SOME THOUGHTS ON ELECTORAL REFORM

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SUMMARY

Part A argues that certain types of electoral reform would most likely require a constitutional amendment under section 38 of the *Constitution Act, 1982*, meaning that at least seven provinces with at least 50 percent of the population of Canada would have to agree.

Part B distinguishes two types of representation and argues that a referendum would not be needed if the electoral reform does not change our current concept of representation.

Part C presents a voting system (Supplementary Vote) not usually considered when discussing electoral reform. Its advantages and disadvantages are outlined briefly.

A. DOES ELECTORAL REFORM REQUIRE A CONSTITUTIONAL AMENDMENT?

The preamble of the *Constitution Act, 1867* declares that three of the provinces of what was then British North America wanted to be "federally united . . . under the Crown of the United Kingdom . . . with a Constitution similar in Principle to that of the United Kingdom". What do the words "Constitution similar in Principle to that of the United Kingdom"—and the provisions of the 1867 Act—can us about the kind of electoral system Canada is supposed to have. Our inquiry should start by drawing up a checklist of the principles, or characteristic features, of the classic 1867 Westminster model. The following checklist is not exhaustive, but it does include those features most commonly identified, though perhaps in different terms, whenever the Westminster model is discussed.

1. There is both a head of state and a head of government.

2. The office of head of state is held by a hereditary monarch who is the Sovereign. (*Monarchy*)

3. With the exception of certain reserve powers, the Sovereign exercises executive power only on the advice of one or more members of the ministry, or cabinet, more commonly referred to simply as the government. (*Cabinet government*)*

4. There is a legislature, or Parliament, composed of the Sovereign and two houses. (*Bicameralism*)

5. **The first or lower house of Parliament is composed of members who are directly elected to represent constituencies into which the population of the country is divided.** (*Parliamentary democracy*)

6. The second or upper house of Parliament is composed of members who are summoned by the Sovereign.

7. Parliament is the supreme law-making body in that it can make or unmake any law, and no person, court, or other body has the right to override or set aside a law made by Parliament. (*Parliamentary supremacy*)**

8. The Sovereign must seek the authorization of Parliament for the imposition of any taxes or duties and the expenditure of public revenue. (*Financial supremacy of Parliament*)

9. Bills to impose a tax or duty and bills to appropriate public revenue must originate in the lower house of Parliament. (*Financial supremacy of the lower house*)

10. The ministry, or government, is composed of the head of government and a number of other ministers, all of whom are appointed by the Sovereign, primarily from amongst the members of the elected lower house of Parliament. (*Fusion of the executive and the legislature*)

11. The Sovereign designates as head of government the person who is able to command the support—formally termed "confidence"—of a majority of the members of the elected lower house of the Parliament. (*Ministerial responsibility*)*

12. The members of the elected lower house are divided into at least two parliamentary parties, one of which supports the government and one of which opposes and seeks to replace it. (*Party government*)

*Features 3 and 11 are the two components of Responsible Government.

**Feature 7 has been replaced in Canada by constitutional supremacy: see section 52(1) of the *Constitution Act, 1982*.

Our focus here is on Feature 5 (written in bold characters). Prior to the Charter's protection of the right to vote and the right to stand for election to the House of Commons (section 3, *Constitution Act, 1982*), the division of provinces into electoral districts, each of which returned one or more members to Parliament, served as the foundation of our

parliamentary democracy: see section 40, *Constitution Act, 1867*. Each geographic community within the province was represented in Parliament.

The Commons was not composed only of people from the richest or most urbanized parts of a province. Instead, all communities, rural and urban, were intended to be covered by the geographic districts into which the whole province was divided. This was the foundation of democratic representation. The franchise did not, of course, include all inhabitants. Women in particular had no right to vote or be elected to the legislature. But representation in Parliament extended throughout the land. I submit, then, that representation by electoral districts is a fundamental feature of a legislative body like the House of Commons.

The Supreme Court of Canada's 2014 decision in the *Senate Reform Reference* contains the following statements; my remarks are in square brackets at the end of each paragraph cited:

> [1] The Senate is one of Canada's foundational political institution. [I would add that so is the House of Commons.]
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> [14] The framers of the *Constitution Act, 1867* sought to adapt the British form of government to a new country, in order to have a "Constitution similar in Principle to that of the United Kingdom": preamble. <u>They wanted to preserve the British structure of a lower legislative chamber composed of elected representatives</u>, an upper legislative chamber made up of elites appointed by the Crown, and the Crown as head of state. [Emphasis added. Being composed of "elected representatives" is thus recognized as a fundamental feature, or essential characteristic, of the House of Commons.]
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> [48] ... Neither level of government acting alone can alter the fundamental nature and role of the institutions provided for in the Constitution. This said, those institutions can be maintained and even changed to some extent under ss. 44 and 45, provided that their fundamental nature and role remain intact. [That its members are elected is clearly a fundamental feature of the House of Commons. That they are elected to represent the electoral districts into which each province is subdivided is also, I would argue, fundamental to the nature of the Commons as is shown by both section 40 and the preamble of the *Constitution Act, 1867*]
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> [75] ... Changes that engage the interests of the provinces in the Senate as an institution forming an integral part of the federal system can only be achieved under the general amending procedure. [Sections 37, 40, 41, 51, 51A and 52 of the *Constitution Act, 1867* each expressly connects the composition of the House of Commons to the provinces.]

While our current voting system (First past the post, or Single Member Plurality) is not entrenched in the Constitution, I would argue that our system of representation by electoral districts is. Section 40 of the *Constitution Act, 1867* is now spent, but it does show the kind of

representation system that the new House of Commons of Canada was intended to have in accordance with the preamble of the Act.

I think it would be a misreading of section 40 to say that it provides Parliament with the authority to abolish electoral districts; rather it authorizes Parliament to change the shape and size of such districts. If electoral districts were eliminated by Parliament and parties chose candidates who ran at large provincially, would the provinces not have an interest in that change? That is, at Confederation did the founding provinces not conceive of the new House of Commons as being modelled on the House of Commons of the UK with members elected by electoral districts, a system of representation also used by each of the founding provinces?

In conclusion, a fundamental feature of the Commons is unquestionably that it consists of the elected representatives of all the people (the nation as a whole). I would add that those representatives have to be elected by districts or constituencies into which each province is divided. Unfortunately, most Canadian political scientists and constitutional lawyers lack the requisite historical knowledge of our Parliament and its counterpart in the United Kingdom to understand that representation by electoral districts is something more than an arbitrary convenience and to recognize that it is a fundamental feature of the House of Commons.

This may rule out, for example, certain forms of proportional representation or quasi-proportional representation, notably MMP (Mixed Member Proportional). In MMP some members are elected not to represent districts but to top up the number of members needed to give a party its proportionate share of seats. (This is unfortunate because I personally like MMP.)

There is one other potential constitutional impediment to adopting certain forms of voting system. The Charter, in section 3, provides that "[e]very citizen of Canada has the right . . . to be qualified for membership [in the House of Commons or a legislative assembly]. Does that provision of the Charter mean that an electoral system cannot reserve some seats in the House of Commons for members of certain political parties, as would be required under a PR system?

B. CONCEPTS OF REPRESENTATION AND REFERENDUMS

What I would call the classical concept of representation dates to the very beginning of the inclusion of the Commons in the English Parliament. Knights of shires (counties) and burgesses in boroughs were each instructed to elect two of their number to attend Parliament to represent their "communities" (*communes* in the French used in England at that time), or constituencies as we might now say. That's the type of parliamentary representation entrenched in our Constitution (see Part A): the member of the House of Commons is elected to represent the electoral district itself, and they are styled "the Member for (name of district)".

The very concept of representation appears to have undergone a change in the minds of many people today. They now want a member in the House of Commons who belongs to the political party that espouses positions closely mirroring their own. That's a very different concept of representation, so different in fact that the classical concept seems positively odd to some, even though they may still want to have a member attached to the electoral district where they live.

It is logically false that the current system "distorts" the vote of the electorate. That's like saying checkers distorts chess. Although they are played on the same board, each game has its own set of rules. Likewise, the current voting system asks voters to choose a representative for their district. Some voters may, however, want to vote for a party, and they want their vote to contribute to the election of a member of that party even if it's someone outside their district. But that's a different game. PR proponents will use all kinds of rhetorical devises to convince members of the Special Committee that there is something wrong with our current voting system: votes are said to be "wasted", and the results "distorted". (Interestingly, the Supreme Court, in a decision on section 3 of the Charter, has said that no votes are ever wasted.)

The real question then is what type of representation system should be used to constitute our House of Commons: the classical concept of representation by district, the concept that makes parties the basis of representation, or some combination? All three are completely valid concepts of representation, but the rhetoric is intended to make you think that one is no longer valid, is outdated, is broken.

The concept of representation is so fundamental to electoral systems that I would argue that any voting reform that maintains the current concept of representation does not require a legitimizing referendum or citizens' assembly. Only a voting system reform that changes the concept of representation from our classical model to one that includes a different form of representation would need to be endorsed by the electorate, in my opinion. The reason is that a change in the concept of representation used by the electoral system will inevitably change the way the House of Commons operates and, most important, how Governments are formed. Such a fundamental change cannot easily be undone. That is why it needs to be submitted to the people for their agreement. The electoral reform adopted by New Zealand and the reforms proposed in British Columbia, Ontario and New Brunswick all involved a change in the concept of representation. The Alternative Vote, or Preferential Vote, adopted years ago by two western provinces did not, however, change the concept of representation used in those provinces, and no referendums were used or needed. Those changes were later easily undone. Any system that is based in whole or in part on a different concept of representation requires, I would argue, a constitutional amendment in accordance with section 38 of the *Constitution Act, 1982*.

C. A DIFFERENT KIND OF VOTING: THE SUPPLEMENTARY VOTE

Leaving to one side the illogical accusations of wasted votes and vote distortion, we must recognize that our current First Past the Post (FPP) voting system does still have one basic flaw: it does not work well if there are three or more major parties presenting candidates, and as a result candidates can be elected with far less than a majority of the votes. Winning without a majority is, in my opinion, undemocratic. I would argue (see Parts A and B) that fixing that one flaw would not require a constitutional amendment involving provincial agreement, nor would it need to be legitimized by a referendum or citizens' assembly.

There's a voting system that I think the Special Committee should consider. It's easy to implement, easy to remove later, requires no constitutional amendment, and needs no referendum. And it uses the current concept of representation, which means it does not result in proportional representation of parties in the House of Commons.

Instead of ranking all the candidates on the ballot, only two choices need be indicated. The ballot would look something like this:

Candidate	Party	1st Round	2nd Round
Sharon SMITH	Red		
John JONES	Blue		
Pierre DESROCHES	Orange		X
Alice DUPONT-SMITH	Green	X	
Abel Kosinoff	Purple		

The first column of boxes would allow the voter to indicate his or her first-round choice, if he or she wishes. The second column would be used to indicate a second-round choice, if any. So far, nothing unusual about this version of preferential voting except that only two choices are indicated. Note that the ballot is not spoiled if the voter decides to indicate only a first- or second-round choice but not both. (If a first-round choice is not shown, the voter could be counted as voting for None of the Above, which apparently is what some people would like to be able to do.)

When the ballots are counted, if one candidate receives 50%+1 of the first-round votes, then that candidate wins—exactly as in FPP. But if that candidate receives less than 50%+1 of the votes, no matter how large his or her plurality, the second-round votes must be counted. In other words, there is an automatic and instantaneous second round of voting in which every candidate, except the top two from the first round, is eliminated. (Note: this could be changed to keep the top three.)

Then the second-round choices of everyone who voted for an eliminated candidate is counted. If a second-round vote is for a candidate who is not among the top two, that vote is discarded. If the second-choice vote is for a candidate who is among the top two, the vote is added to the first-round votes received by that candidate. All second-round votes are thus considered and either discarded (since their preferred candidate was eliminated) or added to one of the top two first-round candidates. Once the second-round votes have been thus distributed, the candidate receiving the most votes (first and second rounds combined) among the top two first-round candidates is proclaimed the winner.

If the top two candidates receive the same number of first-round votes, we proceed exactly as we do in the case where neither of the top two received a majority of the first-round votes. In the event that the top two candidates receive the same number of combined first- and second-round votes, then one solution to break that tie would be to declare that the one receiving the most first-round votes is the winner. One advantage of proceeding this way is that first choices are slightly more important than second choices when there is a tie. It's highly unlikely that there will be a tie for both first-round and second-round votes. If there were to be, we'd have to build another tie-breaker into the system (just as is the case now).

The advantage of this two-round voting system over the usual Alternative Voting system is that we don't run the risk that the winning candidate will be chosen on the basis of the alternative choices of the people who supported candidates who received relatively few votes. In other words, the winning candidate won't receive a majority with the votes of people who supported the Marijuana Party alone. Since we will eliminate all candidates except the top two after the first-round votes are counted, the winner may receive the second-round votes of people who voted for any of those other candidates. A leading candidate will not have to pander to some eccentric minor party in order to gain their votes. Rather candidates will be encouraged by this system to be open to, and try to obtain, the supporters of other major candidates.

This form of Supplementary Voting does not, however, ensure that everyone who voted for a candidate eliminated on the first round will have their second-round choice counted because they may have voted for someone other than one of the top two. Voters would need to follow the polls and the media to see which two candidates might be in the lead.