

The Ever-Expanding House of Commons and the Decennial Debate Over Representation by Population

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ABSTRACT

In 2022, the House of Commons considered two superficially similar bills to amend the Representation Formula in section 51(1) of the *Constitution Act, 1867*. But they were, in fact, radically different. In February, a Bloc Québécois MP tabled Bill C-246, which aimed to give Quebec a fixed percentage of 25% of MPs in the House of Commons irrespective of its population. The Bloc presented the bill as a simple constitutional amendment under the Section 44 Amending Procedure, which allows the Parliament of Canada alone to amend the Constitution of Canada under limited circumstances. In fact, the significant change that the Bloc sought would have disturbed the principle of representation of the provinces in the House of Commons by population and therefore would have required a multilateral constitutional amendment under the General Amending Procedure instead. In March, the Trudeau ministry tabled a rival Bill C-14 that simply updated the Grandfather Clause and guaranteed Quebec a fixed number of 78 seats; Parliament adopted it in June 2022. More fundamentally, these two competing bills represent two conflicting theories on the purpose and nature of political representation in Canada and a debate which ultimately extends back to Confederation: liberalism, based on individualism and equality of votes between individuals, and communitarianism based on representation of communities, economic units, regions, or peoples.

1. INTRODUCTION

The nature of political representation in the House of Commons has often generated controversy throughout Canadian history and flared up most recently in 2010-2011 and once more in 2021-2022. Section 51(1) of the *Constitution Act, 1867* mandates that the number of MPs per province be readjusted after each decennial census based on a series of rules — the Representation Formula — that preserve the basic principle of Representation by Population, but with modification. Parliament alone can alter the

Representation Formula as a constitutional amendment under the Section 44 Amending Procedure. Parliament exercised this authority and adopted new rules in December 2011 which both recognised Quebec's uniqueness and should have ensured that no province could ever lose an MP in a subsequent readjustment. Yet in October 2021, plugging Statistics Canada's population estimates for 1 July 2021 into the Representation Formula produced the unthinkable: the House of Commons would gain four new MPs overall, but Quebec would lose one MP, going from 78 to 77.

This initial loss in 2021 prompted protest from the Government of Quebec and the Bloc Québécois and raised acute anxieties surrounding Quebec's diminishing share of the House of Commons. In February 2022, Bloc Québécois MP Martin Champoux tabled a private members' bill that proposed to guarantee Quebec a fixed percentage of at least one-quarter of MPs in perpetuity and irrespective of its population. However, the Parliament of Canada does not hold the authority to enact such a constitutional amendment. Instead, guaranteeing a province a fixed percentage of MPs would disturb the principle of Representation by Population, what the *Constitution Acts* formally call "the proportionate representation of the provinces," and thereby require a multilateral constitutional amendment under the General Amending Procedure. The Trudeau ministry then tabled a rival government bill on 24 March 2022 that simply guaranteed Quebec the *status quo* from the *Representation Order* of 2013: at least 78 MPs. Parliament enacted this constitutional amendment under the Section 44 Procedure and modification of the Representation Formula in June 2022, and the new calculation confirmed that Quebec retained its 78 MPs.

More fundamentally, these rival bills hinted at a broader debate and highlighted two diametrically opposed and competing theories of the nature and purpose of political representation in Canada which extend all the way back to Confederation and perhaps strike at the very existence of Canada itself: liberalism based on the proportionate representation of the provinces and the equality of individual voters, versus communitarianism based on giving weight to collectivities like peoples and consociational politics. These competing theories are ultimately irreconcilable, but Canada has since the mid-19th century attempted to muddle through and split the difference by layering communitarian exemptions onto a liberal base of Representation by Population to accommodate the concerns of the Atlantic Provinces and Quebec. The decennial readjustment has already degenerated in the last two rounds (2011-2013 and 2021-2023) into a decennial debate over the principle and practice of Representation by Population in the House of Commons and risks producing further acrimony in the coming decades as Quebec's share of Canada's population, and thus share of the House of Commons, continues to decline. Parliament has already amended the Representation Formula twice in this century and might well have to do so again in the 2030s or 2040s as new complications arise.

2. REPRESENTATION IN THE HOUSE OF COMMONS UNDER THE *CONSTITUTION ACT, 1867*

(a) Section 51(1): The Representation Formula

Section 51(1) of the *Constitution Act, 1867* states that “the number of members of the House of Commons and the representation of the provinces therein shall [. . .] on the completion of each decennial census be readjusted [. . .] subject and according to the following rules.”¹ But these rules have changed numerous times since Confederation. The original formula from 1867 lasted until the Imperial Parliament altered them at the request and with the consent of Canada in 1946.² An amendment to the *British North America Act* in 1949 then gave the Parliament of Canada the authority to amend the classes of subjects that currently fall under the Section 44 Amending Procedure. The Parliament of Canada modified the Representation Formula in 1952 and repealed and replaced it outright in 1974.³ Parliament then formally repealed and replaced the Representation Formula as constitutional amendments under the Section 44 Amending Procedure in 1985 and 2011, and it enacted one minor revision in 2022.⁴ Of these seven iterations of the Representation Formula, the Original Formula of 1867 and the Amalgam Formula of 1974 used Quebec’s guaranteed minimum number of MPs (65 and 75, respectively) as the baseline for calculating an electoral quotient and the number of MPs that the other provinces would receive. In contrast, the second, third, and fifth iterations of the Representation Formula from 1946, 1952, and 1985 used the population of a province divided by the total number of MPs within the House of Commons at the time of its enactment (255, 263, and 279, respectively) as the baseline for calculating the electoral quotient.⁵ However, the sixth and seventh Representation Formulas from 2011 and 2022 use the average number of people per riding, and thus per MP, as the baseline for calculating the number of MPs per province.

(b) Applying the Seventh Representation Formula in 2021 and 2022

Overall, sections 51(1) and section 51A of the *Constitution Act, 1867* determine the number of MPs per province; combined with section 51(2), which grants each territory one MP, they also determine the total number of MPs in the House of Commons. Parliament affirmed in sections 12.1 and 14(1)

¹ Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2021) at 11.

² *British North America Act, 1946* (United Kingdom), 9-10 George VI, c. 63.

³ *British North America Act, 1952* (Canada), 1 Elizabeth II, c. 15; *British North America Act, 1974* (Canada), 23 Elizabeth II, c. 13.

⁴ *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8; *Fair Representation Act*, S.C. 2011, c. 26.

⁵ J.W.J. Bowden, “The Origins of Canada’s Electoral System and the Constitutional Considerations of Electoral Reform,” *Journal of Parliamentary and Political Law* 14, no. 1 (June 2020): 131-132.

of the *Electoral Boundaries Readjustment Act* that the Chief Electoral Officer calculates the number of MPs per province by plugging Statistics Canada's population estimates for 1 July in the year of a decennial census into the Representation Formula.⁶ In 2011, 2021, and 2022, the calculations happened according to the following steps.

(i) *Calculating the Electoral Quotient*

The most recent readjustment began in October 2021 when the Chief Statistician sent the population estimates for 1 July 2021 to the Chief Electoral Officer, who, in turn, calculated the new electoral quotient by multiplying the previous electoral quotient (111,166) by the average growth rate in population of the ten provinces between 1 July 2011 and 1 July 2021 (which came to 9.647%) and rounding up to the next larger number.⁷ The new electoral quotient comes to 121,891. Section 12.1 of the *Electoral Boundaries Readjustment Act* and Rules 5 and 6 of section 51(1) of the *Constitution Act, 1867* define the electoral quotient as the average population per riding and thus by necessary implication define the electoral system as single-member plurality, making the number of MPs and number of seats one and the same.⁸

The first five Representation Formulas used the figures from the decennial census itself. In contrast, the sixth and seventh Representation Formulas have relied instead on Statistics Canada's population estimates for 1 July in the year of a decennial census to calculate the electoral quotient and number of MPs per province.⁹ According to the Chief Statistician of Canada, the Representation Formula could reasonably rely on either the estimates or the official figures from the census itself to calculate the number of MPs per province. The population estimates from the year of a decennial census come closer to the true population than the figures from the decennial census itself because they take net under-coverage into account. In contrast, the *Electoral*

⁶ *Electoral Boundaries Readjustment Act*, R.S.C., 1985, c. E-3, ss. 12.1, 14(1).

⁷ Section 51(1) of the *Constitution Act, 1867* says: "6. In these rules, **electoral quotient** means (b) In relation to the readjustment following the completion of any subsequent decennial census, the number obtained by multiplying the electoral quotient that was applied in the preceding readjustment by the number that is the average of the numbers obtained by dividing the population of each province by the population of the province as at July 1 of the year of the preceding decennial census according to the estimates prepared for the purpose of the preceding readjustment, and rounding up any fractional remainder of that multiplication to one."

⁸ Bowden, "The Origins of Canada's Electoral System," at 142-143.

⁹ Statistics Canada, *Quarterly Demographic Estimates, April to June 2021*, 29 September 2021. Statistics Canada explains the methodology of population estimates as follows: "The estimates released in this publication are based on 2016 Census counts adjusted for census net undercoverage and incompletely enumerated Indian reserves, to which are added the population growth estimates for the period from May 10, 2016 to the date of the estimate. These estimates are not to be confused with the 2021 Census population counts, which will be released on February 9, 2022. Total population estimates based on the 2021 Census counts, adjusted for census net undercoverage and incompletely enumerated Indian reserves, will be available in September 2023."

Boundaries Readjustment Act could rely on only the official figures from the decennial census to calculate the electoral quotas for each province. Unlike the population estimates, the census provides more detailed geographic breakdowns of the population and takes into account the higher rates of under-counting in cities compared to rural areas, which therefore prevents under-representation of cities and provides a more accurate electoral quota for each province.¹⁰ In addition, the population estimates come in higher than the figures in the decennial census and thus take into account the growth in population that will occur before the next readjustment, which builds some flexibility into an allocation that has to last for about ten years.

(ii) *Calculating the Initial Seat Allocation*

Under Rule 1 of the Representation Formula, the baseline number of seats, and thus MPs, per province is obtained by dividing the population estimates for each province by the electoral quotient and rounding any remainder to the next larger integer. The rule always goes to the next larger integer, instead of either rounding up or down, because the Representation Formula allows the House of Commons to expand upon each readjustment instead of imposing a cap on the number of MPs.¹¹ The Chief Electoral Officer published this calculation on 16 October 2021; however, Parliament's amendment to the Representation Formula in June 2022 obliged him to issue a revised calculation on 9 July 2022.¹²

¹⁰ Wayne Smith (Chief Statistician of Canada), "Bill C-20: An Act to amend the *Constitution Act, 1867*, the *Electoral Boundaries Readjustment Act*, and *Canada Elections Act*," Standing Committee on Procedure and House Affairs, *Evidence*, 41st Parliament, 1st Session, Number 010, 17 November 2011, at pages 1-3, 5. Other witnesses informed the committee that the original version of the *Electoral Boundaries Readjustment Act* from 1964 allowed the Commissions to take future growth of population into account in establishing the boundaries between electoral districts, which usually benefitted fast-growing suburban ridings, until Parliament repealed this proviso in the 1970s. Andrew Sancton (Professor of Political Science at the University of Western Ontario), "Bill C-20: An Act to amend the *Constitution Act, 1867*, the *Electoral Boundaries Readjustment Act*, and *Canada Elections Act*," Standing Committee on Procedure and House Affairs, *Evidence*, 41st Parliament, 1st Session, Number 011, 22 November 2011, 8; Louis Massicotte (Professor of Political Science at Laval University), "C-20, An Act to amend the *Constitution Act, 1867* and other Acts," *Proceedings of the Senate Standing Committee on Legal and Constitutional Affairs, Evidence*, Issue 8, 15 December 2011. The new system of relying on the estimates to calculate the electoral quotient under the Representation Formula versus the census to calculate the electoral quota for each province under the *Electoral Boundaries Readjustment Act* has a similar effect of allocating room for growth in boundaries that last for about a decade, but only on the level of the province as a whole and not between ridings within each province.

¹¹ Section 51(1) of the *Constitution Act, 1867* says: "1. There shall be assigned to each of the provinces a number of members equal to the number obtained by dividing the population of the province by the electoral quotient and rounding up any fractional remainder to one."

¹² Stéphane Perrault, "Parliament: Office of the Chief Electoral Officer — *Electoral Boundaries Readjustment Act*," in *Canada Gazette, Part I*, Volume 155, No. 42,

(iii) Applying the Senatorial Clause

Under section 51A of the *Constitution Act, 1867*, no province shall be represented by fewer members in the House of Commons than in the Senate. In practical terms, this rule only adds seats to the four Atlantic Provinces.¹³

(iv) Applying the Grandfather Clause

Rule 2, the Grandfather Clause, builds on top of the Senatorial Clause. From 2011 to 2021, no province could be represented by fewer MPs than it held when the *Constitution Act, 1985 (Representation)* entered into force in 1986.¹⁴ This guaranteed Quebec 75 MPs. In June 2022, Parliament changed the point of reference of the Grandfather Clause from 1986 to the 43rd Parliament (elected in 2019 and dissolved in 2021), and thus guaranteed Quebec a minimum of 78 MPs instead of allowing it to lose one. In practical terms, this Grandfather Clause now perpetuates the over-representation of Newfoundland & Labrador, Nova Scotia, Quebec, Manitoba, and Saskatchewan, where some previous iterations of the Representation Formula allowed provinces to lose MPs in proportion with their declining populations.

(v) Applying the Representation Rule

The Representation Formula itself never named the two sub-provisions (Rules 3 and 4), but Elections Canada dubbed them “The Representation Rule.”¹⁵ As of 2011, a province must hold the same percentage of seats in the House of Commons as its percentage of the population of the ten provinces, but if and only if this province was not under-represented in the previous distribution.¹⁶ This number is obtained by multiplying the difference between

Saturday, 16 October 2021, at 5145; Stéphane Perrault, “Parliament: Office of the Chief Electoral Officer — *Electoral Boundaries Readjustment Act*,” in *Canada Gazette, Part I*, Volume 156, No. 28, Saturday, 9 July 2022, at 4221.

¹³ Section 51A of the *Constitution Act, 1867* says: “51A Notwithstanding anything in this Act a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province.”

¹⁴ Section 51(1) of the *Constitution Act, 1867* says: “2. If the number of members assigned to a province by the application of rule 1 and section 51A is less than the total number assigned to that province on the date of the coming into force of the *Constitution Act, 1985 (Representation)*, there shall be added to the number of members so assigned such number of members as will result in the province having the same number of members as were assigned on that date.”

¹⁵ Matthew Lynch, “C-20, An Act to amend the Constitution Act, 1867 and other Acts,” *Proceedings of the Senate Standing Committee on Legal and Constitutional Affairs, Evidence*, Issue 8, 14 December 2011. Lynch described the Representation Rule as “simply a policy decision” compared to the bill from the previous parliament

¹⁶ Section 51(1) of the *Constitution Act, 1867* says:
 “3. After the application of rules 1 and 2 and section 51A, there shall, in respect of each province that meets the condition set out in rule 4, be added, if necessary, a number of members such that, on the completion of the readjustment, the number obtained by dividing the number of members assigned to that province by the total number of

the percentage of seats and the percentage of the population of the provinces by the total number of seats held by the provinces in the House of Commons. The Representation Rule could, in theory, apply to any province but, in practice, can only apply to Quebec. British Columbia, Alberta, and Ontario remain under-represented, but they do not qualify under this rule precisely because they were under-represented in previous readjustments as well.¹⁷ Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland & Labrador do not qualify because they remain over-represented from one readjustment to the next and will not receive more MPs for the foreseeable future. Instead, these provinces benefit from the Grandfather Clause. The under-representation of the three fastest-growing provinces has become a fundamental feature of the House of Commons since at least 1985.

The Representation Rule emerged as a political compromise in 2011 after the Harper ministry's three previous attempts to repeal and replace the Representation Formula between 2007 and 2010 failed, all the while provoking significant backlash from the Bloc Québécois as well as the unanimous condemnation of the National Assembly on three separate occasions.¹⁸ Previous prime ministers might have openly embraced something that can in practice only apply to Quebec as the "Quebec Representation Rule," but Prime Minister Harper did not. The proviso caused so much controversy that Harper took the extraordinary step of holding a special meeting of the

members assigned to all the provinces is as close as possible to, without being below, the number obtained by dividing the population of that province by the total population of all the provinces."

"4. Rule 3 applies to a province if, on the completion of the preceding readjustment, the number obtained by dividing the number of members assigned to that province by the total number of members assigned to all the provinces was equal to or greater than the number obtained by dividing the population of that province by the total population of all the provinces, the population of each province being its population as at July 1 of the year of the decennial census that preceded that readjustment according to the estimates prepared for the purpose of that readjustment."

¹⁷ Andrew Sancton, "Eroding Representation-by-Population in the Canadian House of Commons: The *Representation Act, 1985*," *Canadian Journal of Political Science* 23, no. 3 (September 1990): 452.

¹⁸ Benoit Pelletier (Ministre des Affaires inter-canadiennes), « Demander au Parlement du Canada de retirer les projets de loi C-56 modifiant la Loi constitutionnelle de 1867 et C-43 sur les consultations concernant la nomination des sénateurs, » *Journaux des débats de l'assemblée*, 38e Législature, 1er session, Vol. 50, no. 5 (le 16 mai 2007) at 177-181; « Exiger du gouvernement fédéral qu'il renonce à déposer tout projet de loi ayant pour conséquence de diminuer le poids du Québec à la Chambre des communes », *Journaux des débats de l'assemblée*, 39e Législature, 1er session, Vol. 41, no. 60 (le 7 octobre 2009) at 3399; The Deputy Speaker, « Motion de l'opposition — La représentation du Québec à la Chambre des communes, » *Débates des communes*, 40e Parlement, 3e Session, Vol. 145, no. 029 (le 20 avril 2010) at 1761; M. Dutil, « Motions sans avis : Demander aux élus fédéraux de renoncer à adopter tout projet de loi ayant pour effet de diminuer le poids de la représentation du Québec à la Chambre des communes, » *Journal des débats de l'Assemblée*, 39e Législature, 1ere Session, Vol. 41, no. 108 (le 22 avril 2010) at 6444-6445.

Conservative parliamentary party on Monday, 24 October 2011 (caucuses usually meet every Wednesday when the Commons is sitting), during which he purportedly defended the concession to Quebec as a necessary means of maintaining national unity.¹⁹ The Representation Formula from 2011 (modified slightly but maintained in principle in 2022) sought to solve the chronic under-representation of British Columbia, Alberta, and Ontario by awarding 27 new MPs between them in one readjustment, while also guaranteeing Quebec variable number of compensatory seats so that its percentage of MPs could never fall below its share of the population of the provinces.²⁰ The Representation Rule gave Quebec 3 additional seats in 2011 for a total of 78; however, in 2021, it only provided Quebec two more seats for a total of 77. In June 2022, Parliament rendered the Representation Rule moot in the 2020s by awarding Quebec 78 seats under the Grandfather Clause instead, though the Representation Rule remains and could apply to future readjustments. This decennial tinkering in 2011 and 2022 proved John C. Courtney — who literally wrote the book on the decennial readjustment in Canada — correct; he remarked in 2011 that “Yesterday’s reform is often today’s problem.”²¹

(vi) *Adding Up the Total Number of Seats for Each Province*

The sum of the figures from the previous calculations gives the total number of MPs, and therefore seats, for each province. Under section 51(2) of the *Constitution Act, 1867*, Parliament provides one MP to each of the three territories separate from the Representation Formula under section 51(1), which only ever applied to the provinces. The sums of the MPs allocated under sections 51(1), 51A, and 51(2) yield the total number of MPs in the House of Commons. The *Canada Gazette* published these figures under section 14(1) of the *Electoral Boundaries Readjustment Act* on 16 October 2021, when the total came to 342 MPs.²² However, Bill C-14 obligated the Chief Electoral Officer to re-do the calculation on 9 July 2022 to reflect that Quebec would keep its 78 MPs and that the House of Commons would expand to 343 MPs in total.²³

¹⁹ Althia Raj, “House Of Commons Seat Redistribution: Tories To Introduce Long-Awaited Bill To Adjust Electoral Landscape,” *The Huffington Post*, 26 October 2011.

²⁰ Tom Lukiwski, (Parliamentary Secretary to the Government House Leader), “Government Orders: *Fair Representation Act*,” *House of Commons Debates*, 41st Parliament, 1st Session, Volume 146, No. 042, 2 November 2011, at 2861.

²¹ John C. Courtney (Professor Emeritus of Political Studies at the University of Saskatchewan), “C-20, An Act to amend the Constitution Act, 1867 and other Acts,” *Proceedings of the Senate Standing Committee on Legal and Constitutional Affairs, Evidence*, Issue 8, 15 December 2011.

²² Stéphane Perrault, “Parliament: Office of the Chief Electoral Officer — *Electoral Boundaries Readjustment Act*,” in *Canada Gazette, Part I*, Volume 155, No. 42, Saturday, 16 October 2021, at 5145.

²³ Stéphane Perrault, “Parliament: Office of the Chief Electoral Officer — *Electoral Boundaries Readjustment Act*,” in *Canada Gazette, Part I*, Volume 156, No. 28, Saturday, 9 July 2022, at 4221.

Calculating the Representation Rule

Province	Percentage of Estimated Provincial Population	Percentage of Seats in House of Commons Before Representation Rule	Difference in Percentage	Representation Rule (Difference in Percentage Multiplied by 337)	Rounded to Larger Whole Number
Newfoundland and Labrador	1.37%	2.06%	-0.69%	-2.34	
Prince Edward Island	0.43%	1.18%	-0.75%	-2.51	
Nova Scotia	2.60%	3.24%	-0.63%	-2.13	
New Brunswick	2.07%	2.94%	-0.87%	-2.93	
Quebec	22.57%	22.06%	0.51%	1.73	2
Ontario	38.90%	35.88%	3.01%	10.15	11
Manitoba	3.63%	4.12%	-0.49%	-1.64	
Saskatchewan	3.10%	4.12%	-1.02%	-3.45	
Alberta	11.66%	10.88%	0.77%	2.61	3
British Columbia	13.68%	12.65%	1.03%	3.48	4

Calculating the Representation Rule (Now Redundant)

Province	Percentage of Estimated Provincial Population	Percentage of Seats in House of Commons Before Representation Rule	Difference in Percentage	Representation Rule (Difference in Percentage Multiplied by 340)	Rounded to Larger Whole Number
Newfoundland and Labrador	1.37%	2.04%	-0.68%	-2.30	
Prince Edward Island	0.43%	1.17%	-0.74%	-2.50	
Nova Scotia	2.60%	3.21%	-0.60%	-2.06	
New Brunswick	2.07%	2.92%	-0.84%	-2.87	
Quebec	22.57%	22.74%	-0.17%	-0.57	
Ontario	38.90%	35.57%	3.33%	11.31	12
Manitoba	3.63%	4.08%	-0.45%	-1.53	
Saskatchewan	3.10%	4.08%	-0.99%	-3.35	
Alberta	11.66%	10.79%	0.87%	2.95	3
British Columbia	13.68%	12.54%	1.14%	3.89	4

(c) **The Electoral Boundaries Readjustment Act and the Readjustment Itself**

Parliament can amend at will not only the Representation Formula but also sets the criteria for readjusting the boundaries of electoral districts within the provinces. For the first century after Confederation, Parliament readjusted the boundaries of electoral districts directly through a series of *Representation Acts*, the last of which it passed in 1962.²⁴ In 1964, Parliament passed the *Electoral Boundaries Readjustment Act* and delegated the task of altering the boundaries of electoral districts to a series of independent Federal Electoral Boundaries Commissions for all ten provinces, each of which consists of a federal judge appointed by the Governor-in-Council and two other non-partisan experts (often university professors) appointed by the Speaker of the House of Commons.²⁵ These independent commissions prevent partisan gerrymandering and must follow objective criteria so that each electoral district within a province contains roughly the same number of people.

The Representation Formula under the *Constitution Act, 1867* relies on the population estimates for 1 July in the year of a decennial census to calculate the electoral quotient and number of MPs per province, while the *Electoral Boundaries Readjustment Act* instructs the Federal Electoral Boundaries Commissions to calculate the electoral quota for their province by dividing the real population of their province from the decennial census itself by the number of MPs assigned to their province under the Representation Formula.²⁶ The Chief Statistician released these figures on 9 February 2022, which allowed the Commissions to calculate their respective electoral quotas.²⁷ The electoral quotient remains fixed at 121,891, but the electoral quotas vary from province to province and show the number of people whom each MP should represent. The Commissions must then establish boundaries between electoral districts that contain this quota plus or minus 25%, apart from extraordinary circumstances.²⁸ In the previous decennial readjustment in 2012, the Commissions for Prince Edward Island, Manitoba, Saskatchewan, and Alberta chose to keep all electoral districts within $\pm 10\%$ of their electoral quotas; in contrast, Newfoundland and Labrador's Commission made Labrador its own electoral district with a population 63.64% lower than the province's electoral quota and established a riding on the island of Newfoundland with a population 36.81% higher than the quota.²⁹

²⁴ John C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (Montreal-Kingston: McGill-Queen's University Press, 2001) at 20-28; John C. Courtney, *Elections* (Vancouver: University of British Columbia Press, 2004) at 45-55. Examples include: *Representation Act*, R.S.C. 1952, c. 334; *An Act to Amend the Representation Act* (Canada), 11 Elizabeth II, c. 17.

²⁵ *Electoral Boundaries Readjustment Act*, R.S.C., 1985, c. E-3, ss. 5-6.

²⁶ *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E-3, at s. 15(1)(a).

²⁷ Statistics Canada, *2021 Census: Population and Dwelling Counts*, 9 February 2022.

²⁸ *Electoral Boundaries Readjustment Act*, R.S.C., 1985, c. E-3, at s. 15(1)(a-b).

²⁹ *Report of the Federal Electoral Boundaries Commission for the Province of Prince*

Table 3: Calculating the Electoral Quotas in 2022

Province	Population	Number of MPs	Electoral Quota
Newfoundland & Labrador	510,550	7	72,936
Prince Edward Island	154,331	4	38,583
Nova Scotia	969,383	11	88,126
New Brunswick	775,610	10	77,561
Quebec	8,501,833	78	108,998
Ontario	14,223,942	122	116,590
Manitoba	1,342,153	14	95,868
Saskatchewan	1,132,505	14	80,893
Alberta	4,262,635	37	115,206
British Columbia	5,000,879	43	116,300

In the ongoing decennial readjustment, the Commissions will establish the boundaries between electoral districts by September 2023, and the Governor-in-Council will proclaim the new boundaries into force through *Representation Orders* that will apply to the first general election held at least 7 months after the said proclamation. Normally, one *Representation Order* would cover all ten provinces, but this readjustment will require two under the transitional provisions of the *Preserving Provincial Representation in the House of Commons Act*.³⁰ The *Electoral Boundaries Readjustment Act* mandates that the decennial readjustment follow a specific order of events, which must start only when the *Canada Gazette* publishes the CEO's official calculation of the number of MPs per province and which must end only with the proclamation of the *Representation Order*. Therefore, if Parliament changes the date of the first step in that process (calculating the total number of MPs), then the last date in the process (issuing the *Representation Order*) must also change in kind. The *Canada Gazette* published the Chief Electoral Officer's first set of calculations on 16 October 2021, but Bill C-14 rendered Quebec's portion of that calculation null and void. Parliament enacted Bill C-14 on 23 June 2022, and the Chief Electoral Officer published the new calculation in the *Canada Gazette* on 9 July 2022. Therefore, Quebec's Commission had ten months to complete all its work as of 9 July 2022, while the other Commissions continue

Edward Island (Ottawa: Elections Canada, 2012) at 4; *Report of the Federal Electoral Boundaries Commission for the Province of Manitoba* (Ottawa: Elections Canada, 2012) at 9; *Report of the Federal Electoral Boundaries Commission for the Province of Saskatchewan* (Ottawa: Elections Canada, 2012) at 5-6; *Report of the Federal Electoral Boundaries Commission for the Province of Alberta* (Ottawa: Elections Canada, 2012) at 26-27; *Report of the Federal Electoral Boundaries Commission for the Province of Newfoundland and Labrador* (Ottawa: Elections Canada, 2012) at 7-9.

³⁰ *An Act to Amend the Constitution Act, 1867 (Electoral Representation)*, S.C. 2022, c. 6, at ss. 5(3), 5(4).

their ten-month timeframe as of 16 October 2021. Even though Quebec's Commission ended up issuing its proposal, holding its public hearings, and completing its final report around the same time as those of some of the other provinces, Quebec will still fall under a separate *Representation Order* for this particular readjustment.

Canadian journalists, politicians, and even Elections Canada itself usually refer to the process of re-establishing the boundaries between electoral districts as “redistribution”³¹ — a curious misnomer. In principle, redistribution would mean that the House of Commons maintains a constant number of MPs, that the fastest-growing provinces gain MPs at the expense of provinces the populations of which have grown more slowly or outright declined in the previous decade, and that each MP represents an ever-larger number of Canadians after each decennial reallocation. This describes how readjustment works in the United States and Australia but not in Canada.³² Instead, we continue to increase the number of MPs in the House of Commons by letting the slow-growing or declining provinces keep their representation intact and by awarding the fastest-growing provinces with more MPs, though the number of people whom each MP represents does also increase by about 10,000 after each “readjustment,” the better word to describe this process. The opening paragraph of section 51(1) of the *Constitution Act, 1867* — which Parliament has never amended — also says “readjusted,” instead of “redistributed.”³³ In addition, these decennial readjustments have not always happened precisely every ten years since Parliament enacted the first iteration of the *Electoral Boundaries Readjustment Act* in 1964, nor have they always started directly after the release of the most recent decennial census. The Governor-in-Council issued *Representation Orders* establishing new electoral districts in 1966, 1976, 1987, 1996, 2003, and 2013. Only the last two readjustments finished within two years of the decennial census, taken in the first year of each decade; furthermore, the first four came out closer to the off-cycle censuses taken in

³¹ Elections Canada, “Redistribution of the Federal Electoral Districts 2022,” 21 January 2022; Elections Canada, “Archives: Redistribution of Federal Electoral Districts 2012,” 12 August 2021.

³² United States House of Representatives, Office of the Historian, “The Permanent Apportionment Act of 1929,” accessed 12 July 2022; *Commonwealth of Australia Constitution Act, 1900*, at section 24; *Commonwealth Electoral Act, 1918 (Australia)*; Australian Electoral Commission, “Steps in the Redistribution Process,” accessed 12 July 2022. Section 24 of the Constitution of Australia outlines how the electoral quota is calculated, and the *Commonwealth Electoral Act* outlines how independent electoral commissions undertake redistributions. The US established a maximum number of representatives in 1929, increasing only when Alaska and Hawaii became states.

³³ Two of the four rules under the original Representation Formula (1867-1946) also refer to this process as “Re-adjustment.” The second Representation Formula from 1946, the third from 1952, and the third Amalgam Formula from 1974 also referred to the overall process as a “readjustment.” *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 51(4), s. 51(5); *British North America Act, 1946* (UK) 9-10 George VI, c. 63, s. 51(1)(5); *British North America Act, 1952* (Canada), S.C. 1952, c. 15, s. 51(1)(6); *British North America Act, 1974* (Canada), S.C. 1974-1975-1976, c. 13, s. 51(1)(5).

years ending in “6” instead, which the Representation Formula does not use.³⁴ In addition, Parliament delayed the “decennial” readjustments in the 1970s and 1990s and even forced the process to happen twice in the 1980s.³⁵

(d) Amending Section 52 and Disturbing Representation by Population

Section 37 contains the “constitution of the House of Commons” and set out the original number of MPs per province in 1867; upon each subsequent readjustment until 1962, Parliament effectively replaced this section with the *Representation Acts*, and since 1964, the most recent *Representation Order* under the *Electoral Boundaries Readjustment Act* now states the number of MPs per province.³⁶ Section 52 of the *Constitution Act, 1867* entrenches Representation by Population — a matter of ratio and proportion — all while taking into account that the number of MPs would increase upon each decennial readjustment as the population of the Dominion of Canada increased and when a new province entered Confederation. The Imperial Parliament delegated to the Parliament of Canada the authority to take both these contingencies into account, given that only the Imperial Parliament could amend the *British North America Act* directly until 1949.

52. The Number of Members of the House of Commons may be from Time to Time increased by the Parliament of Canada, provided the proportionate Representation of the Provinces prescribed by this Act is not thereby disturbed.

³⁴ *Canada Gazette*, Part II, Volume 100, No 13, 13 July 1966, “Proclaiming the *Representation Order* into Force upon the Dissolution of the 27th Parliament of Canada,” SI/66-269; *Canada Gazette*, Part II, Volume 110, No. 13, 14 July 1976, “Proclaiming the *Representation Order* into Force upon the Dissolution of the 30th Parliament of Canada,” SI/76-76; *Canada Gazette*, Part II, Volume 121, No. 16, 5 August 1987, “Proclaiming the *Representation Order* to be in Force Upon the Dissolution of the 33rd Parliament of Canada,” SI/87-147; *Canada Gazette*, Part II, Volume 130, No. 3, 7 February 1996, “Proclamation Declaring the *Representation Order* to be in Force Effective on the First Dissolution of Parliament that Occurs after January 9, 1997,” SI/96-9; *Canada Gazette*, Part II, EXTRA, Volume 137, No. 6, 29 August 2003, “Proclamation Declaring the *Representation Order* to be in Force Effective on the First Dissolution of Parliament that Occurs after August 25, 2004,” SI/2003-154; *Canada Gazette*, Part II, EXTRA, Volume 147, No. 2, 13 October 2013, “Proclamation Declaring the *Representation Order* to be in Force Effective on the First Dissolution of Parliament that Occurs after May 1, 2014,” SI/2013-102.

³⁵ *Representation Act, 1974*, S.C. 1974-75-76, c. 13, s. 4; *Electoral Boundaries Readjustment Suspension Act*, S.C. 1992, c. 25; *Electoral Boundaries Readjustment Suspension Act*, S.C. 1994, c. 19; J. Patrick Boyer, *Electoral Law in Canada: The Law and Procedure of Federal, Provincial and Territorial Elections, Volume I* (Toronto: Butterworths, 1987) at 102-106. The Commissions had completed their reports in 1983 based on the Amalgam Formula of 1972 and the decennial census of 1981. But neither the Trudeau, Turner, or Mulroney ministries were issued a *Representation Order*, and Parliament repealed and replaced the Representation Formula in 1985. New Commissions re-did the whole process in 1986-1987.

³⁶ James W.J. Bowden, “Indirect Amendment: How the Federal Department of Justice Unilaterally Alters the Text of the Constitution of Canada,” *Commonwealth Law Bulletin* 44, no.1 (2019): 41-65.

The Parliament of Canada can only increase the number of members of the House of Commons if it also preserves roughly the same ratio, or proportion, of MPs between provinces, what section 52 calls the “proportionate representation of the provinces” and what we often call “representation by population.” If one province contains 25% of the population of the provinces, then it would hold a “proportionate representation” of 25% of the MPs in the House of Commons — 25 MPs in a House of 100 MPs, or 50 MPs in a House of 200 MPs, etc. The number of MPs would vary as the House of Commons itself expands in size, but the proportion should remain intact. In contrast, guaranteeing a province 25% of the seats in the House of Commons when it does *not* hold 25% of the population of the provinces would by mathematical definition “disturb” the “principle of proportionate representation of the provinces in the House of Commons” under section 42(1)(a) of the *Constitution Act, 1982*. Only a constitutional amendment under the General Amending Procedure could grant a province a fixed percentage, or proportion, of MPs in the House of Commons. The legislative assemblies of at least 7 of the 10 provinces representing at least 50% of the population of the provinces, along with the House of Commons and the Senate, would have to pass concurring resolutions guaranteeing Quebec a fixed proportion of 25% of the MPs in the House of Commons. This is unlikely to happen to say the least.

In practice, the Senatorial and Grandfather Clauses and the Representation Rule provide additional MPs to provinces with slow-growing or declining populations and therefore deviate from pure Brownian Representation by Population. But they do not fundamentally “disturb” it. This can be demonstrated mathematically, comparing the number of MPs that would represent each province under the pure Representation by Population to the additional number of MPs assigned under these three provisos. The Senatorial Clause applies to Newfoundland & Labrador, Prince Edward Island, Nova Scotia, and New Brunswick. The Grandfather Clause layers on the Senatorial Clause in Newfoundland & Labrador and Nova Scotia, and it tops up the representation of Quebec, Manitoba, and Saskatchewan. Finally, the Representation Rule applies only to Quebec and builds on the Grandfather Clause.

The distortion from absolute Representation by Population can be measured by comparing the proportion of the province’s total number of MPs in the House of Commons to the proportion of the province’s population out of the total population of the ten provinces. The difference in percentage represents the distortion; a negative percentage signifies over-representation, and a positive percentage indicates under-representation. The Representation Formula under section 51(1) of the *Constitution Act, 1867* only pertains to the provinces, so these calculations therefore show the percentage of each province’s population compared to the population of all ten provinces, not to the population of Canada as a whole. Parliament provides each territory one MP under section 51(2) of the *Constitution Act, 1867* instead, separate from the Representation Formula.³⁷ These figures show that Newfoundland &

Labrador, Prince Edward Island, Nova Scotia, New Brunswick, Manitoba, and Saskatchewan are all over-represented in the House of Commons relative to their proportions of the population of the ten provinces combined. In contrast, British Columbia, Alberta, and Ontario remain under-represented. Tables 1 and 2 demonstrate Ontario would need an additional 12 MPs, for a total of 134, to close that gap.

Table 4: Calculating the Proportionate Representation of the Provinces in 2022

Polity	Population Estimates (1 July 2021)	Number of MPs	Percentage of Population of the Provinces	Percentage of MPs of the Provinces	Percentage of Over-Representation or Under-Representation
Newfoundland & Labrador	520,553	7	1.37%	2.06%	-0.69%
Prince Edward Island	164,318	4	0.43%	1.18%	-0.75%
Nova Scotia	992,055	11	2.60%	3.24%	-0.63%
New Brunswick	789,225	10	2.07%	2.94%	-0.87%
Quebec	8,604,495	78	22.57%	22.94%	-0.37%
Ontario	14,826,276	122	38.90%	35.88%	3.01%
Manitoba	1,383,765	14	3.63%	4.12%	-0.49%
Saskatchewan	1,179,844	14	3.10%	4.12%	-1.02%
Alberta	4,442,879	37	11.66%	10.88%	0.77%
British Columbia	5,214,805	43	13.68%	12.65%	1.03%
Population of the Provinces	38,118,215	340			

³⁷ The *British North America Act, 1867* always included provisions for admitting the rest of the British North American colonies (British Columbia, Prince Edward Island, and Newfoundland) as provinces in Confederation, with representation in the House of Commons and Senate. It also provided for incorporating the remaining British North American territories (Rupert's Land, the Northwestern Territory, and the Arctic Archipelago) into the Dominion of Canada, but without specifying how or whether these territories could be represented in the Parliament of Canada. The Imperial Parliament therefore delegated to the Parliament of Canada the authority of providing parliamentary representation to the territories through the *British North America Act, 1871*, 34-35 Victoria, c. 28. Section 51(2) of the *Constitution Act, 1867* ultimately stems from the amendment from 1871.

(e) Repealing the Senatorial and Grandfather Clauses and the Representation Rule

The Senatorial and Grandfather Clauses only allocate a fixed number of additional MPs, and the Representation Rule allocates a variable number of additional MPs. None of these three deviations from pure Representation by Population guarantees any province a fixed proportion of MPs, which means that the overall proportion of the representation of these seven provinces in the House of Commons decreases after each readjustment. This fundamental mathematical feature saves these three provisos under section 52 of the *Constitution Act, 1867*. In contrast, guaranteeing Quebec a fixed proportion of MPs in the House of Commons would have made Quebec the most over-represented province and therefore demonstrably “disturb” the principle of the “proportionate representation of the provinces” under section 52 of the *Constitution Act, 1867* to a greater extent than any current distortion. Consequently, granting a province a fixed proportion of seats in the House of Commons undoubtedly contradicts the plain meaning of the ratio upon which “proportionate representation” depends and thus meets the threshold of a constitutional amendment under the General Amending Formula of section 42(1)(a) of the *Constitution Act, 1982*.

The Senatorial Clause of 1915 distorted pure Representation by Population in principle, but it still conformed to section 52 for two reasons, one technical and one substantive. First, the Imperial Parliament enacted it as an amendment to the *British North America Act*, and section 52 only forbids the Parliament of Canada from “disturbing” Representation by Population.³⁸ Second and more substantively, the Senatorial Clause only guaranteed a specific number of MPs to the provinces, but never a specific proportion, ratio, or percentage of MPs. The number of MPs guaranteed by the Senatorial Clause remains constant, which therefore means that the proportion of MPs representing the provinces to which the Senatorial Clause applies decreases when the overall number of MPs in the House of Commons increases. For instance, Prince Edward Island held 4 MPs out of 235 MPs in 1921, or 1.70% of the MPs in the House of Commons; in 2021, 4 out of 338 MPs equals only 1.18%. In 1988, the Court of Appeal of British Columbia ruled the Grandfather Clause constitutional and saved under section 52 for similar reasons:

³⁸ In general, matters on which the Imperial Parliament had to amend the *British North America Act, 1867* on the advice and with the consent of Canada prior to Patriation in 1982 now fall under the General Amending Procedure of the *Constitution Act, 1982*. From 1949 to 1982, the Parliament of Canada alone could under the former section 91(1) amend certain provisions of the *British North America Act, 1867* that only affected the Government and Parliament of Canada; the Section 44 Amending Procedure of the *Constitution Act, 1982* repealed and replaced the old method. The provincial legislatures likewise held the authority of amending the provincial constitutions (with the exception of the Office of Lieutenant Governor) under the former section 92(1) from Confederation until Patriation; after 1982, the Section 45 Amending Procedure took over these same functions.

[46] [. . .] Thus, the proportionate representation demanded by the Constitution in 1867 was not pure representation by population. If it had been, then there would not have been any need to limit the words “proportionate representation” in s. 52 by the words “prescribed by this Act”. From the start, the principle was modified representation by population, a principle necessary to protect provinces with declining populations. In 1867 the 5 per cent rule was the means by which it was sought to achieve that constitutional objective. The changes in 1915 (the senatorial clause), in 1952, in 1974 (the grandfather clause) and in 1985 were, in my opinion, all applications of the same principle.

[47] Accordingly, I do not agree with the appellants’ submission that the grandfather clauses are exceptions to the principle.³⁹

The legislative drafting also provides a crucial clue. The Imperial Parliament added the Senatorial Clause to the *Constitution Act, 1867* as section 51A, which suggests that it modifies the specific Representation Formula in section 51 and not the general principle of the “proportionate representation of the provinces” in section 52:

51A Notwithstanding anything in this Act a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province.⁴⁰

“Proportionate representation” can nevertheless only accommodate distortions to or deviations from Representation by Population that rely on granting provinces a fixed number of MPs, as the Senatorial and Grandfather Clauses do. Neither the Imperial Parliament nor the Parliament of Canada has ever assigned a province a fixed percentage of MPs in the House of Commons. Based on the evidence of real usage and a purposive interpretation of the text of sections 51(1) and 52 of the *Constitution Act, 1867* and section 42(1)(a) of the *Constitution Act, 1982*, it therefore stands to reason that Parliament alone can only grant a province a fixed number of MPs but not a fixed percentage of MPs under the Section 44 Amending Procedure.

Achieving something close to absolute Representation by Population would require two coincident or successive constitutional amendments under two different amending procedures. Parliament alone created and can therefore repeal both the Grandfather Clause and the Representation Rule under the Section 44 Amending Procedure, but only a constitutional amendment under the Unanimity Procedure of section 41(b) of the *Constitution Act, 1982* could repeal the Senatorial Clause under section 51A of the *Constitution Act, 1867*. The legislative assemblies of all ten provinces and the House of Commons and Senate would need to adopt concurring

³⁹ *Campbell v Canada (Attorney General)* 1988 CanLII 3043 (BC CA), at paras 46-47.

⁴⁰ Canada. Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2021) at 12. The Second and Third Representation Formulas from 1946 and 1952 directly incorporated (and perhaps somehow redundantly duplicated) the Senatorial Clause, but the Fourth and Fifth Representation Formulas from 1974 and 1985 did not.

resolutions — and Prince Edward Island would never agree. Ironically, repealing the Senatorial Clause in and of itself would not suffice to take away seats from any provinces because the Grandfather Clause would fill the gap. Furthermore, repealing the Grandfather Clause alone would not take away any of Quebec's seats because the Representation Rule would fill the gap. Parliament would therefore also need to repeal the Grandfather Clause and Representation Rule under the Section 44 Amending Procedure simultaneously and immediately after a constitutional amendment under the Unanimity Procedure repealing the Senatorial Clause entered into force in order to guarantee pure Representation by Population and take seats away from the seven provinces which currently benefit from one or more of these rules.

3. TWO COMPETING BILLS ON QUEBEC'S REPRESENTATION IN 2022

(a) Bill C-246: Giving Quebec a Fixed Percentage of MPs

On 8 February 2022, Bloc Québécois MP Martin Champoux introduced a bill to amend section 51(1) of the *Constitution Act, 1867*. He declared: “Recognizing the Quebec nation automatically means acknowledging that Quebec must be properly represented here in the House of Commons. That is the purpose of this bill.”⁴¹ Bill C-246 would have become the *Constitution Act, 2022 (Representation of Quebec)* and would have added Rule 4.1 to the existing Representation Formula. Rule 4.1 would have guaranteed that Quebec maintain 25% of the seats in the House of Commons irrespective of its population by granting the province the number of additional MPs needed to attain that proportion.

4.1 After the application of rules 1 and 2 and section 51A, there shall in respect of Quebec be added any additional members needed so that, after the completion of the readjustment, the total number of members for that province is not less than 25% of the total number of members in the House of Commons.

In 2021, the rules under the Representation Formula then in effect assigned Quebec 77 MPs and gave the House of Commons 342 MPs in total. Applying the Bloc Québécois' new provision on top of the Senatorial and Grandfather Clauses and Representation Rule would have given Quebec an additional 12 MPs, for a total of 89, which would, in turn, have expanded the House of Commons to 354 MPs overall. This new provision would have rendered the Representation Rule moot but would still nevertheless have left it intact. The first recital of the preamble presented the bill as a constitutional amendment under the Section 44 Amending Formula: “Whereas section 44 of the *Constitution Act, 1982* gives Parliament exclusive authority to amend the

⁴¹ Martin Champoux (Drummond, Bloc Québécois), “Routine Proceedings: Constitution Act, 1867,” in *House of Commons Debates*, 44th Parliament, 1st Session, Volume 151, Number 026, 8 February 2022, at 1811.

Constitution of Canada in relation to the House of Commons.”⁴² However, C-246 fell well outside the narrow purview of the Section 44 Amending Procedure and instead fits squarely under section 42(1)(a) of the *Constitution Act, 1982*, the General Amending Procedure. Parliament alone can give a province a fixed number of MPs, but only a multilateral constitutional amendment under the General Amending Procedure can grant a province a fixed percentage of MPs and detract from “the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada.”⁴³

The preamble of Bill C-246 contains three additional recitals which highlight three instances where the House of Commons has previously recognised that Quebecers form a nation (i.e., a people with a collective identity or community based on shared language, religion, culture) and concludes therefore that Quebec deserves a special exemption from Representation by Population. This fixed proportion of representation in the House of Commons would recognise Quebec’s uniqueness and give permanent representation not merely to the residents of Quebec as individuals but to Quebecers as a nation. The second recital mentions that the House of Commons recognised Quebec as a “distinct society” on 11 December 1995, only a few weeks after federalists eked out a narrow victory in Quebec’s second referendum. Prime Minister Chretien himself tabled the motion and drew the phrasing from what the *Meech Lake Accord* would have added as section 2(1)(b) of the *Constitution Act, 1867*: “The Constitution of Canada shall be interpreted in a manner consistent with the recognition that Quebec constitutes within Canada a distinct society.”⁴⁴ The motion from 1995 said:

Whereas the people of Quebec have expressed the desire for recognition of Quebec’s distinct society;

(1) the House recognize that Quebec is a distinct society within Canada;

(2) the House recognize that Quebec’s distinct society includes its French-speaking majority, unique culture and civil law tradition;

(3) the House undertake to be guided by this reality;

(4) the House encourage all components of the legislative and executive branches of government to take note of this recognition and be guided in their conduct accordingly.⁴⁵

⁴² Canada, Bill C-246, *An Act to amend the Constitution Act, 1867 (Representation in the House of Commons)*, 44th Parliament, 1st Session, 2022 (First Reading, 8 February 2022).

⁴³ Canada. Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2021) at 59 and section 42(1)(a) of the *Constitution Act, 1982*.

⁴⁴ Canada. Privy Council Office, Intergovernmental Affairs Secretariat, *1987 Constitution Accord (or Meech Lake Accord)*, “Schedule: Constitutional Amendment, 1987,” (Ottawa: Crown Copyright, 3 June 1987) at s. 1.

⁴⁵ Jean Chretien (Prime Minister of Canada), “Government Orders,” in House of

The third recital of Champoux's bill notes that the House of Commons adopted a motion on 24 November 2006 which recognised that "Quebeckers form a nation within a united Canada." The motion itself contained slightly different wording. Even the English-language motion used the French word "Québécois" rather than the English word "Quebecker," which generated some questions at the time in 2006.⁴⁶ The motion said: "That this House recognize that the Québécois form a nation within a united Canada."⁴⁷ The fourth and final recital then mentions that the House of Commons adopted a motion on 16 June 2021 which recognised that the legislature of Quebec could under the Section 45 Amending Procedure declare in its provincial constitution that Quebeckers form a nation and that French is the sole official and common language of Quebec. Yves-François Blanchet, leader of the Bloc Québécois, tabled the motion from 2021, which passed as follows:

That the House agree that section 45 of the *Constitution Act, 1982*, grants Quebec and the provinces exclusive jurisdiction to amend their respective constitutions and acknowledge the will of Quebec to enshrine in its constitution that Quebeckers form a nation, that French is the only official language of Quebec and that it is also the common language of the Quebec nation.⁴⁸

The Bloc's motion related to legislation that the Legault ministry had unveiled a month earlier on 13 May 2021. The *Official and Common Language of Quebec Act* added the following as sections 90.1 and 90.2 of the *Constitution Act, 1867*.

CARACTÉRISTIQUES FONDAMENTALES DU QUÉBEC

90Q.1. Les Québécoises et les Québécois forment une nation.

90Q.2. Le français est la seule langue officielle du Québec. Il est aussi la langue commune de la nation québécoise.⁴⁹

Section 90 falls under Part V of the *Constitution Act, 1867*, which pertains to the "Provincial Constitutions." Provincial legislatures have amended many of these provisions over the years by necessary implication through simple organic statutes,⁵⁰ but Quebec's legislature has for the first time directly

Commons, *Journals*, 35th Parliament, 1st Session, Number 275, 11 December 1995, at 6. The motion passed on division, 148 to 91.

⁴⁶ Paul Szabo (Mississauga South, Liberal), "Government Orders: The Québécois," in *House of Commons Debates*, 39th Parliament, 1st Session, Volume 141, Number 86, 24 November 2006, at 5328.

⁴⁷ Stephen Harper (Prime Minister of Canada), "Government Orders: Government Business No. 11," in House of Commons, *Journals*, 39th Parliament, 1st session, Number 87, 27 November 2006, at pages 811-812. The motion passed on division, 265 for and 16 against.

⁴⁸ Yves-François Blanchet (Leader of the Bloc Québécois), "Business of Supply," in *Journals*, 43rd Parliament, 2nd Session, Number 119, 16 June 2021, at 1115-1116. The motion passed on division overwhelmingly, 281 to 2.

⁴⁹ Quebec, National Assembly, 42nd Legislature, 1st session, « Projet de loi 96, Loi sur la langue officielle et commune du Québec, le français », 13 May 2021, section 159.

amended the text of Part V by adding new provisions to it.⁵¹ Quebec enacted the bill into law on 1 June 2022.⁵²

The debate at Second Reading of Bill C-246 served by proxy as a debate on both C-246 and C-14. Champoux observed that “there are fundamental differences and some deep incompatibilities [. . .] between Quebecers and Canadians.”⁵³ He again justified his bill by referring to the *Charlottetown Accord*, all the while ignoring that it only guaranteed Quebec a fixed percentage of 25% of MPs because Quebec would have given up 18 of its 24 Senators in a restructured, elected Senate. He also neglected to mention that the *Charlottetown Accord* fell under the Unanimity Amending Procedure of the *Constitution Act, 1982*. Champoux criticised Bill C-14 as “nothing but a watered-down version of what Quebec, Quebecers and the Bloc Québécois are calling for.” In contrast, his bill “addresses the urgent need to protect Quebec’s political weight.” He concluded: “Since Quebec is a nation, it should have the resources it needs to be represented so long as it decides to remain here in the House of Commons.”⁵⁴ In fact, Bill C-14 differed in principle from Bill C-246: the first merely updated the point of reference of the Grandfather Clause, while the second would have purported to impose, under the wrong amending formula, an unprecedented new provision to guarantee Quebec a fixed percentage of representation in defiance of the principle of

⁵⁰ Canada. Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2001) at ii. Elmer Driedger’s foreword explains that this consolidation sets out “Indirect Amendments” through “Alterations by the Legislatures.” Driedger explains: “Provisions subject to alteration by legislatures of the provinces, either by virtue of specific authority (e.g., sections 83, 84) or by virtue of head 1 of section 92 (e.g., sections 70, 72), have been included in the text in their original form, but the footnotes refer to the provincial enactments effecting the alteration.”

⁵¹ While the bill would make French “the only official language of Quebec,” it carefully avoids treading upon section 133 of the *Constitution Act, 1867* because the Legislature of Quebec alone lacks the authority to repeal or amend this section under the Section 45 Amending Formula. Section 133 guarantees the use of both English and French “in the Debates of [. . .] the Houses of the Legislature of Quebec” as well as in “any Pleading or Process in or issuing from any [. . .] all or any of the Courts of Quebec” and states that the “The Acts of [. . .] the Legislature of Quebec shall be printed and published in both those Languages.” Moreover, the National Assembly, House of Commons, and Senate would have to pass concurring resolutions to amend or repeal section 133 pursuant to the bilateral constitutional amending procedure under section 43(b), “any amendment to any provision that relates to the use of the English or the French language within a province.” Canada. Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2021) at 33 and section 133 of the *Constitution Act, 1867*; *ibid.*, at 60 and section 43(b) of the *Constitution Act, 1982*.

⁵² *Loi sur la langue officielle et commune du Québec, le français, Recueil annuel des lois du Québec*, 2022, c. 14.

⁵³ Martin Champoux (Bloc Québécois), “Private Members’ Business: *Constitution Act, 1867*,” in *House of Commons Debates*, 44th Parliament, 1st Session, Volume 151, Number 045, 24 March 2022, at 3552.

⁵⁴ *Ibid.*, 3554.

Representation by Population — a difference in kind, and not merely of degree.

New Democratic MP Peter Julian elided this crucial difference between fixed numbers and fixed percentages as well. The Senatorial and Grandfather Clauses guarantee Newfoundland & Labrador, Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Manitoba, and Saskatchewan a fixed number of MPs; in contrast, the Bloc in 2022 and the New Democrats in 2011 wanted to grant Quebec a fixed percentage of MPs. Julian emphasised that the New Democratic Party recognised Quebec as a nation in its *Sherbrooke Declaration* of 2005⁵⁵ and argued that Quebec therefore merits an exemption from Representation by Population. He criticised the Liberals and Conservatives for having opposed not only the aim of Bill C-246 but also that of a similar private members' bill C-312 tabled by a New Democratic MP in 2011.

This motion is in line with a bill introduced in 2011 by the former NDP member for Compton—Stanstead. That bill sought to guarantee minimum representation in the number of members for the province of Quebec, as is already the case for seven provinces and territories. This is nothing new; most provinces and territories already have minimum representation in the House of Commons.⁵⁶

When the NDP tabled this bill 10 years ago, the Liberals and Conservatives opposed it, despite the fact that the Liberals support the principle of a threshold for Atlantic Canada and the Conservatives support the same principle for Saskatchewan and Manitoba. We have to be logical and consistent. That is why we will vote in favour of the motion.⁵⁷

In October 2011, New Democratic MP Jean Rousseau tabled Bill C-312, which would also have purported to amend the Representation Formula to grant Quebec a fixed proportion of MPs.⁵⁸ Its main provision read:

The proportion of members from the Province of Quebec shall remain unchanged from the representation that it had on November 27, 2006, when the motion was adopted in the House of Commons recognizing that the Québécois form a nation within a united Canada.⁵⁹

⁵⁵ New Democratic Party, *Quebec's Voice and a Choice for a Different Canada: Federalism, Social-Democracy [sic] and the Quebec Question: Statement Adopted by the General Council of the NDP Quebec Section*, 2005.

⁵⁶ Peter Julian (New Democrat), "Representation of Quebec in the House of Commons," 2999.

⁵⁷ *Ibid.*, 3012.

⁵⁸ This bill prompted my column in the *National Post* that same month and my question to New Democratic MP Paul Dewar at the Canadian Study of Parliament Group's seminar on 12 October 2011, at which he filled in for fellow-MP Charlie Angus. James W.J. Bowden, "Favouring Quebec in Parliament Is Illegal," *The National Post*, 17 October 2011; James W.J. Bowden, "Paul Dewar Dodged My Question on Section 52 and the Over-Representation of Quebec," *Parliamentum*, 12 October 2011.

⁵⁹ Canada, Bill C-312, *An Act to amend the Constitution Act, 1867 (Democratic*

Quebec held 75 out of 308 MPs, or 24.35% of the total, in November 2006. The preamble of this unconstitutional bill from 2011 justified granting Quebec a fixed proportion of seats with similar arguments to those contained in the preamble of Champoux's unconstitutional bill from 2022: namely, that the House of Commons recognised "that the Quebecois form a nation within a united Canada" in November 2006, which therefore makes it "imperative to recognize that the only province whose population is considered a nation is the Province of Quebec and that it thus represents a 'community of interests' that must have 'effective representation.'"⁶⁰

The House of Commons ultimately defeated Bill C-246 at Second Reading on 8 June 2022 by a large margin of 264 to 51.⁶¹ Even if Martin Champoux's private members' bill had been constitutional and valid, the Trudeau ministry would have needed to grant it Royal Recommendation by Third Reading under Standing Order 79,⁶² because increasing the number of MPs beyond that which the current Representation Formula provides would have required the expenditure of additional public monies. The ministry could have therefore quietly vetoed Bill C-246 if the House of Commons had not done so directly. For example, the Harper ministry gave the previous bill amending to the Representation Formula the Royal Recommendation upon First Reading in October 2011.⁶³

(b) Bill C-14: Giving Quebec a Fixed Number of Seats

On 24 March 2022, the Trudeau ministry tabled Bill C-14, *An Act to Amend the Constitution Act, 1867 (Electoral Representation)* at First Reading just as Bill C-246 came up for its debate at Second Reading.⁶⁴ Bill C-14

Representation), 41st Parliament, 1st Session, 2011, at 3 (First Reading, 3 October 2011).

⁶⁰ *Ibid.*, at 2. Rousseau's preamble therefore also invoked the Supreme Court of Canada's ruling in *The Attorney General for Saskatchewan v. Roger Carter* and things like "communities of interest", which the *Electoral Boundaries Readjustment Act* now also instructs the Federal Electoral Boundaries Commissions to take into account when they establish electoral districts every ten years. But Rousseau twisted this phrase to refer to the number of MPs allocated to a province under the Representation Formula, when it fact refers to the electoral quotas and the number of people whom each MP represents within a province. *The Attorney General for Saskatchewan v. Roger Carter*, QC [1991] 2 S.C.R. 158; *Electoral Boundaries Readjustment Act*, R.S.C., 1985, c. E-3, s. 15(1)(b)(i).

⁶¹ *House of Commons Debates*, "Private Members' Business: Constitution Act, 2022 (Representation of Quebec)," 44th Parliament, 1st Session, Volume 151, N0. 084, 8 June 2022, 6329-6331.

⁶² Audrey O'Brien and Marc Bosc, "Royal Recommendation and Public Bills Sponsored by Private Members," in *House of Commons Procedure and Practice*, 2nd edition (Ottawa: House of Commons, 2009) at 835.

⁶³ Peter Van Loan (Minister of State (Democratic Reform)), "First Reading," Bill C-20: *An Act to amend the Constitution Act, 1867, the Electoral Boundaries Readjustment Act and the Canada Elections Act*, 41st Parliament, 1st Session, 27 October 2011.

⁶⁴ Canada, Bill C-14, *An Act to amend the Constitution Act, 1867 (Electoral*

updated the Grandfather Clause by changing its point of reference from when the *Constitution Act, 1985* entered into force on 6 March 1986 to “during the 43rd Parliament”, elected in 2019 and dissolved in 2021.⁶⁵ In other words, this bill restored Quebec’s representation back up to 78 MPs, but it also guarantees new baselines of 42 MPs for British Columbia, 34 for Alberta, and 121 for Ontario, which could necessitate additional amendments to the Representation Formula if any of the three fastest-growing provinces ever start to decline in population. The Governor General gave Bill C-14 Royal Recommendation on the advice of the Trudeau ministry upon First Reading.⁶⁶ The bill contained a series of transitional provisions so that the readjustment and Federal Electoral Boundaries Commissions already established in 2021 could continue uninterrupted. Amongst other things, the Chief Electoral Officer had to recalculate the number of MPs per province after this constitutional amendment entered into force.⁶⁷ In addition, the Federal Electoral Boundaries Commission for Quebec now has 10 months to complete its proposal, public hearings, and final report as of 9 July 2022 instead of 16 October 2021.⁶⁸ Finally, the Chief Electoral Officer will now also need to draft two separate *Representation Orders*, one for the nine provinces not affected by Bill C-14 and a second for Quebec, which went from 77 MPs in 2021 to 78 MPs in 2022.

The Liberals finally invoked the specter of multilateral constitutional amendment on 24 March 2022. Kevin Lamoureux, the Parliamentary Secretary to the Leader of the Government in the House of Commons, pointed out that Bill C-246 would, in fact, fall under the General Amending Procedure: “[Bill C-246] would entail a constitutional change that would require the support of 50% of the population and seven of the 10 provinces in order to be approved.”⁶⁹ Lamoureux reiterated twice more that the “constitutional change” which Champoux proposes “would require approval

Representation), 44th Parliament, 1st Session, 2022, (First Reading, 24 March 2022). Two days earlier, the Liberals and New Democrats had struck a confidence-and-supply agreement for the duration of the 44th Parliament, in which they pledged to “ensur[e] that Quebec’s number of seats in the House of Commons remains constant.” Justin Trudeau (Prime Minister of Canada), *Delivering for Canadians Now: A Supply and Confidence Agreement*, 22 March 2022.

⁶⁵ Canada, Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2001) at 15.

⁶⁶ Bill C-14, *An Act to amend the Constitution Act, 1867 (Electoral Representation)*, 44th Parliament, 1st Session, 70-71 Elizabeth II, 2021-2022, (First Reading, 24 March 2022). “Recommendation: Her Excellency the Governor General recommends to the House of Commons the appropriation of public revenue under the circumstances, in the manner and for the purposes set out in a measure entitled “*An Act to amend the Constitution Act, 1867 (electoral representation)*”.

⁶⁷ *Ibid.*, at s. 5(1).

⁶⁸ Bill C-14, *An Act to amend the Constitution Act, 1867 (Electoral Representation)*, 44th Parliament, 1st Session, 70-71 Elizabeth II, 2021-2022, (First Reading, 24 March 2022) at s. 5(2)(a-c).

⁶⁹ Kevin Lamoureux, “Private Members’ Business: Constitution Act, 1867,” in *House of*

under the 7/50 formula.”⁷⁰ Dominic LeBlanc, the Minister who tabled the legislation, also testified before committee that Parliament alone cannot guarantee a province a fixed percentage of representation under the Section 44 Amending Procedure; instead, only a constitutional amendment under the General Procedure could grant Quebec one-quarter of all MPs irrespective of its population.⁷¹

The Standing Committee on Procedure and House Affairs dispensed with two proposed amendments to this government bill. Bloc Québécois MP Alain Therrien introduced a motion that would have copied the main provision of Bill C-246 into Bill C-14 to guarantee Quebec 25% of MPs, but the Chair of the Standing Committee on Procedure and House Affairs ruled it out of order.⁷² Brad Vis, a Conservative MP from British Columbia, moved an amendment that would have applied the Representation Rule to the under-represented provinces as well. As the calculation in the lower half of Tables 1 and 2 show, this modified Representation Rule in 2022 would have increased the House of Commons to 362 MPs in total, assigning an additional four MPs to British Columbia, three to Alberta, and 12 to Ontario. However, the Chair of the Standing Committee on Procedure and House Affairs also ruled Vis’s amendment out of order as well.⁷³ On 15 June 2022, the House of Commons adopted the bill without amendment and on division.⁷⁴ The Senate whisked Bill C-14 through all stages of debate — bypassing committee entirely — in only three sitting days between 16 and 21 June.⁷⁵ The Governor General gave

Commons Debates, 44th Parliament, 1st Session, Volume 151, Number 045, 24 March 2022, at 3555.

⁷⁰ *Ibid.*

⁷¹ Dominic LeBlanc (Minister of Intergovernmental Affairs, Infrastructure, and Communities), “Bill C-14, an Act to amend the Constitution Act, 1867,” in *Evidence*, House of Commons Standing Committee on Procedure and House Affairs, 44th Parliament, 1st Session, Number 25, 7 June 2022, at 13. LeBlanc said that the Trudeau ministry agreed with Benoit Pelletier’s conclusion that guaranteeing Quebec a fixed percentage of seats would trigger the 7-50 Amending Procedure.

⁷² Alain Therrien (Bloc Québécois), “Bill C-14, an Act to amend the Constitution Act, 1867,” in *Evidence*, House of Commons Standing Committee on Procedure and House Affairs, 44th Parliament, 1st Session, Number 26, 9 June 2022, at pages 9-11. Therrien’s amendment used the same wording of the late Bill C-246, verbatim:

“(2) Subsection 51(1) of the Act is amended by adding the following after rule 4:
4.1 After the application of rules 1 and 2 and section 51A, there shall in respect of Quebec be added any additional members needed so that, after the completion of the readjustment, the total number of members for that province is not less than 25% of the total number of members in the House of Commons.”

⁷³ Brad Vis, “Bill C-14, an Act to amend the Constitution Act, 1867,” in *Evidence*, House of Commons Standing Committee on Procedure and House Affairs, 44th Parliament, 1st Session, Number 26, 9 June 2022, at pages 11-12.

⁷⁴ House of Commons of Canada, *Journals*, 44th Parliament, 1st Session, no. 089, 15 June 2022, at 1022. The Bloc Québécois allowed the House to adopt C-14 on division but did not call for a voicevote and vote against it.

⁷⁵ Senate of Canada, “*Constitution Act, 1867: Bill to Amend — First Reading*,” in *Debates of the Senate*, 44th Parliament, 1st Session, Volume 153, Number 55, 16 June

Royal Assent by written declaration to this constitutional amendment on 23 June 2022.⁷⁶

4. COMPETING INTERPRETATIONS OF THE NATURE OF POLITICAL REPRESENTATION

(a) Liberalism: The Rationale Underpinning Representation by Population

In an age of liberal hegemony, many English-speaking Canadians consider Representation by Population as the only legitimate basis for allocating MPs to the provinces and thus regard any alternative as a quaint relic at best and an alarming aberration at worst. The individual serves as the base unit of political representation, and the population as the aggregate of individuals therefore determines the number of individuals whom each MPs represents and, in turn, the number of MPs per province in the House of Commons. The ratio of MPs between provinces therefore mirrors the share of the population of the provinces. Representation by Population flows from these premises. In contrast, some sort of collectivity — a social class, a religious denomination, a geographical community like a town, an economic unit like a farm, or a political identity like a nation — serves as the basis of political representation under a communitarian framework. The House of Commons therefore would represent the interests of these communities against other groups and ensure that no one group can force its will over the others. Representation by Population overwhelms these communities worthy of representation as communities with sheer numbers.

Electoral systems themselves can also reflect these purposes and choices. Multi-member plurality accommodated different classes or religious communities living within the same territory but without guaranteeing proportionality or that each MP represented roughly the same number of people. Josep Colomer calls multi-member plurality the “originating” electoral system because it emerged in the elected lower houses of parliaments throughout medieval Europe, including England, and was not replaced by new electoral systems until the 19th century.⁷⁷ This communal understanding of political representation continued in the Atlantic colonies and provinces throughout the 19th and 20th centuries, and even the Canadas started out

2022, at 1679; Senate of Canada, “*Constitution Act, 1867: Bill to Amend — Second Reading*,” in *Debates of the Senate*, 44th Parliament, 1st Session, Volume 153, Number 56, 20 June 2022, at pages 1711-1716; Senate of Canada, “*Constitution Act, 1867: Bill to Amend — Third Reading*,” in *Debates of the Senate*, 44th Parliament, 1st Session, Volume 153, Number 57, 21 June 2022, at 1771-1774.

⁷⁶ Senate of Canada, “Royal Assent,” in *Debates of the Senate*, 44th Parliament, 1st Session, Volume 153, Number 59, 23 June 2022, at pages 1892-1893; *An Act to amend the Constitution Act, 1867 (Electoral Representation)*, S.C. 2002, c. 6.

⁷⁷ Josep M. Colomer, “On the Origins of Electoral Systems and Political Parties: The Role of Elections in Multi-Member Districts,” *Electoral Studies* 26 (2007): 262-273.

using this “originating” system in the 18th. Upper Canada’s Legislative Assembly maintained a handful of dual-member districts from 1792 to 1840;⁷⁸ and Lower Canada’s Legislative Assembly used multi-member plurality by default: towns returned one MP, the counties elected two MPs, and Montreal and Quebec City were each represented by four MPs.⁷⁹ Universal single-member districts only dates from the *Act of Union* of the Canadas in 1841.

Proponents of the traditional, originating multi-member plurality probably did not see it in ideological terms, or even as a system at all, but simply as the practical default and norm; it only became a “system” in retrospect after suddenly confronting a new ideology like liberal individualism. Liberals in the 19th century (considered radical at the time but now regarded as classic) began introducing new electoral systems and modes of representation to reflect the primacy of the individual and to counter-act the influence of emerging political parties, which hijacked multi-member plurality through bloc voting and thus thwarted a way of representing different economic and social interests in the same geographic location.⁸⁰ In 1839, Lord Durham took up the liberal cause and argued that the Imperial Parliament should amalgamate Upper Canada and Lower Canada into one province the legislative assembly of which would guarantee Representation by Population. He expressly rejected granting the two former provinces sectional equality:

As the mere amalgamation of the Houses of Assembly of the two Provinces would not be advisable, or give at all a due share of representation to each, a Parliamentary Commission should be appointed, for the purpose of forming the electoral divisions, and determining the number of members to be returned on the principle of giving representation, as near as may be, in proportion to population. I am averse to every plan that has been proposed for giving an equal number of members to the two Provinces [. . .].⁸¹

The Imperial Parliament considered Representation by Population too radical — the United Kingdom itself did not use it at the time — and imposed sectional equality through the *Act of Union* in direct opposition to Durham’s recommendation. George Brown then took up Durham’s cause in the 1850s.

⁷⁸ Arthur G. Doughty and Duncan A. McArthur, “Proclamation on the Division of Upper Canada into Counties”, in *Documents Relating to the Constitutional History of Canada, 1791-1818* (Ottawa: The Queen’s Printer, 1914) at 77-82; *Redistribution Act, 1800* (Upper Canada) 40 George III, c. 3, s. 1; *Redistribution Act, 1808* (Upper Canada) 48 George III, c. 11, s. 1.

⁷⁹ Arthur G. Doughty and Duncan A. McArthur, “A Proclamation Dividing the Province of Lower Canada into Counties and Electoral Districts”, in *Documents Relating to the Constitutional History of Canada, 1791-1818* (Ottawa: The Queen’s Printer, 1914) at 72-77.

⁸⁰ Josep M. Colomer, “The Strategy and History of Electoral System Choice”, chapter 1 in *Handbook of Electoral System Choice*, edited by Josep M. Colomer, 3-80 (Palgrave-Macmillan, 2004) at 31-35.

⁸¹ John Lambton (1st Earl of Durham), *The Report and Dispatches of the Earl of Durham, Her Majesty’s High Commissioner and Governor-General of British North America* (London: Ridways, Piccadilly, 1839) at 239.

At precisely the same time, prominent British liberals like Thomas Hare and J.S. Mill invented and advocated the electoral system now known as single-transferable vote, which uses multi-member proportional representation coupled with preferential balloting and pure Representation by Population.⁸²

The *Constitution Act, 1867* reflects George Brown's liberalism and what Lord Durham himself recommended in the 1830s. Representation by Population under sections 51 and 52, the Origination Principle in section 53, and the Royal Recommendation in section 54 make Responsible Government as we understand it in Canada possible.⁸³ Section 90 then extended the Origination Principle and the Royal Recommendation to the provinces and thereby guaranteed that Responsible Government would prevail throughout British North America. Responsible Government is all about the money: cabinet proposes and takes responsibility for taxation and spending, and parliament approves taxation and spending. The Origination Principle guarantees that only the people's elected representatives in the House of Commons can introduce bills that would levy tax or grant expenditures; the Royal Recommendation, which the Governor General grants on and in accordance with ministerial advice, means that the Ministry must approve of and thus take responsibility for all money bills. Brown himself saw Representation by Population in expressly financial terms:

The people of Upper Canada have bitterly complained that though they numbered four hundred thousand souls more than the population of Lower Canada, and though they have contributed three or four pounds to the general revenue for every pound contributed by the sister province, yet the Lower Canadians send to parliament as many representatives as they do. Now, sir, the measure in your hands brings that injustice to an end.⁸⁴

The Origination Principle and the Royal Recommendation thus also tie neatly into Representation by Population within the House of Commons: the most populous provinces that contribute the most tax revenue correspondingly exert the most influence over taxation and expenditure. Sections 51, 52, 53, and 54 enshrine the classical liberal principles of good government by inextricably linking taxation, expenditure, and representation together. Any

⁸² Thomas Hare, *The Machinery of Representation*, 2nd Ed (London: W. Maxwell Law Booksellers and Publisher, 1857); Thomas Hare, *Treatise on the Election of Representatives, Parliamentary and Municipal* (London: Longman, Brown, Green, Longman's, and Roberts, 1859); William Robert Ware, "Application of Mr. Hare's System to the Nomination of Overseers of Harvard College," *Journal of Social Science Containing the Transactions of the American Association* no. 3 (1871): 192-199.

⁸³ Janet Aizenstat, *The Once and Future Canadian Democracy: An Essay in Political Thought* (McGill-Queen's University Press, 2003) at 65-67; Dennis Baker, "'The Real Protection of the People': The Royal Recommendation and Responsible Government," *Journal of Parliamentary and Political Law* 4 (2010); Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (McGill-Queen's University Press, 2010) at 61.

⁸⁴ Janet Aizenstat, Paul Romney, Ian Gentles, and William D. Gairdner, editors, *Canada's Founding Debates* (Toronto: University of Toronto Press, 1999) at 115.

attempt to base political representation on communal interests, such as nations, would therefore undermine not only Representation by Population but Responsible Government itself.

(b) Communitarian Representation as the Tradition in Atlantic Canada

Legislatures in the Maritimes kept some form of multi-member plurality well into the 20th century. Dual-member plurality prevailed in Prince Edward Island from 1893 to 1993 because it diffused sectarian tensions and allowed Catholics and Protestants living in the same area to each elect one of their own.⁸⁵ New Brunswick also experimented with dual- and three-member electoral districts 1935 to 1967, and they served much the same purpose by recognising distinct English-speaking Protestant, French-speaking Catholic, and sometimes English-speaking Catholic, communities within the same towns.⁸⁶ Newfoundland practised a form of confessional gerrymandering in the 20th century, where single-member districts would follow sectarian boundaries between Catholic and Protestant neighbourhoods where possible.⁸⁷ It is not a coincidence that Quebeckers and Atlantic Canadians today are more likely to oppose pure Brownian Representation by Population than Ontarians and Westerners.

Representation by Population enjoyed surprisingly little support outside of Ontario in the 1860s, yet still managed to gain official endorsement under the *British North America Act, 1867*. Charles Tupper, then the Conservative Premier of Nova Scotia, stood out as a notable exception by supporting Representation by Population.⁸⁸ So, too, did Charles Hamilton, who agreed with Tupper and argued that representation within a federation simply must be based on population (“the only true and safe principle”) and not on economic production.⁸⁹ But most other MLAs in Nova Scotia’s House of Assembly strenuously opposed it. For example, William Annand, a Liberal and anti-Confederate, noted that neither the Imperial Parliament nor any legislature of the other British North American colonies used Representation by Population, and that therefore the proposed federal House of Commons should not.⁹⁰ Annand believed in the communal model of representation and argued that “Cape Breton has a right to additional representation by other considerations than those of population,” namely economic considerations

⁸⁵ Frank MacKinnon, *The Government of Prince Edward Island* (Toronto: University of Toronto, 1951) at 217.

⁸⁶ Edmund A. Aunger, *In Search of Political Stability: A Comparative Study of New Brunswick and Northern Ireland* (Montreal-Kingston: McGill-Queen’s University Press, 1981) at 145

⁸⁷ G.O. Rothney, “The Denominational Basis of Representation in the Newfoundland Assembly, 1919-1962,” *Canadian Journal of Economics and Political Science* (November 1962): 557-570

⁸⁸ G.P. Browne, editor, *Documents on the Confederation of British North America* (Montreal & Kingston: McGill-Queen’s University Press, 2009) at 104-106.

⁸⁹ *Ibid.*, 111.

⁹⁰ *Ibid.*, 107.

around coal mining. He rejected the liberal underpinning of Representation by Population out of hand: “It is a sound principle that property and classes should be represented as well as numbers.”⁹¹ Annand further dismissed Lord Durham (and therefore, by implication, George Brown) as a “radical reformer” and pointed out that even moderate liberals like Earl Russell, British Prime Minister from 1846 to 1852 and again in 1865 and 1866, continued to oppose Representation by Population.⁹²

Archibald McLelan, another anti-Confederate Nova Scotian Assemblyman, also opposed Representation by Population: “I contend, in view of the geographical position of Nova Scotia — 800 miles from the capital [Ottawa] and almost an island — that the principle of Representation by Population was not at all sufficient to do her justice.”⁹³ He believed instead that “As you recede from the place of the meeting of parliament, representation should increase in order to give a balance of influence.”⁹⁴ Henry Renouf argued that Newfoundland deserved more than merely “the same representation as a town with the same population in the backwoods of Canada” because of its economy in “valuable fisheries, rich minerals, extensive trade and commerce, splendid harbours, and great natural advantages.”⁹⁵ Of all the Atlantic colonies, New Brunswick seemed most favourable to the radical liberal notion of Representation by Population. Edward Chandler denounced as “an absurdity” the competing idea that weighed regional representation should prevail in the House of Commons, because this would mean that “one man in New Brunswick was equal to two in Canada” and derogate from the equality of individuals through an arithmetic contrivance.⁹⁶

Despite some objections expressed in the other Atlantic Provinces, only Prince Edward Island voted against George Brown’s motion for Representation by Population at the Quebec Conference in October 1864.⁹⁷ Islanders strongly objected to the liberal-individualist principle of Representation by Population because they saw political representation in traditional communal terms. They wanted six MPs instead of five so that they could maintain their three dual-member districts, which diffuse sectarian tension between Catholics and Protestants.⁹⁸ Brown responded to Prince Edward Island’s request with unrelenting arithmetic and refused to deviate from the principle of Representation by Population and make a concession to communal principles of political representation: “We should have to add thirty-eight members to the House in order to give Prince Edward Island six,

⁹¹ *Ibid.*

⁹² *Ibid.*, 108.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, 109.

⁹⁵ *Ibid.*, 118.

⁹⁶ *Ibid.*, 113.

⁹⁷ *Ibid.*, 108.

⁹⁸ Sir Joseph Pope, *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell, 1895) at 72.

as the basis of Representation by Population.”⁹⁹ Thomas Health Haviland declared on 19 October 1864: “Prince Edward Island would rather be out of Confederation than consent to this motion. We should have no status. Only five members out of 194 would give the Island no position.”¹⁰⁰ Edward Palmer, then the Attorney General of PEI, agreed: “Representation by population is not applicable when a certain number of Provinces are throwing their resources into one Confederation, and giving up their own self-government and individuality.”¹⁰¹

Prince Edward Island initially made good on Haviland’s threat in the 1860s but eventually joined Confederation in 1873, by which time its population had grown enough to warrant it 6 MPs. And it was Prince Edward Island that insisted upon the Senatorial Clause in 1915 after the readjustment that decade reduced it to 3 MPs.¹⁰² The Atlantic Provinces would today fight to keep the Senatorial and Grandfather Clauses as reasonable exemptions to unalloyed Representation by Population, but no politician from these provinces has argued in the 2020s for granting a fixed percentage of MPs irrespective of population.

(c) Communitarian Representation as Nationalism in Quebec

Under a communitarian theory of political representation, the House of Commons represents communities of interest instead of aggregates of individuals. Politics divides not along programmatic lines and competing ideologies, but instead depends on consociational dialogue and distributing resources to various competing groups. French-Canadians have always seen themselves as a people, or nation, and have therefore sought to use political institutions to preserve their nationhood. James Bruce, the 8th Earl of Elgin, regarded consociation and the dual ministries of the Province of Canada, as well as the French-Canadian attitude toward communitarian representation, as obstacles to Responsible Government. Upon his appointment as Governor General in 1847, Elgin expressed his frustration and distain toward the French-Canadian viewpoint to Colonial Secretary Earl Grey:

They seem incapable of comprehending that the principles of constitutional government must be applied against them, as well as for them. Whenever there appears to be a change of things taking this turn, they revive the ancient cry of nationality, and insist on their right to have a share in the administration, not because they party

⁹⁹ *Ibid.* By this stage, what would become the first Representation Formula had already been set. It used Quebec’s 65 MPPs in the Province of Canada as the baseline for calculating for Quebec’s 65 MPs in the Dominion of Canada and the baseline for calculating how many MPs would represent each of the other provinces.

¹⁰⁰ Browne, editor, *Documents on the Confederation of British North America*, 108.

¹⁰¹ *Ibid.*

¹⁰² M.R. Clark, “Island Politics,” chapter 12 in F.W.P. Bolger, ed., *Canada’s Smallest Province: A History of Prince Edward Island*, at 289-327 (Charlottetown: Prince Edward Island 1973 Centennial Commission, 1973) at 294.

which they have chosen to connect themselves is in the ascendant, but because they represent a people of distinct origin.¹⁰³

It is not that French-Canadians were incapable of understanding the liberal underpinnings of Responsible Government and the adversarial dynamic between Government and Opposition in the Legislative Assembly of the Province of Canada. French-Canadian politicians simply rejected this liberal framework because they held a communal and consociational understanding of how the Province of Canada should operate. After all, the *Act of Union, 1840* had granted an equal number of MPPs to Upper Canada and to Lower Canada irrespective of their populations and deliberately preserved the bijuralism of Common Law in Upper Canada and Civil Law in Lower Canada. Politicians from Quebec have consistently held this view for some 180 years, and the Bloc Québécois continues in this long tradition of rejecting the liberal-individualist basis of political representation in favour of a communal approach.

Yves-François Blanchet, the Leader of the Bloc Québécois, introduced a motion on 2 March 2022 that complemented Bill C-246 and reinforced the chain of reasoning contained in its preamble:

That, in the opinion of the House:

(a) any scenario for redrawing the federal electoral map that would result in Quebec losing one or more electoral districts or that would reduce Quebec's political weight in the House of Commons must be rejected; and

(b) the formula for apportioning seats in the House must be amended and the House call on the government to act accordingly.¹⁰⁴

Blanchet reminded his colleagues that the House of Commons toward the end of the previous parliament had adopted a motion on 16 June 2021 which both recognised Quebec as a nation and French as the only official and common language of that nation. He concluded: “If that recognition means anything, the House needs to back up those words with action.”¹⁰⁵ The MPs of the Bloc Québécois expressly reject the liberal-individualist model and argue that political representation depends not merely upon the “mathematic aspect” of the equality of votes but on recognising the “political weight” of nations. They hold to a communitarian theory of representation in which peoples — not merely individuals — must maintain their “demographic weight.” Bloc MP Marilene Gill argued that “Quebec’s specificity must

¹⁰³ J. L. Morrison, *British Supremacy and Canadian Self-Government, 1839-1854* (Glasgow: James MacLehose and Sons, Publishers to the University of Glasgow, 1919) at 196. Elgin wrote this despatch to Grey on 28 June 1847.

¹⁰⁴ Yves-François Blanchet (Leader of the Bloc Québécois), “Business of Supply: Opposition Motion — Representation of Quebec in the House of Commons,” in *House of Commons Debates*, 44th Parliament, 1st Session, Volume 151, No. 038, 1 March 2022, 2997-2998.

¹⁰⁵ *Ibid.*

prevent us from losing seats in the House of Commons.”¹⁰⁶ Gill concluded that this motion “is calling on the House to take into account our nation and its corollary, in other words, the defence of its political weight.”¹⁰⁷ The House of Commons adopted the motion on 2 March 2022, 262 in favour and 66 (65 Conservatives and 1 Liberal) opposed.¹⁰⁸

5. CONCLUSION

Quebec nationalists initially reacted to Patriation by working within the new amending procedures contained in the *Constitution Act, 1982*. They tried to persuade the rest of Canada to recognise Quebec as a distinct society (and accept the asymmetrical federalism that would come along with it) and pursued the *Meech Lake Accord* between 1987 and 1990 and *Charlottetown Accord* in 1992 under the unanimity amending procedure. English-speaking Canadians largely abandoned Compact Theory, the idea that Confederation represented a bargain between two founding British and French settler populations,¹⁰⁹ after Canadians as a whole (including over 56% of Quebecers) defeated the *Charlottetown Accord* in the referendum held on 26 October 1992.¹¹⁰ The inter-governmental and legislative defeat of the *Meech Lake Accord* in 1990 and the popular rejection of the *Charlottetown Accord* in 1992 showed Quebec nationalists that they could not achieve their aims within Canada. They responded by holding a second referendum to secure Quebec’s distinctiveness unilaterally as an independent, sovereign state, but Quebecers by a slim majority also rejected this approach in October 1995.

In the 21st century, Quebec nationalists have reverted to a pre-Quiet Revolution posture of autonomism and therefore no longer concern themselves with obtaining recognition from the rest of Canada. François Legault brought this autonomism to power in 2018 when he led the *Coalition pour l’avenir du Québec* to a majority. Nationalists now simply assert Quebec’s autonomy and distinctiveness unilaterally yet within Canada. For instance, Quebec used the Section 45 Amending Procedure to insert two new sections that recognise Quebecers as a nation the only official language of which is

¹⁰⁶ Marilene Gill (Bloc Québécois), “Representation of Quebec in the House of Commons,” 3023.

¹⁰⁷ *Ibid.*

¹⁰⁸ *House of Commons Debates*, “Business of Supply: Opposition Motion — Representation of Quebec in the House of Commons,” 44th Parliament, 1st Session, Volume 151, No. 039, 2 March 2022, 3088-3090.

¹⁰⁹ Paul Romney, *Getting It Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999).

¹¹⁰ Curtis Cook, “Table 1: Provincial Vote, Referendum of 26 October 1992”, in *Constitutional Predicament: Canada After the Referendum of 1992*, edited by Curtis Cook, 2-24 (McGill-Queen’s University Press, 1994) at 7. Majorities in British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, and Nova Scotia voted against the *Charlottetown Accord*, while majorities in Ontario, New Brunswick, Prince Edward Island, and Newfoundland and Labrador supported it. Fully 56.7% of Quebecers rejected it.

French directly into the part of Quebec's provincial constitution housed in the *Constitution Act, 1867*.¹¹¹ The Bloc opted for a similar strategy of unilateral constitutional amendment through Bill C-246 but failed.

In 2022, several Bloc MPs cited the *Charlottetown Accord*, which would also have assigned one-quarter of the House of Commons to Quebec irrespective of its population, to justify Bill C-246.¹¹² However, none of them mentioned that Quebec secured this guarantee only because it would have made concessions of its own: the *Charlottetown Accord* would have guaranteed Quebec one-quarter of the MPs in the House of Commons irrespective of its population in exchange for reducing its complement of Senators from 24 to 6.¹¹³ They also never acknowledged that a clear majority of Quebecers voted against this proposed constitutional amendment in October 1992. The Bloc Québécois attempted to revive the portion of the *Charlottetown Accord* that benefited Quebec but without giving up anything in return. Furthermore, it was the proposed Canada Clause of the *Charlottetown*

¹¹¹ Unlike the interpretative “Canada Clauses” in the *Meech Lake* and *Charlottetown Accords*, these new provisions should not affect how federal courts interpret the *Constitution Acts* overall. The Government of Quebec started issuing its own consolidations of the *Constitution Acts* in 2021 and issued the second edition of its consolidation in June 2022 to take sections 90.1 and 90.2 of the *Constitution Act, 1867* into account. The federal Department of Justice issued its most recent *Consolidation of the Constitution Acts, 1867 to 1982* on 1 January 2021, before this bill became law. The federal Department of Justice will have to decide whether it regards the Legislature of Quebec's constitutional amendment under the Section 45 Procedure as legitimate direct amendments to the text of the *Constitution Act, 1867* and therefore whether it will list these sections 90.1 and 90.2 in its next consolidation. Québec. Secrétariat du Québec aux relations canadiennes, *Codification administrative de la Loi constitutionnelle de 1867 et de la Canada Act 1982* (Gouvernement du Québec, 2021). Indeed, it is telling that the Government of Quebec refuses to use the term “*Constitution Act, 1982*”, given that the Government of Canada patriated the Constitution Acts over Quebec's objections; Québec. Secrétariat du Québec aux relations canadiennes, *Codification administrative de la Loi constitutionnelle de 1867 et de la Canada Act 1982, 2e ed* (Gouvernement du Québec, le 1e juin 2022).

¹¹² Julie Vignola (Bloc Québécois), “Business of Supply: Opposition Motion — Representation of Quebec in the House of Commons,” in *House of Commons Debates*, 44th Parliament, 1st Session, Volume 151, No. 038, 1 March 2022, at 3004; Yves Perron (Bloc Québécois), “Business of Supply: Opposition Motion — Representation of Quebec in the House of Commons,” in *House of Commons Debates*, 44th Parliament, 1st Session, Volume 151, No. 038, 1 March 2022, at 3051; Xavier Barsalou-Duval (Bloc Québécois), “Business of Supply: Opposition Motion — Representation of Quebec in the House of Commons,” in *House of Commons Debates*, 44th Parliament, 1st Session, Volume 151, No. 038, 1 March 2022, at 3055; Martin Champoux (Bloc Québécois), “Private Members' Business: Constitution Act, 1867,” in *House of Commons Debates*, 44th Parliament, 1st Session, Volume 151, Number 045, 24 March 2022, at 3554; Alain Therrien (Bloc Québécois), “Private Members' Business: Constitution Act, 1867,” in *House of Commons Debates*, 44th Parliament, 1st Session, Volume 151, Number 045, 24 March 2022, at 3560.

¹¹³ Canada. “C. House of Commons, 21. Composition of the House of Commons” in *Consensus Report on the Constitution* (Charlottetown, PEI: Crown Copyright, 28 August 1992).

Accord, not the fixed representation in the House of Commons, which would have recognised Quebec as a “distinct society,” or in the parlance of the 21st century, as a nation.

The parallel societies, or “Two Solitudes,”¹¹⁴ of English Canada and French Canada sometimes operate on opposing or contradictory norms, such as on the nature and purpose of political representation in the House of Commons. This dispute over the purpose and foundation of political representation extend all the way back to the 19th century and has already erupted twice so far in the 21st. These two contradictory viewpoints are, by definition, irreconcilable and strike at the question of what Canada itself should be. If Quebec wants to maintain one-quarter of the House of Commons, then it will have work multilaterally with Ottawa and other provinces to secure a constitutional amendment under the General Amending Procedure. However, this collaborative spirit contradicts the unilateral autonomism of the latest iteration of nationalism in Quebec, and the Bloc accepted its defeat on obtaining a fixed percentage of MPs through Bill C-246 and settled for a fixed number instead through Bill C-14. This latest legislation preserved the *status quo* of Canada’s hybrid Representation Formula in a classic Canadian compromise: a communitarian compensation layered on top of a liberal foundation. But Parliament can only maintain this tenuous balance by continuing to tinker *ad hoc* with the Representation Formula and turning the decennial readjustment into a decennial parliamentary debate over the nature of representation in the House of Commons.

¹¹⁴ Hugh MacLennan, *The Two Solitudes* (McGill-Queen’s University Press, 1945).