

The Law Commission's Report on Electoral Reform

Submission to House of Commons Electoral Reform Committee
Roderick J Wood, Faculty of Law, University of Alberta

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A. Introduction

The Law Commission of Canada in 2004 released its report entitled *Voting Counts: Electoral Reform for Canada*. The Commission examined the existing electoral system as well as alternative systems and ultimately recommended that a stronger element of proportionality should be added into Canada's electoral system through the adoption of a mixed member proportional electoral system.

I was one of four Commissioners responsible for this report, and I would like to take the opportunity today to discuss how it was that we came to the conclusions that we did.

B. Is there a Problem with the Existing Electoral System?

The first step with any law reform project is to ask if there is a problem with the current state of the law. In this regard, we consulted with the public, grass roots organizations and experts to determine if there was a problem with the status quo. We concluded that the present first past the post (FPTP) system was encountering a significant degree of criticism in relation to the way that it translated votes into seats in Parliament.

The major criticisms of FPTP that we heard can be summarized below:

- It gives parties artificial majorities despite the fact that the party may command significantly less than 50% of the votes.
- The artificial majorities that are produced may lead to inefficiency and lack of stability as the controversial programs are implemented and then reversed upon the eventual defeat of the party.
- It often produces weak opposition parties – sometimes wiping them out completely – despite the fact that they may have received a significant portion of the votes.

- It promotes regional divisions and punishes parties that have more dispersed national support.
- It creates a false impression that the political views of particular regions are monolithic.
- It can leave large portions of the country with little or no representatives in the governing party caucus.
- It disregards votes. Many votes that are cast are wasted in the sense that unless a voter casts his or her vote for the winning candidate the vote has no bearing on the eventual makeup of the House of Commons. This will often discourage citizens from voting as they will perceive their vote to be of utterly no consequence.
- The attention of the parties during elections are often focused on a smaller number of swing ridings while safe ridings are ignored.
- It may force citizens to vote strategically – to vote for candidates and parties that are not their first choice – in order to prevent some other candidate from obtaining the most votes in a riding.
- It contributes to the hyper-partisan, “blame the other side for everything” adversarial nature of political culture in Canada. Canadians value cooperation and consensus building in their interactions with one another, and yet our politics sometimes resembles a form of ritualized warfare.
- It contributes to a lack of diversity amongst those elected.

C. Identifying the Values

Having concluded that there was a problem, the next step was to identify the important democratic values that we wish to see reflected in our electoral system. Our research and consultations resulted in our identification of ten criteria that we used to evaluate the alternatives to the FPTP voting system. These criteria, together with a brief description, are set out below:

Representation of Parties

Each party’s contingent in the legislature is roughly proportionate to its voting strength.

Demographic Representation

The electoral system should broadly represent the diversity of people in society, including women, minority groups, and Aboriginal people.

Diversity of ideas

The electoral systems should reflect the diversity of ideas and interests its citizens.

Geographic Representation

Voters elect a representative who is ultimately accountable to that area.

Effective government

Governments are able to develop and implement various legislative and policy agendas.

Accountable government

Voters are able to identify policy makers, to hold them accountable for their decisions while in office.

Effective opposition

The electoral system should help to ensure the presence of an opposition that can critically assess legislation and present an alternative to the current government.

Valuing votes

The electoral system should seek to minimize the sense that a vote cast by a citizen is disregarded or wasted. Citizens should cast their votes with the assurance that it will matter and that it will be counted and that it will make a difference.

Regional balance

All parts of the country should be represented in the system of democratic governance and its related decision-making processes.

Inclusive decision making

The electoral system should promote a more consensual and less adversarial and more inclusive style of politics.

I would note that there is a considerable degree of commonality with the criteria that we identified and the principles for electoral reform contained in the mandate of the Special Committee on Electoral Reform.

D. Assessing the Different Electoral Systems

After identifying these important values, we attempted to assess the extent to which the different electoral systems promoted these values. We observed a basic division existed between plurality/majority voting systems and proportionate voting systems. First past the post and alternative voting (also referred to as ranked ballots or preferential voting) fell within this class. I have previously mentioned some of the criticisms of our present first past the post system. Alternative voting is relatively simple to use and to understand. It ensures that the winning candidate will have broader support than under first past the post. It also shares the strength of the existing system in connection with geographic representation and accountable government. A major difficulty with alternative voting is that it does not adequately address the problem of disproportionality and indeed it may sometimes worsen this problem. It also does not adequately address the concern of making every vote count. The votes that we use to produce the majority are only the second choice votes given by voters in respect of the least popular candidate. Nor does it adequately address the problem of regional balance: “there would still be large tracts of the country which would be electoral deserts for major parties.” (Jenkins Commission)

We then examined the proportionate voting systems. The European style list PR systems represented a significant departure from our Parliamentary traditions. The single transferrable vote system was complicated and the ballot is the most convoluted. It involves a significant departure from the one-member–one-riding principle, and has the major disadvantage of drastically shrinking the number of constituencies greatly increasing their size and thereby frustrating the goal of geographic representation.

Ultimately, we concluded that the mixed member proportional system offered the best balance and was the best candidate for satisfying the ten criteria that we identified. It offers the benefits of proportionality but also preserves the geographic representation of our present system. Our sense was that Canadians place a strong value on the idea of geographic representation. They very much like the idea of an MP representing their riding who was accountable to them. We were also of the view that the electoral system simply had to display a higher degree of proportionality.

On further examination we also discovered that the MMP system performs well in relation to the other criteria. It addresses the concern over wasted votes. A further advantage is that voters are able to “split their ticket” by voting for a candidate of one party in their riding, and for a different party on the proportional representation. This frees voters from the dilemma of having to vote for an undesirable candidate in their riding in order for the party that they prefer. It also seemed to do better in ensuring regional balance so as to avoid the electoral deserts that are often produced by FPTP.

After having selected MMP as the best alternative to FPTP, we attempted to identify and test criticisms that have been made in respect of mixed member proportional systems. There were three major criticism that we encountered. First, it is argued that the system produces more minority and coalition governments and this produces an undesirable lack of stability. Second, it is argued that it produces two classes of MPs and this is undesirable. Third, it is argued that it can lead to extremist or splinter parties that may hold the balance of power.

We addressed each of these arguments. We examined countries that adopted proportional systems and concluded that they did not produce unstable governments. Indeed most of the world’s Parliamentary democracies operate with a minority (whether as a one party minority or part of a coalition). The argument that MMP creates two classes of MPs also appeared to be exaggerated. We concluded that it was more likely that the list MPs would actively engage and share in the constituency work within the region. We recommended that the list MPs be afforded the same rights and privileges as the constituency MPs. The fear of extremist splinter parties is also overstated as this can be controlled through threshold requirements.

E. Resolving Second Order Technical Issues

Next, we addressed a number of second order issues concerning more technical but highly significant issues. We thought that the most sensible approach was first to choose a basic model and then get into a more detailed discussion of the various technical issues in relation to that model. We dealt with the following issues:

Open Lists versus Closed Lists

We considered the question of closed lists versus open lists. Does the political party choose the ranking on the list (closed list) or should the voters be able to rank the persons on the list (open list)? This was quite a difficult issue for us. On one hand, we recognized that Canadians are not generally inclined to support changes that grant greater power to the party machine. We were concerned that party elites would be able to place themselves at the top of the lists. On the other hand, the closed list makes it easier for parties to ensure that under-represented groups such as women and minorities are elected. So there is a

trade-off between accountability and diversity. Moreover, the open lists result in more complicated ballots and can produce intraparty competition. Ultimately, we favoured a compromise (the “flexible approach” of the Jenkins Commission) that would give voters the option of either endorsing the party “slate” or of indicating a preference for a candidate within the list.

Ability to Run Simultaneously on Both Lists

We recommended that there was no difficulty with double inclusion of candidates on both lists.

Threshold Requirements

We recommended that there should be no legal threshold for gaining access to the list (compensatory) seats. However, a party should be eligible for compensatory provincial list seats only if it presents candidates for election in at least one third of the constituencies in the relevant province.

The Number of List Seats

We concluded that that one third would be sufficient, although for smaller provinces that number would be greater.

Vacancies

We recommended that vacancies in the constituency MPs should be filled through a by-election, while vacancies among list MPs filled by the next highest ranked candidate on the party list for the province or territory.

F. Implementation

Finally we addressed the issue of implementation. Our report predated the Supreme Court of Canada reference on Senate Reform. We recommended that there should be a public consultation process that was broadly representative and adequately resourced, and that it could consider the option of holding a referendum.

G. Further Observations

Over a decade has passed since the publication of the Law Commission of Canada Report. I have had, since its publication, the following additional reflections on electoral reform:

- In plurality or majoritarian systems like FPTP or AV, there is a heightened concern about electoral boundaries and gerrymandering that threatens the integrity of the electoral system. There is much less of a concern in an electoral system based on proportional representation.
- The difficulty with requiring a referendum is that there is a bias towards rejection because many citizens will not understand the proposed system. A referendum does not always need to precede a change. Another possibility is to implement the new electoral system (after broad public consultation as to the new model) and then after a fixed period of time hold a referendum on whether to retain the new system or revert to the old system. By this mechanism citizens will have had the opportunity to become acquainted with the new system and therefore will be able to make a more informed choice.
- Giving women and First Nations peoples the vote was a much greater change to our electoral system and there was never a suggestion that a referendum should have been held before implementing these changes.