A Tale of Two Commissions:
Historical Minorities and Consociational Districting in Nova Scotia

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Introduction

The periodic revision of electoral boundaries by independent electoral boundary commissions has been a key component of the federal electoral process in Canada since the 1960s, and in every province since the 1990s. As described by John Courtney, electoral boundary commissions and the redistricting process has become an 'institutional building block' vital to the construction and operation of legislatures (Courtney 2001, 237). But while electoral jurisprudence has provided legal guidelines for legislatures and commissions, these guidelines have remained ambiguous and open to interpretation, and in a highly federalized country such as Canada, this has given provinces leeway to apply these guidelines in a fashion unique to their provincial context. In effect, these institutional building blocks have been adapted to unique provincial contexts. This has been made possible because Canadian courts have opened up legal 'space' for the exercise of discretion by legislatures and boundary commission mapmakers – where and when they are disposed to do so – that can be legitimately occupied to protect the political representation of minority communities. In effect, over time and with repeated redistributions, minority electoral districts can become *de facto* and to some extent *de jure* a **consociational** feature of the political system. This is precisely the evolved situation in the province of Nova Scotia.

Nova Scotia stands apart from other Canadian provinces in both the process and outcome of its redistribution exercises, beginning with its first one in 1992. In particular, it has been the only province to embrace the practice of 'affirmative gerrymandering' or 'consociational districting' as a means to ensure the effective political representation of two historic minority communities: Acadians and African Nova Scotians. It has done this by protecting four minority seats under the 'exceptional circumstances' dispensation for any riding exceeding the +/-25% outer limit on deviation from absolute voter parity, a standard enshrined in federal legislation and subsequently adopted by seven of ten provinces, including Nova Scotia. This use of the exceptional circumstance dispensation is unique in Canada, and runs directly counter to the trend in redistribution exercises elsewhere toward reducing the extent of population variance between electoral districts. Nor did territorially-concentrated minority groups elsewhere seize on the Carter decision as grounds for the construction of electoral districts, as in Nova Scotia (Courtney 2004, 63).

This paper will focus on the 'politics of redistricting' in the Nova Scotia case through examination of the province's controversial 2012 Electoral Boundary Commission (EBC) report, its political and legal contestation, and the special 2019 EBC established to rectify (bring into legal and constitutional compliance) the impugned 2012 electoral map. The paper will highlight normative and institutional issues raised by the Nova Scotia experience, along with its potential significance of an exemplar and model for other jurisdictions.

Electoral Districting and 'National Group' Representation

In a 2018 article in the *Canadian Journal of Political Science*, Aaron John Spitzer argues that the courts have granted francophone minority communities in Canada a "sort of" consociational form of protection in the districting process (462). He bases his argument on the wording and outcome of several court decisions, beginning with the Supreme Court's *Carter* decision (1991) and most recently the Nova Scotia Court of Appeals decision in *Reference re the Final Report of the Electoral Boundaries Commission* (2017). In Spitzer's view, the principles by which representation is apportioned in Canada is complicated in the first instance by federalism, "where

representation attaches not only to individuals but also to territorial polities", but also by the country's multinational character, "where rights-bearing polities are not (or not solely) territorially defined, but are discrete ethnic, cultural, linguistic or religious peoples"(448). Whereas the former can lead to non-equipopulous apportionment between territorial units within a federation, the latter can find expression through polity-based representation in a consociational dimension. This enhances the legitimacy of democratic institutions by accommodating national groups who have grounds to assert a moral and legal claim to various forms of ethno-national power-sharing arrangements.

Overweighting of francophones in political institutions (the cabinet, judiciary, bureaucracy) is a long-established practice and tradition in Canada, along with legislative and constitutional guarantees for official language minority communities. Additional consociational arrangements are those that grant a form of non-territorial autonomy for minority communities in the education, health care or other policy fields. While such arrangements may be an affront to classical liberalism which privileges formal individual equality (expressed in electoral terms through voter parity), Spitzer argues that Francophone Minority Community (FMC) claimants, like Acadians, "might be owed internal self-determination based on constitutional guarantees" (459), including rights of representation. He acknowledges, however, that the courts have not adopted this particular line of reasoning in decisions upholding legal challenges to electoral maps that submerge francophone minorities, as in New Brunswick and Nova Scotia (450-51). Rather, they have sidestepped ruling on such consociational representation claims, relying instead on 'effective representation' and 'community of interest' concerns to provide legal space for exemptions from the egalitarian principle of voter parity. Spitzer argues this judicial reasoning conflates constitutionally distinct, first-order polity-based rights with second-order egalitarian concerns, a lack of jurisprudential clarity "that may ultimately erode the legitimacy of governance in multinational states like Canada" (464).

Spitzer worries that a potentially significant feature of multinational governance in Canada – consociational apportionment – has been set aside in electoral jurisprudence in favour of something of less political and constitutional significance: affirmative gerrymandering. Indeed, these worries may be justified, as we will see, by the recent history of protected minority ridings in Nova Scotia. On the other hand, the ultimate resolution of the status of these ridings may suggest otherwise. While many consociational practices in Canada do not take the form of explicit constitutional rights, they can and have been 'legally enabled' by the courts. Where such practices assume the status of political conventions embedded within the political culture and traditions of a jurisdiction, and buttressed by institutions that exert their own path dependency effects, the line between 'affirmative gerrymandering' and 'consociational apportionment' can become blurred to practical insignificance. This preference for evolved practice over entrenched constitutionality is itself a time-honoured tradition within Canadian federalism.

Electoral Boundary Adjustment in Nova Scotia, 1992-2012

The legal context for ensuring fair and democratic elections was entrenched with the adoption in 1982 of the Charter of Rights and Freedoms. Section 3 of the Charter reads as follows: "Every citizen of Canada has the right to vote in an election of the members of the House of Commons or of a legislative assembly and to be qualified for membership therein." In case law since the Charter's inception, the courts have interpreted the full meaning and import of this right for Canadian citizens by ruling on such issues as acceptable restrictions on the right to vote (eg, age

of eligibility). However, the most pertinent ruling for the boundary adjustment process was the *Carter* decision, handed down by the Supreme Court in 1991. At issue in *Carter*, or *Reference re Provincial Electoral Boundaries (Sask.)*, was the question of variance in the size of voter populations between constituencies, and whether the sec. 3 Charter right of some citizens had been infringed by proposed changes to Saskatchewan electoral boundaries which treated urban, rural and northern ridings differently. In its ruling, the Court held that the purpose of the right to vote enshrined in the *Charter* is not equality of voting power *per se* but the right to "effective representation".

"*The right to vote therefore comprises many factors, of which equity is but one. The section does not guarantee equality of voting power. Relative parity of voting power is a prime condition of effective representation. Deviations from absolute voter parity, however, may be justified on the grounds of practical impossibility or the provision of more effective representation.* ***Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic.*** *Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced*" (emphasis added; excerpted from pages 8-17 of the Supreme Court's *Carter* decision, re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158).

In *Carter*, the Supreme Court found that a violation of sec. 3 of the Charter had not been established. More important in a general sense was the meaning given to sec. 3 of the Charter: a citizen right not to *equal* representation but to *effective* representation, with due consideration given to several factors, including community interests and minority representation. What Carter left unanswered, however, was the exact meaning of the terms "relative parity", "effective representation" and "exceptional circumstances"; as a result, the decision did not standardize varying interpretations of the guiding principles in redistricting. Instead, the difficult task of reconciling contradictory principles was left to legislatures and EBCs (Courtney 2001, 198-99). However, *Carter* did "contribute to a shift in the debate over territorially defined representational building blocks, moving it in a direction not previously a part of constituency redistributions in Canada" (Courtney 2001, 203).

In retrospect, *Carter* was a game-changer for the electoral boundary adjustment process in Canada, and for Nova Scotia in particular. In the wake of the decision, the province was exposed to the possibility of a constitutional ruling that would strike down electoral boundaries that did not conform to sec. 3 of the Charter. There was particular concern about excessive deviance in relative voter parity (or 'malapportionment') due in part to past practices of legislative gerrymandering. Indeed, between the 1960s and 1990s, no other province featured a greater degree of malapportionment in its electoral districts (Courtney 2001, 240).

This situation led to an all-party agreement in the Nova Scotia legislature to the establishment of the province's first "non-partisan" Electoral Boundaries Commission, comprised of a membership larger in size and "more demographically varied … than has been usual for Canada," including Acadian and Black representatives to ensure minority representation would be a focus (Courtney 2001, 102-103). Courtney in his comprehensive study *Commissioned Ridings* argues that no province was impacted by the *Carter* decision as much as Nova Scotia; it provided both the language for the establishment of an all-party Select Committee, as well as the terms of reference for the commission (174, 185). The subsequent electoral map drawn by the EBC – which included four protected ridings designed to encourage the election of three

Acadians and an African Nova Scotian – "was unlike any other in Canadian history" (Courtney 2001, 104).[1] These smaller-than-average minority districts were "justified in terms that the commission was certain would meet *Carter*'s goal of ensuring that a legislature 'represent the diversity of the social mosaic'" (Courtney 2001, 191).

While the Carter decision had changed the legal context for the process of reviewing and adjusting electoral boundaries, the provincial and national political context helps to explain the form and character of the Nova Scotia response. Provincial political sentiment had shifted strongly toward the need to reform the province's political system and governance practices. The new Premier in 1991, Donald Cameron, promised to move the province away from traditional politics (including patronage, corruption and fiscal laxity). In particular, reform of the electoral process, including the manner in which constituency boundaries were determined, was included in this reform agenda (Courtney 2001, 190). At the same time, the national political scene was engrossed in urgent negotiations and proposals to reform the Canadian constitution in order to stave off the surging movement toward secession in Quebec. Prominent on the agenda was the status of Quebec and Aboriginal Peoples, prompting debates across the country about minority rights and the need to recognize and accommodate minorities whose history and identity generated claims to 'distinct society' or 'nation' status within Canada.[2]

This political context helps to explain why Acadian and African Nova Scotian communities obtained special consideration in the 1992 redistribution. Both constituted historic minority communities that are indigenous to Nova Scotia, and further can be said to have fairly well-defined territorial 'homelands' that have been continuously occupied for hundreds of years. Their distinctiveness derives from their long evolution as ethno-linguistic or racial minorities within an English-speaking majority of predominantly Anglo-Celtic heritage, but also, just as importantly, from their distinctive, indigenous cultures that have developed over centuries of relative isolation as coherent communities (due to remote rural locale and social exclusion). In short, these minority cultures are very old, distinctively Nova Scotian *and* deeply rooted in specific, territorially-based communities.

Descendents of the early residents of these minority communities now reside throughout the province. However, this does not diminish the importance of constituency representatives from the protected ridings. Rather, the evolved demographic reality gives them a dual role both within and outside the legislature: they represent a particular geographic constituency but also act as representatives for the whole of the extended cultural community they represent. Acadians across the province depend on them to do what they can to preserve the distinctive Acadian language, culture and tradition. Similarly, a strong African Nova Scotian voter presence within the boundaries of the protected constituency of Preston has given its elected representative a special role to play on behalf of that cultural community.[3] They provide what Melissa Williams has called "voice" and "trust" in the representational process for marginalized groups, "especially those who can draw on a long memory of systemic discrimination" (Courtney 2001, 121).

A decade after the path-breaking 1992 Nova Scotia boundary commission, the Terms of Reference for a second EBC differed in two key respects. First, a 52-seat legislature was mandated and there was no mention of a designated Aboriginal seat. Secondly, a maximum variance of 25% (+/-) from the average number of electors per constituency was set, except for extraordinary circumstances, including the desire to promote minority representation of the Acadian and Black communities. Once again, four small ridings (all of which fell between .50

and .60 of the average constituency size) were exempted from the variance limit due to their 'exceptional circumstances'. It is worth noting, however, that the Final Report of the 2002 EBC also expressed some doubt about continuing with the protected ridings approach, as it recommended that the next Commission re-evaluate the method and means of encouraging effective representation for specified minority communities, "based on considerable public comment" it had received (Dodds, 36-37). Otherwise, the changes recommended by the 2002 Commission reflected the ongoing shift of population away from rural areas toward the main urban region of Halifax. Thirteen mainly rural counties in the province recorded population decreases, with four experiencing decreases greater than 10 percent.[4]

The Contested 2012 Redistribution

As we have seen, in the redistributions of 1992 and 2002, Nova Scotia extended protection to four provincial constituencies deemed to have a special significance. In three of these ridings – Clare, Argyle and Richmond – the Acadian population was either dominant or numerically very important. In the fourth electoral district of Preston, African Nova Scotians comprised a key component of the voting population. The special protection afforded to these minority constituencies provided a means to avoid the political dilution of the Acadian and African Nova Scotian voting population within the surrounding majority.

The 2012 Electoral Boundaries Commission found itself at the centre of a political controversy when its Interim Report to the government was invalidated (declared null and void) by the provincial Attorney General (a cabinet member in Darrell Dexter's NDP government). The Terms of Reference for the EBC differed in three key aspects from previous commissions. They stipulated an assembly of "not more than" 52 seats, freeing the Commission (if not signaling it) to reduce the number of ridings; further, they released the Commission of any constraint on a new electoral map imposed by the long tradition of observing the integrity of county or municipal boundaries. The most significant change, however, was the inclusion of section 2d), which triggered the dissent of the Select Committee's opposition members. This was the stipulation that there should be no exceptions to the maximum permitted variance in constituency population of +/-25%. This would effectively exclude the possibility of maintaining the four protected ridings that had been in place since 1992 (MacNeil, 2012a).

In its deliberations, the 2012 EBC recognized that there are a number of legal, constitutional and political factors relevant to the question of protected constituencies. French is one of Canada's official languages, given effect by the Official Languages Act (1969), amongst other laws and programs. Further, constitutional protection for minority language rights is entrenched in Sections 16-23 of the Charter of Rights and Freedoms. Provincially, the French Language Services Act and the creation of the Acadian school board are measures taken to preserve and promote the linguistic rights French-speaking Nova Scotians. The protection offered to the three Acadian constituencies was an additional measure taken to recognize and protect the indigenous Acadian communities from whence the vast majority of Nova Scotia's French-speaking population derives. As well, a detailed presentation by representatives of the Acadian community argued that more than two decades of special protection had established a political convention and moral covenant between the province of Nova Scotia and the minority populations in the affected constituencies.[5]

Taking these facts into consideration, and hearing extensive testimony and strong demonstrations of public support in the affected Acadian ridings during the public hearings process, the

Commission recommended that there continue to be an exemption for the four protected ridings of Clare, Argyle, Richmond and Preston from the maximum variance rule provided to the Commission in its terms of reference. Accordingly, in its Interim Report it recommended that the electoral boundaries of these districts remain unaltered, basing its decision on the constitutional right of the minorities in question to effective representation in the legislature. One Commission member strongly disagreed with this position and resigned in protest.[6]

Confronted with the Commission's non-compliance with section 2d) of the Terms of Reference, which the government insisted were legally binding, the EBC was formally directed by the Attorney General to prepare a new report, one that eliminated the four special ridings (MacNeil 2012b, 66). After internal discussion of its options – including the possible legal implications of refusing the directive, the wasted public money should the EBC be dismissed, and the importance of providing Nova Scotians with a revised electoral map before the next election – a decision was taken to revise the Interim Report such that all ridings were compliant with section 2d) of the Terms of Reference. This effectively abolished the protected ridings. The Commission's Acadian member, reflecting the strong negative public reaction in the affected minority communities, dissented from the Final Report, stating his conscientious objection to the elimination of the protected ridings.[7]

Like the Commissions before it, the recommended boundary changes in the 2012 EBC Report reflected the gradual but steady shift of population toward Halifax Regional Municipality (HRM). With the removal of protection for the Acadian ridings, their 'host regions' – Cape Breton and Southwest Nova Scotia – would lose three electoral districts while Halifax would gain two, reducing the size of the legislature to 51 seats. Other recommendations included consultation with minority communities on alternative forms of representation and study of electoral system reform, including public consultations on this issue. A final recommendation was that there should be an initial draft of proposed changes to electoral boundaries *before* the first round of public hearings, as a means of stimulating low levels of public response and participation in the process (MacNeil 2012c).

Reference re the Final Report of the Electoral Boundaries Commission

In October, 2014, the recently elected Liberal government in Nova Scotia asked the Nova Scotia Court of Appeal (NSCA) for its opinion on constitutional legality of the 2012 electoral boundaries. The case, heard by the court in September, 2016, was unprecedented. Entitled *Reference re the Final Report of the Electoral Boundaries Commission*, the decision to ask the court for its opinion on these questions was the result of negotiation over threatened legal action by the Fédération acadienne de la Nouvelle Écosse (FANE), who strongly objected to both the process and outcome of the 2012 redistribution exercise. The province submitted a two-step question to the Court. Did the actions of the Nova Scotia government toward the 2012 Electoral Boundaries Commission violate Section 3 of the Charter of Rights (the right to effective representation)? And if the Court answered 'yes' to this question, was the 'impugned legislation' that implemented the new electoral boundaries 'saved' by Section 1 of the Charter (the limits clause)? In its response, the Court answered YES to question 1 and NO to question 2. In effect, the Court of Appeal had placed in question the legality of provincial elections conducted on the basis of what now appeared to be (or potentially could be) legally invalidated electoral boundaries.

In handing down its opinion, the NSCA argued that the Attorney General's intervention had thwarted the 2012 Electoral Boundaries Commission in the performance of its constitutional mandate as required by sec. 3 of the Charter, resulting in a Final Report that was not the *authentic view* of the Commission. In effect, the Court ruled that the Government must allow an Independent Commission to carry out its work in an unimpeded fashion, to submit its recommendations in a Final Report, and to have the latter introduced unaltered into the House of Assembly in the form of a bill. The opinion raised two serious issues. First, the Court objected to the manner in which the government intervened in the workings of the Commission: the boundary review *process*. Simply put, the Attorney General had undercut the independence of the Commission, thereby contravening Section 5 of the House of Assembly Act (the legislation establishing Electoral Boundaries Commissions and the boundary review process). Secondly, by preventing the Commission from conveying its "authentic view" of an electoral boundary map that would best achieve the balance between voter parity and other considerations, the Commission was blocked from fulfilling its constitutional requirement under sec. 3 of the Charter ( ). In effect, the revised boundaries in the EBC's Final Report raised the possibility that the Charter right of the minorities in question to effective representation had been unjustifiably limited or denied. Clearly, in its comments the Court was also registering its misgivings about the *substantive* outcome of the boundary review, which was the reduction of the minority community's political influence to the point of ineffectiveness.

The Keefe Commission

In response to this NSCA opinion, the Nova Scotia government appointed the *Commission on Effective Electoral Representation of Acadian and African Nova Scotians*, chaired by former Deputy Minister of Justice Doug Keefe. The Commission was directed to provide recommendations on how best to achieve effective representation for Acadian and African Nova Scotians, in a manner consistent with the principles enunciated in the Carter decision. It was further directed to seek the advice and support of these minority communities on this issue, and to consider various options including the concept of *designated seats* similar to section 6(1) of the House of Assembly Act (pertaining to the provision for a Mi'kmaq seat in the legislature).

The Keefe Commission dismissed serious consideration of electoral system reform as a solution. While Keefe recognized "the tendency of our electoral system to submerge minority voters," he concluded that adoption of some version of proportional representation with a minimum threshold requirement would not guarantee the effective representation of Acadians and African Nova Scotians, unless this also included some form of quota, designated or reserved seats for these communities. Indeed, it was discussion of this latter option that generated the most intense Commission analysis and also its most difficult decision: that based on conceptual and practical grounds, it could not recommend designated or reserved seats (Keefe 2018, 5).

With electoral system reform and designated seats eliminated as options, two general strategies shaped the Commission's approach: 1) improve the chances of electing Acadians and African Nova Scotians under the simple plurality, single member district electoral system and 2) strengthen other means of representing these minorities through reforms to government organization and practices. The first strategy yielded a number of key recommendations. First, EBCs should be permitted to create additional ridings (beyond the status quo) in order to increase flexibility in crafting boundaries that meet the principle of effective representation. Second, the standard variance limit from voter parity of 25% (+/-) should be maintained. Third,

there should be discretion to recommend exceptional ridings that exceeded this variance limit. Fourth, the possibility of non-contiguous ridings that connect small minority communities should be admitted. Finally, the Keefe Commission suggested there may be an opportunity to *improve* representation for Acadians and African Nova Scotians beyond the four protected ridings (Keefe 2018, 8-9).

The Keefe Report also reflected on the more general problem of rural representation. In a section of its report entitled "The Gathering Storm", Keefe noted that the steadily growing population gap between urban and rural areas of the province was likely to produce ever-larger and more unwieldy rural constituencies (Keefe 2018, 79). To highlight the representational implications of maintaining the status quo in terms of the size of the legislature, the Commission recommended that the next EBC prepare two electoral maps: one that reflected the status quo (51 seats) and a second map with a higher number of total constituencies. This would provide the basis for a broader discussion about whether a 51-seat legislature is adequate to meet the principle of effective representation in rural areas of the province. As the Keefe Report plainly stated: "The more ridings there are, the more flexibility boundaries commissions will have to craft boundaries in accordance with the principles of effective representation" (Keefe 2018, 7). Producing electoral maps for each option would clarify the representational consequences of each, while moving the debate away from simplistic tropes about smaller government and "saying no to more politicians".[8]

The 2018-19 Electoral Boundary Commission

Acknowledging that it would accept and follow the NSCA judgement and the recommendations of the Keefe Report, in January, 2018 the McNeil Liberal government assured publicly that it would introduce new legislation aimed at achieving effective representation for Acadians and African Nova Scotians in the House of Assembly. FANE, the primary interest group representing the francophone and Acadian population of Nova Scotia, also weighed in publicly, registering its approval of the Keefe recommendations and expressing the hope that protected ridings would be re-established. Setting the tone for deliberations to come, FANE added that the federation would push "for a new, exceptional riding in the Chéticamp area of Cape Breton, which has a large Acadian population" (MacDonald, 2018). The Provincial Government soon moved with a resolution and subsequent legislation (Bill 99) in the Spring of 2018, which provided amendments to the House of Assembly Act. A special EBC would be established to recommend boundary changes congruent with the principles enunciated in the Supreme Court's *Carter* decision and with the opinion of the NSCA in *Reference re the Final Report of the Electoral Boundaries Commission*.

The select committee's composition seemed to signal the government's desire to address the fallout from 2012. The committee included a long-serving Acadian MLA from Argyle-Barrington, the larger riding that was recrafted from the protected constituency of Argyle.[9] The committee also included a Lebanese-Nova Scotian, an African Nova Scotian MLA, and the member for Clare-Digby, containing the formerly protected constituency of Clare. (This MLA did not identify as Acadian.) In terms of regional representation, the rest of the committee membership tilted towards Halifax, although the committee Chair represented a riding in the Cape Breton region (NS Legislature Bill 99, 2018).

By Spring, 2018 the select committee commenced its work on appointing a new EBC. The amended House of Assembly Act stipulated that EBCs are to be "broadly representative" of the province's population and include at least one member from each of the Acadian and African Nova Scotian communities. In keeping with this, the committee agreed to appoint members based on "experience, skill, and commitment" (Dodds, 2018: 82). Former Saint Mary's University president, Dr. Colin Dodds (who EBC Vice Chair in 2012) was appointed Chair. The nine-member EBC was, like past commissions, regionally diverse. As well, appointed members exhibited academic expertise, cultural awareness, and engagement in their respective communities. Most significant was that descriptive representation on this EBC was the most extensive to date (NS Legislature Select Committee Report 2018).[10] Two African Nova Scotian women were appointed, both with strong community ties to the previously protected riding of Preston.[11] The EBC also included two Acadians, one of whom was Paul Gaudet, the lone dissenter from the 2012 commission; the second was a former Acadian school board administrator from Chéticamp, a Cape Breton community of approximately 3,000 people situated in the northern part of the district of Inverness. Addressing effective representation for this community became a major bone of contention for the 2018-19 EBC, leading four of the nine commission members to register their dissent when, from their standpoint, Cheticamp was again denied the exceptional status it needed to attain effective representation.[12]

The Terms of Reference (TOR) for the 2018-19 commission closely reflected the recommendations in the Keefe Report. While the revised statute (namely subsection 5(C)) allotted some discretionary powers to the select committee, most discretion was essentially waived and passed on to the EBC. The TOR maintained the 25% limit for allowable variance from voter parity, but discretion was restored to the EBC to create *exceptional electoral districts* that exceed this limit. As well, for the first time, the TOR explicitly allowed for the creation of non-contiguous constituencies. Finally, in accordance with one of the recommendations of the 2012 EBC, the 2018 Commission was directed to prepare a draft of proposed boundary changes prior to its first round of public hearings. Following this, a preliminary report containing electoral boundaries for 51 provincial ridings and at least one other number of electoral districts had to be submitted to the government no later than November 30, 2018. After a second round of public hearings, a final report was to recommend only one option in terms of total number of ridings (Dodds, 2018: 5; Select Committee Report, 2018).

At the commission's first meeting, a background report on the history of electoral boundary commissions in the province was presented by political scientist and 2012 EBC commissioner Dr. James Bickerton.[13] The report reviewed the province's unique historical-cultural character, the Charter's protection of minority rights, the *Carter* ruling on effective representation, the direction taken by earlier EBCs, the NSCA opinion, and the findings of the Keefe Report. It concluded that there was "no reasonable option but to prepare boundary changes that, at minimum, restored some version of the four protected constituencies" (Bickerton, 2018: 12; Dodds, 2018: 12), and outlined the various options for doing this. The EBC was in full agreement with this conclusion; it also agreed that the best way to begin this process was to revisit and build out from the disallowed 2012 Interim Report and its proposed electoral map. The EBC also carried over from the 2012 commission and Bickerton Report the legal, constitutional and political justification for protected constituencies.

The various approaches and strategies for more effective representation for minorities included continuing the protected ridings concept (referred to as "exceptional" electoral districts), variations on the concept of 'at large' administrative districts, and the idea of non-contiguous ridings (Dodds, 2018: 13-27; 2019: 87-96). In connection with the latter, the commission explored scenarios proposed by Bickerton regarding non-contiguous arrangements for Acadian ridings and "previously excluded individuals or communities" (namely Chéticamp and its environs). The Bickerton Report also floated the alternative of a return to the dual member tradition for the Inverness constituency, "with the stipulation that one of the two elected representatives be a French-speaking Acadian" as a way to improve representation for Cheticamp area Acadians (2018: 12-13).[14]

During its public consultations the EBC asked for feedback on the following options:

1. Restoring (as closely as possible) the exceptional ridings
2. Adopting #1 but with also combining Chéticamp and its environs with the predominantly Acadian part of Richmond to form a non-contiguous Acadian district
3. Creating two additional ridings in Halifax-Metro to reflect demographic trends
4. Pursuing the administrative districts/members-at-large strategy to address effective representation for historic minorities
5. Creating a fourth Acadian district (even smaller than the other three) comprised of Chéticamp and its environs.[15]

In its Interim Report, the EBC produced a number of boundary scenarios reflecting these options, along with a 51-seat status quo option that virtually mirrored the controverted 2012 electoral map. Restating the observation made by the 2012 EBC, the report noted that any support for non-contiguous ridings, both among the commissioners and the public, was lukewarm at best. Indeed, while both sets of public hearings saw some concerns raised regarding "special" treatment for minorities, along with the usual (though not many) calls for fewer MLAs and "smaller government", strong public support was again demonstrated for the restoration of affected exceptional districts (see Dodds 2019: 70-81).

The EBC presented its final report in April, 2019 recommending an electoral map containing 55 districts. This included restoring the four previously protected districts including Preston, which was redrawn to "include as many African Nova Scotians living in the area as possible" (2019: 32). While this newly configured riding did not exceed the 25% variance limit, *technically* eliminating the "exceptional" status, the commission reiterated its symbolic, cultural, and historical importance, on this basis recommending that its exceptional designation be maintained by future EBCs (2019: 67, 90). In response to public input and commission deliberations, the EBC also utilized its discretion to justify recommend three more exceptional ridings based on geographic considerations and a long-standing definition of community of interest associated with traditional political boundaries (2019: 31-33). [16]

The deliberations of the 2018-19 EBC were not without internal tension and conflict. While the commission "debated the option of including Chéticamp as an exceptional electoral district" (2), and seriously examined other options for balancing effective representation for Acadians with voter parity across the populace (86-87), it ultimately decided (by a 5-4 margin) to recommend remaining with the status quo in the Inverness district that contained Cheticamp and its environs.

The dissenting commissioners opined that on this issue, the EBC "did not get it right" (2019: 46). Their dissent conveyed the sentiments expressed by FANE and other community groups during the consultations: Acadians in the region have not been able to converse in French with their representative in the legislature; only twice since Confederation has their district elected an Acadian MLA; and historically they have experienced marginalization in the form of deportation and land expropriation (2019: 47). Simply put, the dissenting commissioners felt that Chéticamp Acadians have not experienced representation on par with that of other Nova Scotian voters. Despite this reality, the majority of the commission felt that creating a riding containing less that three thousand voters was, as Dr. Dodds noted during the final report's release, "going too far" in terms of deviation from voter parity. He further noted that, "some members of the commission – including myself – said it was a decision between the head and the heart and it was a very difficult choice for us" (Canadian Press Staff, 2019).

Dodds' comments speak to the balance that EBCs must strike between communities of interest, effective representation of minorities and voter parity. Of course, the same statement could have come from the dissenting members in support of their position. They quoted the *Carter* judgement in rationalizing and justifying their stance and offered that, "as soon as we begin balancing countervailing factors we believe necessary to enhance representation against the prime consideration of voter parity, the "primacy of prime" is weakened, if not neutralized" (49). These conflictual dynamics reiterate how the EBC exercise is one of interpretation and complexity and underline –as do John Courtney's works and the EBC's Final Report -- the importance that boundary commissions, voters, and other institutional actors place on communities of interest and effective representation of minorities in the electoral boundaries process. The EBC's Final Report emphasized that the public's prioritization of these considerations over the principle of voter parity, when combined with the "gathering storm" of declining rural population outlined by the Keefe commission, could present significant challenges for future EBCs and possibly "hinder the likelihood of maintaining the current standards for parity" (2019: 16). This becomes plausible when one considers that most of the recommendations in the EBC Final Report aim to enhance effective and descriptive representation. In Nova Scotia, these have become primary components of the institutional matrix that supports and guides the electoral boundaries process.[17]

Alluding to wider political trends, the commission also took note of the push for electoral system reform. While guided on most matters by recommendations from the Keefe report, the 2018-19 EBC was willing to break ranks with Keefe's position on electoral system reform. Instead, in its discussion of strategies for improving effective representation, the EBC referenced conclusions from the literature that suggest women and minorities are better represented through proportional electoral systems (2018: 17; 2019: 87). The point was raised again by the dissenting commissioners (52-53) and reinforced through a recommendation in the final report: *"Although it is outside our mandate, we respectfully recommend that future governments consider consulting the public and elections experts about whether a proportional system would achieve more effective representation than our current single-member plurality (first-past-the-post) system"* (2019: 67).

In pointing toward electoral system reform, the 2018-19 EBC (like the 2012 Commission before it) recognized that 'consociational districting' within a single member simple plurality system is

a potentially fragile electoral compromise for securing the effective representation of minorities. As time goes on, will a consociational ethos supporting accommodative institutional measures be enough to sustain protected or exceptional ridings given the systemic biases of an electoral system prejudicial towards minorities lacking the territorially-concentrated numbers that would ensure election of their own political representatives? It appears that the 2018-19 EBC was able to design a workable compromise between voter parity and effective representation for key minorities (though not without division over the outcome). In doing so, the legal-constitutional fallout of the contested 2012 redistribution was resolved. By expanding the legislature, the growing urban area of the province gained additional seats even with the restoration of four protected constituencies designed to enhance effective minority representation. At least for this latest round of boundaries adjustment, the primary goal of balancing voter parity with concerns about community of interest and effective representation of minorities has again taken centre stage in Nova Scotia's redistricting process.

Conclusion: History and Institutions Matter

On the face of it, two small minorities (each under 4% of total provincial population) should not garner the degree of special political consideration that has been the case for Nova Scotia's Acadian and African Nova Scotian communities. The explanation lies in provincial history (especially its evolved demography), political culture and the structuring 'path dependency' effects of legal and political institutions. Together these have embedded a particular set of values that embody a bias toward what Ken Carty has called a 'full range' approach to redistribution able to accommodate cultural group identity in the redistricting process (1992, 153). While on its own this does not connote a consociational form of democracy in a formal-legal sense, it does imply a consociationalist impetus and ethic at work in Nova Scotia's redistricting process.

This general approach has deep roots in provincial history. The first Acadians representing smaller-than-average provincial districts entered the Nova Scotia legislature in 1837 (Wikipedia). But it was the political context for the creation of the province's first independent EBC during a key historical conjuncture (1991-92) that is most pertinent to present-day outcomes. With constitutional negotiations at the national level reaching an apex at that historical moment, and a new provincial Premier in Nova Scotia determined to modernize political institutions and governance practices badly in need of reform, a window of opportunity was opened for a gesture toward historic minority communities that could reasonably claim status as 'charter groups' in the province's social mosaic. This political opportunity only arose, however, because of a Supreme Court ruling that tapped into Canada's pluralistic political culture and anti-majoritarian electoral tradition to reject, "formal and individualistic equality in favour of a more sociological and group-based approach which legitimized preferential treatment of the disadvantaged in the interests of equality" (Roach 1992, 204).

In this connection, Kent Roach proved prescient when he mused that while the Courts, "may be unwilling to create boundaries to facilitate minority representation themselves, they may find a way to remand the issue back to boundary commissions and legislatures with some guidance as to how they could comply" (1992, 211). Given the constraining features of the single member, simple plurality electoral system, this would only be effective under specific circumstances. It could "only protect minorities that are politically and geographically cohesive and large enough to influence election results. This will be easier to achieve in less-populous provinces with smaller constituency sizes" (Roach 1992, 213). Nova Scotia's four protected districts met these

conditions; they represented a near-perfect overlap of the place-based 'community of interest' and the sociological imperative of 'effective representation' of a minority cultural group that, for historical reasons, was deemed to have particular significance for the province's social mosaic.

This Nova Scotia version of 'consociational districting' at once gave form to and was sustained by legal and political institutions. This can be traced to the coincidence of a conducive legal framework and a reform-oriented political regime that set about creating the province's first electoral boundary commission, one with an unusually diverse composition and a mandate to make an exceptional accommodation for two historic minority communities. Electoral jurisprudence that encouraged departures from definitions of political equality that gave preference to voter parity over other considerations proved essential for the establishment – and later the revival (after a period of banishment) – of consociational districting. The electoral boundaries themselves, as institutional building blocks, reinforced a shared sense of community interest and identity, especially as they overlapped other political or administrative boundaries, and because they had remained in place for an extended period. Electoral boundary commissions, district-linked political associations, and various civil society organizations (media, religious, heritage, etc.) combined to provide a supportive and legitimizing institutional setting. This institutional matrix in place over multiple rounds of redistricting contributed to a path dependency effect that revealed itself in the social, legal and political response to the Dexter government's abolition of protected ridings through the enforcement of new legal guidelines that banned the degree of malapportionment in boundary revision that consociational districting required.

While the Nova Scotia experience suggests the possibility of consociational districting within the legal framework provided by electoral jurisprudence in Canada, it may also suggest its inherent limits. Most importantly, the institutional, social and political setting must be conducive to this innovative districting approach. The 2019 EBC was able to restore four protected ridings for Acadians and African Nova Scotians. And having breached the variance limit for consociational reasons, it proved easier for the commission to do so for certain other rural communities where traditional place-based understandings of 'community of interest' had been eroded to such an extent that their effective representation was placed in question. But the 2019 EBC did not go *further* than this to improve upon the effective representation of historic minorities, as counselled by the Keefe Commission. It was ultimately unwilling to depart from traditional districting principles such as territorially-based single-member ridings that were geographically contiguous and compact. Rejection of a proposed fourth, even smaller minority district along these lines to capture a geographically and culturally isolated Acadian community (although the commission divided over this issue) suggests limits to how far consociational districting can go before voter parity concerns become an overriding consideration for boundary commissions. Neither did the EBC pursue the idea of non-contiguous electoral districts, nor designated 'at large' seats, due mainly to negative public response to these options in the affected communities, as well as Commission concerns about the complicating and controversial representational issues that inevitably would arise.

The next Nova Scotia election (due in 2021) will be contested on the revised 2019 boundaries. In all likelihood, another boundary review will take place shortly thereafter based on the results of the 2021 census. Path dependency will be a major factor both in determining the terms of reference for the next EBC, the composition of the commission, and the prospect of extending protection for the four minority ridings. Beyond exceptions for geographically expansive

northern ridings with significant Indigenous populations, other provinces have not demonstrated an inclination to experiment with consociational-style districting, or other forms of affirmative gerrymandering. Nor does it seem likely they will soon choose to do so. Despite favourable electoral jurisprudence supportive of innovation in redistricting to enhance minority representation, the absence of ‘late adopters’ after almost 30 years suggests Nova Scotia’s pathbreaking approach to drawing electoral boundaries will continue to remain unique within the Canadian federation.

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[1] The province's Aboriginal leadership was unwilling to accept the proposed creation of a single designated Aboriginal seat at that time (Landes 1992, 33), nor has it subsequently.

[2] Official bilingualism and minority language education rights had already acknowledged the co-equal status of French-speaking Canadians, while treaty and aboriginal rights were entrenched in section 35 of the Constitution. The various proposals culminating in the 1992 Charlottetown Accord would have gone much further in terms of constitutional recognition and accommodation of Quebec and Aboriginal difference.

[3] It is worth noting that there are parallels here with the special status accorded to Indigenous people in the form of a designated 'native' seat in the legislature. This speaks to the fact that historic minority cultures indigenous to Nova Scotia – Mi'kmaq, Acadian, or African Nova Scotian – depend for their continued vitality on the traditional communities that have provided the physical, social and cultural context for their formation and development.

[4] Significant outmigration due to structural job loss in the coal and steel region of Cape Breton was also a factor. Ultimately, the EBC recommended only a modest adjustment, eliminating one Cape Breton seat while adding one to Halifax, though many urban seats continued to be at the higher end of the variance tolerance, with many rural constituencies at the lower end.

[5] For the Commission's detailed arguments on deciding to maintain the protected constituencies, see MacNeil 2012a, Appendix G, 59-61.

[6] In her letter of resignation, Dr. Jill Grant argued that, "The majority of members of the Commission determined that they did not view the Terms of Reference provided by the government as mandatory. I disagree with this interpretation and decision. While the Commission has the independence to conduct its work at arm's length from government, the scope of the Commission's independence is necessarily defined and constrained by the TOR which the Legislature provided to guide the process" (MacNeil 2012a, 62).

[7] Mr. Paul Gaudet, stated his disagreement with boundary recommendations that would spell the end of the protected Acadian ridings. His dissent recognizes that the task given the Commission by the conflicting and irreconcilable terms of reference (2c and 2d) that required the Commission to protect minority representation while respecting the Select Committee directive on minimum riding size, was ultimately an impossible one. The letter of dissent also contains an eloquent plea for the Acadian people: that their uphill struggle for the survival of their culture and identity not be made even more difficult by losing their distinctive voice in the House of Assembly. As viewed by Gaudet, the Acadian constituencies – proud geographical and political symbols of Acadian historical and cultural presence in Nova Scotia – were nothing less than "vital cornerstones of resilience over adversity".

[8] To quote directly from the Commission's Report: "We recommend the boundaries commission be authorized to produce two or more maps, one at the current 51 seats and another at a higher number, to inform a discussion about whether 51 seats will adequately provide effective representation for Nova Scotians in the future. The more ridings there are, the more flexibility boundaries commissions will have to craft boundaries in accordance with the principles of effective representation" (7).

[9] This MLA, Chris d'Entremont, was on the previous select committee and Hansard records reveal the value that the select committee placed on the institutional memory he brought to the table, especially with regard to EBC composition and selection (e.g. opinions on number of members and minority representation) (Nova Scotia Select Committee Report, 2018).

[10] One MLA from the select committee highlighted the importance of descriptive representation, expressing that "just like all of us, for me, having gender and diverse individuals on the commission is of prime importance" (Nova Scotia Select Committee Report 2018).
[11] These appointees included education and labour advocate Carlotta Weymouth and lawyer and African Nova Scotian community land titling advocate Angela Simmonds. Simmonds was chosen by fellow members to be the 2018 EBC Vice Chair.
[12] Also appointed to the 2018 commission were two other academics with research backgrounds in Nova Scotia politics, culture, and political behaviour; a lawyer and former returning officer previously involved with First Nations outreach for Elections Nova Scotia; and a senior manager with Nova Scotia Community College actively involved with regional and indigenous development.

[13] The introduction of the 2018-19 EBC's interim report notes that the interim report's proposals were based on the TOR, input from the public, and the commissioned report prepared by Bickerton (1).
[14] According to the 2019 Letter of Dissent, two commissioners supported the dual-member constituency option as a preferred way to address effective representation for Chéticamp and its environs, before moving back to the exceptional district option after it continued to receive strong support during the public hearings.
[15] The non-contiguous option of combining Chéticamp and its environs with the predominantly Acadian part of the Richmond exceptional district was dropped after the first round of consultations due to a lack of support from both the commission and the public.
[16] Specifically, TOR #2 states that "Deviation from electoral parity is justified because of geography" while TOR #3 notes that deviation "may be justified because of historical, cultural, or linguistic settlement patterns and because of political boundaries. TOR #5 stipulates that "There may be one or more exceptional electoral districts where, in exceptional circumstances, the estimated number of electors in the electoral district is more than 25 per cent above or below the estimated average number of electors per electoral district (Dodds 2018: 5).
[17] With regard to a continued emphasis on communities of interest, some of the 2018-19 commissions recommendations included: improving Mi'kmaw consultation in the future, via select committees, prior to and during EBC boundary review process; encouraging political parties to promote minority candidacy (especially in exceptional ridings); encouraging future select committees to ensure that there is balanced descriptive and rural-urban representation on EBCs; asking that future EBCs maintain exceptional status for Preston; and encouraging the House to adopt Keefe Report recommendations 8-29 which would provide further opportunity to enhance effective representation.