

Ward Boundary Review Case Law and the Principle of “Effective Representation”

Effective Representation – The “Goal” of Ward Boundary Reviews

As noted in the [Toronto Ward Boundary Review Background Research Report](#) (December 2014), effective representation “is the goal of all ward boundary reviews.” The report further stated as follows:

“The primary consideration when it comes to effective representation is ‘voter parity’ (often also referred to as representation-by-population). This is the principle that all votes should have equal weight and therefore the number of people living in each voting area (i.e. ward) should be similar. However there are other factors used by the courts and the Ontario Municipal Board [Local Planning Appeal Tribunal predecessor] to define effective representation, including protection of communities of interest and neighbourhoods, respect for natural and physical boundaries, ward history, and recent and projected population growth.”¹

How is “Effective Representation” Defined?

While the *Municipal Act, 2001*, does not speak to the criteria and scope of a ward boundary review, the common law in Canada requires that the principle of “effective representation” be applied when reviewing ward boundaries. This is to ensure that the notion of “representation by population” is balanced by other important factors such as geography, communities of interest, community history and minority representation.

The principle of “effective representation” was set out by the Supreme Court of Canada in the case of [Reference Re Provincial Electoral Boundaries \(Sask.\), \[1991\] 2 S.C.R. 158](#), also known as the “Carter” case. In rejecting the American principle of “one person, one vote,” Madame Justice McLachlin provided the following comments in favour of “effective representation”:

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

¹ *Toronto Ward Boundary Review Background Research Report*, p. 1.

representation.' Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative...

What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.

But parity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation...

Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.

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

Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.

It emerges therefore that deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced. I adhere to the proposition asserted in *Dixon*, at p. 414, that 'only those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace

as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed.”²

As referenced by Justice McLachlin above, *Dixon v. Attorney General of British Columbia* was the first case in Canada addressing fairness of an electoral boundaries map. The Province of British Columbia had been using a ‘complex quota system’ for its electoral districts rather than using the typical 25 per cent variance rule. The districts varied in population from 5,511 to 68,347. In 1989, the British Columbia Supreme Court found that the Province’s electoral districts established with the quota system violated the right to vote guaranteed by Section 3 of the *Charter of Rights and Freedoms*. The Court ruled that a new set of electoral districts with more equitable populations had to be created. The case established that equality of voting power was the single most important factor to be considered in determining electoral boundaries, as articulated in the following excerpt from the decision [emphasis added]:

“The historical development of voting rights in Canada and the view taken of such rights in other democracies leads inexorably to the conclusion that **relative equality of voting power is fundamental to the right to vote** enshrined in s.3 of the *Charter*. **In fact, it may be seen as the dominant principle underlying our system of representational democracy.**

At the same time, absolute equality of voting power has never been required in Canada. It has been recognized since Confederation that some degree of deviation is permissible where other considerations so require.”³

The Supreme Court of Canada’s ruling in *Carter* is now the primary basis upon which considerations with respect to establishing ward boundaries are established, with reference to the *Dixon* decision and relevant Ontario Municipal Board (OMB)/Local Planning Appeal Tribunal (LPAT) rulings⁴. The City of Toronto’s Ward Boundary Review Background Research Report summarizes the considerations based on the *Carter* decision and other case law as follows:

“While there are differences in how municipalities in Ontario conduct their ward boundary reviews, there are some common guiding principles, stemming from the *Carter* Case decision that are the foundation of successful ward boundary reviews. These include:

² *Reference Re Provincial Electoral Boundaries, (Sask.)* [1991] 2 S.C.R. 158.

³ *Dixon v. British Columbia (Attorney General)*, 1989 CanLII 248 (BC SC), at p. 28-29.

⁴ It should be noted that the Ontario Municipal Board (OMB) has been replaced by the Local Planning Appeal Tribunal (LPAT).

- **Representation by Population:** In a successful ward system, every Councillor will represent generally the same number of people. This is often referred to as ‘voter parity’. Usually, population variations of up to 25% above or below the average size are considered acceptable.
- **Consideration of present and future population trends:** A ward boundary review must consider future increases or decreases in population in order to ensure that wards continue to meet the representation by population criterion as the City grows. The goal is to design a system that can be used for three elections.
- **Consideration of natural and physical boundaries:** Natural and physical boundaries shape patterns of life in cities, and so ward designs should respect these features.
- **Communities of Interest:** Ward boundaries should consider settlement patterns, traditional neighbourhoods and community groupings in specific geographic locations. Where possible, ward boundaries should not fragment a community.
- **Effective Representation:** Considered the ultimate goal of all ward boundary reviews, effective representation aims at achieving fair and equal representation for voters to the greatest extent possible. The primary consideration is voter parity, but effective representation also takes into account the all other criteria.”⁵

As indicated above, it is a general rule of thumb that the population in each ward would be within 25 per cent of the average ward population size. That said, if justified by the criteria, the case law does support a wider range of plus or minus 33 per cent, or even slightly wider in an appropriate case. In the case of *Teno v. Lakeshore (Town)*, the OMB provided discussion with respect to the issue of population variances and the need for deviations to be justified, as follows:

“The concept of effective representation has been adopted by municipalities and by this Board in various ways in considering the question of an appropriate electoral model for ward boundaries ... the Board notes that there are various views on the tolerance factor for a deviation in the principle of equality of vote (meaning electoral boundaries which divide the population evenly). In the cases

⁵ *Toronto Ward Boundary Review Background Research Report*, December 2014, p. iv.

presented to the Board, a factor of 25% to 33% has been suggested as tolerable, if supportive of more effective representation.

The Board finds that in assessing whether ward boundaries should be redivided, the overriding principle is voter parity as cited by the Supreme Court of Canada. Any deviations from voter parity must be justified based on the other factors referred to by the Supreme Court and by this Board, in a manner which supports the notion that in the absence of this deviation, there would be a loss of effective representation. Thus any deviation factor whether it be 1% or 33% must be supportive of a more effective representation of the electors and their interests.”

The City of Ottawa has some unique challenges with respect to addressing the issue of effective representation. As the [Recommendations Report from the City's 2004-2005 Ward Boundary Review](#) notes: “As the only truly regional city in Canada, Ottawa is unique among its peers. No other city contains such a large rural area inside its municipal boundaries. It is no surprise that such uniqueness also brings its own set of challenges. Urban, suburban and rural communities are just beginning to understand each other’s concerns, adjust for different needs and establish communication channels for the future.”⁶

In particular, the City of Ottawa has had to, and will continue to have to, address the issue of effective representation for the rural areas. When the current ward boundaries were established, it was understood that the rural wards would have smaller populations relative to the suburban and urban wards.⁷ The OMB decision with respect to Ottawa’s 2001-2002 Ward Boundary Review articulates some of the reasons for this as follows:

“The evidence supports the contention that the City of Ottawa does contain rural communities with historical economic and social differences. Rural concerns are not always understood in the context of urban policy and rural concerns often require a special understanding of rural issues. Members of council elected by urban voters may not always have the experience or the willingness to represent rural points of view. One-dimensional representation will eventually be harmful to the local economy...”

The Council and Task Force did not recognize and acknowledge the

⁶ The Davidson Group: *Building Consensus: Ottawa Ward Boundary Review – Recommendations Report*, April 2005, Executive Summary.

⁷ Ibid, p. 26.

uniqueness of the rural communities within the City of Ottawa when it concluded through the enactment of By-law 2002-316, that the rural wards should be combined with suburban wards to achieve representation by population. The Board is satisfied that this will have the effect of eliminating rural representation on Ottawa's City Council thereby disenfranchising a substantial community of interest..."⁸

This understanding is important when considering the issue of the average population size and the generally accepted variances of 25 per cent and, in some cases, 33 per cent, when looking at the current context of ward boundaries and effective representation in the City of Ottawa.

Recent Ontario Municipal Board Comments Relating to Rural Considerations and Effective Representation

As described below in more detail, a 2017 OMB decision in an appeal relating to the City of Hamilton's ward boundary review⁹ included comments regarding matters relating to rural considerations and effective representation, with specific reference to the City of Ottawa.

By way of background, further to a ward boundary review conducted between 2015 and 2017, Hamilton City Council approved new ward boundaries on February 8, 2017. The resulting by-law was appealed by two parties. Prior to a hearing at the OMB, the Council-approved boundaries were amended to resolve an appeal from one of the parties. The result of this settlement became known as the "City Preferred Ward Boundaries" and was the basis for the Board's decision. The other appeal proceeded.

In a decision issued December 12, 2017, the OMB noted that Hamilton City Council had adopted modifications that "were little more than tweaks from the existing boundaries". The Board allowed the remaining appeal and ordered the City to amend its by-law to reflect another option that had been provided by its consultant for the ward boundary review. The Board concluded that while the process followed by the City of Hamilton for the ward boundary review was appropriate, the City's decision to adopt the "City Preferred Ward Boundaries" was not reasonable. Much of the Board's ruling discussed matters related to voter parity and rural representation.

⁸ *Osgoode Rural Communities Assn. v. Ottawa (City)* [2003], Ontario Municipal Board Decision/Order No. 0605, p. 20.

⁹ [Dobrucki v Hamilton \(City\), 2017](#) CanLII 85763 (ON LPAT).

The OMB decision noted that the City of Ottawa's OMB case from 2003 was referenced during the appeal proceedings for the Hamilton case. In the Ottawa case, the Board had repealed the by-law resulting from the 2001-2002 ward boundary review – in part because it determined that Council did not give sufficient weight to communities of interest and, in particular, rural communities of interest, as described in more detail in the staff report and Document 1.

Noting that the Ottawa case had many similarities to the Hamilton case, the Board's decision in the Hamilton matter stated as follows:

“... In that case the amalgamated City of Ottawa was undertaking a ward boundary review similar to the one before the Board in Hamilton. It took place much sooner (2003) after amalgamation (2001) than Hamilton, but had a basic similarity in that there existed in that case a “social contract” (as it was called) similar to the implied agreement in the Hamilton amalgamation whereby the rural community of interest would be protected by the establishment of exclusively rural wards with lower populations that would ensure a rural voice on council.

[124] The protection of the rural voice in Ottawa had resulted in population disparities between wards of approximately 33%, well above the standard of 25% commonly used. In the Ottawa case, the council proposed to address the disparity and revise the boundaries by combining rural and suburban interests. The rural community concluded that this did not protect the exclusively rural band of wards on the outer ring of the amalgamated city and appealed the decision of council to the Board.

[125] The Board in that case ruled that in the interest of effective representation in the unique circumstance of Ottawa at that time, the disparity was warranted by the need to protect a rural interest. The Board concluded that when considering the relationship between population parity and community of interest in Ottawa, the council had not struck the correct balance, relying too much in that case on the principle of representation by population and too little on protecting the rural interest.”

In the Hamilton case, some of the Board's concern also arose around matters relating to voter parity and a specific “community of interest” (being the rural interest). That said, the decision stated as follows:

“[152] Having reviewed the entire body of evidence, the conclusion of the Board is that the ward boundary review came to be dominated by a concerted mandate to preserve, first, the agreement set at amalgamation that maintains a split of urban versus suburban/rural interests, and second, the rural minority interest reflected in maintaining Ward 14 (Flamborough) as an exclusively rural ward.

[153] Both of these priorities have been sustained on the basis that they protect communities of interest in the face of significant disparities in ward populations. In other words, the trade-off that has been accepted by the City and supported by their consultants is that representation by population (which protects against vote dilution) will continue to be sacrificed in order to achieve traditionally defined communities of interest.”

The decision further noted that, “at the very outset, the Board considered that the proper approach to arriving at a ward boundary solution that was *Charter* compliant in accordance with the *Carter* decision is that the over-arching aim is ‘effective representation.’ This begins from an initial position that is based on representation by population – population parity – but then must take account of, and be adjusted by other factors that are key to effective representation.”

The Board found that although the guideline for the Terms of Reference that established the criteria or principles to guide the review “constituted a serviceable list of the considerations that must be made,”¹⁰ the criteria “were not completely helpful in themselves in determining the priorities and process for arriving at the appropriate balance between the criteria where they conflicted with one another or where they were not completely complementary.” The Board stated that, as a result, “the selection of the City’s Preferred Ward Boundaries emphasized one community of interest without having any apparent regard for the others.”

The Board’s decision continued as follows:

“[160] This has led to an over-arching emphasis on the protection of an exclusively rural ward as a means of protecting a rural voice on council. While such protections may have been appropriate in the unique circumstances of Ottawa in 2003, it is open to review and reconsideration years after amalgamation. Similarly, the maintenance of a founding compromise that favoured rural representation on council in order to make amalgamation

¹⁰ These criteria included representation by population; population and electoral trends; means of communication and accessibility; geographical and topographical features; community or diversity of interests; and effective representation, as set out in para. 31 of the OMB decision.

acceptable to those opposing it at the time, should not be considered a permanent solution, especially in the face of ongoing changes in population numbers and the character of the population.

[161] At some point it is legitimate to enquire whether maintaining disparity can be justified. As the SCC [Supreme Court of Canada] concluded, ‘... deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. *Beyond this the dilution of one citizen’s vote as compared with another’s should not be countenanced*’ (emphasis added). At some point, arrangements that have held for a long time warrant reconsideration to ensure effective representation is maintained in the face of change.

[162] The Board has previously supported this in *Teno* [*Teno v. Lakeshore (Town)*, 2005 CarswellOnt 6386] where it concluded, at paragraph 45, ‘based on an analysis of the disparities in voter representation that now exist and will continue to worsen ... the Board finds that it is untenable, and contrary to principles set by the Supreme Court of Canada to allow the current system to continue. While it may please the long term residents of the municipality to maintain the existing ward boundaries, which reflect the historic townships which have been amalgamated, it is clearly doing a disservice to the new residents of this community, and is unfairly diluting the rights of these new citizens to voter parity.’”

The Board’s decision stated that the “appropriate balance” was struck through the different ward boundary option it was ordering. It added that the OMB’s preferred option “achieves a high degree of population parity without slavishly adhering to some mathematical ideal. It retains several of the characteristics that permitted the existing system to function, including recognition of geographic and topographic features (notably the escarpment, waterways, major highways), and considerations of access and communications based on the transportation communication systems.”

The option ordered by the OMB included the creation of a larger version of a combined rural/suburban ward (Ward 12), as well as a new combined suburban/rural ward. In discussing the Board’s preferred option and the matter of protection of rural interests, the decision further noted as follows:

“[170] The Board is satisfied that the rural voice and the community of interest

that is represented in these wards will continue to enjoy effective representation in these newly configured rural/suburban wards. By all accounts, Ward 12 has functioned well as a combined ward, developing over time a strongly integrated rural and suburban population that has been well represented since amalgamation. Similarly, Waterdown and its Flamborough component have been well represented.

[171] These examples are proof of the fact that anyone representing a ward with a very significant rural component must take account of the values and views of those in the rural area. In the past, rural residents of the wards that include within them suburban areas have enjoyed effective representation and the Board is confident that this will continue in the future and that it will apply equally to the newly configured Ward 13 as it has to the previously configured Wards 12 and 15.”

The independent consultant retained for the City of Ottawa’s ward boundary review would be required to consider matters such as case law, OMB/LPAT decisions and the principle of “effective representation” throughout the process of developing criteria and recommendations relating to the ward boundary review.