

Date: 19981211
Docket: AD-0725
Registry: Charlottetown

**PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - APPEAL DIVISION**

BETWEEN:

CITY OF CHARLOTTETOWN

APPELLANT

AND:

THE GOVERNMENT OF PRINCE EDWARD ISLAND

RESPONDENT

Before: The Honorable Chief Justice N.H. Carruthers
The Honorable Mr. Justice G.E. Mitchell
The Honorable Mr. Justice J.A. McQuaid

David W. Hooley, Q.C., and Karen A. Campbell

Counsel for the Appellant

Gordon L. Campbell and Rosemary Scott

Counsel for the Respondent

Place and Date of Hearing

Charlottetown, Prince Edward Island
November 9, 10, 12, 13, 1998

Place and Date of Judgment

Charlottetown, Prince Edward Island
December 11, 1998

Written Reasons by:

The Honorable Chief Justice N.H. Carruthers

Concurred in by:

The Honorable Mr. Justice J.A. McQuaid

Dissenting reasons by:

The Honorable Mr. Justice G.E. Mitchell

Date: 19981211
Docket: AD-0725
Registry: Charlottetown

CITY OF CHARLOTTETOWN

APPELLANT

AND

THE GOVERNMENT OF PRINCE EDWARD ISLAND

RESPONDENT

(30 pages)

Before: Carruthers, C.J.P.E.I.; Mitchell J.A.(dissenting) and
McQuaid, J.A.(concurring with Carruthers C.J.P.E.I.)

Heard: November 9, 10, 12, 13, 1998

Judgment: December 11, 1998

***CIVIL RIGHTS - CHARTER OF RIGHTS - RIGHT TO VOTE - ELECTORAL
BOUNDARIES AND VOTER VARIANCES IN ELECTORAL DISTRICTS***

Appellant challenged the validity of the new electoral boundaries in the Province of Prince Edward Island. Trial judge dismissed the application and held the appellant had not established an infringement of s.3 of the Charter.

HELD on appeal (Mitchell J.A. dissenting): The appellant did not establish any infringement of the right to vote in s.3 of the Charter. Appeal dismissed.

CASES CONSIDERED: *Reference Re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 (S.C.C.); *Dixon v. British Columbia (Attorney-General)* (1989), 59 D.L.R. (4th) 247 (B.C.S.C.); *Miron v. Trudel*, [1995] 2 S.C.R. 418 (S.C.C.); *The Queen v. Oakes*, [1986] 1 S.C.R. 103; (1986), 26 d.l.r. (4TH) 200 (S.C.C.); *MacKinnon v. The Government of Prince Edward Island* (1993), 101 D.L.R. (4th) 362, 104 Nfld. & P.E.I.R. 232 (P.E.I.S.C.-T.D.)

STATUTES CONSIDERED: *Election Act*, R.S.P.E.I. 1988, Cap. E-1; *Electoral Boundaries Act*, S.P.E.I. 1994, Cap. 13; *Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982*, ss.1, 3, s-s.15(1), 33

ARTICLE CONSIDERED: Charney, Robert E.: *Saskatchewan Election Boundary Reference: "One Person - Half a Vote"* (1992) N.J.C.L. 225

David W. Hooley, Q.C., and Karen A. Campbell, for the appellant
Gordon L. Campbell and Rosemary Scott, for the respondent

CARRUTHERS C.J.:

[1] This appeal and cross-appeal involves an old chestnut which has been aptly described by scholars as being how to accommodate the urbanization of society and the concept of representation by population while at the same time providing an adequate voice and service to rural residents by their elected representatives.

BACKGROUND

[2] In 1991 an application was filed in court seeking an order and declaration that certain provisions of the *Election Act*, R.S.P.E.I. 1988, Cap. E-1, were null and void and of no force or effect in that they were inconsistent with and contravened the *Canadian Charter of Rights and Freedoms*. It was submitted, among other things, that certain provisions of the Election Act denied the right to a full, effective and equal vote in elections for members of the Legislative Assembly of the Province of Prince Edward Island and, therefore, denied equality of representation in the Legislative Assembly.

[3] Mr. Justice DesRoches heard the application in 1992 and rendered reasons for judgment on February 16, 1993, reported in [1993] 1 P.E.I.R. 216; 104 Nfld. & P.E.I. R. 232. He noted that the most recent provincial general election in the Province had been held on May 29, 1989, when there were 16 Electoral Districts represented by two members each. On p.227, he sets out a table showing the sixteen Electoral Districts with the number of voters in each District, and on pp.227-228 he sets forth the following table which shows the variation in the number of electors from District to District.

ELECTORAL DISTRICT	PERCENTAGE UNDER OR OVER AVERAGE
First Kings	-41%
Second Kings	-62%
Third Kings	-48%
Fourth Kings	-40%
Fifth Kings	-63%
First Queens	-38%
Second Queens	+48%
Third Queens	+60%
Fourth Queens	-44%
Fifth Queens	+115%

TABLE 1	
Sixth Queens	+71%
First Prince	+35%
Second Prince	-43%
Third Prince	-32%
Fourth Prince	+84%
Fifth Prince	-17%

[4] Mr. Justice DesRoches made the following conclusions as reported at p.245:

CONCLUSIONS AS TO S.3

McLachlin, J. observes in *Carter* that an electoral system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. I find that the existing electoral distribution in this Province provides inadequate representation to a large percentage of the voters because of the significant variances in population in the electoral districts. In my opinion, the evidence presented is not sufficient to justify the existing electoral boundaries. Factors like community history, communities of interest and the need to maintain an appropriate urban/rural and regional balance in political representation in the Province do not support a conclusion that the existing extreme deviations are necessary to ensure the better government of the populace as a whole. In my opinion, based upon all the evidence presented reasonable persons applying appropriate principles could not have set the electoral boundaries as they exist.

In the light of all of the above, I conclude that the present electoral districts in Prince Edward Island violate the right to vote guaranteed by s.3 of the *Charter*. Accordingly, ss.147, 148, 149, 150 and 151 of the *Election Act*, R.S.P.E.I. 1988, Cap. E-1 are invalid unless justified under s.1 of the *Charter*.

[5] He then concluded that these sections of the *Election Act* could not be saved by s.1 of the *Charter*. He granted the respondent, Government of Prince Edward Island, a reasonable period of time to implement the necessary legislative action to remedy the legislation and allowed the offending sections of the *Election Act* to stay provisionally in place to avoid any constitutional crisis.

[6] A Provincial General Election was held on March 29, 1993, under the old legislation.

[7] By Order-in-Council No. EC451/93, dated September 9, 1993, the Lieutenant-

Governor-in-Council appointed an Election Act and Electoral Boundaries Commission (the Commission). Its mandate was to review the provisions of the *Election Act*, the existing provincial electoral boundaries, the distribution of representation and in particular to examine, inquire into and report upon:

- a. the appropriate number of persons to comprise the Legislative Assembly;
- b. the number of geographical constituencies and their boundaries; and
- c. whether or not these constituencies should be represented by single or dual members.

[8] The Commission Report recommended:

THAT the titles Assemblyman and Councillor be abolished and that the title Member of the Legislative Assembly be the sole title in identifying elected representatives to the Legislative Assembly.

THAT members of the Legislative Assembly be elected in single member ridings according to the traditional plurality method.

THAT the Legislative Assembly consist of 30 members.

THAT the thirty provincial electoral districts be as outlined in Chapter 7 of the Report. The thirty districts are based on an average number of voters per district of 3,072 voters, a variance of ± 15 percent and the other considerations outlined in Chapter 6 of the Commission Report.

THAT the Legislative Assembly enact electoral boundaries legislation, separate from the *Election Act*, R.S.P.E.I., 1988, Cap. E-1, which includes a provision for review of electoral boundaries after every third Provincial General Election.

THAT the Legislative Assembly establish a mechanism to review the *Election Act*, R.S.P.E.I. 1988, Cap. E-1, excluding sections 147 to 151.

[9] The Commission Report was tabled in the Legislative Assembly on March 17, 1994, and considerable debate followed concerning the Report. It became obvious to some people that the Commission Report was not going to be fully endorsed by the Legislative Assembly and that a compromise must be found. As a result, Ross Young, a member of the Legislative Assembly, through the services of the Clerk of the Legislative Assembly, obtained the services of Lowell Croken, a Special Projects Officer employed in the Executive Council Office, who had drawn the electoral map for the Commission. Mr. Croken prepared a new map with 27 electoral districts: five in Kings County, thirteen in Queens County, and nine in Prince County, with a variance of not greater than $\pm 25\%$. A private members Bill was then drafted incorporating the 27 electoral districts set out in the

new map prepared by Mr. Croken. It was presented to the Legislative Assembly on May 6, 1994, as an amendment to the motion to adopt the Commission Report. The Legislative Assembly adopted the Private Members Bill and new map as an amendment to the Commission Report. It is known as the *Electoral Boundaries Act*, Stats. P.E.I. 1994, C.13. It received Royal Assent on May 19, 1994, and came into force on October 21, 1996.

[10] On February 17, 1995, an application was filed by the appellant and others seeking an Order and Declaration declaring

...that the process by which the Legislative Assembly determined the new electoral boundaries, including particularly but not limited to, the striking of a partisan Electoral Boundaries Commission by way of Order in Council No. EC451/93, and sections 2 (except with respect to the provision for 27 electoral districts, as set out in section 2(1)), 3, 4, 5, 17 and the Schedule of the *Electoral Boundaries Act*, S.P.E.I. 1994, Cap.13 (hereinafter referred to as the "Act") are null and void and of no force or effect in that they are inconsistent with and contravene the Canadian Charter of Rights and Freedoms (hereinafter the "Charter") and deny and infringe rights, liberties and freedoms guaranteed by the Charter by contravening, denying or infringing:

- (ii) the right to a full, effective and equal vote in elections for members of the Legislative Assembly of the Province of Prince Edward Island and equality of representation therein as guaranteed by Section 3 of the Charter.

[11] The application was heard by Chief Justice MacDonald in 1996. He released his reasons for judgment on December 13, 1996, reported in [1996] 2 P.E.I.R. 383; [1996] 150 Nfld. & P.E.I.R. 91. He held that the process by which the Legislative Assembly of Prince Edward Island determined the new electoral boundaries did not violate s.3 of the Charter. He also held that the variances in the size of voter populations among the constituencies and the distribution of these constituencies did not violate s.3 of the Charter. He also made some general comments on other submissions of the parties as well.

[12] The appellant now appeals from the judgment of Chief Justice MacDonald. It sets forth six grounds of appeal which may be briefly stated as follows:

1. He erred in concluding the process was fair and that it did not contravene the Charter.
2. He erred in applying a degree of judicial deference not in accordance with the Charter.
3. He erred in failing to apply the appropriate standard of review for s.3 of the Charter.

4. He erred in failing to apply the appropriate burden/onus of proof with respect to ss.3 and 1 of the Charter.
5. He erred in his general observations.
6. He erred in concluding that mixed districts satisfy the requirements of s.3 of the Charter.

[13] The appellant seeks the following relief:

- (1) An order overturning the decision of Chief Justice MacDonald and declaring sections 3, 4, 5, and 17 and the Schedule of the *Electoral Boundaries Act* to be inconsistent with the provisions of the Charter.
- (2) An order requiring the Respondent to redraw the electoral map of Prince Edward Island in conformity with the Charter, within a reasonable period of time and in any event prior to the writ of election being issued under the *Election Act*, R.S.P.E.I. 1988, Cap. E-1, for the next provincial general election.

STANDING AND LEGAL CAPACITY

[14] The Court questioned the standing of the appellant to pursue this appeal as it is a corporation and, therefore, does not have a right to vote. The Court, in a judgment dated October 27, 1998, held that the appellant did have standing to challenge legislation and activity based on an allegation that such legislation or activity denies effective representation of its population as guaranteed under s.3 of the Charter. The respondent then objected to the appellant's legal capacity to proceed with the appeal. I agree with Mr. Justice Mitchell that the appellant does have the legal capacity to proceed with the appeal.

ISSUES

[15] The issues on this appeal focus on the constitutionality of the "variances" in the number of electors among the electoral districts and the "distribution" of those electoral districts between rural and urban electors and whether the variances and distribution violate the Charter guarantee of the right to vote.

[16] This case, therefore, involves the scope of s.3 of the Charter which reads:

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[17] The Supreme Court of Canada has dealt with this issue in *Reference Re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 (S.C.C.), commonly referred to as the "*Carter*" case. Madam Justice McLachlin, who gave the majority opinion for the court, states on p.183:

It is my conclusion that the purpose of the right to vote enshrined in s.3 of the Charter is not equality of voting power per se, but the right to 'effective representation.'

[18] Madam Justice McLachlin rejects the concept of absolute voter parity in the Canadian context. She states there is little in the history or philosophy of Canadian democracy to suggest that the framers of the Charter in enacting s.3 had as their ultimate goal the attainment of voter parity. She goes on to say that such a purpose would have represented a rejection of the existing system of electoral representation in this country and notes that the circumstances leading to the adoption of the Charter negate any intention to reject existing democratic institutions. She described the Canadian tradition in *Dixon v. British Columbia (Attorney-General)* (1989), 59 D.L.R. (4th) 247 (B.C.S.C.) at p.262 as follows:

What is that tradition? It was a tradition of evolutionary democracy, of increasing widening of representation through the centuries. But it was also a tradition which, even in its more modern phases, accommodates significant deviation from the ideal of equal representation. Pragmatism, rather than conformity to a philosophical ideal, has been its watchword.

[19] Madam Justice McLachlin does, however, state that relative parity of voting power is the first condition of effective representation and the value of a citizen's vote should not be unduly diluted. Other factors which may justify departure from absolute voter parity include geography, community history, community interests and minority representation. She then states on p.185:

... only those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed.

[20] It is obvious then that Madam Justice McLachlin defines the scope of s.3 of the Charter as affirming the right to effective representation by means of a system which does not rely on absolute voter parity but which gives due weight to relative voter parity and admits other considerations as well. She makes this very clear on pp.188-189 where she states:

In summary, I am satisfied that the precepts which govern the interpretation of Charter rights support the conclusion that the right to vote should be defined as

guaranteeing the right to effective representation. The concept of absolute voter parity does not accord with the development of the right to vote in the Canadian context and does not permit of sufficient flexibility to meet the practical difficulties inherent in representative government in a country such as Canada. In the end, it is the broader concept of effective representation which best serves the interests of a free and democratic society.

[21] The appellant then has the burden to establish that the present electoral system in the Province of Prince Edward Island for the election of the members of the Legislative Assembly does not provide effective representation to the electors of the Province.

[22] Chief Justice MacDonald found that the appellant had failed to meet this burden. The appellant now alleges he erred in reaching this conclusion.

DO THE ELECTORAL BOUNDARIES VIOLATE THE RIGHT TO VOTE

[23] The Legislative Assembly enacted the *Electoral Boundaries Act* which provides for 27 Electoral Districts distributed throughout the Province in such a manner that Prince County has nine Districts, Queens County has thirteen Districts, and Kings County has five Districts with each District represented by one member in the Legislative Assembly. Subsection 17(2) of the *Act* provides for a $\pm 25\%$ variance in the number of electors in each district. It states:

17(2). The number of electors of a proposed district shall not be more than 25 percent above, nor more than 25 percent below the average number of electors of all the proposed districts.

[24] Mr. Croken prepared an Electoral Map for the Province showing these 27 Electoral Districts, and he broke each District down into polling divisions. The data he used to produce the map came from the 1993 Provincial election which was the last election to be held in the Province prior to the preparation of the map. This data gave an electoral quotient of 3413 electors per district. The following table shows the 27 Electoral Districts, the number of electors in each District and the percent variation for each District from the electoral quotient. (See Appeal Book, Vol. 9, p.1989.)

DISTRICT	NO. OF ELECTORS	% VARIANCE
Souris-Elmira	2864	-16.10
Morell-Fortune Bay	2774	-18.72
Georgetown-Baldwin's Road	2818	-17.43

TABLE 2		
Montague-Kilmur	2789	-18.30
Murray River- Gaspereaux	2755	-19.28
Belfast-Pownal Bay	2900	-15.03
Glen Stewart-Bellevue Cove	3497	+2.46
Tracadie-Fort Augustus	3069	-10.08
Stanhope-East Royalty	3638	+6.59
Sherwood- Hillsborough	3587	+5.10
Parkdale-Belvedere	3682	+7.88
Charlottetown-Kings Square	3689	+8.09
Charlottetown- Rochford Square	3857	+13.01
Charlottetown-Spring Park	3962	+16.09
Winsloe-West Royalty	3900	+14.27
North River-Rice Point	4095	+19.98
Crapaud-Hazel Grove	4032	+18.14
Park Corner-Oyster Bed	3974	+16.44
Borden-Kinkora	3656	+7.12
Kensington-Malpeque	4079	+19.51
Wilmot-Summerside	4133	+21.10
St. Eleanors- Summerside	4076	+19.43
Cascumpec-Grand River	3008	-11.87
Evangeline-Miscouche	2733	-19.92
West Point-Bloomfield	2810	-17.67

Alberton-Miminegash	2970	-12.98
Tignish-DeBlois	2804	-17.80

[25] It is to be noted that District Wilmot-Summerside has the largest number of electors with 4133 and a variance of +21.10% from the electoral quotient and the Evangeline-Miscouche District had the smallest number of electors with 2733 and a variance of -19.92% from the electoral quotient. The size of the Evangeline-Miscouche District can be justified on a linguistic minority claim to representation. Twenty-six out of 27 districts or 96.3% fall within a $\pm 20\%$ variance. These figures are well within the variance of $\pm 25\%$ allowed by the *Electoral Boundaries Act*.

[26] The enumeration of the electors for the November 18, 1996, election produced different figures for the number of electors in each District. These figures gave an electoral quotient of 3482 electors per district. The following table shows the 27 Electoral districts, the number of electors in each District and the percent variation for each District from the electoral quotient.

DISTRICT	NO. OF ELECTORS	% VARIANCE
Souris-Elmira	2713	-22.09
Morell-Fortune Bay	2846	-18.27
Georgetown-Baldwin's Road	2941	-15.54
Montague-Kilmur	2597	-25.42
Murray River-Gaspereaux	2713	-22.09
Belfast-Pownal Bay	2981	-14.39
Glen Stewart-Bellevue Cove	3848	+10.51
Tracadie-Fort Augustus	3256	-6.49
Stanhope-East Royalty	3712	+6.61
Sherwood-Hillsborough	3707	+6.46
Parkdale-Belvedere	3349	-3.82

District	Number of Electors	Variance (%)
Charlottetown-Kings Square	3520	+1.09
Charlottetown-Rochford Square	3476	-0.17
Charlottetown-Spring Park	3984	+14.42
Winsloe-West Royalty	4249	+22.03
North River-Rice Point	4432	+27.28
Crapaud-Hazel Grove	4093	+17.55
Park Corner-Oyster Bed	4359	+25.19
Borden-Kinkora	3836	+10.17
Kensington-Malpeque	4277	+22.83
Wilmot-Summerside	4356	+25.10
St. Eleanors-Summerside	4153	+19.27
Cascumpec-Grand River	3069	-11.86
Evangeline-Miscouche	2902	-16.66
West Point-Bloomfield	2704	-22.34
Alberton-Miscouche	3082	-11.48
Tignish-DeBlois	2860	-17.86

[27] This table shows that District North-River Rice Point had the largest number of electors with 4432 and a variance of +27.28% above the electoral quotient and District Montague-Kilmur had the smallest number of electors with 2597 and a variance of -25.42% below the electoral quotient. It is to be noted that four Districts exceed the variance level of $\pm 25\%$. It should also be noted that fourteen districts had larger variances and thirteen districts had smaller variances when compared to the 1994 electoral map which used the 1993 figures. Eight of the fourteen districts were rural districts and six were urban districts. Eight of the thirteen districts were rural districts and four were urban districts. The following Table 4 illustrates how the number of voters declined in one urban district, Charlottetown-Kings Square, from the 1994 map, the 1996 Election and the 1997 By-election.

TABLE 4	
1994 Map	3689
1996 Election	3520
1997 By-election	3300

[28] I am of the opinion these figures clearly illustrate that it does not make much sense to be constantly changing the boundaries of the electoral districts just to accommodate the ever changing numbers. It is obvious that the number of electors will constantly fluctuate somewhat in each District from time to time, and it is not practical to change the electoral boundaries with every minor population change. There needs to be some reasonable period of time elapse between redistributions so the boundaries fixed at redistribution will govern for a number of years. The members of the Legislative Assembly were obviously conscious of this fact when they enacted the *Electoral Boundaries Act* as it contains provisions for the review of the boundaries of the Electoral Districts after every third general election.

[29] One of the reasons why Madam Justice McLachlin rejected absolute voter parity in the *Carter* case was this very fact of the fluctuation in the number of electors in any given District from time to time. She states at p.184:

First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same numbers of voters in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible.

[30] I, therefore, do not give a great deal of weight to the evidence concerning the figures from the 1996 Election when deciding the merits of this appeal. This evidence was adduced at the appeal hearing even though it had not been available to Chief Justice MacDonald when he gave his decision in December, 1996. It clearly substantiates the fact that the number of electors in an electoral district does change over a very short period of time, but it does not invalidate the findings of Chief Justice MacDonald.

[31] The appellant then has the burden to establish that Chief Justice MacDonald erred when he concluded on p.393 of his decision:

I do not find the variances are large enough or so manifestly unreasonable that the Court should interfere in the electoral process and invalidate the existing legislation. I conclude that none of the various objections raised by the applicants and intervenor can be said to be so manifestly unreasonable to reach a finding that there has been a violation of s.3.

[32] The appellant submits Chief Justice MacDonald erred in accepting the $\pm 25\%$ variance by finding the process was fair. It submits the process was flawed and unfair and in essence produced too large a variance percentage. I do not find any merit in this submission. It is true that Madam Justice McLachlin did discuss process in a limited way, but Mr. Justice Sopinka makes it very clear in the *Carter* case that there is no constitutional guarantee for the process.

[33] The question then arises as to what is the extent of the permissible deviation from equal voting power under s.3 of the Charter?

[34] The appellant now submits the deviations shown in Table 1, supra, are significant, material deviations. It submits there is nothing peculiar to Prince Edward Island to justify variances from relative voter parity and that these variances are far beyond what is justifiable. It submits a range as -19.92% to $+21.10\%$ represents profound differences in Prince Edward Island and is beyond voter parity.

[35] The respondent submits the range of -19.92% to $+21.10\%$ meets Madam Justice McLachlin's requirement of voter parity as she, the respondent submits, endorsed a $\pm 25\%$ variance in the *Dixon* case and implicitly did so in the *Carter* case as she refused to interfere where there was a variance from $+23$ to -24 in two adjoining ridings in Saskatoon.

[36] It is clear that Madam Justice McLachlin in the *Dixon* case rejected any notion that s.3 of the Charter requires absolute - or as near as practicable to absolute - equality to numbers of electors within electoral districts (see p.265).

[37] Madam Justice McLachlin points out in the *Dixon* case that relative equality of voting power is the dominant principle underlying our system of representative democracy and is fundamental to the right to vote enshrined in s.3 of the Charter. She does not define relative equality of voting power but she does state that "significant discrepancies" in the numbers of people represented by the members of the Legislature and members being "grossly overburdened" with constituents, as compared with another member, is not consistent with good government and may undermine the legitimacy of our system of government.

[38] Madam Justice McLachlin then goes on to state that other valid factors may justify deviations from the ideal of equal representation. She did not enumerate any list of valid factors in the *Dixon* case which might be capable of justifying deviations, but she did state the following general proposition on p.267:

However, I am satisfied that the following general proposition may be supported: only those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed. Geographic considerations

affecting the servicing of a riding and regional interests meriting representation may fall in this category and hence be justifiable.

[39] It is, therefore, apparent that in order to justify a deviation it must be such that it contributes to the better government of the populace as a whole. Madam Justice McLachlin goes on to state that it is the responsibility of the Legislature to decide what factors and considerations are to be applied to each individual riding and what degree of relative weight is to be given to them. The courts will only look at the results of the efforts of the Legislature to see whether the deviation in districts from the electoral quota can be justified.

[40] Madam Justice McLachlin then went on to apply these principles in the *Dixon* case and determined that the provincial electoral districts in British Columbia violated the right to vote guaranteed by s.3 of the Charter. She held that the factors relied upon by the Attorney-General of British Columbia to support the deviations fell far short of the target. She was dealing with Districts which had 15 times as many voters as others. Another, where a winning candidate in the last provincial election with the fewest votes had 1,587 voters whereas the losing candidate with the highest number of votes had 34,245, and where one riding exceeded the provincial quotient by 52.6%.

[41] In the *Carter* case Madam Justice McLachlin had to decide whether deviations within $\pm 25\%$ of the provincial quotient could be justified on the basis of valid considerations. She found that the electoral map showed a tendency for "urban" seats to have more voters than "rural" seats with the urban seats generally being over the provincial quotient and the rural ridings generally being under the provincial quotient. She found the discrepancies were not great. She makes the following comment on this situation at p.192:

The actual allocation of seats between urban and rural areas is very close to the population distribution between those areas. The rural areas have 53.0 percent of the seats and 50.4 percent of the population. Urban areas have 43.9 percent of the seats and 47.6 percent of the population.

[42] She found these deviations to be relatively small and to closely approximate the actual split between urban and rural population. She held that any variances were justified on one or more of the following factors: more difficult to represent rural ridings than urban, geographic boundaries, growth projections and community interests.

[43] The appellants now submit such factors are not really present in Prince Edward Island to justify the deviances which exist in this Province. It submits the evidence establishes that it is not more difficult to represent rural ridings; there are very limited geographic boundaries or features that play a significant role; and there is not much change in population. It submits the deviances are really due to respect for the county line boundaries coupled with the designation of five members for Kings County.

[44] The respondent, on the other hand, submits the deviances are justified on one or more of the following criteria:

- (a) the practical problems of ensuring that district boundaries can be readily identified and described;
- (b) the practical problems encountered in the use of polling divisions as building blocks;
- (c) the practical problems associated with the use of small numbers;
- (d) geographic concerns/natural boundaries;
- (e) desirability of maintaining compactness and contiguity of districts;
- (f) linguistics minority claims to representations;
- (g) regional claims to representation;
- (h) urban/rural differences;
- (i) other community of interest concerns;
- (j) the traditional role played by county lines;
- (k) the need for political compromise;
- (l) the desirability of making gradual but substantial change.

[45] The respondent submits the present redistribution is a political compromise that accommodates, in a relatively measured way, all the competing interests involved and, as such, should not be interfered with by the courts. It submits the electoral map need not be the optimal plan that is capable of achievement in order to be constitutional. It also submits that since redistribution is a legislative function, rather than a judicial function, there must be room for legislative negotiation and compromise on practical problems.

[46] The following chart shows the county elector populations and the allocation of districts based on the 1993 figures. These figures establish that the actual elector population obviously played a major role in the allocation of districts to the counties, but I do not find the end result to show significant, material deviations.

TABLE 5				
COUNTY	% ELECTORS	% DISTRICTS	ACTUAL DISTRICTS	DISTRICTS ENTITLED TO
PRINCE	32.83	33.33	9	8.9
QUEENS	51.90	48.15	13	14.0
KINGS	15.25	18.5	5	4.1

[47] The parties to this appeal agreed that the 27 Districts in this Province can be divided into 16 rural districts and 11 urban districts with the following percentages of seats and electors.

TABLE 6			
	ELECTORS	DISTRICTS	DIFFERENCE
Rural Electors	54.3%	59.3%	5.0%
Urban Electors	45.7%	40.7%	5.0%

[48] This difference is, in my opinion, well within the tolerances accepted by Madam Justice McLachlin in the *Carter* case and represents a very marked reduction in the over representation of rural districts and the under representation of urban districts that was present in the electoral map that was before Mr. Justice DesRoches.

[49] These figures show that the effect of the new redistribution is to allocate more districts to the urban areas which reflect the population increase in those areas and gives due weight to the principle of relative voter parity. However, it is also worthy to note there are at least three rural districts with more electors than at least eight of the urban districts, and two of these rural districts are in Queens County. Any additional district for Queens County would in all likelihood be a rural district and not an urban district as the appellant seemed to suggest it should be.

[50] These charts illustrate, I believe, that it is difficult to accept the appellant's suggestion that a process was at work to adjust boundaries in such a manner that there would be systemic over representation of rural electors at the expense of the urban electors.

JUDICIAL DEFERENCE

[51] Another matter which plays an important role in the determination of this issue is Judicial Deference. Madam Justice McLachlin makes this very clear in the *Dixon* case where she points out that deference must be accorded to the Legislature in answering the question. She states at p.266:

In determining the amount of deviation permissible, deference must be accorded to the legislature. It is in a better position than the courts to determine whether deviation is required. However, in making that determination, the legislature must act in accordance with such legal principles as may be found to be inherent in the Charter guarantee of the right to vote.

[52] Madam Justice McLachlin makes the following statement on deference in the *Carter* case at p.189:

It is important at the outset to remind ourselves of the proper role of courts in determining whether a legislative solution to a complex problem runs afoul of the Charter. This court has repeatedly affirmed that the court must be cautious in interfering unduly in decisions that involve the balancing of conflicting policy considerations.

[53] Madam Justice McLachlin determined that the provincial electoral districts in British Columbia violated the right to vote guaranteed by s.3 of the Charter. She then proceeded to determine whether the infringement of s.3 was saved by s.1 of the Charter. The issue then became whether population discrepancies which were incapable of being supported under s.3 of the Charter could be upheld under s.1 of the Charter. Before applying the analysis as enunciated by the Supreme Court of Canada in *R. v. Oakes* (1986), 26 D.L.R. (4th) 200, she again refers to the deference which must be given to the legislature by the court. She states on pp.271-272:

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 Book & Art Ltd.* (1986), 35 D.L.R. (4th) 1, [1986] 2 S.C.R. 713, 55 C.R. (3d) 193 (S.C.C.), 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 populations 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.

[54] It is obvious from these foregoing comments that the legislative process must be

allowed to operate without undue judicial interference.

[55] The appellant submits Chief Justice MacDonald erred in according the Legislature a high level of judicial deference. It submits that a high level of deference should not be accorded to the Legislature in this case as an independent commission was not required and, in fact, did not exist. The appellant bases this submission, in part, upon what it submits was a flawed and unfair process. I have already indicated supra at p.12, that I do not find any merit in such a submission.

[56] There is considerable acceptance in Canada for a variance of $\pm 25\%$. This is the figure adopted for Federal elections and it prevails in such provincial jurisdictions as Alberta, British Columbia, New Brunswick, Ontario, Quebec, Yukon and the Northwest Territories. Smaller variances are found in Manitoba, Newfoundland and Saskatchewan. Nova Scotia, it appears, does not have any provision in its legislation for a variance figure.

[57] The appellant, in my opinion, has not shown a breach of s.3 of the Charter because of the $\pm 25\%$ variance. I am satisfied that reasonable people applying the appropriate principles could indeed have established the electoral boundaries in this Province as they now exist.

[58] I, therefore, do not find that the $\pm 25\%$ variance has caused any infringement of the right to vote in s.3 of the Charter.

BURDEN OF PROOF

[59] The appellant submits Chief Justice MacDonald erred in his analysis of s.3 of the Charter by employing a shifting evidentiary burden of proof with the end result being that the ultimate burden remained on the appellant throughout. It submits he erred in his interpretation of the manner in which Madam Justice McLachlin placed the burden of justification on the Government in the *Carter* case.

[60] The appellant submits that when Madam Justice McLachlin came to consider whether s.3 of the Charter had been violated in the *Carter* case, she appears to have applied the same principles and factors to the s.3 analysis as she applied to the s.1 analysis in the *Dixon* case. In other words, her approach was to largely subsume the usual s.1 analysis into the s.3 analysis and, the appellant submits, in so doing she placed an insurmountable burden on the appellant under s.3 of the Charter. The appellant submits the analysis of the Charter right at issue and the saving provision in s.1 should be kept analytically distinct because of the danger of confusing the allocation of the burden of proof. One must always bear in mind that it is up to the citizen to establish an infringement of a Charter right and that it is for the state to justify the infringement.

[61] The appellant submits Madam Justice McLachlin should have followed the same

approach she applied in *Miron v. Trudel*, [1995] 2 S.C.R. 418 (S.C.C.) where she deals on pp.485-486 with the division of the equality analysis between s.15(1) and s.(1) of the Charter. It also relies on the viewpoint expressed by Robert E. Charney in his article *Saskatchewan Election Boundary Reference: "One Person - Half a Vote"* (1992) N.J.C.L. 225 (Schedule A, Tab 12, Appellant's Authorities) where he states that the factors which may need to be taken into account to ensure effective representation should not have been used in the s.3 analysis but should have been taken into account as justification under s.1 of the Charter. Mr. Charney states on p. 229 of his article:

While I agree with the Court's conclusion that these factors may well 'justify' deviations from absolute voter parity, I believe that the Court was wrong to incorporate these justifications within Charter section 3. Instead, these considerations should have been taken into account as justifications under section 1 of the Charter.

[62] The appellant now urges this court to approach the s.3 and the s.1 analysis in the manner adopted by the Supreme Court of Canada in *The Queen v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.).

[63] The appellant may disagree with the approach Madam Justice McLachlin took to her analysis of s.3 of the Charter in the *Carter* case, but I am bound by her decision. I, therefore, do not accept the appellant's submission that Chief Justice MacDonald erred when he subsumed in his s.3 analysis what the appellant submits should be done in a s.1 analysis and thereby shifted the burden of proof. Madam Justice McLachlin did not lose sight of where the burden of proof of justification fell having observed that it fell upon the Province. She concluded that she did not have to go beyond the s.3 analysis as she found the evidence supplied by the Province was sufficient to justify the existing electoral boundaries.

[64] Chief Justice MacDonald interpreted her use of the word "justify" to mean that the appellant, faced with the explanation put forth by the Province, was not able to meet the burden of establishing an infringement of s.3 of the Charter so as to get to a s.1 analysis. This is in keeping with the proper allocation of the burden of proof in such analysis. The citizen has to establish an infringement of a Charter right and then it is for the state to justify the infringement.

[65] It must be remembered that in this case the Charter right involved here is effective representation and not one of just numbers. The appellant has the burden of establishing there has been a denial of effective representation and more than numbers is required.

MIXED DISTRICTS

[66] The appellant's final submission is that Chief Justice MacDonald erred in concluding that mixed districts satisfy the requirements of s.3 of the Charter for effective

representation.

[67] The appellant submits mixed districts do not provide effective representation in that they combine urban and rural electors, who do not share a sufficient community of interest, together in one district. It also submits that even if mixed districts are acceptable, then the proportion of them is unacceptable.

[68] The appellant takes considerable exception to the fact that the electoral map for the Province does not follow municipal boundaries. It submits the City of Charlottetown and the City of Summerside are distinct communities of interest and they should not be placed into mixed districts where their legislative representation, or their legislative voice, is muted as a result of being represented by members having to be accountable for both rural and urban interests which may often be divergent or even in conflict.

[69] The respondent submits there is no constitutional requirement that municipal boundaries be respected in electoral distribution.

[70] Chief Justice MacDonald held there was no clear evidence as to any inherent disadvantage in mixing districts in this Province, and I agree with his conclusion. There is no evidence to establish that any of the mixed districts in this Province affect any citizen's right to effective representation. Even the appellant's own expert witness, Dr. Arrington, does not appear to be against mixed districts.

[71] I, therefore, dismiss the appeal, and it is not necessary for me to deal with the issues raised on the respondent's cross-appeal. I make no order as to costs.

The Honorable Chief Justice N.H. Carruthers

I AGREE WITH CHIEF JUSTICE N.H. CARRUTHERS:

The Honorable Mr. Justice J.A. McQuaid

MITCHELL J.A.(dissenting):

[72] This appeal and cross-appeal from a decision of a judge of the Trial Division reported at [1996] 2 P.E.I.R. 382, involve a constitutional challenge to the provincial electoral distribution in the province of Prince Edward Island. My conclusion is that the electoral boundaries created by the *Electoral Boundaries Act*, S.P.E.I. 1994, Cap. 13, do violate the right to vote enshrined in s.3 of the *Canadian Charter of Rights and Freedoms*.

[73] The challenge is based on claims that the variances among voter populations in the districts are too great; that there are too many mixed districts; and that the process was flawed.

[74] This court has previously decided that the appellant has standing, and contrary to the contention of the respondent, I am of the view that it also has the legal capacity to proceed with the matter.

[75] The background of the case is set forth in the reasons of the Chief Justice. I will not repeat it here.

[76] According to McLachlin J. speaking for the Supreme Court of Canada in *Ref. Re: Electoral Boundaries Commission Act (Sask.)* (1991), 81 D.L.R. (4th) 16 (S.C.C.), at p.34, the proper way for the court to proceed in dealing with such a case is to:

- a. define the scope of s.3;
- b. evaluate the existing boundaries in light of that definition;
- c. conduct a s.1 analysis if a violation is found.

[77] The first task has already been taken care of by McLachlin J. in the above noted case hereinafter referred to as the "Carter" case. At p.35 she said the purpose of the right to vote under s.3 of the Charter is not equality of voting power *per se* but effective representation. She went on to say that in our type of democracy effective representation means each citizen should have a voice in the deliberations of government and have access to their representative. She identified relative voter parity as the primary condition of effective representation. She pointed out that undue dilution of one person's vote compared to another would adversely effect the legislative power and access to representation of the citizen whose vote was diluted.

[78] Although she gave it primacy, McLachlin J. said that parity was not the only factor to be taken into account in ensuring effective representation. She acknowledged that effective representation often cannot be achieved without taking into account countervailing factors. She identified two practical realities that have to be taken into account. First, that absolute parity is not possible. Secondly, that in some situations such relative parity as is possible may have to give way to other factors (e.g. geography,

community history, community interests and minority representation) to ensure that our legislative assemblies effectively represent the diversity of our social mosaic.

[79] After saying that deviations from absolute voter parity may be justified on grounds of (1) practical impossibility, or (2) the provision of more effective government, McLachlin J. at mid p.36 immediately warned "beyond this, dilution of one citizen's vote compared to that of another should not be countenanced." She reiterated and confirmed what she had said earlier in *Dixon v. British Columbia (Attorney-General)* (1989), 59 D.L.R. (4th) 247 (B.C.S.C.) at p.267 that:

...only those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues, within the populace and geographic factors within the territory governed.

[80] Madame Justice McLachlin in the *Carter* case says the right in s.3 must be interpreted according to its purpose. She points out there is little to suggest the framers of the Charter intended to adopt the American model and have voter parity as their ultimate goal. Absent such evidence she says one should assume that the goal was to recognize the right affirmed in this country since the time of Sir John A. MacDonald. That is, a right to effective representation in a system that gives due weight to voter parity but admits other considerations where necessary. The history of our right to vote and the context in which it existed at the time the Charter was adopted, support the conclusion that its purpose was not to affect perfect voter equality, but rather, the broader goal of guaranteeing effective representation. Canadian democracy has developed in a way that tolerates deviation from voter parity in the interests of better government.

[81] Madame Justice McLachlin at the bottom of p.38 of the *Carter* case says that one of the practical living facts to which the courts must be sensitive in interpreting the s.3 right is that effective representation and good government in this country compel those charged with setting electoral boundaries to sometimes take into account factors other than voter parity. At p.39 she defines the right to vote as a guarantee of effective representation. She rejects the concept of absolute voter parity because it does not accord with the development of the right to vote in the Canadian context and because it does not permit sufficient flexibility to meet the practical difficulties inherent in governing a country such as Canada. Thus, effective representation, not parity, is the ultimate goal. However, relative parity is the prime condition of effective representation and departure from it must be justified on the basis of necessity for the provision of better government.

[82] The question this court has to consider now is whether the P.E.I. electoral boundaries violate the right to vote as the Supreme Court has defined it. In this phase of the process, we are again guided by the reasons of McLachlin J. in the *Carter* case. At pp.39-40 she cautioned courts not to interfere with a Legislature's electoral map unless reasonable persons *applying the appropriate principles* could not have set the boundaries

as they exist. The appropriate principles she refers to require that map makers strive for *equality of voter power subject only to such limits as are required for good government*. Departure from parity may not constitute a violation of s.3 *so long as it can be objectively justified as contributing to better government*. See: *Dixon*, supra, at p.271.

[83] Considering the small size and population of P.E.I. outsiders might be forgiven for considering any debate here about lack of representation somewhat a tempest in a teapot. Relative to others, Islanders as a whole certainly cannot claim under representation. However, that is not the issue in this case. The issue is about the justification for giving some Island voters better access to representation and more voting power than others. The question is whether the deviances are based upon a reasonable application of the correct principles. It is just as important and just as legitimate to insist on the application of correct principles regarding voter population deviances in this province as it is elsewhere.

[84] It is in light of all the foregoing that we must now consider the P.E.I. electoral map and determine whether the boundaries can be justified on the basis of valid considerations. The appellant identifies two areas of concern: (1) variances in voter populations among districts; and (2) the number of mixed (urban/ rural) districts. The appellant contends that the variations are not justified and that the mixing of urban and rural voters to the extent that has occurred is not conducive to effective representation and therefore violates s.3. The appellant also takes issue with the process used, but I do not find a sufficient basis there for ruling that s.3 has been infringed.

[85] The *Electoral Boundaries Act* provides for 27 districts, nine in Prince County, thirteen in Queens County, and five in Kings County. Like the trial judge I am not satisfied that the number of mixed districts (urban/rural) has such an adverse effect on effective representation as to violate s.3. Furthermore, I do not find the distribution of districts among urban and rural voters significantly out of line with their respective percentages of the population. However, the issue of deviations in voter populations among the individual districts is much more problematic. The trial judge ruled against the appellant because he found a variance range of $\pm 25\%$ not "manifestly unreasonable" in spite of his own conclusion that in nearly all cases the justifications offered by the respondent were without merit.

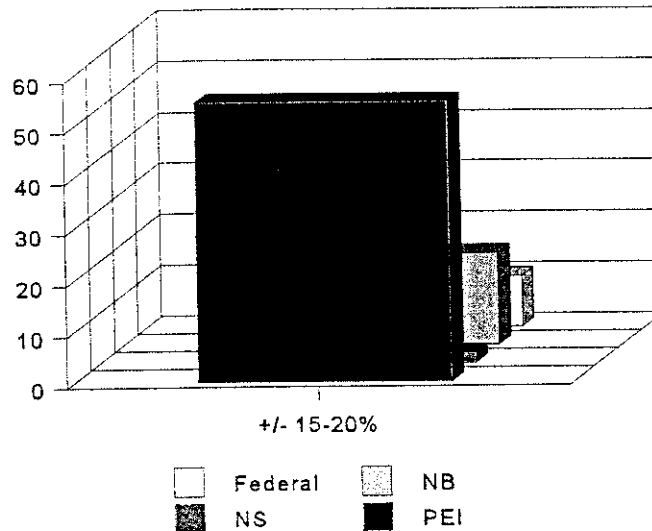
[86] The party alleging a violation of s. 3 bears the ultimate burden of proof and, as appears from the decision of McLachlin J. at p. 45 in the *Carter* case, cannot rely solely on population evidence to discharge it. In this case, the appellant did not rely on numbers alone but, in addition, advanced both expert and lay evidence to prove the deviations were not justified as necessary in the interests of better government for the populace as a whole. In any event, just because the applicant in a Charter case bears the ultimate burden does not mean they bear this burden at every turn on every relevant issue. In practice, the burden of persuasion tends to shift back and forth between the parties depending on what the issue is and who is seeking to rely on it. Of course, if at the end of the day the evidence does not

establish a violation on a balance of probabilities, the applicant loses. In my view, the evidence adduced by the appellant was sufficient to meet the threshold for shifting the burden of persuasion to the respondent to justify the deviances.

[87] The evidence before the trial court indicates the deviances under the current map were considerable from the beginning. Nearly 60% exceeded the provincial quotient by $\pm 15\%$. Based on figures from the 1996 general election that were not available to the trial judge but which were introduced on this appeal, the deviances have become even more pronounced at the extremes. Four (14.8%) of the twenty-seven districts have variances exceeding the provincial quotient by $\pm 25\%$; 9 (33.33 %) exceed $\pm 20\%$; 15 (55.55 %) exceed $\pm 15\%$; and 21 (77.77 %) exceed $\pm 10\%$. The largest exceeded the quotient by 27.28% while the smallest fell 25.42% below. Four exceed the limit that a commission established under the *Electoral Boundaries Act* is even permitted to recommend. See: s-s. 17(2).

[88] When one considers the comparative Maritime Provinces and Federal data supplied by the respondent's witness Jennifer Smith, the proportion of P.E.I. districts in the ± 15 to 20% range is, to use her term, "overwhelming." See: paragraph 66 of her report at p.2567 of vol. 12 of the Appeal Book. Prince Edward Island has 55.55% in that range while New Brunswick has 18%; Nova Scotia has only 2%, and the Federal (based on 1987 figures), 10%. Ms. Smith's comparison is depicted in the following graph:

**Comparison of Deviations from Quotient
For Federal (1987), N.B. N.S. and P.E.I.**



The graph makes it easy to understand why Ms. Smith would be "overwhelmed." Prince Edward Island is truly in a class by itself when it comes to variances in this range.

[89] It seems common ground that deviation is appropriate in the case of district 24, Evangeline-Miscouche, because of its distinctive Acadian culture. The question is whether the deviations from voter parity in the various remaining districts can also be justified on the basis of valid considerations. It must be remembered that the only valid considerations which can justify deviations from voter parity are those that are necessary to provide better government. Neither map drawing convenience nor the need to respond to preset formats or quotas in themselves qualify as such justifications. In the *Carter* case, McLachlin J. concluded at p.45 that "the evidence supplied by the Province is sufficient to justify the existing electoral boundaries." She found that discrepancies between particular ridings appeared to be justified on the basis of factors such as geography, community interest, and population growth patterns. I don't believe similar findings can be made in this case. Indeed, at pp.393-399 of his decision the trial judge finds that virtually all of the grounds of justification for the variances advanced by the respondent are without merit. The lone exception related to district 24, Evangeline-Miscouche.

[90] It can readily be seen that the deviances in the P.E.I. electoral map are driven in large measure by the legislated requirement to give five of the 27 seats to Kings County, and the indication from the Legislature that variances of up to $\pm 25\%$ would be tolerable. This is confirmed by the trial judge at p.397 of his reasons where states: "It is the

requirement of five seats in Kings County that necessitated the variance level of $\pm 25\%$." All five of the Kings County districts have deviances ranging from -15.54% to -25.42% . These ridings are predominantly rural. However, in the P.E.I. context, the evidence does not support the conclusion that our rural districts are more difficult to serve than our urban ones. Distances are not great. Roads are plentiful. Communication is easy. There is not a community that is as much as a hundred miles from the capital. Compared to other provinces, the Island is quite densely populated. The population is relatively homogeneous in racial and ethnic terms. There are certain hydrologic features that should be taken into account, but there are no mountains or large empty spaces. The deviances among districts in the current map are not explained by the need to accommodate geographic barriers. The county lines in P.E.I. do not demark the borders of any distinct communities of interest. As political divisions in this province, counties are historical anomalies that ought to be abandoned rather than traditions that deserve preservation. It does not appear that the variances in the Kings County districts can be justified on the basis of any projected population growth patterns. In fact, one of the Kings County districts includes some Queens County areas within it. If it were not for that, its deviance would be even greater. In short, no valid justification has been advanced for a rural district in Kings County to have fewer voters than rural or urban ones elsewhere in the province. In fact, apart from the Acadian district of Evangeline-Miscouche, no adequate justification has been advanced for any of the deviations among districts elsewhere in the province. The dilution of a North River-Rice Point citizen's vote compared to one from Montague-Kilmuir by a proportion of 1:1.7 or that of a West Point-Bloomfield voter to that of a Park Corner-Oyster Bed voter by a proportion of 1:1.6 has not been justified by the province on the basis that it is necessary for the sake of more effective representation or better government. There does not appear to be any valid justification for limiting the access to representation of the 4277 voters of Kensington-Malpeque to the same level as that provided to only 2713 voters in Murray River-Gaspereaux.

[91] The province argues that even if the appellant's position is accepted, Kings County would only be over represented by one seat and Queens under represented by one seat. The province therefore suggests the appellant is making too much fuss over one seat. This argument has a rather beguiling allure. It tends to take the focus off individual variances and to trivialize the complaint. However, a citizen's democratic right to vote is too hard won and precious to be rationalized away so easily. If there is a hierarchy of Charter Rights, the right to vote stands near the top for it is expressed in unqualified terms, and it is not subject to a s.33 override. The dilution of a citizen's vote should never be regarded as a trifling matter. The right to vote is of fundamental importance to a free and democratic society. Indeed, as Cory J. said in the *Carter* case at p.22: "The right to vote is synonymous with democracy." Accordingly, it must be guarded jealously against any undue encroachment. The unjustified dilution of any citizen's vote is a blow against democracy and therefore is constitutionally unacceptable in Canada. Deviation from voter parity is acceptable if necessary for effective representation; but apart from that, it is necessary to avoid deviation to the extent possible. In any case, in the P.E.I. context one extra seat for

Kings County is not really a small matter. Absent other valid justifications, it means that, at the expense of other citizens' rights to effective representation, Kings County would have 25% more seats than its share of the Island's population would warrant. Even if it is true that Kings County needs five seats for effective representation, that does not justify the under representation of others.

[92] The respondent argues the current electoral map should be upheld as a reasonable and necessary political compromise. It says the need for this compromise arose because it was apparent that the recommendations of the *Election Act* and Electoral Boundaries Commission established pursuant to EC451/93 did not have sufficient support among legislators to become law. I agree with those who say that political compromise cannot and should not be divorced from the legislative process. However, the perceived need to find a compromise does not provide justification for infringement of a Charter right. Legislatures are limited in what they can do by the constitution. The *Constitution* is the supreme law of Canada, and any law that is inconsistent with it is of no force or effect. Legislators are not free to make compromises that infringe Charter rights. Accordingly, no politician or legislature has the right to compromise even a single citizen's right to effective representation as guaranteed by s.3 of the Charter. If legislation, whether achieved through political compromise or otherwise, violates a Charter right, there is no room for judicial deference unless it passes the test of s.1. On the other hand, if an electoral map is the product of the reasonable application of the correct principle (equality of voting power subject only to such limits as are required for good government; per McLachlin J. at p. 271 of *Dixon*, supra, and at p. 36 of the *Carter* case, supra.) a court should not interfere even if the boundaries are not as it would have drawn them. Unfortunately the legislative solution arrived at in this case does not meet the threshold for deference.

[93] It is true that P.E.I.'s irregular shape and its rivers, bays and inlets present certain challenges to a map drawer trying to define districts with near equal populations. But according to the witness Dr. Theodore S. Arrington, an expert on voting rights, districting, and elections systems, they are far from insurmountable and certainly do not justify having over 75% of the provinces 27 districts with deviances exceeding $\pm 10\%$. Indeed, Dr. Arrington saw no difficulty in following P.E.I.'s major hydrological features when necessary and at the same time keeping all of the districts relatively equal in population. Aside from the case of Evangeline-Miscouche, I do not believe the province has supplied evidence on the basis of factors such as geography, community of interest, minorities, or population growth patterns to justify in the interests of good government the number and extent of the discrepancies that exist among the various districts. On the contrary, I am satisfied the evidence considered as a whole establishes on a balance of probabilities that on the basis of the present district map, a significant number of citizens have their votes unduly diluted compared to others without justification on the basis that such dilution produces better government for all. Accordingly, I find that the P.E.I. electoral boundaries violate s.3 of the Charter.

[94] The next issue is whether the infringement is justified under s.1 of the Charter. I have concluded it is not. The discrepancies are not rationally connected to addressing any substantial and pressing need. Furthermore, assuming there was some pressing and substantial need, there is no evidence that the means taken to address it impair the rights of citizens as little as possible. Accordingly, the electoral boundaries are not saved by s.1. The province argues that the current map is at least a considerable improvement over the one it replaced and that such incremental reform ought to be accepted at least until the next Commission Report provided for under the *Electoral Boundaries Act*. I agree that the current map is an improvement compared to the one considered by DesRoches J. in *MacKinnon v. The Government of Prince Edward Island* (1993), 101 D.L.R. (4th) 362, 104 Nfld. & P.E.I.R. 232 (P.E.I.S.C.-T.D.). However, I do not consider it adequate. In my view, all citizens of the Island are entitled to the full measure of their constitutional right to vote as defined by McLachlin J., and they are entitled to have it now. Incidentally, DesRoches J. in *MacKinnon*, supra, and the trial judge in the present case both indicated that variances of $\pm 10\%$ but not greater might be acceptable in P.E.I. As I pointed out earlier, under the current map, 77% of the districts exceed $\pm 10\%$; 55% exceed $\pm 15\%$; 33% exceed $\pm 20\%$; and 15% exceed $\pm 25\%$. In my view, such deviations are unjustified and citizens should not have to wait years in hopes that a Commission established under s.8 of the *Electoral Boundaries Act* will recommend correction of the situation and that the Legislature will act on it. The Charter is the supreme law of the land, and it says nothing about citizens having to wait for their right to vote. Furthermore, I do not endorse a 10% variance as being automatically acceptable. Parity is the prime condition for effective representation. All variation from parity must be justified on the grounds of practical impossibility or the provision of more effective representation. See: McLachlin J. at p.39 of the *Carter* case. Thus, in a given case the appropriate variation may be more or less than 10%. For example, I agree with the trial judge's observation that even a greater deviance than exists might have been justified for district 24. There is no limit to the amount of deviation allowed provided it is justified as necessary for more effective representation. On the other hand, aside from the impossibility factor, any deviation beyond that necessary for more effective representation is not constitutionally permissible and as McLachlin J. said "should not be countenanced". I do not agree with the view of the majority of this court that any variance falling within $\pm 25\%$ should be tolerated. All deviances must be justified. Here, except for district 24, they were not.

[95] Accordingly, I would allow the appeal, dismiss the cross-appeal, and reverse the decision of the trial judge. He did not apply the correct test. He found the Legislature had not acted manifestly unreasonably, but he did so without considering whether they had applied the correct principle. The test is not whether the boundaries can be rationalized. It is whether reasonable persons applying the correct principle of equal voting power, subject to such limits as required for good government, could have set them as they exist. It is obvious from pp.393-399 of his reasons that if he had applied the correct test, the result would have been different. The trial judge's decision falls under the weight of his own

findings. Except for the case of the Acadians of district 24, he rejected all explanations put forth by the respondent in support of the deviations. The trial judge himself and the respondent attempt to downplay the significance of the former's findings which show a lack of justification for the deviations. After making them the trial judge said: "The comments I have made on those latter pages in no way detracts from the opinion I initially reached. They are merely an expression of my thoughts on some of the various issues that were raised in the trial." However, findings regarding justification were essential to a determination of whether the deviations were the result of a reasonable application of correct principles. That is the central issue of the case. In my view, the trial judge's findings on justification not only detract from, but completely undermine, his decision that the deviations do not violate s.3.

[96] Having concluded the trial judge ought to have found a Charter violation and that it was not saved by s.1, what is the appropriate remedy? In my view, it is a declaration of invalidity under s.52 of the Charter. However, I have also concluded that the prudent approach in this case would be to suspend the declaration of invalidity. Accordingly, I would declare that the current electoral boundaries under the *Electoral Boundaries Act* are invalid because they infringe s.3 of the Charter. However, so as not to precipitate a crisis and to allow a reasonable time to rectify the situation, this declaration shall be suspended for a period of eighteen months.

[97] Finally, I want to add that I agree with those who say that electoral boundaries ought to be reasonably durable and not constantly changing. On the other hand, the desirability of consistency is not justification for maintaining boundaries that violate Charter rights. I am confident that boundaries will remain relatively stable once they are established according to the correct principles. After that, generally speaking, they should only require periodic review such as is contemplated under the present legislation.

[98] I would award the appellant costs, both here and in the court below.

The Honorable Mr. Justice G.E. Mitchell