NOVA SCOTIA COURT OF APPEAL

Citation: *Reference re the Final Report of the Electoral Boundaries Commission*, 2017 NSCA 10

Date: 20170124
Docket: CA 432219
Registry: Halifax

IN THE MATTER OF Section 3 of the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89;

AND IN THE MATTER OF a Reference by the Governor in Council concerning the September 24, 2012 Final Report of the Electoral Boundaries Commission and Section 1 of the *House of Assembly Act*, Chapter 61 of the *Acts of Nova Scotia*, 2012, as set out in Order in Council 2014-414, dated October 1, 2014

Judges: Fichaud, Saunders, Oland, Bryson and Bourgeois, JJ.A.

Reference Heard: September 20-21, 2016, in Halifax, Nova Scotia

Held: The questions on the Reference are answered Yes to question #1, and No to question #2, per reasons for judgment of the Court

Counsel: Edward A. Gores, Q.C. and Debbie Brown, for the Attorney General of Nova Scotia
Michel Doucet, Q.C., Réal J. Boudreau and Réjean Aucoin, Q.C. for the Intervenor, Fédération Acadienne de la Nouvelle-Écosse

Reasons of the Court:

[1] This is a Reference. The Court is asked (1) whether the abolition, in 2012, of the former provincial electoral ridings of Clare, Argyle and Richmond infringed s. 3 of the *Canadian Charter of Rights and Freedoms* and, if so, (2) whether the infringement is justified under s. 1 of the *Charter*.

[2] Electoral boundaries should achieve "effective representation". This is a constitutional right of citizens in s. 3 of the *Charter*. It is not a policy option for the Government. On this Reference, the analysis turns on the standards that govern the implementation of the constitutional principle of effective representation.

[3] Effective representation derives from a balance of criteria, broadly described by the Supreme Court of Canada, that are deduced from s. 3. The equilibrium is applied to the circumstances on the electoral map. It is a normative and contextual inquiry whose outcome may be in the eye of the beholder. Reasonable observers may disagree. So it is crucial to identify who is assigned the inquiry.

[4] The machinery for fixing electoral boundaries is legislative, and it varies among jurisdictions. An independent boundaries commission is common, though not constitutionally required. The constant is that the legally authorized body must be permitted to consider the constitutional criteria of effective representation.

[5] After the fact, the courts may be asked to determine whether the legislated boundaries deny effective representation under s. 3. The courts apply a standard of reasonable deference to the enacted boundaries.

[6] This means that, in a boundaries case, the odds favour the *status quo*. It is the incumbent view of effective representation that attracts judicial deference. It also means that an artificially distorted expression of that view, by the body which was tasked with balancing the constitutional criteria, can deform the implementation of the constitutional imperative in s. 3. On this Reference, a critical issue is whether the body that was authorized to appraise the criteria of effective representation was thwarted in the performance of its constitutional mandate.

1. Summary of Background

[7] Nova Scotia's *House of Assembly Act*, s. 5, says that, every ten years, an "independent" Electoral Boundaries Commission is to conduct hearings, prepare a preliminary report with provisional suggested boundaries, hold further hearings to gauge the reaction, then submit a final report that recommends electoral boundaries. The Commission's mandate blends the constitutional principles of effective representation, that are derived from s. 3 of the *Charter*, with the terms of reference that were drafted by a select committee of the House of Assembly. The *House of Assembly Act* obligates the Government to introduce a bill with the boundaries recommended by the Commission's final report. Then, according to the House's normal procedures, the bill may be amended before passage.

[8] In 1992 and 2002, Nova Scotia's decennial Electoral Boundaries Commissions recommended three ridings – the significantly Acadian constituencies of Clare, Argyle and Richmond – that would have notably less than the average population ratio for Nova Scotia's ridings generally. The reason was to encourage the participation in the Legislature by individuals belonging to the Acadian minority. The Commissions noted that, for effective representation, though parity of voting power was the primary factor, the promotion of minority representation and cultural identity were countervailing criteria that had been approved by the Supreme Court of Canada. In 1992 and 2002, the Commissions' recommendations enjoyed smooth passage by the Legislature.

[9] In 2012, events took a turn.

[10] The Select Committee's Terms of Reference to the 2012 Commission excluded the option of maintaining these protected ridings. All ridings in Nova Scotia were to satisfy the same maximum variance of population ratio. It was clear from the outset that Clare, Argyle and Richmond offended the prescribed maximum variance.

[11] Nonetheless, the Commission's Interim Report recommended the continuation of Clare, Argyle and Richmond. The Commission drew its interpretation from the constitutional principles of effective representation that, in the Commission's view, informed its mandate. The Commission relied particularly on the criteria of minority representation and cultural identity, cited in the leading Supreme Court decision.

[12] The Attorney General, on the other hand, took the view that the Commission had violated the Terms of Reference with a rogue recommendation. The Attorney General, by letter, informed the Commission that the Interim Report was "null and void", and directed the Commission to prepare a new and compliant interim report. Nothing in the *House of Assembly Act* said the Government had the authority to void an interim report.

[13] The Commission then wrote a Revised Interim Report, followed by a Final Report, that recommended the elimination of the protected ridings, as the Attorney General had directed. From the three 2012 reports, it is apparent that this recommendation was not the Commission's authentic view of effective representation for constituents of Clare, Argyle and Richmond.

[14] In December of 2012, the Legislature enacted the boundaries from the Final Report, meaning the three protected ridings disappeared.

[15] In October 2014, an Order in Council asked this Court to advise whether the abolition of the three electoral districts infringes s. 3 of the *Charter* and, if so, whether the infringement is justified under s. 1 of the *Charter*.

[16] Our analysis will follow this path:

- In 1991, the Supreme Court of Canada's definition of "effective representation" in the *Carter* decision.
- In 1992, Nova Scotia's response to *Carter* with the enactment of the system involving electoral boundary recommendations, once every decade, by an Independent Electoral Boundaries Commission.
- The 1992 and 2002 recommendations by the Independent Electoral Boundaries Commissions, and their enactment.
- The events during the 2012 electoral boundaries revision that led to this reference.
- An in depth analysis of *Carter*'s constitutional principles of effective representation.
- The application of those principles to the events in Nova Scotia during the 2012 boundaries revision.

- Consideration of the particular submissions of the Attorney General on this Reference respecting "tight guidelines", "process" and parliamentary privilege.
- The Court's conclusion on Question # 1 - whether there is an infringement of s. 3 of the *Charter*.
- Consideration of Question # 2 - whether an infringement is justified under s. 1 of the *Charter*.

[17] The Attorney General was involved with the events in 2012. The Attorney General also is a party to this Reference. To avoid confusion, we will use "Province" to denote the Attorney General as a litigant.

2. "Effective Representation" - Section 3 and Carter (1991)

[18] Section 3 of the *Canadian Charter of Rights and Freedoms* is headed "Democratic Rights". It says every citizen has "the right to vote in an election of members of the House of Commons or of a legislative assembly".

[19] Section 3's "democratic" reach extends beyond the polling booth. Early on, the courts' purposive interpretation of s. 3 impacted electoral boundaries. First was the decision of Chief Justice McLachlin, then of the British Columbia Supreme Court, in *Dixon v. British Columbia (Attorney General)* (1989), 59 D.L.R. (4th) 247. Next was *Reference Re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 (commonly called "*Carter*"), that overturned (1991), 78 D.L.R. (4th) 449 (Sask. C.A.), on the Government of Saskatchewan's electoral boundaries reference.

[20] In *Carter*, Justice McLachlin, as she then was, for the majority, explained the governing principle of "effective representation":

> C. The Meaning of the Right to Vote
>
> 49 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". …
>
> 50 What are the conditions of effective representation? The first is relative parity of voting power. …

> 51 But parity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation. …
>
> 52 Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.
>
> …
>
> 54 Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of 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. …
>
> 55 It emerges therefore that deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen's vote as compared to another's should not be countenanced. …
>
> …
>
> 60 To return to the metaphor of the living tree, our system is rooted in the tradition of effective representation and not in the tradition of absolute or near absolute voter parity. It is this tradition that defines the general ambit of the right to vote. …
>
> …
>
> 63 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

[21] Later (paras. 65-75) we will expand on *Carter*'s approach to electoral boundaries.

3. Nova Scotia's Response to Carter (1991-92)

[22] After *Carter*, it was clear that electoral boundaries were no longer the exclusive domain of the legislatures or the playground of majority governments. Boundaries that offended the constitutional principles of s. 3 could be declared as having no force and effect under s. 52(1) of the *Constitution Act, 1982*. That prospect left some Nova Scotian constituencies in a vulnerable spot. An article from the Province's materials for this Reference elaborates:

> *House of Assembly Act* The Saskatchewan decision [referring to the Saskatchewan Court of Appeal's decision in *Carter*] put Nova Scotia's electoral map in constitutional jeopardy. For example, by 1991 the extent of malapportionment was significant, ranging from 5,000 constituents in Cumberland Centre to over 20,000 in urban ridings like Sackville and Dartmouth East – a difference of 400 percent! The product of a major Liberal gerrymander in 1978, and a minor Conservative one in 1981, the map was already in political jeopardy. The new Conservative leader and premier, Donald Cameron, had promised electoral reform in his leadership campaign, including a "nonpartisan" redistribution of seats. Thus the events in Saskatchewan added urgency to the leader's publicly-expressed intentions, and undoubtedly helped the government to obtain an all-party agreement to the creation (May of 1991) of a Legislative Select Committee on Establishing an Electoral Boundaries Commission. …
>
> [Jennifer Smith and Ronald G. Landes, "Entitlement versus Variance Models in the Determination of Canadian Electoral Boundaries", International Journal of Canadian Studies 17, Spring 1998, pages 21-36, at pages 22-23]

[23] Nova Scotia responded to *Carter* by changing its approach to electoral boundaries. The *House of Assembly Act*, R.S.N.S. 1989, c. 210 defined the boundaries. Previous boundary revisions had come from amending bills drafted by the Government. The new approach mandated an "independent" commission every ten years to review and recommend boundaries, which the *Act* obliged the Government to introduce in the House as an amendment to the previously enacted boundaries. The change objectified the partisanship of electoral mapping and incorporated the principles of effective representation.

[24] The Province's factum summarizes this departure:

> 5. Nova Scotia changed the way electoral boundaries were created in 1991. For the first time in Nova Scotian history, by an all-party agreement, an impartial and independent Electoral Boundaries Commission (the "Commission") was established for the purpose of reviewing and redistributing electoral boundaries through a nonpartisan process. With the new transparent process, all communication with the Commission became part of the public record. An independent commission would conduct a boundary review at least every ten years.

[25] The policy was implemented with the following steps.

[26] On July 3, 1991, a Select Committee of the House of Assembly reported to the House with a recommendation for a Provincial Electoral Boundaries Commission, to be chaired by Professor Ronald Landes, with five other members: the Honourable C. Denne Burchell, Professor Jennifer Smith, Ms. Carolyn G.

Thomas, Ms. Alphonsine Saulnier and Mr. Sherman Zwicker. Justice McLachlin's ruling in *Carter* had been released a month earlier. The Select Committee's Terms of Reference to the Commission paraphrased *Carter*'s principles of effective representation:

> In keeping with the constitutional right to "effective representation", the Committee recommends the following terms of reference for the Provincial Boundaries Commission in determining the province's electoral boundaries:
>
> 1. The primary factors to be considered by the Boundaries Commission to ensure "effective representation" are:
>
> (i) of paramount importance, relative parity of voting power achieved through constituencies of equal population to the extent reasonably possible;
>
> (ii) geography;
>
> (iii) community history;
>
> (iv) community interests;
>
> (v) minority representation, including, in particular, representation of the Acadian, Black and Mi'kmaq peoples of Nova Scotia;
>
> (vi) population rate of growth projections.
>
> The Commission is to be guided by the principle that deviations from parity of voting power are only 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.
>
> 2. After considering the preceding criteria, county boundaries should be followed where desirable, reflecting the historical use of county lines in delineating Nova Scotia's electoral map.
>
> 3. Based on the most recent population statistics available to the Provincial Boundaries Commission, the Commission is to delineate electoral boundaries to achieve a 52-member Legislative Assembly with an additional member to represent the Mi'kmaq people of Nova Scotia.
>
> The Provincial Boundaries Commission is not to be governed by a predetermined population deviation factor or by a predetermined split between urban and rural ridings.
>
> In considering the factor of minority representation, the Commission shall seek out the advice, support and cooperation of, in particular, representatives of the Black, Native and Acadian communities of the Province.
>
> …

[27] On July 16, 1991, Order-in-Council 91-844 appointed the Electoral Boundaries Commission under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372, and referred the Select Committee's Report to the Commission as the mandate.

[28] In the autumn of 1991, the Commission undertook 18 public hearings across the Province involving 121 oral presentations, and received some 100 written submissions.

[29] On March 6, 1992, the Commission submitted its Report to the Speaker of the House of Assembly. The Report is significant to this Reference. The Report not only suggested boundaries. It also recommended, and set the tone for the system of independent electoral boundaries review that the Legislature enacted soon thereafter and remains today. The following extracts pertain to the issues that arise in this Reference.

1. The Report emphasized the Commission's independence and explained the Commission's process to safeguard its independence:

> The drawing of constituency boundaries for the Nova Scotia House of Assembly is a political act with important political consequences. The political implications of redistribution provide the best reason why the process must be nonpartisan. As the first independent boundaries commission in the history of Nova Scotia, created by all-party agreement, the 1992 Provincial Electoral Boundaries Commission is an important milestone in the development of political representation in Nova Scotia.
>
> The provincial Electoral Boundaries Commission adopted the following procedures to ensure that the process of redistribution would be nonpartisan. First, all contacts with the Commission were considered to be part of the public record. The public hearings held by the Commission were recorded and transcribed, with the transcripts published for archival purposes. Any letters or written submissions to the Commission were also considered part of the public record, again published for archival purposes. Second, individual and/or private submissions or meetings with the Commission as a whole or with individual members of the Commission dealing with the substance of our findings were not allowed. Third, no consideration of the partisan implications of our recommendations was discussed at any time by the Commission, either in the drawing of specific boundaries or in determining the general principles that govern redistribution. Very simply put, party standings and partisan implications were not part of the

> deliberations of the Provincial Electoral Boundaries Commission. [p. 1]

2. The Report explained how the ideal of fair representation reflects political diversity by recognizing minority interests:

> In seeking a nonpartisan pattern of fair representation for all concerned, the main theme of the Commission's Report is the broadest pattern of community of interest, namely, what is good for the province of Nova Scotia as a whole. The current view of representation held by the average voter and MLA alike is too narrowly focused on particular individual and constituency concerns. Only a broader view of political representation will allow for a fair pattern of constituency boundaries reflecting the diversity of Nova Scotia's political culture. At the same time, within the general concept of Nova Scotia's overall community of interest, particular interests must be recognized as well, namely, the Acadian, Black and Mi'kmaq communities. [p. 2]

3. The Report identified two underlying concerns to be addressed by electoral boundaries review:

> In any electoral redistribution, two key questions are often raised: first, are the political parties and the legislature directly involved in the drawing of the new constituency boundaries and second, are the constituencies of comparable, if not equal, population size?
>
> In British-style parliamentary systems, the traditional pattern used in an electoral boundary redistribution is for the legislature itself to carry out the process of boundary change. Such a procedure (used in Nova Scotia until 1992 and in Canada federally until 1964) often resulted in charges of **gerrymandering**, that is, the drawing of constituency boundaries for explicit partisan gain. As explained in our opening comments, the Commission, as the first independent boundaries commission in Nova Scotia history, has sought to eliminate gerrymandering as an element of the electoral redistribution process.
>
> The second key issue concerns the population size of each constituency and the relevant concept is that of malapportionment. **Malapportionment** means constituencies that are highly unequal in terms of population. …
>
> [pp. 3-4] [bolding in original]

4. After quoting at length from Justice McLachlin's reasons in *Carter*, the Report accepted that the Commission's mandate was to

implement the principles of "effective representation" under s. 3 of the *Charter*:

> Combined with the right to vote in section three of the Canadian Charter of Rights and Freedoms that was adopted in 1982, the Supreme Court decision in the Carter case in 1991 has altered the process of electoral redistributions in Canada in several key ways. First, the idea of "effective representation" has become the overriding goal and it is premised on "relative parity of voting power", as conditioned by factors such as geography and community interests. Second, an electoral redistribution for the provincial legislature is subject to both the Charter and to possible review by the Supreme Court of Canada. Thus, any electoral redistribution produced after June 6, 1991 is constrained by this new context of electoral reform. [p. 9]

5. The Report then applied the Commission's view of effective representation to individuals in Nova Scotia's Acadian and African Nova Scotian communities. The Commission recommended five protected constituencies in the Acadian regions of Clare, Richmond and Argyle, in the African Nova Scotian region of Preston, and (for geographical reasons unrelated to minority representation) in Victoria. The Report explained:

> 6. In seeking to encourage more effective representation for the Acadian and Black communities, the Commission felt that a fair and nonpartisan drawing of constituency boundaries would produce acceptable results. While geographic constituencies fairly drawn in areas of minority population concentration will not necessarily guarantee that representatives of the group will be elected to the House of Assembly, they will certainly make such a result much more likely. At a minimum, they will afford to the minority a substantially greater influence upon the electoral result and the quality of representation. [p. 11]
>
> …
>
> … Factors such as community interests or geography condition but do not cancel the importance of the first criterion, "relative parity of voting power". At the same time, minority group representation might be encouraged by creating somewhat smaller constituencies in terms of voters or population in order to generate more "effective representation" for those groups. [p. 16]
>
> …

… The concept of a **protected constituency** refers to creating constituencies that might differ substantially from the concept of relative parity of voting power, due to such factors as geography, community history, community interests and minority representation.

The Provincial Electoral Boundaries Commission concluded that a fair and nonpartisan drawing of constituency boundary lines, based around areas of minority group population concentration, was the best method for encouraging the effective representation of such groups in the Nova Scotia House of Assembly. Thus, there are no specifically-designated Acadian seats, nor is there a specifically-designated Black seat. Instead, boundary lines are recommended that encourage, but do not guarantee, minority group representatives in the House of Assembly. The seat entitlement or population size for such protected constituencies would be less than that for the ideal average-sized constituency.

The first protected seat considered was one designed to promote more effective representation of the Black community in the Legislature. The Commission concluded that this proposed seat should consolidate the Black communities in the Preston area within one provincial constituency and that its territorial base should be approximately that of the municipal districts 7 and 8. The population size should be from one-half to two-thirds of an average-sized seat, with a Black population concentration of between 25 to 35 percent of the total constituency.

The next question confronted by the Commission was how to promote the effective representation of the Acadian community in the House of Assembly. Given the population concentration, as well as the dispersion of the Acadian community, the Commission decided to retain unchanged the existing constituencies of Clare, Richmond, and Argyle. These constituencies are not designated-Acadian seats, but, given the population patterns in these ridings, maintaining the existing boundaries will encourage, but not guarantee, Acadian representatives in the Nova Scotia House of Assembly.

[pp. 28-29] [bolding in original]

…

The proposed seats created to encourage minority representation in the House of Assembly are all smaller than the average size of ideal constituencies. On this point the Commission would refer back to Nova Scotia's community of interest, in that minorities have a greater need for political representation than the majority,

> which will predominate no matter what pattern of constituencies is recommended. In political terms, however, the overrepresentation of minorities has to be tempered by a realization that the majority has legitimate rights and demands for political representation as well. As usual, the tradeoff between minority rights and majority rule is a judgmental one that must be tempered by understanding and respect for all members of the political community. [p. 38]

6. The Commission considered the promotion of representation from the Mi'kmaq community. But there was no consensus in the Mi'kmaq community on the structure for a dedicated seat. The Commission's Report said:

> At the request of the Mi'kmaq community, no recommendation as to how a native seat should be constituted is being made at this time. [p. 33]

7. The Report concluded with a recommendation that the independent process recur every ten years:

> The Provincial Electoral Boundaries Commission hereby recommends that all future boundary revisions be carried out by an Independent Boundaries Commission and that such required reviews take place once every ten years, based on the Canadian census. … [p. 81]

[30] The Legislature implemented the Report by amending the *House of Assembly Act*. On April 16, 1992, Bill 203 received first reading. The House invited a supplementary report, on several items, from the Electoral Boundaries Commission. The House's Law Amendments Committee accepted the Commission's supplementary report. The amendment to the *Act* received Royal Assent on June 30, 1992 and came into force on August 1, 1992: R.S.N.S. (1992 Supp.), c. 21. Some of these events were discussed in *Bedford (Town) v. Nova Scotia (Law Amendments Committee)* (1994), 147 N.S.R. (2d) 161 (S.C.A.D.), 1994 CarswellNS 460, paras. 1-7, allowing the appeal from (1993), 120 N.S.R. (2d) 251 (S.C.T.D.), 1993 CarswellNS 285, paras. 6-13.

[31] The *House of Assembly Act*, s. 4, as amended, described the 52 electoral districts. Then the newly-enacted s. 5 prescribed the future process. Thereafter, by law, the electoral boundaries commission was to be "independent":

> 5 (1) In this section, "Commission" means the Independent Electoral Boundaries Commission appointed pursuant to this Section.

(2) The electoral districts described in Section 4 have effect until new electoral districts are approved pursuant to this Section.

(3) No later than the thirty-first day of March, 2002, and, thereafter, within ten years after the last change in electoral districts made pursuant to this Section, and at least once in every ten years from the thirty-first day of March, 2002, an Independent Electoral Boundaries Commission shall be appointed and issued terms of reference by a select committee of the House constituted to appoint members of the Commission.

(4) The Commission shall prepare, for approval by the House, a report recommending the boundaries and names for the electoral districts comprising the House.

(5) The terms of reference of the Commission shall provide that

(a) the Commission is broadly representative of the population of the Province;

(b) the Commission prepare a preliminary report and hold public hearings prior to preparing the preliminary report; and

(c) following the preparation of the preliminary report the Commission hold further public hearings prior to preparing its final report.

(6) The final report of the Commission shall be laid before the House, if the House is then sitting, and the Premier, or the Premier's designate, shall table the report in the House on the next sitting day.

(7) If the House is not sitting when the final report of the Commission is completed, the final report of the Commission shall be filed with the Clerk of the House and the Premier, or the Premier's designate, shall table the final report in the House within ten days after the House next sits.

(8) Within ten sitting days after the final report of the Commission is tabled in the House pursuant to subsection (6) or (7), the Government shall introduce legislation to implement the recommendations contained in the final report of the Commission.

[32] Three features of s. 5 are noteworthy for the issues in this Reference:

1. Section 5(3) says that the Select Committee is to appoint members of the Commission and issue terms of reference. Section 5(5) then states what the terms of reference "shall provide": a broadly representative Commission; that the Commission would hold public hearings, then issue a preliminary report; that the Commission would then hold further public hearings, followed by a final report. Section 5 does not say that the Select Committee's terms of reference are to

include legally binding rulings on the *Charter*-sourced criteria of effective representation.

2. Under s. 5(5)(c), after the preliminary report, the next step is further public hearings. Section 5 does not provide that the preliminary report is subject to a validation ruling by the Attorney General before those further hearings.

3. Section 5(8) requires the Government merely to introduce the Bill with the Independent Electoral Boundaries Commission's recommended boundaries. The Commission's function is to table an independent view for consideration and debate. The *House of Assembly Act* did not delegate to the Commission the ultimate decision on boundaries, to enact by regulation. Neither did s. 5 require the Government or House to do anything after the Bill was introduced. The Commission's recommended boundaries would receive first reading as a Government Bill that could then be amended according to the House's process.

[33] The 1992 amendment to the *House of Assembly Act* also declared the House's intention to add, at a future date, a fifty-third seat for a representative of the Mi'kmaq people:

> 6 (1) The House hereby declares its intention to include as an additional member a person who represents the Mi'kmaq people, such member to be chosen and to sit in a manner and upon terms agreed to and approved by representatives of the Mi'kmaq people.
>
> (2) Until the additional member referred to in subsection (1) is included, the Premier, the Leader of the Official Opposition and the leader of a recognized party shall meet at least annually with representatives of the Mi'kmaq people concerning the nature of Mi'kmaq representation in accordance with the wishes of the Mi'kmaq people and the Premier shall report annually to the House on the status of the consultations.

[34] This statutory regime was in place for the next boundary review a decade later.

4. The 2002 Boundaries Review

[35] On November 30, 2001, further to s. 5(3) of the *House of Assembly Act*, the House's Select Committee nominated the next Independent Electoral Boundaries Commission. Dr. Colin Dodds chaired. The other eight members included Dr. Landes, the 1992 chair. Citing *Carter*'s principles of effective representation, the Select Committee's Terms of Reference to the Commission included:

> In keeping with the constitutional right to effective representation, the Committee recommends the following terms of reference for the Provincial Boundaries Commission in determining the Province's electoral boundaries:
>
> > The primary factors to be considered by the Provincial Boundaries Commission to ensure effective representation are:
> >
> > 1. of paramount importance, relative parity of voting power achieved through constituencies of equal electoral population to the extent reasonably possible;
> > 2. geography, and in particular the difficulty in representing a large physical area;
> > 3. community history;
> > 4. community interests;
> > 5. minority representation, including, in particular, representation of the Acadian and Black peoples of Nova Scotia.
>
> Based on the most recent population and electoral statistics available to the Provincial Boundaries Commission, the Commission is to delineate electoral boundaries to achieve a 52-member Legislative Assembly, not counting any additional member authorized pursuant to Section 6 of the *House of Assembly Act*.
>
> The Provincial Boundaries Commission is to be governed by the general principle that a constituency should not deviate by greater or lesser than 25 per cent from the average number of electors per constituency, except in extraordinary circumstances. Extraordinary circumstances are the desire to promote minority representation by Nova Scotia's Acadian and Black communities.
>
> The Commission is to be guided by the principle that deviations from parity of voting power are only 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.
>
> …
>
> The Commission will hold public meetings and prepare a preliminary report. After making this preliminary report public, the Commission will hold further public meetings and will then prepare a final report.

…

[36] The 2002 Terms of Reference differed in two material respects from those to the 1992 Commission. First, further to ss. 5(5)(b) and (c) of the *House of Assembly Act*, the Commission was directed to prepare a preliminary report, then solicit further public input before preparing its final report. Second, in 2002 there was a cap of 25% deviation from the average population ratio among constituencies, but the protected constituencies for Acadian and African Nova Scotian communities were excepted from the cap. The 1992 Terms of Reference had not mentioned a preliminary report or a 25% cap.

[37] The continuum of reasoning that spans the Reports of the 1992, 2002 and 2012 Commissions is a helpful touchstone for the analysis of the issues before this Court. We will track the 2002 Commission's views on the issues that pertain to the Reference:

1. The Commission's 2002 Final Report noted the effectiveness of the preliminary report (described by the Commission as its "Interim Report"), followed by a second round of presentations before the final report. Before its Interim Report, the Commission conducted 14 public hearings, with oral presentations from 72 persons, and received 73 written submissions. After its Interim Report, the Commission's culminating round involved 11 public hearings, 152 presenters and 179 written submissions. The presenters at both stages included elected members of the House of Assembly. The Final Report explained how the Interim Report had been a "work in progress" that, after the further public hearings, was significantly improved in the Final Report. The changes "demonstrate the considerable impact of the public's role in the electoral boundary revision process":

> The second significant impact of the Commission's consultative process can be seen in changes made to its recommendations between the Commission's Interim and Final Reports. As the Commission stressed in its Interim Report, the initial recommendations of the Commission were a "work in progress rather than a series of decisions cast in concrete." The Commission listened to the public's reaction to its Interim Report, reviewed transcripts from the public hearings, analyzed the submissions it received, and altered its recommendations in a number of areas. In its Final Report the Commission changed its recommendations from those of the Interim Report in a number of respects. To be specific, these were the number of constituencies which fell under

> its "extraordinary circumstances clause," the size (both population and geography) of the recommended constituencies based on Victoria and Guysborough Counties, the allocation of seats along both the South Shore and Eastern Shore, the boundary line between Cumberland North and Cumberland South, and the distribution and population size of a number of the constituencies in Halifax County. Such significant changes in the Commission's recommendations between its Interim and Final Reports demonstrate the considerable impact of the public's role in the electoral boundary revision process. [pp. 18-19] [Commission's underlining]

2. The Commission's Final Report set out its measures "to ensure the independence and non-partisanship of the Commission" (p. 4). These resembled those mentioned in the 1992 Commission's Report. Additionally, because of the new two-stepped process of interim and final reports, the 2002 Final Report said:

> With respect to the public consultation process, the Commission agreed it would not consider any proposed boundary changes for its Interim Report until after the First Round of Public Hearings had been completed. Similarly, no proposed boundary changes were recommended by the Commission for its Final Report until after the Second Round of Public Hearings had been completed, until transcripts of those hearings were reviewed by the Commission members, and until the Commission had reviewed all written submissions. Such procedures were adopted by the Commission to ensure that the public consultation process was real and effective. [pp. 4-5] [Commission's underlining]

3. The 2002 Final Report acknowledged the Commission's dually sourced mandate that stems from the *Charter*'s principles of effective representation, discussed in *Carter*, and the Select Committee's Terms of Reference:

> … In particular, the Commission, based on its Terms of Reference, which are themselves grounded on the Canadian Charter of Rights and Freedoms (Section 3) – as interpreted by the Supreme Court of Canada in the Carter case (*Reference re Provincial Electoral Boundaries [Saskatchewan]*), has made recommendations which it feels will provide a pattern of effective representation for the province of Nova Scotia as a whole – in other words, just boundaries. [p. 2]
>
> …

The Provincial Electoral Boundaries Commission spent a considerable amount of time discussing its Terms of Reference and the Carter case. The Commission's Terms of Reference are based on, drawn directly from, and infused with the Carter case. [p. 6]

…

Deviations from voter parity, based on such factors as geography, community interests, and minority representation, must be justifiable by providing or contributing "to better government of the populace as a whole." Thus, the question becomes one of how extensive are the deviations allowed from parity of voting power by the concept of relative parity of voting power. The Canadian practice, both before and after the Canadian Charter of Rights and Freedoms and the Carter decision, has been to use a ± factor (plus-or-minus factor) as a way of operationalizing the idea of relative parity of voting power.

A ± factor is the percentage by which a given constituency may be over or under the average constituency (parity of voting power), based on either population or electors. The ± factor allows for recognition of factors, such as geography, community interests, community history, and minority representation, in the drawing of electoral boundaries. In the Carter case, the Supreme Court of Canada did not approve of, or stipulate, any specific ± factor that would be automatically acceptable. The constitutionality of a specific ± factor (e.g., 10 percent, 25 percent) is dependent on how it has been used in a particular electoral redistribution. As a general rule, according to the Supreme Court of Canada, any deviations greater than the specified ± factor (assuming one has been established) would have to be based and justified "on the ground that they contribute to better government of the populace as a whole. …"

The impact of the Supreme Court's ruling in the Carter case has been significant in the drawing of electoral boundaries in Canada: It has asserted the power of judicial review over both provincial and federal electoral redistributions and it has specified the factors that may need to be considered in such exercises. However, as mentioned earlier, the Carter case did not define or approve of a specific ± factor *a priori*, nor did it define what it meant by such key terms as relative parity of voting power or community interests. As a result, such concepts are "elastic" in terms of both their interpretation and application in specific contexts.

The legislative-mandated Terms of Reference given to the Provincial Electoral Boundaries Commission reflect the Nova Scotia House of Assembly's assessment of how the Supreme

> Court's decision in the Carter case is to be applied in reviewing provincial electoral boundaries in the province of Nova Scotia.
>
> [pp. 8-9]

4. The Commission turned to the constituencies that the 1992 Report had "protected" to enhance minority representation. The 2002 Commission's Interim Report recommended that only Clare, Argyle and Preston retain protected status. After the further public hearings, the Commission returned Richmond to the list. The Final Report recommended that (1) the constituencies of Clare, Argyle, Richmond and Preston be unchanged, but (2) the term "protected" be dropped, and (3) the next Commission re-evaluate the approach to encouraging minority representation:

> The Commission reviewed the use of the five protected constituencies created in 1992. The Commission decided not to continue the term "protected constituencies," but instead use the "extraordinary circumstances clause" contained in its Terms of Reference. …
>
> In three counties the percentage of the population whose mother tongue is French exceeded 20 percent: Digby (33 percent), Richmond (29 percent) and Yarmouth (23 percent). Within the District of Clare in Digby County, 70 percent of the population have French as their mother tongue, while in the District of Argyle within Yarmouth County, that percentage is 54 percent.
>
> 2. **The Commission recommends that the four constituencies for minority representation be retained as they currently exist (Clare, Argyle, Richmond, and Preston).** (In its Interim Report, the Commission had recommended three constituencies for inclusion under its "extraordinary circumstances clause:" Clare, Argyle and Preston. The Victoria riding was the fifth protected constituency in 1992, but the basis of protection was geography, which is not an "extraordinary circumstance" as specified in the current Commission's Terms of Reference.)
>
> The use of the term "protected constituencies" in the 1992 redistribution and the current Commission's "extraordinary circumstances clause" for minority representation has generated considerable public comment. The Commission feels that this method of encouraging minority representation should be re-evaluated during the next electoral redistribution.
>
> 3. **The Commission recommends, during the next electoral redistribution, that the Provincial Electoral Boundaries**

> **Commission re-evaluate the method of encouraging minority representation.**
>
> [pp. 36-37] [underlining and bolding in original]

[38] By S.N.S. 2002, c. 34, s. 1, the Legislature amended the *House of Assembly Act* to enact the 2002 Commission's recommended electoral boundaries.

5. The 2012 Boundaries Review

[39] The next boundaries review is the subject of this Reference.

[40] On November 3, 2011, the Legislature unanimously approved Resolution no. 1846:

> Therefore be it resolved as follows:
>
> (1) That pursuant to Section 5(3) of the House of Assembly Act and the Rules and Forms of Procedure of the House of Assembly, this House constitute a select committee to determine no later than December 31, 2011,
>
> a. the composition of an independent Electoral Boundaries Commission; and
>
> b. the terms of reference for the commission;

The Resolution named nine MLAs to the Select Committee – five from the majority Government and two each from the two Opposition parties. The Resolution appointed Mr. Ross Landry, the Attorney General and Minister of Justice, as the Chair. Another Government MLA, Mr. Leonard Preyra, was vice-chair.

[41] On December 30, 2011, the Select Committee delivered its Report to the House. The Report named eight individuals to the Independent Electoral Boundaries Commission. These included Dr. Theresa MacNeil as Chair and the 2002 Commission's Chair, Dr. Colin Dodds, as the vice-chair. The Select Committee's Report defined the Commission's Terms of Reference to include:

> In keeping with the constitutional right of Nova Scotians to fair and effective representation, the Committee directs the Provincial Boundaries Commission to be guided by the following:

> 2(a) Based on the most recent census and other population data available, the Commission delineate electoral boundaries to achieve an Assembly of not more than 52 seats, not counting any additional Member authorized pursuant to Section 6 of the House of Assembly Act;
>
> 2(b) Of paramount importance, relative parity of voting power must be achieved through constituencies of equal population to the extent possible;
>
> 2(c) Deviations from parity of voting power may be justified in consideration of:
>
> i Geography, in particular, the difficulty in effectively representing a large physical area;
>
> ii Community history and interests;
>
> iii Nova Scotia's linguistic and cultural diversity, in particular, the Province's Acadian and African Nova Scotia population.
>
> 2(d) Notwithstanding 2(c), no constituency may deviate by a variance greater or less than 25 per cent from the average number of electors per constituency;
>
> …
>
> 3) For greater clarity, the Commission is to be bound by Section 5, subsections 5(4) and (5), of the House of Assembly Act.

[42] Clause 2(d) shifted the paradigm of the Terms of Reference to the earlier Commissions. The general language in 1992 and the explicit direction in 2002, that had allowed "protected" or "extraordinary" status for the ridings of Clare, Argyle and Richmond to promote Acadian representation, and Preston to promote African Nova Scotian representation, were replaced. Those ridings would now be subject to the same maximum 25% deviation as other ridings. From the data in the 1992 and 2002 Commission Reports, it was known that all four ridings exceeded the maximum deviation. Effectively, the Select Committee had decided to abolish the protected ridings.

[43] Clause 2(d) fractured the all-party consensus that had existed since the House's Select Committee initiated the process of independent Commissions in July 1991.

[44] The Select Committee's Report of December 30, 2011 was endorsed by the five Government MLAs on that Committee. The other four members, all Opposition MLAs, attached a "Dissenting Opinion" aimed at clause 2(d):

…

> It had been agreed that the Terms of Reference would be modelled on the previous Boundaries Commission's Terms of Reference. Those terms allowed the commission to create opportunity for minority representation to provide for better representation of linguistic and/or cultural groups, (for example Acadian and African Nova Scotians) despite those constituencies having a population variance more than 25 per cent of the average electoral population. It was up to the commission whether to actually maintain the current projected seats (Argyle, Clare, Preston, and Richmond), or even to consider new protected constituencies.
>
> The change to the wording was made between drafts four and five of the terms of reference on orders of the Vice Chair of the Select Committee without prior discussion or agreement at either the sub-committee or the Select Committee. In an email dated December 15, 2011 the Vice Chair referenced discussions of the sub-committee stating "in section 2 I have re-ordered the directives in clusters while remaining true to the substance of the discussion." It is our position these discussions did not take place. (email attached with consent of Select Committee)
>
> …
>
> The purpose of clause 2C(i. ii. iii) is to provide the Boundary Commission with the ability to maintain, create, and consider minority representation and geography as extraordinary circumstances for consideration. As noted, Argyle, Clare, and Richmond exist to provide for the possibility of representation by Acadian and French speaking Nova Scotians in the legislature. As well, the constituency of Preston exists to provide the opportunity for African Nova Scotian representation focussed on the interests of one of Nova Scotia's largest and historically-distinct African Nova Scotian communities.
>
> Previous Terms of Reference have permitted the Boundaries Commission members to make their own informed decision based on public feedback and the appropriateness of protecting linguistic, cultural and historic interests of Nova Scotia's minority communities. The 2002 Boundaries Commission provided for minority representation in ridings which varied from the maximum 25 per cent through the "extraordinary circumstances clause".
>
> …
>
> Inserting the notwithstanding clause makes it impossible for the Boundary Commission to properly consider minority representation as currently known in Nova Scotia and as supported by the Supreme Court in other jurisdictions.
>
> …

[45] In March and April 2012, the Independent Electoral Boundaries Commission conducted hearings across the Province. Some 116 individuals spoke. These included MLAs, provincial cabinet ministers and the Premier. The Commission received about 130 written submissions.

[46] On May 31, 2012, the Commission issued its Interim Report, *i.e.* the "preliminary report" directed by s. 5(5)(b) of the *House of Assembly Act*.

[47] In a passage titled "Interpretation of the Terms of Reference", the Commission focused on clause 2(d):

> …
>
> The Terms of Reference for this Commission differ fundamentally from those given to previous commissions:
>
> …
>
> - Second, in clause 2(d), it is indicated that notwithstanding concerns about geography, community history and interests, and Nova Scotia's linguistic and cultural diversity, constituencies may not deviate by a variance greater or less than 25 per cent from the average number of electors per constituency; and
>
> …
>
> The Commission heard various representations about how to interpret and act on its Terms of Reference. Having discussed how to act on the Commission's Terms of Reference at great length, the Commission decided to adopt the following course of action (the Dissenting Opinion Regarding the Commission's Interpretation of the Terms of Reference is expressed in Appendix H):
>
> - The Terms of Reference provided by the House of Assembly Select Committee offer guidance and direction to the Commission;
>
> - A literal interpretation of Clause 2(d) would require the Commission to substantially alter the boundaries of the four constituencies that have been protected for the past twenty years as a means to encourage and promote the effective political representation of the Acadian and African Nova Scotian minorities in the legislature. Removal of this protection as implied by clause 2(d) raises significant social, cultural, and political issues. Consequently, the Commission decided to retain the "protected constituencies" of Argyle, Clare, Preston, and Richmond (see Appendix G);
>
> …

[48] The Interim Report repeated the view, expressed in the 1992 and 2002 Final Reports, that section 3 of the *Charter* tasks the Commission to ensure effective representation under *Carter*'s principles:

> The process of redrawing electoral boundaries in Nova Scotia recurs every ten years and is meant to ensure that provincial constituencies continue to reflect the

> constitutional right of all citizens to fair and effective representation in the legislature. Relative parity of voting power is not the only factor which government may take into account in ensuring fair and effective representation. Quoting from the Supreme Court of Canada's decision in the Carter case (1991) to review how the courts have dealt with the factors to consider:
>
> [… quoting extracts from *Carter*, paras. 52-62]
>
> The electoral redistribution process, undertaken in Nova Scotia by two independent Electoral Boundary Commissions since 1992, is fraught with challenges, some of which are unique to Nova Scotia while others are of a more general nature.
>
> …
>
> Ensuring fair and effective representation while accommodating a concern for cultural diversity and minority representation is another important consideration for the boundary redrawing exercise, one made more difficult by the territorial dispersal of minority populations in the context of the simple plurality electoral system that groups electors into single-member constituencies. Nova Scotia's French-speaking Acadian population is concentrated mainly in several rural communities located at the geographic extremities of the province. Its African-Nova Scotian community is also widely dispersed, though there is concentration of population in and around the area of the Prestons, on the Dartmouth side of Halifax Harbour.
>
> In short, while relative parity of voting power remains of paramount importance, other factors impinge upon the right of all citizens to fair and effective representation, and these combine to form the background and broader context for the electoral redistribution process.

[49] The Interim Report's Appendix G explained the Commission's reasoning for recommending the maintenance of protected ridings in Argyle, Clare and Richmond (to encourage Acadian representation) and Preston (to encourage African-Nova Scotian representation). The Commission applied its view of *Carter*'s effective representation to the circumstances that had become apparent during the Commission's hearings:

> **Appendix G: Maintaining "Protected Constituencies"**
>
> Canada is known throughout the world for the recognition and accommodation of minority rights within its democratic and parliamentary institutions. Indeed, the Supreme Court identified this as one of the defining features of the Canadian constitutional order (see Reference re Secession of Quebec, 1998). Nova Scotia has its own relatively recent history of recognizing and accommodating its distinctive Acadian and African Nova Scotian communities. Since 1991, the province of Nova Scotia has done this by extending special "protection" to four

electoral districts. … The creation and maintenance of such electoral districts represents a choice – acknowledged or not – about how well to represent a minority group. Ensuring "effective representation" in the House of Assembly for all Nova Scotians (which is their constitutional right and the primary purpose of the electoral redistribution exercise) requires that relative parity of voting power be balanced against other considerations, and the balance struck will vary depending upon a range of factors and circumstances. In the judgment of the Commission, retaining the four protected constituencies for Acadians and African Nova Scotians continues to be the appropriate balance between relative voter parity and other considerations in order to best ensure that these groups receive effective representation in the Nova Scotia legislature.

The protected districts in Nova Scotia were designated as such because they have a special historical significance for the province, as well as major significance for the Acadian and African Nova Scotian minorities whose political representation within the legislature they are intended to protect. Three of the four are ridings where the Acadian population is either dominant or numerically important: Clare, Argyle, and Richmond. The fourth is the riding of Preston, where African Nova Scotians comprise a key component of the voting population. The special protection was conferred as a means of avoiding the inevitable political dilution of these minority communities within the surrounding majority (even though their overall provincial numbers would otherwise justify proportionate representation in the legislature). While this particular mode of accommodating these specific minority groups is not without its problems (see below), it remains both a politically important and culturally significant gesture, recognizing as it does the unique place and role of these minority groups in the province's history, and within its present cultural diversity.

Like the Mi'kmaq people, the Acadian and African Nova Scotian communities have a particular cultural uniqueness and territorial basis in Nova Scotia that supports the argument for retaining a form of 'special status' in the electoral redistribution process. This status follows from the fact that they constitute minority cultural communities that are indigenous to Nova Scotia, and further can be said to have fairly well-defined territorial 'homelands' in this province that have been continuously occupied for hundreds of years. Their distinctiveness derives from their long evolution as ethno-linguistic (Acadian) or racial (African Nova Scotian) minorities within an English-speaking majority of predominantly British heritage, but also, just as importantly, from their unique indigenous cultures that have developed over centuries of relative isolation as coherent communities (due to remote rural locale and/or social exclusion). In short, these minority cultures are both distinctively Nova Scotian and deeply rooted in specific, territorially-based communities within the province.

…

In effect, the elected representatives from the protected ridings in Nova Scotia have a mandate and a responsibility to perform a dual role both within and outside

> the legislature: they have a duty to be constituency representatives like other members of the legislature, but they also act as political representatives for the extended cultural community they represent. Thus, Acadians across the province, whether they live in the three protected ridings or not, depend on these protected political districts and the elected representatives they send to the legislature to play an important role in safeguarding the interests and identities associated with the Acadian language, culture and tradition. The same can be said for the riding of Preston, which, whether it elects an African Nova Scotian to the legislature or not (an outcome dependent in large part upon decisions made by political parties through their candidate selection processes), still expects its elected MLA to play this dual role – a mandate which they are able to impart through the strong African Nova Scotian voter presence within the boundaries of the protected constituency of Preston. (It should be noted that this fits the classic political definition of an influence district, where political candidates need to court support from a minority group to ensure their election, though the extent of minority influence will vary depending on local circumstances, and even from election to election). This is an additional consideration to take into account. This is the importance of symbolic recognition to minority communities. Such recognition constitutes a positive message of affirmation to minorities regarding acknowledgement by the majority of their existence, their historical significance and their continued distinctiveness. Revoking the protected status of the four designated constituencies would revoke this recognition; it would send a strong negative message about their place and status within the larger provincial community.
>
> … The protection offered to the three Acadian constituencies should be seen as a further measure taken to recognize and protect the French-speaking minority in the province, but beyond this the unique and indigenous Acadian communities from whence the vast majority of Nova Scotia's French-speaking population derives. The Constitution also explicitly acknowledges – in section 15(2) protecting the constitutionality of affirmative action programs – that equality for minorities needs to be understood as something other than 'sameness' of treatment; different treatment is sometimes necessary to achieve a form of equality that equates more closely with fairness for minorities, especially those that have been subject to historical discrimination. Finally, and directly pertinent to the elected redistribution process, is the Supreme Court decision in Reference re Provincial Electoral Boundaries (1991), where the Court held that the right to vote guaranteed by section 3 of the Charter of Rights and Freedoms does not include the right to votes of equal 'weight' in the sense that constituencies must be of equal population size.

[50] One member of the Commission, Dr. Jill Grant, attached a "Dissenting Opinion Regarding the Commission's Interpretation of the Terms of Reference".

The dissent expressed the view that the Select Committee's Terms of Reference precluded any special status for the minority ridings:

> The majority of members of the Commission determined that they did not view the Terms of Reference (TOR) 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. As the democratically elected body with the mandate to articulate the will of the people, only the Legislature has the authority to specify the principles and values which should guide the Commission in redrawing electoral boundaries. The Commission exceeds its authority in substituting alternative principles to those provided by the government of the province.
>
> …
>
> … I respect the deeply held views of the other Commission members and share the concern that the interests of Acadian, African Nova Scotian, and Mi'kmaq electors be safeguarded in the democratic process. However, because of the complex social and political questions related to safeguarding rights in Nova Scotia, I believe that the Legislature is the appropriate body to debate the relative merits and implications of strategies for effectively representing minority populations. Members of the Commission have neither the expertise nor the delegated authority to set public policy in this matter. If the Legislature wishes to provide targeted representation of Acadian and African Nova Scotian electors it may, for instance, wish to consider alternative strategies (such as administrative districts or non-contiguous constituencies) that could better accommodate the geographic distribution of the communities involved while securing fair and effective representation for all Nova Scotians.
>
> The Legislature could assist future electoral boundary commissions by providing rules and regulations for redistribution through legislation rather than in the form of a TOR from a Select Committee.

[51] Dr. Grant resigned from the Commission on May 31, 2012, the date of the Interim Report.

[52] On June 14, 2012, the Attorney General, Mr. Landry, wrote to the Chair of the Commission. Mr. Landry's letter stated that the Interim Report was "null and void", for failure to follow the Terms of Reference, and directed the Commission to replace it with another Interim Report:

> Dear Dr. MacNeil:
>
> … As Attorney General, unfortunately, I am not able to accept the interim report as drafted, as it does not follow the requirements set out in the terms of reference in the final report of the Select Committee. I have been advised by the Chief Legislative Counsel of the House of Assembly that the terms of reference are legally binding upon the Commission, and that the interim report is therefore null and void. As such, I would request that the Commission prepare a revised interim report that complies with the terms of reference.
>
> There is no authority in the terms of reference for constituencies that deviate by a variance of greater or less than 25 percent from the average number of electors per constituency. The government respects the independence of the Commission and does not wish to interfere with its work or recommendations. However, it is necessary that the Commission follow its legally binding terms of reference.
>
> …

[53] The Commission then prepared a Revised Interim Report, dated July 20, 2012. The recommendations defined every riding within the 25% variance. The former ridings of Clare, Argyle, Richmond and Preston disappeared, having merged with neighbouring ridings.

[54] Under s. 5(5)(c) of the *House of Assembly Act*, the Commission held further public hearings to receive reaction to the Revised Interim Report. This round included nine public meetings with 156 presentations and over 3,000 attendees. The presenters included many MLAs, cabinet ministers and the Premier. In addition, the Commission received 540 emailed and telephonic comments.

[55] On September 24, 2012, the Commission issued its Final Report. All the recommended ridings were within the 25% variance. For the former protected ridings:

(1) Richmond joined with portions of the former ridings of Inverness and Cape Breton West.

(2) The Revised Interim Report had listed alternatives to the former ridings of Clare and Argyle and, from these, had recommended that they merge with portions of the neighbouring riding of Yarmouth. The Final Report said, of those recommendations:

> … These were soundly rejected through the Commission's public consultation processes. The remaining three alternatives were essentially

> disregarded in public discussions. In short, all three electoral districts strongly opted to maintain the status quo.
>
> Yet the Commission is bound by the terms of reference with respect to the number of electors. It therefore proposes the following in its Final Report:
>
> -That the electoral district of Clare be merged with the remainder of the County of Digby to form a new constituency to be named Clare-Digby.
>
> -That the electoral district of Yarmouth be retained.
>
> -That the electoral district of Argyle be merged with the District of Barrington, including Cape Sable Island, to form a new constituency to be named Argyle-Barrington. …
>
> [pages 30-31]

(3) The former riding of Preston merged with a Dartmouth riding.

[56] The 1992 and 2002 Reports had said that the recommended boundaries would achieve effective representation. Though the 2012 Final Report was titled "Toward Fair and Effective Representation", its text conspicuously omitted an assertion that effective representation would result from the recommendations, particularly for individuals in the formerly protected ridings. It did not suggest that the Commission had found an equilibrium among *Carter*'s criteria, particularly minority representation and cultural identity, for Acadian and African Nova Scotian minorities. Instead, the Report emphasized that the recommended boundaries complied with the Terms of Reference and the Attorney General's direction. It noted that, after the Attorney General's letter, "we found ourselves without any discretionary authority":

> Our task was to present concluding recommendations for boundary revisions to provincial electoral boundaries for the approval of the House of Assembly; moreover, these recommendations should be fully compliant with the terms of reference. We believe we have done that. … [page 4]
>
> …
>
> **Initial Interpretation**
>
> …
>
> Our initial, general interpretation – as an independent commission – was to treat the various clauses [of the Terms of Reference] as guides. This was in keeping with the wording contained in the terms of reference: "The [Select] Committee directs the provincial Boundaries Commission to be guided by the following …" In fact, all the clauses were observed except for our decision to retain protected constituencies.

As matters turned out, our initial, general interpretation of the terms of reference was not accepted. Following delivery of the Interim Report, we were advised by letter (June 14, 2012) from the Attorney General that he was "not able to accept the interim report as drafted, as it does not follow the requirements set out in the terms of reference in the final report of the Select Committee." He further indicated that the terms of reference were legally binding. At this point we found ourselves without any discretionary authority. [page 7]

…

Electoral Redistribution in Nova Scotia: Key Issues and Challenges

…

Last but certainly not least, ensuring effective representation while accommodating a concern for *cultural diversity and minority representation* [Commission's italics] is an important consideration, one that is made more difficult by the fragmented territorial dispersal of key minority populations. In the context of the simple plurality (first-past-the-post) electoral system used throughout Canada that groups electors into single-member constituencies, minorities that are widely dispersed rather than territorially concentrated are at risk of political under-representation (in terms of having one of their number elected to office). Of particular note in Nova Scotia is that its historic French-speaking Acadian population is concentrated in a number of rural communities located at the geographic extremities of the province. Also, its African Nova Scotian community, which itself dates back to the origins of the province in the 18th century, is widely dispersed, though in relative terms there is a concentration of population in and around the area of Preston, on the Dartmouth side of Halifax Harbour.

Voter Parity versus Effective Representation

The relative parity of voting power of individual Nova Scotians, achieved through constituencies of equal size in terms of the number of electors, is an important part of the effective representation of all Nova Scotians in the legislature. The Commission is recommending boundary changes that will ensure that Nova Scotia's electoral districts continue to adhere to this principle to the extent possible, as described in the Commission's terms of reference. …

[pages 14-15]

…

Minority Representation and Protected Constituencies

The problem of ensuring effective representation for minority populations that are not territorially concentrated is a vexing one. Indeed, the working of the electoral system makes it unlikely that a territorially fragmented minority population (such

> as the Acadians or African Nova Scotians) will succeed in electing one of their community members to represent them in the legislature. As previously indicated, to some extent this bias in the electoral system was overcome in Nova Scotia (at least over the past 20 years) by protecting selected ridings from redistribution based on voter parity in order to encourage minority representation in the legislature. Under its legally binding terms of reference, the Electoral Boundaries Commission is no longer able to maintain this special dispensation for four protected constituencies. …
>
> …
>
> The history of the Acadians is one of the great stories of tragedy and redemption in western civilization. Their expulsion from Nova Scotia from 1755 to 1760 (le Grand Dérangement) was one of the early instances of 'ethnic cleansing' in the western world. Acadians were deprived of their homes and property, families were rent asunder, and many lives were lost during transit to regions far from the Acadian homeland. That some Acadians were able to return and re-establish themselves as minority communities in Nova Scotia and New Brunswick, against improbable odds, has become the central touchstone of Acadian history and identity. Nova Scotian Acadians today represent not only the remnants of the Acadian diaspora returned to the region, but an internal diaspora as well, forced into a fragmented and peripheralized geography of settlement within the province by the alienation of their ancestral lands and by their marginalized political status. This diasporic geography is particularly unsuited to effective political representation in the House of Assembly under the first-past-the-post electoral system. So, while in New Brunswick their greater numbers and relative geographic concentration has enabled the Acadian community to attain a political, cultural, and linguistic status of equality with the Anglophone majority, in their traditional homeland of Nova Scotia – again because of numbers and geography – they are today poised on the knife-edge of assimilation.
>
> Considered in this context, the loss of the protected Acadian seats can be perceived as a further reduction in the means and instruments available to Nova Scotia's Acadians to protect their fragile linguistic and cultural position within the province. Under these circumstances, some compensatory measure to ensure French-speaking, Acadian representation in the legislature seems both reasonable and appropriate. The problem is the difficulty of accomplishing this within the Boundary Commission's terms of reference, which forbid the small districts (a form of affirmative gerrymandering) that over the past 20 years made the three protected Acadian seats possible.
>
> [pages 18-20]

[57] The Final Report described the public reaction, at its hearings, to the loss of the protected ridings:

> Faced with the requirement to prepare a revised interim report, we agreed to try to achieve relative voter parity throughout the province's electoral constituencies as mandated by the Attorney General. This became a difficult exercise. The Revised Interim Report was released on July 20, followed two weeks later by a round of nine public meetings.
>
> …
>
> From the high level of negative public response, we might conclude that many of those who objected simply didn't understand the principle of relative voter parity – that one voter should have approximately the same power as another. On the other hand, they may have understood the principle but simply did not consider it valid. … Arguments offered by the protected constituencies referred over and over again to the unique significance of their history and culture in Nova Scotia. Many strong, well-reasoned presentations made to the Commission argued against holding strictly to one clause or another, expressing strong sentiments of loss of identity or declaring unwillingness to merge with neighbouring districts. Nonetheless, this Final Report proposes electoral distribution that meets all of the terms of reference as required by the Attorney General. [page 8]
>
> …
>
> Public response to the Revised Interim Report during the second round of meetings (nine in all) was considerably greater. This time, there was heated reaction to the changes we had proposed to accommodate population shifts and to move boundaries of the four protected constituencies to bring their voter numbers up to at least 75 per cent of the provincial average. We met passion, enthusiasm, anger, and cynicism. Some speakers called for fewer seats; some called for more. Many condemned the emphasis on numbers and the use of a simplistic arithmetic exercise to meet relative parity of voting power. … [page 24]

[58] One Commissioner, Mr. Paul Gaudet, dissented from the recommendations in the Final Report. Mr. Gaudet objected particularly to the Attorney General's letter of June 14, 2012:

> Against my better judgment, I participated in the exercise of writing a revised interim report, knowing full well it wouldn't protect existing protected minority representation. It was a mistake to think we could adequately address the conundrum imposed by guidelines 2(c) and 2(d) in submitting a revised interim report. The public outcry, predominantly in the Southwest Nova Scotia ridings, demonstrated that the revised interim report did not reflect the will of the people. The decree by the Attorney General left no middle ground for compromise. Any trade-off suggested or accepted by the citizens in the protected ridings would effectively condone the disappearance of their ridings, and would not be compromise but political suicide.
>
> ...

> Finally, my conscience and my judgment will not allow me to recommend the elimination of the protected constituencies. I therefore dissent from the other Commission members who felt legally compelled to recommend the elimination of the three protected Acadian constituencies in the Final Report.

[59] Further to s. 5(8) of the *House of Assembly Act*, the Government introduced Bill 94 to amend the *House of Assembly Act* by adopting the recommended boundaries in the Commission's Final Report. Bill 94 received first, second and third readings on October 25, November 5 and December 6, 2012, and Royal Assent on December 6, 2012. It is enacted as S.N.S. 2012, c. 61. ("2012 Amendment"). The formerly protected ridings of Clare, Argyle, Richmond and Preston merged into other constituencies as proposed in the Commission's Final Report.

[60] On October 8, 2013 the Province held a general election with the constituencies defined by the 2012 Amendment.

6. The Reference

[61] On October 1, 2014, further to the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, the Governor-in-Council approved Order in Council 2014-414. The Order in Council referred two questions for the opinion of the Court of Appeal:

> 1. Does Section 1 of Chapter 61 of the Acts of Nova Scotia 2012 (a copy of which is attached as Schedule "A"), by which provisions the recommendations tendered by the Electoral Boundaries Commission by its Final Report (a copy of which is attached as Schedule "B") to the House of Assembly were enacted, violate Section 3 of the *Canadian Charter of Rights and Freedoms* by abolishment of the electoral districts formerly known as Clare, Argyle and Richmond?
>
> 2. If the answer to question 1 is "yes", is the impugned legislation saved by operation of section 1 of the *Charter of Rights and Freedoms*?

[62] La Fédération Acadienne de la Nouvelle-Écosse intervened, filed evidence and a factum, and made oral presentations at the Court's hearing.

7. First Question: Did the Abolition of the Ridings of Clare, Argyle and Richmond Violate s. 3 of the Charter?

[63] As quoted earlier (para. 20), in *Carter*, Justice McLachlin's reasons for the majority established that s. 3 of the *Charter* guarantees "effective representation", and that offending electoral boundaries may be of no force and effect under s. 52(1) of the *Constitution Act, 1982*. In *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, Justice Iacobucci for the majority reiterated the primacy of effective representation:

> 21 This Court first considered the purpose of s. 3 in *Reference re Provincial Electoral Boundaries (Sask.)* [citation omitted]. In determining that s. 3 does not require absolute equality of voting power, McLachlin J. held that the purpose of s. 3 is "effective representation" (p. 183). This Court has subsequently confirmed, on numerous occasions, that the purpose of s. 3 is effective representation: see *Haig v. Canada*, [1993] 2 S.C.R. 995; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; and *Thompson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877.

[64] *Figueroa* and the authorities cited in this passage did not involve fixing electoral boundaries. The majority's reasons in *Carter* remain the seminal authority on electoral boundaries, and direct the analysis of the issues on this reference. We will examine the elements of Justice McLachlin's reasoning.

(a) The *Carter* Principles

[65] There is no straight road to effective representation. Justice McLachlin framed the question as "comprising many factors":

> 46 The question for resolution on this appeal can be summed up in one sentence: to what extent, if at all, does the right to vote enshrined in the *Charter* permit deviation from the "one person – one vote" rule? The answer to this question turns on what one sees as the purpose of s. 3. Those who start from the premise that the purpose of s. 3 is to guarantee equality of voting power support the view that only minimal deviation from that ideal is possible. **Those who start from** the premise that the purpose of s. 3 is to guarantee **effective representation see the right to vote as comprising many factors, of which equality is but one**. …
>
> …

> 49 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".** Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative; as noted in *Dixon* [citation omitted], elected representatives function in two roles – legislative and what has been termed the "ombudsman role". [emphasis added]

[66] The body which determines or recommends the boundaries is expected to balance those factors. Effective representation weighs the principle of voter parity against countervailing criteria. The countervailing criteria include minority representation, cultural and group identity. Justice McLachlin put it this way:

> 50 What are the conditions of effective representation? The first is relative parity of voting power. A 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. …
>
> 51 But parity of voting power, though of prime importance, is not the only factor **to be taken into account in ensuring** effective representation. …
>
> 52 Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation **cannot be achieved without taking into account countervailing factors.**
>
> …
>
> 54 Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of 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. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.
>
> …
>
> 55 … I adhere to the proposition asserted in *Dixon*, *supra*, at p. 414, 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".
>
> …

> 62 In the final analysis, the values and principles animating a free and democratic society are arguably best served by a definition that places effective representation at the heart of the right to vote. …Respect for individual dignity and social equality mandate that citizen's votes not be unduly debased or diluted. But **the need to recognize cultural and group identity** and to enhance the participation of individuals in the electoral process and society **requires** that other concerns also be accommodated.
>
> 63 … 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.
>
> [emphasis added]

[67] Voter parity is arithmetic. It compares the number of electors per constituency according to the latest census. The countervailing criteria are more complex, drawing from political science and sociological aspiration.

[68] This means the exercise is not a linear analysis. It is pragmatic and contextual. Justice McLachlin (para. 58) adopted a passage from her ruling in *Dixon*:

> 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 ideals of equal representation. **Pragmatism**, rather than conformity to a philosophical ideal, **has been its watchword**. [emphasis added]

[69] The body that crafts the electoral boundaries is tasked to ascertain the equilibrium from this pragmatic balance, then apply it to the circumstances that appear from that body's factual inquiry. Justice McLachlin explained:

> 61 … The "practical living fact", to borrow Frankfurter J.'s phrase, is that effective representation and good government in this country **compel** those charged with setting electoral boundaries **sometimes to take into account** factors other than voter parity, such as geography and community interests. … ; to insist on voter parity might **deprive citizens with distinct interests** of an effective voice in the legislative process as well as of effective assistance from their representatives in their "ombudsman" role. This is only one of a number of factors

> which **may necessitate** deviation from the "one person – one vote" rule in the interests of effective representation. [emphasis added]

[70] The court may be asked to review the enacted boundaries for compliance with s. 3 of the *Charter*. Justice McLachlin described the standard of review:

> 64 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 courts must be cautious in interfering unduly in decisions that involve the balancing of conflicting policy considerations: [citations omitted]. These considerations led me to suggest in *Dixon, supra*, at p. 419, 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 … could not have set the electoral boundaries as they exist**." [emphasis added]

[71] What "appropriate principles" may the court consider? Justice McLachlin's application of the standard in *Carter* is instructive.

[72] In *Carter*, Saskatchewan's *Electoral Boundaries Commission Act* legislated the conditions to be applied by the Boundaries Commission. Those conditions directed that rural ridings would have a significantly lower number of electors than urban ridings. The Boundaries Commission recommended boundaries that applied the statutory conditions. The Saskatchewan Court of Appeal cited the principle of simple voter parity to overturn those boundaries. After ruling that the Court of Appeal had applied the wrong test, Justice McLachlin then applied the proper test based on effective representation. She dealt with two issues – process and outcome:

> 68 The question is whether the deviations from voter parity in southern ridings can be justified on the basis of valid considerations. The respondent suggests the voter population disparities between ridings cannot be justified and violate s. 3. In support of this he argues: (1) that the electoral commission, constrained as it was by the legislation, acted arbitrarily; and (2) that in fact there are discrepancies in the population of various ridings which are unjustified. The first argument is concerned mainly with process; the second with result.

[73] First, on process:

> 69 I turn first to the proposition that the electoral commission acted arbitrarily and without due regard for the need to maintain relative voter parity. The argument in support of this position, accepted by the Court of Appeal, is that the electoral commission was improperly prevented from giving due weight to voter

equity because The *Electoral Boundaries Commission Act* required that it produce an electoral map with a specified number of urban, rural and northern seats.

70 This argument overlooks the genesis of the stipulation in the legislation and the actual population distribution that underpinned the allocation of urban and rural seats. The allotment of seats to the various urban centres in *The Representation Act, 1989* flows logically from the electoral map that it replaced. … **This map was made by an impartial commission not required to establish** a particular number of rural or urban ridings.

71 … This is not an "arbitrary" allocation of constituencies. It is founded on the electoral map made by an **impartial and unfettered commission** in 1981 and the population growth that has since occurred.

…

74 The argument that the commission was arbitrarily constrained by the governing legislation may also be criticized on the ground that it assumes an unduly constrained view of *The Electoral Boundaries Commission Act*. Section 20 of the *Act* sets out the criteria which must govern the electoral map: [section 20 omitted]

75 The Commission adhered to these criteria in setting the boundaries, **applying a test consistent with s. 3 of the *Charter* as I have interpreted it** …

76 I am satisfied that the proposition that the Commission was unduly constrained by the governing legislation and consequently failed to take into consideration the appropriate factors must fail. **The process, viewed as a whole, was fair**. The original division between urban and rural ridings was the work of **an unimpeded commission**; the subsequent adjustment largely reflected population changes, and **gave due weight** to the principle of voter parity. The fact that the legislature was involved in the readjustment does not in itself render the process arbitrary or unfair, in my view.

[emphasis added]

[74] Second, Justice McLachlin discussed the actual boundaries:

79 Against this background, I turn to the boundaries themselves.

80 **The Commission** did not address deviations on a riding by riding basis in its report, contenting itself with a general description of the factors it relied on in establishing the boundaries. It did, however, **point out the importance** of geography in drawing boundaries in the sparsely populated southwestern areas, where river banks often serve to demarcate distinct regions and communities and additionally affect transportation and the ease of servicing the populace. **The Commission also commented** specifically on the two ridings showing the greatest deviation, Morse Constituency and Humboldt Constituency. In each case**,**

> **it provided good reasons** in its Final Report, at p. 7, for the degree of variation: [quotation from Commission's report omitted]
>
> …
>
> 83 In summary, **the evidence supplied by the province is sufficient** to justify the existing electoral boundaries. … I conclude that a violation of s. 3 of the *Charter* has not been established.
> [emphasis added]

[75] From the majority's reasons in *Carter*, we distill the following:

1. Process -

- In *Carter*, the controversial feature – the urban/rural allocation – derived from recommendations of an "unfettered", "unimpeded", "impartial" Commission that was "not required to establish" a particular view of effective representation.

- The Commission had a dual mandate: statutory and constitutional. It implemented the legislated rural/urban criteria while also "applying a test consistent with s. 3 of the *Charter* as I have interpreted it" – *i.e.* by implementing principles of effective representation.

- Those constitutional principles of effective representation involved the balancing, by Saskatchewan's Commission, of voter parity and the countervailing criteria that derived from s. 3.

Accordingly, in *Carter*, "[t]he process, viewed as a whole, was fair".

2. Outcome -

- Justice Mclachlin applied the standard of review by considering whether reasonable persons applying the appropriate principles could have set the boundaries.

- This required the Court to examine the evidence. The pivotal items of evidence were the reports of the Independent Commissions. These included the 1981 report, which was the "genesis" of the urban/rural allocation, and the 1989 report, which recommended the challenged electoral boundaries.

- Those reports set out the bases for the Commission's findings. In particular, the Commission's 1989 report "pointed out the importance of geography in drawing boundaries in the sparsely populated southwestern areas" (the key countervailing criterion), "gave due weight" to voter parity

> and "provided good reasons" for the degree of variation that was at issue on the Reference. The evidence satisfied the reasonableness standard of review.
>
> Accordingly, "the evidence supplied by the province is sufficient to justify the existing electoral boundaries", and there was no breach of s. 3.

[76] With this framework in mind, we turn to Nova Scotia's electoral boundaries in 2012.

(b) Application of Principles to Nova Scotia

[77] The 2012 amendment to the *House of Assembly Act*, that abolished the protected ridings, adopted the recommendations in the Commission's Final Report. From *Carter*'s framework, several questions arise:

1. Did those recommendations reflect an "unfettered" and "unimpeded" view of effective representation?

2. Was the Commission permitted to implement its constitutional mandate by balancing voter parity and the countervailing criteria for effective representation, as outlined in *Carter*?

3. Is there evidence that the body which actually decided to abolish the protected ridings of Clare, Argyle and Richmond attempted that balance, gave "due weight" to the countervailing criteria and "provided good [or any] reasons" for its decision?

[78] The Commission's Final Report said that, after the Attorney General's "null and void" directive, "we found ourselves without any discretionary authority" (Report, page 7, quoted above, para. 56). That discretion would have allowed the Commission to consider whether or not *Carter*'s criteria of "minority representation", or "cultural and group identity" might support a variance over 25% in the circumstances of the Acadian ridings. The Attorney General's letter of June 14, 2012 swept this option from the table (above, para. 52). Consequently, the Final Report omitted any assertion that the Commission's recommendations represented effective representation for the formerly protected ridings. Instead, that Report recited that the Commission had complied with the Attorney General's directive (above, para. 56).

[79] From the text in the Commission's first Interim Report, it appears likely that, without the Attorney General's letter of June 14, 2012, the Commission would

have concluded that *Carter*'s criteria of minority representation, cultural and group identity, supported a higher variance for the Acadian ridings (above, paras. 47-49). The Attorney General's intervention forced the Commission to sign a Final Report with electoral boundaries that, in this respect, did not represent the Commission's authentic view of effective representation according to the constitutional criteria.

[80] The Province's factum cites the Final Report's boundaries as commanding judicial deference:

> 65. Reasonable people may disagree on how the challenges involved in drawing electoral boundaries should be resolved. Weighing all of the factors, the Legislative Assembly may have drawn different boundaries, but this is not the question. The question is whether the boundaries, as drawn, could not have been drawn by reasonable people having regard to the circumstances. The Attorney General submits **the boundaries drawn by the 2012 Boundary Review Commission are reasonable** and give appropriate consideration and weight to the necessary factors involved in any boundary review.
>
> …
>
> 86. The Terms of Reference for the 2012 Commission were consistent with the Supreme Court of Canada's reasoning in *Carter*. **The Commission's mandate and methods** employed in setting the impugned boundaries basically **incorporated *Carter*'s factors** for effective representation. The measures employed **are, thus, rationally connected** to achieve the desired objective of effective representation.
>
> [emphasis added]

[81] The Province relies on the Final Report as embodying the **Commission's** opinion of effective representation, that the Government benignly introduced and the Legislature compliantly implemented, and which therefore should generate judicial deference under *Carter*'s standard of review.

[82] With respect, the Final Report embodied no such thing. The Final Report does not represent the Commission's view of effective representation for constituents in Clare, Argyle and Richmond. Rather, the Final Report's treatment of Clare, Argyle and Richmond incorporated the **Attorney General's** opinion of effective representation. But s. 5 of the *House of Assembly Act* doesn't task the Attorney General with conducting hearings, appraising the results and reporting on

effective representation. Section 5 assigns those functions to the "independent" Commission.

[83] To this, the Province submits that the Attorney General merely asserted clause 2(d) of the Select Committee's binding Terms of Reference.

[84] To assess that submission, it is helpful to revisit *Carter*.

[85] Justice McLachlin made it clear that the Boundaries Commission had a blended mandate from **two** sources: the statutory terms of reference **and the constitutional** criteria of effective representation derived from s. 3 of the *Charter*. She concluded that Saskatchewan's enacted boundaries satisfied both. The boundaries complied with the constitutional mandate because there was evidence that the Commission had balanced voter parity with the countervailing factors, had given "due weight" to those criteria, and had supported its conclusions with "good reasons". That satisfied the judicial standard of review.

[86] This is not what happened in Nova Scotia in 2012. Starting with the enactment of the boundaries, and working backwards:

1. The Legislature just adopted the Commission's Final Report. The Province's factum puts it this way:

> 22. The Final Report was put before the House of Assembly and received First Reading on October 25, 2012, its Second Reading on November 5, 2012, its Third Reading and Royal Assent on December 6, 2012. All of the recommendations set out in the Report were implemented by the Legislature, resulting in an amendment to the *House of Assembly Act*.

2. So we turn to the Commission. The Commissions of 1992 and 2002 had recommended the protected ridings following a balance of voter parity and the countervailing criteria according to *Carter*. The 2012 Commission's Final Report did not say that the abolition of the protected Acadian ridings would achieve effective representation. Rather, it said the Attorney General's directive removed the Commission's discretion to consider the matter (above, para. 56).

The only unfettered statement of the 2012 Commission's view on the merits of effective representation for the protected Acadian ridings is the first Interim Report, that was written before the Attorney General's "null and void" letter of June 14, 2102. The first Interim Report expresses the strong view that, after balancing the criteria,

effective representation required the continuation of the protected ridings in Clare, Argyle and Richmond (above, paras. 47-49). The Final Report described the decidedly negative public reaction to the proposed elimination of those ridings at the insistence of the Attorney General (above, para. 57).

3. This brings us to the Attorney General. The Attorney General's letter of June 14, 2012 (above, para. 52) said nothing about balancing the criteria for effective representation. It merely cited the Select Committee's Terms of Reference as "legally binding upon the Commission". The Attorney General assumed that, by law, the Select Committee's Terms of Reference trumped any constitutional mandate to balance the criteria for effective representation under s. 3 of the *Charter*.

4. In the end, the spotlight fixes on the Select Committee. The Select Committee adopted clause 2(d) on December 30, 2011. It was known from the beginning that Clare, Argyle and Richmond did not satisfy clause 2(d). It was the Select Committee who decided that the protected Acadian ridings should vanish.

It appears that the key wording in clause 2(d) was added between drafts four and five of the Terms of Reference. The change was approved by the five government MLAs on the nine-member Committee, after the Committee's final meeting, with no discussion of the point in the full Committee (see above para. 44).

[87] The Province says none of this matters. The Attorney General in 2012, and the Province on this Reference, operated from the premise that clause 2(d) of the Terms of Reference legally barred the Commission from expressing any discordant view of effective representation.

[88] With respect, that premise misapprehends both s. 3 of the *Charter* and s. 5 of the *House of Assembly Act*.

[89] The Commission is not just a Crown agent following orders from its principal. It also entertains authority directly from s. 3 of the *Charter* to implement the constitutional principles of effective representation. Effective representation is not a favour of the Government's beneficence. Section 3 expresses the citizens' entrenched "democratic right" that is untouchable even by a legislative override under s. 33.

[90] The *Charter* does not require that there be an "independent commission". But, under *Carter*, whatever body fashions electoral boundaries is tasked by s. 3 of the *Charter* to balance voter parity against the countervailing criteria. In Nova Scotia, the Legislature has decided that body is "the Independent Electoral Boundaries Commission", whose functions are prescribed by s. 5 of the *House of Assembly Act*.

[91] Section 5 of the *House of Assembly Act* is quoted above (para. 31):

- Section 5(1) defines the Commission as "the Independent Electoral Boundaries Commission".
- Section 5(3) says that the Commission "shall be appointed and issued terms of reference by a select committee".
- Section 5(5) states what the terms of reference "shall provide": appointment of a broadly representative Commission; that the Commission shall hold hearings, then prepare a preliminary report, hold further hearings, then prepare a final report.

[92] Section 5 neither says nor contemplates that the Select Committee, with its majority of government members, may (1) make binding rulings on effective representation, or (2) impede the Commission's expression of its views on the core analysis of effective representation. This interpretation is apparent from the plain words, context and scheme of s. 5. It also embodies the objective that was expressed by the Report of the 1992 Commission (above, paras. 22-30), whose recommendations led to the enactment of s. 5. That objective was to replace the previous system of pre-emptive decisions by the Government of the day, on core issues of effective representation, with non-partisan recommendations by an independent commission.

[93] The Legislature could have assigned effective representation to the Select Committee, for instance, with words to the effect of:

> 5 (5) The terms of reference to the Commission shall provide that
>
> …
>
> (d) the Commission shall apply such interpretations of the principles of effective representation that the Select Committee considers appropriate.

Then this Court would apply *Carter*'s deferential standard of judicial review to the Select Committee's Terms of Reference. But the Legislature conspicuously omitted that feature from its prescription.

[94] Provided the Commission may express its view of effective representation under its constitutional mandate, nothing prevents suggestive terms of reference. In this case, the 2012 Commission's first Interim Report took clause 2(d) as suggestive only (above, paras. 47-49). The Commission gave it consideration, but decided that the constitutional criteria of minority representation and cultural identity outweighed it.

[95] Subject to the same proviso, nothing prevents the Commission being tasked with an additional assignment. A supplementary assignment occurred in 1992 (above, para. 30). That additional assignment might be to append provisional boundaries under an alternative assumption. One alternative might be the elimination of "protected ridings".

[96] Finally, nothing precludes administrative terms of reference that do not usurp the Commission's assessment of effective representation. An example is 52 seats for the Province.

[97] We return to s. 5. Sections 5(4) to (8) plot the itinerary to implementation: (1) the Commission conducts public hearings, (2) then prepares a preliminary report, (3) that generates further public hearings before the Commission at which anyone, including the Attorney General, may comment, (4) from which the Commission prepares a final report, (5) whose recommendations are embodied in a Government Bill that must be tabled and introduced in the House. Under s. 5, the preliminary report's next stop is an auditorium for public hearings, not the Attorney General's desk for approval.

[98] Once the Bill is introduced on first reading, s. 5 is spent. Then the Government may use its majority to amend the Bill, and the Attorney General may intercede.

[99] If the Government, or Attorney General, disagrees with the Commission's balancing of *Carter*'s criteria for effective representation, then after the Bill's introduction, the Government may move an amendment. The amendment could, for instance, adopt provisional boundaries appended to the Commission's Report, under the alternative assumption as posited above, to abolish the protected Acadian ridings. The amendment would follow the House's normal process. That includes

sessions before the Law Amendments Committee, where the public may speak, and the Committee of the Whole House, where members may speak, and any debate on second and third readings.

[100] The Government's rejection of the Independent Commission's recommendation would play out on the stage of the Legislature. There might be heated presentations from the public to the Law Amendments Committee and pointed debate in the House. After the amendment is enacted, there might be a court challenge under section 3 of the *Charter*, where the Government would be expected to explain its rejection of the Independent Commission's view of "effective representation". Those prospects do not justify stifling the Independent Commission's view of effective representation. Public debate, challenge and justification energize a "democratic right".

[101] In short, section 5 allows a majority government to retain ultimate control over the enactment of boundaries, subject to the political consequences of rejecting the recommendation of an independent commission. That suasive feature is how section 5 reconciles the principle of "majority rule" with the objective of non-partisan electoral boundaries.

[102] By contrast, nothing in s. 5 contemplates that a letter from the Attorney General's office may pre-empt the statutory process.

[103] We return to the questions posed earlier (para. 77):

1. The abolition of the ridings of Clare, Argyle and Richmond did not reflect the Independent Electoral Boundaries Commission's unfettered and unimpeded view of effective representation for the constituents in those ridings.

2. The Commission was not permitted to implement its constitutional mandate of balancing voter parity and the countervailing criteria according to *Carter*'s protocol.

3. The body which actually decided to abolish the ridings of Clare, Argyle and Richmond was the Select Committee. That decision was made by the adoption of clause 2(d) in the Terms of Reference on December 30, 2011. There is no evidence of how the Select Committee undertook the balancing of *Carter*'s criteria and there are no reasons by which the court may assess any balancing exercise.

(c) "Tight Guidelines" and "Process"

[104] In *Carter*, Justice McLachlin's reasons represented the views of five justices, and Justice Cory's dissent spoke for three. Justice Sopinka, writing for himself only, concurred with the majority's result. But Justice Sopinka's view of the test under s. 3 was more restrictive than that of either Justices McLachlin or Cory. Justice Sopinka said:

> 89 … My colleague Cory J. is of the view that once an independent boundaries commission was established, it was incumbent upon the Saskatchewan legislature to ensure that the commission was able to fulfill its mandate freely without unnecessary interference such as that contained in s. 14 of *The Electoral Boundaries Commission Act*. With respect, I cannot agree. Cory J.'s position assumes that there is some kind of constitutional guarantee for the process. **It was not necessary for the Saskatchewan legislature to create an independent commission, and, had it simply legislated the impugned boundaries, the process itself would not have been subject to judicial scrutiny.** Having chosen to delegate the task to the commission, **there is no reason why the legislature should be prohibited from laying down tight guidelines** delineating the powers to be conferred on the commission. [emphasis added]

[105] From this passage, the Province's factum draws the following:

> 32. The Supreme Court not only found there was no constitutional guarantee for the process, but confirmed the Legislature's right to lay down tight guidelines which delineate the powers of the Commission. …

The Province submits that clause 2(d) in the 2012 Terms of Reference was merely a "tight guideline" which is an unreviewable matter of "process".

[106] We respectfully disagree, for four reasons.

[107] First, Justice Sopinka spoke for himself, not for the Supreme Court. Justice McLachlin wrote the majority's reasons in *Carter*. Insofar as they differ from those of Justice Sopinka, Justice McLachlin's reasons must be taken as settling the matter.

[108] Second, Justice Sopinka's passage responded to Justice Cory's dissent by saying there was no guarantee of a process that involves an independent commission. We agree there is no guarantee of an independent commission. That is not the point on the Nova Scotia Reference. The point is that **whichever** body is authorized to craft the boundaries is mandated to address the balance of

constitutional criteria for effective representation, as discussed by Justice McLachlin.

[109] Third, it is not entirely clear what Justice Sopinka meant by "had it simply legislated the impugned boundaries, the process itself would not have been subject to judicial scrutiny". On the Nova Scotia Reference, the Province interprets those words to exempt the any terms of reference from review under s. 3 of the *Charter*, meaning Terms of Reference 2(d) is "binding" *per se*. We disagree with that interpretation. The majority's reasons in *Carter* make it clear that the principles of effective representation are constitutional. The majority subjected Saskatchewan's conditions to the crucible of effective representation, according to the court's standard of review. Legislative terms of reference do not trump the constitutional principles.

[110] Fourth, in *Carter*, Saskatchewan's statute articulated the limitation. Nova Scotia's statute does not. Clause 2(d) is the work of the Select Committee. The Terms of Reference are a subordinate instrument under s. 5(3) and (5) of the *House of Assembly Act*, and derive their legal status from the enabling statute. As discussed earlier, section 5 of the *House of Assembly Act* does not say either that (1) the Select Committee may make binding rulings on effective representation, or that (2) the Select Committee's Terms of Reference may block the Independent Commission's expression of its own view on effective representation. Nova Scotia's Legislature did not enact the "tight guidelines" that the Province's submission envisages.

[111] The Province's submission does not alter the views we have expressed earlier.

(d) Parliamentary Privilege

[112] The Province next submits that the Attorney General's "null and void" letter of June 14, 2012 implemented Term of Reference 2(d), that was protected by parliamentary privilege and is unreviewable by a court. The Province's reply factum puts it this way:

> 18 Section 3 must be read in context of parliamentary privilege which provides Parliament and the legislature with the fundamental constitutional right to regulate their own proceedings. Justice McLachlin [in *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876] noted a Court may inquire into the existence of the parliamentary privilege being claimed, but held once a court finds the

> privilege exists, that is the end of the review. To require otherwise would require express wording within the Constitution.
>
> 19 The doctrine of necessity governs the Court's inquiry into whether parliamentary privilege exists. The necessity doctrine does not involve a substantive judicial review as to whether the particular action at issue was necessary, but rather inquires whether the dignity, integrity and efficiency of the legislative body could be maintained without the ability to carry out the type of action done. …
>
> 21 In this Reference, the Attorney General submits the House of Assembly has control over its own process and procedures. The House of Assembly delegated the boundary review task to the Boundary Review Commission, but maintained control over how the review was conducted. …
>
> …
>
> 24 … The Attorney General submits the dignity, integrity and efficiency of the Legislature would not be maintained if the Attorney General is not permitted to reject Interim reports which do not comply with a Commission's terms of reference. Therefore, the Attorney General submits the Terms of Reference and the Interim Report were part of the Legislature's process of conducting boundary reviews. As it is part of the Legislature's process, it is the subject of parliamentary privilege and is not open to this Court to review.

[113] In *Harvey*, cited by this passage, provincial legislation disqualified a member convicted of corrupt practices from holding electoral office for five years. Justice LaForest, for six justices, held that the disqualification violated s. 3 of the *Charter*, but was justified under s. 1. Justice McLachlin, with one other justice concurring, agreed with the result, but for different reasons. Justice McLachlin said that (1) the control of membership in the Legislature was subject to parliamentary privilege, (2) the court may determine whether the privilege exists, but (3) once the privilege is upheld, the exercise of that privilege is not reviewable even under the *Charter*.

[114] Nine years later, in *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, the Supreme Court defined the principles to assess a claim for parliamentary privilege. Justice Binnie for the Court set out twelve propositions:

> A. General Principles of Parliamentary Privilege
>
> …
>
> 29 … For present purposes, it is sufficient to state a number of propositions that are now accepted both by the courts and by the parliamentary experts.

1. Legislative bodies created by the *Constitution Act, 1867* do not constitute enclaves shielded from the ordinary law of the land. "The tradition of curial deference does not extend to everything a legislative assembly might do, but is firmly attached to certain specific activities of legislative assemblies, *i.e.*, the so-called privileges of such bodies" …

2. Parliamentary privilege in the Canadian context is the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions [citations omitted].

3. Parliamentary privilege does not create a gap in the general public law of Canada but is an important part of it, inherited from the Parliament at Westminster by virtue of the preamble to the *Constitution Act, 1867* and in the case of the Canadian Parliament, through s. 18 of the same Act [citations omitted].

4. Parliamentary privilege includes the <u>necessary immunity</u> that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces …<u>in order for these legislators to do their legislative work</u>. [Justice Binnie's emphasis] [citations omitted] The idea of necessity is thus linked to the autonomy required by legislative assemblies and their members to do their job.

5. The historical foundation of every privilege of Parliament is necessity. If a sphere of the legislative body's activity could be left to be dealt with under the ordinary law of the land without interfering with the assembly's ability to fulfill its constitutional functions, then immunity would be unnecessary and the claimed privilege would not exist. [citations omitted]

6. When the existence of a category (or sphere of activity) for which inherent privilege is claimed (at least at the provincial level) is put in issue, the court must not only look at the historical roots of the claim but also determine whether the category of inherent privilege <u>continues</u> to be necessary to the functioning of the legislative body today. … [Justice Binnie's emphasis]

7. "Necessity" in this context is to be read broadly. The time-honoured test, derived from the law and custom of Parliament at Westminster, is what "the dignity and efficiency of the House" require …

8. Proof of necessity may rest in part in "shewing that it has been long exercised and acquiesced in" [citation omitted]. The party who seeks to rely on the immunity provided by parliamentary privilege has the onus of establishing its existence. …

9. Proof of necessity is required only to establish the existence and scope of a *category* of privilege. Once the category (or sphere of activity) is

established, it is for Parliament, not the courts, to determine whether in a particular case the *exercise* of the privilege is necessary or appropriate. … [Justice Binnie's emphasis]

10. "Categories" include freedom of speech [citations omitted]; control by the Houses of Parliament over "debates or proceedings in Parliament" (as guaranteed by the *Bill of Rights* of 1689) including day-to-day procedure in the House, for example the practice of the Ontario legislature to start the day's sitting with the Lord's Prayer [citation omitted]; the power to exclude strangers from proceedings [citations omitted]; disciplinary authority over members [citations omitted]; and non-members who interfere with the discharge of parliamentary duties [citations omitted], including immunity of members from subpoenas during a parliamentary session [citations omitted]. Such general categories have historically been considered to be justified by the exigencies of parliamentary work.

11. The role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the necessary scope of the category of privilege … The same division of jurisdiction between the courts and the House was accepted by this Court in *Landers v. Woodworth* (1878), 2 S.C.R. 158 where Richards C.J., our first Chief Justice, had this to say at p. 196:

> [[T]he courts will see whether what the House of Commons declares to be its privileges really are so, the mere affirmance by that body that a certain act is a breach of their privileges will not oust the courts from enquiring and deciding whether the privilege claimed really exists.

This jurisdictional rule has been accepted by authorities on the law and custom of the Canadian Parliament as well [citation omitted] and is not challenged in this appeal.

12. Courts are apt to look more closely at cases in which claims of privilege have an impact on persons outside the legislative assembly than at those which involve matters entirely internal in the legislature. [citations omitted]

[115] On the necessity test, Justice Binnie added:

(3) The Necessity Test

41 Parliamentary privilege is defined by the degree of autonomy necessary to perform Parliament's constitutional function. Sir Erskine May's leading text on the subject defines parliamentary privilege as

> the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each

> House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. [Justice Binnie's underlining]
>
> …
>
> 46 All of these sources point in the direction of a similar conclusion. In order to sustain a claim of parliamentary privilege, the assembly or member seeking immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfillment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.

[116] Justice Binnie also discussed how the analysis is affected by legislation on the topic. In *Vaid*, a former chauffeur to the Speaker of the House of Commons filed a complaint against the Speaker and House under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. The Speaker and House claimed parliamentary privilege. Justice Binnie considered how the provisions of the *Canadian Human Rights Act* affected the point:

> 26 … The appellants [the House and Speaker] say it is a well-established principle that an express provision of a statute is necessary to abrogate a privilege of Parliament or its members (*Duke of Newcastle v. Morris* (1870), L.R. 4 H.L. 661). …
>
> …
>
> 80 The appellants argue that the *Canadian Human Rights Act* "has no application to the House of Commons and its members because it does not expressly provide" (*Duke of Newcastle v. Morris*). This argument cannot be accepted for a number of reasons. Firstly, the argument presupposes the prior establishment of a parliamentary privilege, which has not been done. Secondly, the "presumption" suggested by Lord Hatherley 135 years ago is out of step with the modern principles of statutory interpretation accepted in Canada, as set out in Driedger's *Construction of Statutes* 2nd. ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the intention of Parliament.
>
> …
>
> 81 There is no indication in the language of s. 2 that the *Canadian Human Rights Act* was not intended to extend to employees of Parliament [Justice

> Binnie's emphasis]. There is no reason to think that Parliament "intended" to impose human rights obligations on every federal employee except itself. …
>
> 82 I conclude therefore that the *Canadian Human Rights Act* does apply to employees of the Senate and House of Commons. …

[117] Under *Vaid* (para. 54), the first inquiry is whether the category asserted by the party claiming privilege is established by prior authority. If not (para. 71), the court asks whether the party claiming privilege has established necessity. Last (paras. 80-82) is whether legislation assists to determine the matter.

[118] We will apply *Vaid*'s principles to the Province's claim of privilege. The Province's Reply Factum characterizes the privilege as follows:

> 21. In this Reference, the Attorney General submits the House of Assembly has control over its own process and procedures. …

[119] The Province asserts a privilege of the "House of Assembly". We note that, unlike *Vaid*, the Speaker or the House in Nova Scotia has not asserted a privilege. Nonetheless, we proceed to the merits.

[120] **Established by authority:** In *Vaid*, the House of Commons asserted privilege over its "internal affairs". Justice Binnie (paras. 50-51) said that a description of such "elasticity" was unsupported by precedent. The Province's claim that the House has privilege over "its own process and procedures" has unqualified breadth similar to the problematic "internal affairs" in *Vaid*. The established categories are defined with more precision. See *Vaid*, para. 29, item 10, quoted above, para. 114. The analysis turns on the alternative test of necessity.

[121] **Necessity:** Is the asserted privilege necessary so the House can perform its functions with dignity and efficiency? We reiterate our comments above (paras. 87-102):

- By s. 3 of the *Charter*, as interpreted by the majority in *Carter*, it is the right of every citizen to vote in a riding whose boundaries embody effective representation, and the entity that fashions those boundaries is obliged to consider the criteria for effective representation.
- It is unnecessary that this body be an independent commission. That is a choice for the Legislature. But Nova Scotia's Legislature has chosen to assign to an independent commission the task of making recommendations. The Legislature did not assign the function of making pre-emptive rulings on

effective representation to the Select Committee, the Government or the Attorney General.

- All Nova Scotia's Commission does is make recommendations that are introduced in the House. Then the Bill is amendable by the House under its normal procedures, in the public spotlight, and the majority government may have its way. That is the Legislature's contemplated route for the Government to assert control.

- The elements of this system, including the independence of the Commission, were deliberate policy choices adopted by the Legislature in 1992, following recommendations of the 1992 Commission, with the aims of objectifying a previously partisan and government-dominated process and implementing *Carter*'s principles of effective representation.

[122] In the Court's view, the process bulleted above enhances the dignity and invigorates the efficiency of the House as a democratic institution. That was the vision of the 1992 amendments. The alternative, proposed by the Province on this Reference, would allow the Government to usurp the independent appraisal of effective representation, simply by dictating terms of reference on that topic in the Select Committee, which is dominated by the Government. In our view, that would blemish the dignity and weaken the efficiency of the House as a democratic institution, as exemplified by the turmoil in 2012.

[123] **Effect of *Charter* and legislation:** In *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, page 785, the majority said:

> How Houses of Parliament proceed, how a provincial legislative assembly proceeds is in either case a matter of self-definition, **subject to any overriding constitutional or self-imposed statutory or indoor prescription.** [emphasis added]

[124] An example is *Roberts v. Northwest Territories (Commissioner)*, 2002 NWTSC 68. Justice Vertes (para. 57) cited this passage from *Reference re Resolution to Amend*, then continued:

> 58 … To require the Assembly to comply with the dictates of its own legislation cannot be regarded as an intrusion on the Legislature's privilege. It is simply the rule of law. It can in no way impede the functioning of the Assembly, since it must function in accordance with its statutes.

[125] To similar effect: *Page v. Mulcair*, 2013 FC 402, para. 28.

[126] In *Vaid*, para. 81, Justice Binnie applied the standard principles of statutory interpretation to conclude that "there is no indication in the language of s. 2 that the *Canadian Human Rights Act* was not intended to extend to employees of Parliament" [Justice Binnie's emphasis].

[127] On this Reference, resort to a double negative is unnecessary. Section 3 of the *Charter*, as interpreted by *Carter*, and s. 5 of the *House of Assembly Act* explicitly govern electoral boundaries.

[128] The mandate to fashion electoral boundaries according to principles of effective representation derives from s. 3 of the *Charter*. Section 3 says "[e]very citizen of Canada" has that right and, under s. 33, the right is excluded from the legislative override. The topic is not just the House's "own" internal matter. It is a fundamental right of individuals.

[129] In *Carter*, the Court faced a similar submission in the context of electoral boundaries. The submission relied on "constitutional convention" instead of constitutional privilege. Justice McLachlin rejected it:

> 35 The Minister of Justice of the Northwest Territories submits that the *Charter* does not apply since the legislation whereby constituencies are created is part of the constitution of Canada and hence not subject to the *Charter*. He submits that the provinces have had the right to establish electoral boundaries since joining Confederation. In his view, the place of voter equality in this determination is a matter of constitutional convention which is impervious to judicial review. The right of the provinces to create electoral boundaries as they see fit "must be taken as being an inherent limitation on the right to vote in s. 3."
>
> 36 I cannot accept this submission. Although legislative jurisdiction to amend the provincial constitution cannot be removed from the province without a constitutional amendment and is in this sense above *Charter* scrutiny, the provincial exercise of its legislative authority is subject to the *Charter*; as McEachern C.J. observed "[i]f the fruit of the constitutional tree does not conform to the *Charter* … then it must to such extent be struck down": *Dixon v. B.C. (A.G.)* (1986), 7 B.C.L.R. (2d) 174, at p. 188. The convention for which the Minister contends goes no further than to empower the province to establish its electoral boundaries. The particular exercise of that power is subject to s. 3 of the *Charter*, which binds Saskatchewan as it does every province and territory of Canada.

[130] Then there is s. 5 of the *House of Assembly Act*. In 1992, the Legislature assigned the job of recommending electoral boundaries to the "Independent"

Electoral Boundaries Commission. The function exited the House's sheltered enclave when the House externalized its status by law.

[131] **Conclusion – Privilege:** We disagree with the Province's claim of parliamentary privilege.

(e) Summary – Question # 1

[132] Reference Question # 1 asks whether the abolition of the electoral districts of Clare, Argyle and Richmond violated s. 3 of the *Charter*.

[133] Section 3 requires that electoral boundaries reflect effective representation. The determination involves a balance of voter parity and countervailing criteria. The applicable countervailing criteria vary with the circumstances. For Clare, Argyle and Richmond, criteria that were noted in *Carter* and are reasonably worthy of consideration, include minority representation and cultural identity.

[134] Section 3 does not require that an independent Boundaries Commission be involved. It does require that whichever body is tasked with drawing boundaries be permitted to balance voter parity against the reasonably applicable countervailing criteria. Otherwise, the principles of effective representation would fizzle in the implementation. Nova Scotia's Legislature has enacted that the Independent Electoral Boundaries Commission, not the Attorney General, Government or Select Committee, recommends those boundaries.

[135] We do not state that s. 3 of the *Charter* requires that there be protected ridings in Clare, Argyle and Richmond. Rather, under s. 3, the body that is authorized by law to craft the electoral boundaries must be allowed to balance the constitutional criteria as set out by the majority's reasons in *Carter*, and to express its view on the matter.

[136] The Attorney General's intervention on June 14, 2012 prevented the Commission from performing the balance, and from expressing its authentic view of effective representation for electors in Clare, Argyle and Richmond. Hence the Attorney General's intervention violated the precepts of s. 3 of the *Charter*. The violation (1) led directly to the Final Report's recommendation to eliminate the protected ridings which, in turn, (2) led directly to their abolition in (to quote the wording of Reference Question # 1) "Section 1 of Chapter 61 of the Acts of Nova Scotia 2012 … by which provisions the recommendations tendered by the

Electoral Boundaries Commission by its Final Report … to the House of Assembly were enacted".

[137] We answer Reference Question # 1 – Yes.

8. Second Question: Is the Infringement Justified under s. 1?

[138] There were no submissions whether the *Charter* infringement was "prescribed by law" under s. 1. Given our conclusion on proportionality, expressed below, it is unnecessary to comment on that point.

[139] Both the Province and the Intervenor relied on *R. v. Oakes*, [1986] 1 S.C.R. 103. By correspondence before the hearing, the Court asked counsel to reflect whether the adjusted approach from *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 might govern, insofar as the Commission is a statutory body with discretion to weigh the *Charter*-sourced criteria of effective representation. At the hearing, both counsel reiterated their view that *Oakes* applied, and the argument proceeded on that premise. The Court has no submissions based on *Doré*. We will apply *Oakes*.

[140] *Oakes*, paras. 69-70, establishes a two-branched test. First – is the legislative objective that impelled the *Charter* infringement of sufficient importance to warrant overriding a constitutionally protected right or freedom? Second – if so, is the measure that was adopted proportionate to the legislative objective in each of three respects: (1) is the measure rationally connected to the objective? (2) does the measure impair the right or freedom no more than necessary to achieve the objective? (3) are the deleterious and salutary effects of the measure in proportion?

[141] In *Oakes*, Chief Justice Dickson said:

> 66. The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.

[142] Here the Province has the onus.

(a) Sufficiently Important Legislative Objective

[143] The Province's factum identifies the legislative objective:

> 81. In this case, the Legislature's primary goal in setting the Commission's Terms of Reference was to ensure relative parity of voting power to the degree possible while also considering factors of geography, various community interests and history. …

[144] On *Oakes*'s first branch, the Province's factum says:

> 83. … The Attorney General submits reviewing and updating electoral boundaries to keep pace with the changes in society is a pressing and substantial objective.

[145] In the Court's view, the legislative objective was to implement *Carter*'s constitutional principles of effective representation in Nova Scotia's circumstances, with the assistance of an independent commission as contemplated by s. 5 of the *House of Assembly Act*. This synopsizes the view expressed in the 1992 Commission's Report that led to the enactment of s. 5 (above, para. 27). This is a pressing and substantial objective.

[146] Next is *Oakes*'s second branch – proportionality. We need only address the first and second tests: rational connection and minimal impairment.

(b) Proportionality – Rational Connection

[147] In *Oakes*, para. 70, Chief Justice Dickson said:

> …First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective….

[148] The Province submits that the elimination of protected ridings carefully and rationally achieved the objective.

[149] We respectfully disagree. The Attorney General's intervention on June 14, 2012 was disconnected from the legislative objective.

[150] As discussed at length above, section 5(5) of the *House of Assembly Act* says what the terms of reference "shall provide". Those features do not include either (1) a binding ruling by the Select Committee that balances the criteria of "effective representation" under s. 3 of the *Charter*, or (2) a prohibition of the Independent Commission's expression of its view on the constitutional criteria for effective representation. Sections 5(4) to (8) prescribe that the preliminary report shall move directly to further public hearings, to be followed by a final report, which is

embodied in a Government Bill introduced in the House. Then, if the Government is unhappy with the Commission's recommendations, the Government may use its majority to amend the Bill.

[151] The Government may suffer political consequences for amending its bill and rejecting the Independent Commission's view. That is immaterial to the *Oakes* analysis. Section 1 of the *Charter* isn't a heat-shield for governments on controversial issues of public policy.

[152] The point is: under s. 5 of the *House of Assembly Act*, the majority Government always controls the content of the eventual enactment that fixes electoral boundaries. Despite anything in the Commission's reports, by following s. 5 and House legislative procedures, the majority Government could enact the abolition of protected ridings in Clare, Argyle and Richmond (above, paras. 92-99). That is the process which is rationally connected to the legislative objective.

[153] The legislative objective does not, on the other hand, contemplate that the Attorney General may derail the statutory process by prohibiting the Commission from expressing its view of effective representation and by "voiding" a Report that does so.

[154] There is no rational connection between the *Charter* infringement and the legislative objective.

(c) Proportionality – Minimal Impairment

[155] The Province submits that the measure minimally impaired any *Charter* right. The Province (factum, para. 89) cites *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, para. 110, and says simply that the measure "need not be the least impairing option".

[156] In the full passage from *Harper*, Justice Bastarache for the majority said:

> *(e) Minimal Impairment*
>
> 110 To be reasonable and demonstrably justified, the impugned measures must impair the infringed right or freedom as little as possible. The oft-cited quote from *RJR-MacDonald*, *supra* [*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199], at para. 160, sets out the appropriate standard:
>
> > The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring

> process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.

Thus, the impugned measures need not be the least impairing option.

[157] As discussed, the Government can alter the Commission's recommendations by proposing an amendment after the Bill's introduction in the House. The Attorney General could propose an amendment that would eliminate the protected ridings, and would substitute a standard 25% variance. The Government majority could enact the amendment and the protected ridings would vanish. This would be subject to the outcome of any later court challenge under s. 3, which is available under any alternative.

[158] The "leeway to the legislator" mentioned in *Harper* and *RJR-MacDonald* does not help the Province with *Oakes*'s proportionality test. Here, the less intrusive option was the **Legislature**'s prescribed course in s. 5 followed by the **Legislature**'s process for amending a Bill. The Government had only to follow the statute and House procedure. It was the Attorney General's letter of June 14, 2012 that attenuated the Legislature's contemplated leeway.

[159] The Attorney General's "voiding" of the Commission's Interim Report did not minimally impair the *Charter* right.

(d) Summary – Question # 2

[160] For each of those two reasons, the infringement fails *Oakes*'s proportionality test. It is unnecessary to consider the third aspect of proportionality.

[161] Reference Question # 2 asks whether any infringement of s. 3 is justified under s. 1. We answer – No.

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9. Conclusion

[162] The answers to the Reference Questions are:

> # 1 – Yes, the abolition of the three ridings violated s. 3.
>
> # 2 – No, the infringement is not justified by s. 1.

[163] In *Dixon,* McLachlin, C.J.S.C.., declared that the boundaries offended s. 3 of the *Charter*, then (D.L.R., page 284) declared that, during a reasonable interval required for the enactment of amending legislation, the invalid legislation "will stay provisionally in place to avoid the constitutional crisis" that otherwise might follow.

[164] This is a reference, not an application for a declaration like *Dixon*. In *Re Remuneration of Judges (No. 2)*, [1998] 1 S.C.R. 3, paras. 4-11, Chief Justice Lamer, for the Court, said that on a reference, a court has no authority to issue a declaration. But he also noted the ameliorative effect of the doctrine of necessity and the exception recognized in *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721. In *Manitoba Language Rights*, a reference, the Court (paras. 75-81) discussed the *de facto* doctrine and (para. 88) noted "there are other doctrines which might provide relief".

[165] The concluding page of the Province's factum says:

> 103. The Attorney General seeks this Honourable Court's opinion as it relates to the questions posed in this Reference. No declaration is sought on this Reference and none ought to be given.

[166] At the hearing, the Court asked the Province's counsel whether or how the Court might soften the impact, should this Court answer question #1 - Yes, and question #2 - No. The Court invited further written submissions, should counsel wish to pursue the point. The Province's counsel reiterated that this reference requests merely an advisory opinion that answers the two questions, not a declaration, and the Court has no authority to issue a provisional declaration.

[167] The Court accepts the Province's view. The Province retains the option of filing another properly constituted application that requests a provisional remedy.

Fichaud, J.A.

Saunders, J.A.

Oland, J.A.

Bryson, J.A.

Bourgeois, J.A.