reflects Canadian electoral traditions and is in accord with the *Andrews* philosophy because those who live in the north are vulnerable to systemic disadvantaging in the political process.

What bothered the editorial writers was a perception that the law was passed in an attempt to capitalize on the strength of the governing Conservative party in rural areas. Justice McLachlin addressed these allegations and concluded that the addition of seats in Regina, Saskatoon and Prince Albert in the 1989 electoral map "belies the suggestion that the 1989 Act was an unjustified attempt to adjust boundaries to benefit the governing party."[13] She admits that the map overrepresents rural as opposed to urban ridings on the basis of population but suggests that this is justified in part by servicing considerations including "difficulty in transport and communications".[14] In making these conclusions, Justice McLachlin ignored evidence submitted to the Court of Conservative electoral dominance in the 1986 election in rural ridings and their relative weakness in urban areas. She also accepts without question some contested and empirically verifiable assumptions about the difficulty for members to service rural as opposed to urban ridings.[15] In seeking to minimize the shortcomings of the Saskatchewan legislation, Justice McLachlin engaged in some questionable political science.

Justice Cory's dissent accepted the need for some differential treatment of rural as opposed to urban ridings but made no reference to allegations of partisan distribution. He did suggest that the 1989 legislation's "mandatory rural-urban allocation may have prevented the Commission from taking sufficient account of the diminishing rural population and the corresponding urban

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9. [1989] 1 S.C.R. 143.
10. *Ref. re Electoral Boundaries Commission Act (sask.) ss. 14, 20* (1991), 78 D.L.R. (4th) 449 at 460 (Sask. C.A.).
11. As the Court stated: "And what applies at the level of the individual applies at the level of the group. If one constituency of voters, 5,000 in number let us say, is entitled by law to elect one representative, while another, numbering 10,000, is entitled to no more, then obviously it cannot be said each is being accorded their democratic rights. The rights of the latter are debased." *Ibid.* at 461. Even the Court of Appeal's decision to hold that 2 northern ridings were justified under s.1 of the *Charter* is not connected to a notion of the need for effective representation of distinct groups. *Ibid.* at 481.
12. *Supra*, note 1 at 36.
13. *Ibid.* at 42.
14. *Ibid.* at 44.
15. Increasingly heterogenous urban ridings may very well present their own servicing problems.

growth of the province"[16], adding specifically that, on the basis of its population, Saskatoon would be entitled to another member. In the end, however, Justice Cory's decision to invalidate the boundaries revolved around the fact that the 1981 map provided proof positive that boundaries could be drawn in a better fashion. This conclusion is, in my respectful view, questionable political science and constitutional law because it begs the normative question.

The problem with Justice Cory's reasoning is he does not explain why the 1981 map should set the constitutional standard. As Robert G. Dixon argued: "[t]he key concept to grasp is that there are no neutral lines for legislative districts ... every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place."[17] Given that there are no neutral boundaries, it is not clear why, as a matter of constitutional law or political theory, the 1981 map should be preferred to the 1989 map. Both respect relative equality of voting power; there is little explanation of why a 15% tolerance from equal population standards respected in 1981 is better than the 25% tolerance respected in 1989. The 1981 map would give the growing cities slightly more representation, but why is this good? All other things being equal, similar treatment has a value in a democracy, but as was recognised in *Andrews*, in some contexts, it may be antithetical to equality. Justice Cory criticizes the Saskatchewan legislation for "shackling" the boundary commission but, given the assumption that there are no neutral boundaries, it would have been more appropriate to praise the legislature for its candour. If urban residents don't like the policy behind the distribution, they know who to vote for in the next election.

And this is the core of the issue. In general, a decision to overrepresent rural voters as opposed to urban voters would not raise concerns about domination of politics by rural interests. Urban residents are generally more numerous in number than those in rural and remote areas and, in the absence of empirical evidence to the contrary, it seems reasonable to assume that urban residents enjoy easier access to the machinery of politics: their member, government offices, and the media.[18]

What makes Saskatchewan a somewhat difficult case, however, is that urban residents in that province have historically been a minority and, even on the basis of the data before the Supreme Court, they continue to be a minority with 47.6% of the population and, under the challenged boundaries, 43.9% of the seats. Moreover, rural residents have not traditionally been a minority and they now form a bare majority of the population and have 53% of the seats. This alone would not be disturbing; on the admittedly crude basis of numbers, urban residents have only a slightly better claim to being a vulnerable minority than men. However, the rural/urban polarization of support for the Progressive Conservatives and NDP in the 1986 election raises the spectre of people in the cities being rendered a permanent minority in the legislature and, hence, vulnerable to systemic political and legal discrimination. Fortunately, however, the increasing growth of Saskatchewan's urban centres as well as the changeable political allegiances of rural residents mitigates the possibility of a rural stranglehold on power. It is difficult to believe that urban residents, as well represented as they are, are vulnerable to systemic political and social prejudice.[19] Given the reality of urban voting power, there is reason to believe that policies such as moving government offices out of urban areas will be balanced by policies such as the government's role in enticing Crown Life to Regina.

The Saskatchewan legislation may not be admirable or public-spirited but judicial intervention was not required to protect a vulnerable minority. The Court's anti-majoritarian role will require invalidation of voting restrictions on groups such as prisoners and the homeless, invalidation of districting decisions that dilute the voting strength of geographically concentrated minorities, and deference to legislative and administrative attempts to maximize the voting strength of minorities. It is, however, neither surprising or disturbing that the Court has not reached out to augment the political power of urban residents.

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16. *Supra*, note 1 at 25-26.
17. R.G. Dixon "Fair Criteria and Procedures for Establishing Legislative Districts" in Grofman, Lijphart, McKay and Scarrow *Representation and Redistricting Issues* (Lexington: D.C. Heath, 1985) at 7-8.
18. Roach "Reapportionment in British Columbia" (1990) 24 U.B.C. Law. Rev. 79 at 92-3.
19. To be sure, there are disadvantaged people living in the cities but the disadvantages they suffer from electoral boundaries are at most indirect. There is little reason to think that adding a few members would result in better representation of disadvantaged groups in the cities.