The Charter and Electoral Law in British Columbia

The patriation of the Constitution of Canada and the adoption of the Charter of Rights in 1982 changed the Canadian constitutional scene in a major way. The expansion of the role of interpretation must be acknowledged but predicting its scope or what effects it may have on the traditional views of parliamentary supremacy is difficult. The Dixon case in British Columbia provides an interesting, if not conclusive, view of how the courts and Parliament approach the question of electoral distribution.

by Ian D. Izard

In British Columbia, as in other jurisdictions, electoral representation has evolved with, but not necessarily at the same pace as or in step with, population growth. The vast size of the province, the pattern of valley settlements in the Interior and concentrated growth in the Vancouver and Victoria areas must somehow be accommodated. Traditionally, the urban areas argued for 'one man-one vote' in choosing members for the Assembly while the rural areas, with vastly greater geographical concerns, desired a community of interest approach. In addition, British Columbia, for many years, used two or three-member ridings as a method of allocating seats in various urban and semi-urban areas.

Two events emerged which would have a major effect on distribution. John Dixon, of the B. C. Civil Liberties Union, commenced the judicial process by petitioning the British Columbia Supreme Court, in 1985, to review the allocation of seats in the Legislature by applying the Charter of Rights to the Constitution Act. His petition, in broad terms, alleged that uneven distribution, whereby there were as many as 15 or 16 times more electors per member in one district than another, contravened the principle of 'one man-one vote', said to be guaranteed by various sections of the Charter. Secondly, in 1986 the inquiry process began with the appointment of The Honourable Judge Thomas K. Fisher, under the provisions of the Inquiry Act. The appointing order-in-council provided in part ...

> 1.... to inquire into the composition of those electoral districts that now return 2 members to the Legislative Assembly and into the composition of the electoral districts that are contiguous to those electoral districts that now return 2 members, and to carry out the other duties hereinafter set out.
>
> 2. The commissioner shall conduct his inquiries with a view to recommending the establishment of new electoral districts, each returning one member to the Legislative Assembly, to replace those that now return 2 members to the Legislative Assembly.
>
> 3. In recommending the establishment of new electoral districts to replace those that now return 2 members, the commissioner shall, where he considers it desirable, also recommend adjustments to the boundaries of contiguous electoral districts and shall generally have regard to the following:
>
> (a) the principle of the electoral quota, that is to say, the quotient obtained by dividing the population of the Province, as ascertained by the most recent population figures published by Statistics Canada, pursuant to the Statistics Act (Canada), by the total number of members of the Legislative Assembly;
>
> (b) historical and regional claims for representation;
>
> (c) special geographic considerations including the sparsity or density of population of various regions, the accessibility to such regions or the size of shape thereof;
>
> (d) special community interests of the inhabitants of particular regions ...

Mr. Justice Fisher's initial instructions, to consider the future of dual-member ridings, were subsequently altered inter alia and Paragraph 1 reworded as follows:

Ian Izard, B.A., LLB. is Law Clerk of the Legislative Assembly of British Columbia and President of the Canadian Association of Parliamentary Counsel.

by striking out everything after "inquire into the composition of" and substituting "and make recommendations respecting

(a) the appropriate number of electoral districts, each returning one member, for the Legislative Assembly, and

(b) the establishment, including the boundaries, of electoral districts."

The Judicial Process

The Dixon case worked its way through the British Columbia Supreme Court over a three-year period, being resolved by three decisions. The first decision in 1986 by Chief Justice McEachern[1], on a preliminary point, determined that the Charter of Rights does apply to the Constitution of a Province and that the courts have the right to review and scrutinize it although the Judge took pains to point out that the petition must be heard on its merits and that his decision did not affect the recent provincial election or impose an obligation on the Legislature.

The Dixon petition was heard on its merits by Madam Justice McLachlin[2] before her elevation to the Supreme Court of Canada, this decision being handed down in the Spring of 1989.

The Judge considered the degree of disparity between the number of voters per member, which ranged as high as 143% above or 91% below the mean, and enunciated several principles which would determine whether the Charter guarantee of "the right to vote" had been violated. These principles may be summarized as follows:

- The Charter, being a constitutional guarantee of rights, requires a generous interpretation, avoiding what has been called the "austerity of tabulated legalism" and accordingly, the "right to vote" meant more than the bare right to place a ballot in a box.
- The notion of equality is inherent in the Canadian concept of voting rights.
- The standard of equality (to be found in factors such as geography or regional interests) is relative rather than absolute. The American jurisprudence is not totally helpful as the Canadian experience of evolutionary democracy, coupled with pragmatism, differs from the American birth in revolution.
- The Legislature is the appropriate body to determine the permissible deviation from absolute equality and in doing so it must act in accordance with the following principles: (1) Relative equality is required for representation of the constituency through roles of legislation and Ombudsman. (2) Deviation should only be admitted which can be justified on the grounds that it contributes to the better government of the population as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed. Geographical considerations affecting the servicing of a riding and regional interests meriting representation may fall in this category and hence be justifiable.

In summary, an outside limit for deviation from equal representation may be appropriate... but it is not alone sufficient, particularly if it is relatively generous.

The Judge compared various ridings and disparities such as the fact of the number of voters in Coquitlam- Moody being 15 times as many as in Atlin. She determined that the Act did not comply with section 3 of the Charter in that the system "enhanced the power of the rural voter". She went on to consider whether the apparent conflict could be justified under section I, saying:

> ...I am satisfied that the objectives of ensuring that geographic and regional concerns are reflected in electoral boundaries to the end of ensuring better government, are valid and meet the "pressing and substantial" test laid down by the Supreme Court of Canada. The question is whether the means adopted by the British Columbia Legislature and Cabinet to attain these ends are proportional to the goal.
>
> In making this assessment, it is clear that considerable leeway must be given to the Legislature and cabinet to enact what appear to them to be reasonable measures to ensure that valid geographic and regional considerations are taken into account in establishing electoral boundaries in the interests of better government. As the Supreme Court of Canada held in *R. v. Edwards Books*, (1986) 2 S.C.R. 713, 55 C.R. (3d) 193, the Court ought not to require that the scheme adopted by the Legislature be shown to be the optimal scheme; leeway for different views and the difficulties of precision in formulating and applying an appropriate rule must be granted. In such matters, the Court should defer to the Legislature.
>
> The process of adjusting for factors other than population is not capable of precise mathematical definition. People will necessarily disagree on how important a regional grouping is to the boundary of this riding, on how significant problems of serving constituents are to that electoral district. It is for the legislatures to make decisions on these matters, and not for the courts to substitute their views. Applying a test used in other areas of the law, I would suggest that the courts ought not to interfere with the Legislature's electoral map under s.3 of the Charter unless it appears that reasonable persons applying the appropriate principles — equal voting power subject only to such limits as required for good government — could not have set the electoral boundaries as they exist. In other words, departure from the ideal of absolute equality may not constitute breach of s.3 of the Charter so long as the departure can be objectively justified as contributing to better government.
>
> Other considerations may dictate divergence from the standards required by s.3 of the Charter. For example, electoral boundaries cannot practically be changed with every minor population fluctuation. To this extent electoral laws which cannot be justified under s.3 may nevertheless be held constitutional under s.1 ...

and determining that it could not.

Finally, the Judge determined that any remedy must lie with the Legislature, recommended the adoption of the Fisher

Report and left open the question of timing to allow the Legislature to act.

Subsequently another application was brought before the Honourable Mr. Justice Meredith[3] for an order to terminate the stay of proceedings ordered by Judge McLachlin and for an order declaring the Act void.

The Judge answered the request, in part, as follows:

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

The Inquiry Process

After a series of hearings and inquiries, Judge Fisher tabled a preliminary report which recommended inter alia the abolition of multi-member ridings, an increase in the number of members of the House from 69 to 75 and the setting of a formula to determine acceptable levels of deviation in voting numbers. This report was referred to the Special Committee On Electoral Boundaries and the final report was referred to the Select Standing Committee on Labour, Justice and Intergovernmental Relations with instructions to consider its contents and make a unanimous report. In July of 1989, the Committee recommended to the Legislature that various features of the Fisher Report be adopted and legislation was introduced and passed to implement its provisions. The imminent adjournment of the House required a mechanism to be created so that fine tuning could be achieved during the adjournment and in the event that an election were called before the House next met. A copy of the Act is attached and the reader may note the unique method adopted to allow Cabinet to implement the Committee's findings without deviating from them if the House was not then sitting.

It should be noted that the inquiry process paralleled the judicial process and indeed that Madam Justice McLachlin even went so far as to recommend the Fisher Report as the basis of a legislative response.

The outcome of the Dixon case has relevance to all legislatures in Canada. The decisions were not appealed because the Legislature used its jurisdiction to pass remedial legislation and, accordingly, they may not have the ultimate force of an appellate decision.

> ***It is readily apparent that the courts will review electoral legislation, and Provincial constitutions, to determine whether they comply with the Charter. The courts will espouse broad guidelines and will examine local circumstances to determine compliance but will not "legislate" a result.***

It would appear that by acknowledging the position and jurisdiction of the Legislature, the courts will respect the legislative role of Parliament but once legislation has been passed it is then subject to review. Madam Justice McLachlin pointed out that in a cross-country comparison British Columbia ranked fourth among the provinces in deviation from a standard of strict equality.✦

Notes

1. *Dixon v. Attorney General of British Columbia* (1986) 7 C.C.L.R. (2d) p.174.

2. *Ibid.*, p. 273

3. *Ibid.*, p. 231.