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Political Space, Guaranteed: Utilizing New Zealand's 'Reserved Seats' System to Help Aboriginal Canadians Realize Their Guaranteed Democratic Rights

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POLITICAL SPACE, GUARANTEED: UTILIZING NEW ZEALAND'S 'RESERVED SEATS' SYSTEM TO HELP ABORIGINAL CANADIANS REALIZE THEIR GUARANTEED DEMOCRATIC RIGHTS

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ABSTRACT

Despite having formally recognized the distinctiveness and importance of Aboriginal Rights with the enactment of section 35 of the 1982 Constitution, Aboriginal persons continue to be under-represented in Canadian political institutions. This article will argue that the solution to this problem does not lie in section 35. Instead, this article will demonstrate this historic lack of political space constitutes an infringement of rights guaranteed to Aboriginal Canadians under section 3 of the Charter of Rights and Freedom. The most effective method to remedy this breach is through the implementation of a 'reserved-seat' system similar to that in New Zealand.

This article begins with a brief historical summary of the relationship held between Canada and its Aboriginal people, moving to compare this with the association linking the New Zealand crown and the indigenous people of New Zealand – the Maori. New Zealand did not initially incorporate rights for the Maori in constitutional documents, but instead chose to allocate reserved parliamentary seats to the Maori people – a method that has proven quite successful. The article then moves to analyze the Canadian jurisprudence under section 3 of the Charter, demonstrating that our current electoral system and under-representation of Aboriginal persons constitutes a breach of this right. Due to the inherent inequalities existent in the political sphere, only a method as assertive and direct as reserving seats will begin to remedy this breach. This argument can withstand justification – under both the Canadian liberalized view of rights and section 1 of the Charter.

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In a really equal democracy, every or any section would be represented, not disproportionately, but proportionately.
– John Stuart Mill[1]

Introduction

The importance of citizen participation and representation in the public sphere is two-fold. At the societal level, political participation is crucial to the proper functioning of participatory democracy – yet it is equally important at the individual or group level, in creating a sense of true inclusion and belonging. Countries have struggled for centuries with how best to provide a means for citizen participation. In the author's view, political participation in Canada encompass (among other things) exercising the right to vote, having a legitimate and effective representative in traditional political institutions such as Parliament and provincial Legislative Assemblies, and consulting with or participating in local and administrative levels of governance.

Aboriginal Canadians comprise one group that has been historically under-represented in the full sphere of political participation. Interestingly, Canada and New Zealand – both liberal democracies sharing a common British parliamentary tradition – have pursued different approaches in the facilitation and encouragement of political participation and representation of their respective indigenous populations. While Canada took the positive step of constitutionally acknowledging the collective rights of Aboriginals in 1982,[2] this recognition has not specifically facilitated the public participation and representation of Aboriginals in any meaningful way. Although Aboriginal people possess the franchise, and there exists no law explicitly denying their participation in politics, they nevertheless are not able to fully participate in, nor identify with mainstream Canadian political institutions. This is not simply a flaw in the electoral system – it amounts to a breach of democratic rights under

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[1] J.S. Mill, *Considerations on Representative Government* (New York: Longmans, Green, 1900) at 53-54.

[2] *Constitution Act, 1982,* s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

section 3 of the Charter.[3] Indeed, the bare legal extension of the right to vote – without the substantive ability to meaningfully participate and be represented in the public space – will not meet the components of effective representation under section 3 and cannot be saved under section 1. As Cory J. notes, "in a democratic society based upon the right of its citizens to vote, this right must have some real significance."[4]

Conversely, New Zealand, early in its history (in a move that was ironically manipulative and oppressive) decided to allocate reserved space in their House of Representative for Maori legislators. Despite its flaws, this mechanism has ultimately proved successful in terms of creating public space for the Maori population of New Zealand, not only within their legislature, but also throughout other areas of political participation.

This paper therefore asserts that the constitutional recognition of Aboriginals' rights has been insufficient to bring Aboriginal people into a fully participatory role within the mainstream political sphere in Canada. New Zealand's system of reserved seats for their indigenous population should be incorporated into the Canadian electoral system as a starting point towards meeting what is guaranteed to Aboriginal people under section 3 of the *Charter*. Although some may view New Zealand's system as drastic or paternalistic, it is necessary. An analysis of democratic rights must not only engage with the inherent unfairness and power imbalances existing in the political sphere, but must recognize that sometimes the formal, equal right to vote will be insufficient to combat these inequalities. Inadvertently, perhaps, New Zealand has recognized this. Not only can Canadian democracy tolerate a similar change, section 3 of the *Charter* makes such a change essential.

1. Aboriginal Perspectives and the Self-Government Question

While further incorporating Aboriginals into the greater democratic discussion is important, the debate about how to best effect this has been fraught with negativity, distrust and suspicion. Initially, Canada's elec-

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[3] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].

[4] *Reference Re Provincial Electoral Boundaries (Sask.)* [1991] 2 S.C.R. 158 at para. 2 [*Saskatchewan Boundaries*].

toral system forced Aboriginals to denounce their Indian status to vote – painting a picture of enfranchisement as a tool of assimilation, rather than a means for a collective society to participate in Canada's 'nation-building.'[5] Aboriginal persons did not have a great deal of input during the construction of Canada's political institutions and, consequently, may not see their interests legitimately represented within them. As the New Brunswick Aboriginal Council once stated, "Aboriginal voter turnout is low because native people feel the process is not their process."[6]

Beyond a general mistrust of Canadian institutions, it is also possible that Aboriginal leaders have not prioritized representation in mainstream legislative institutions for the reason that changes of this nature may stand at odds with their right to self-government.[7] Indeed, this paper concurs that the notion of true self-government and participation in the greater governance of the nation are to a large extent mutually incompatible.[8] Furthermore, if both self-government and increased participation in traditional institutions were available as legitimate options to Aboriginal populations in Canada, self-government would most likely be preferred and most of the analysis set out here would be irrelevant on a fundamental level.[9]

This paper nevertheless surmises that self-government is not fully achievable in the near future, and in its absence, the creation of a legitimate democratic space for Aboriginal people within our traditional system of politics is required. While others have made this argument,

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[5] Canada, Royal Commission on Electoral Reform and Party Financing, *Aboriginal Peoples and Electoral Reform in Canada,* vol. 9 (Toronto: Canada Communication Group, 1991) at 4 [RCERPF].

[6] Trevor Knight, "Electoral Justice for Aboriginal People in Canada" (2001) 46 McGill L.J. 1063 at para. 60 [Knight].

[7] See generally, Knight, Ibid. Specifically, see para. 66. "Many Aboriginal people argue that even if there is a normative justification for guaranteed Aboriginal representation, it is not a goal worth achieving. Some maintain that it is inconsistent with self-government, and should be resisted."

[8] An apt example would be the likely withdrawal of Quebec federal representatives in the event of its secession.

[9] See Melissa Williams "Sharing the River: Aboriginal Representation in Canadian Political Institutions" in David Laycock ed. *Representation and Democratic Theory* (Toronto: UBC Press, 2004) 93. ("The rationale for enhanced aboriginal representation in federal legislative institutions will presumably fade as the institutions of aboriginal self-government develop" at 110) [Williams].

this paper proposes that there is something guaranteed to Aboriginal people under section 3 of the *Charter* – of which they are currently being deprived – and only a system similar to New Zealand's 'reserved seat' method will fully remedy this deprivation.

2. Relative Disadvantage and Section 15

It should be acknowledged that it is not only Aboriginal people in Canada who can or should be accorded reserved seats in Parliament, as other minority groups may face under-representation in the public sphere. However, as New Zealand's system of guaranteed seats for their indigenous people is central to the analysis, an appropriate comparison can be made with Canadian Aboriginals. Other groups may have similar claims to effective representation under section 3, yet a discussion of those claims will be left to other authors.

Claims from other minority groups could lead to a discussion of whether their rights under section 15 of the *Charter* are infringed by a system of reserved spots for Aboriginal people, either as an initiative that distinguishes on the basis of race or is under-inclusive. In response, Aboriginal persons may also attempt to rely on section 15, either on the basis that the current electoral system infringes their equality rights, or that separate electoral districts and seats can be justified as an affirmative action initiative under section 15(2) of the *Charter's* equality rights provisions. Although these arguments are intriguing, the improvement of Canada's electoral system to increase Aboriginal participation in Canada can best occur under section 3, and thus, that is where the focus of this paper's constitutional argument will lie.

I. Aboriginals and the Canadian State

The history of the relationship between the Canadian government and Aboriginal peoples[10] is one of colonization and assimilation. While the intricate details are beyond the scope of this paper, it is important to

[10] Canada has three major groups of native descent - Indians, Inuit and Métis. While the distinct relationship of each group with the Canadian government is outside the scope of analysis, it is important to note that all three are being included in this paper's conception of Aboriginal Canadians. See RCERPF, *supra* note 5 at 4.

understand the relative impact past attempts and historic negotiations directed towards the goal of incorporating greater Aboriginal participation within Canadian institutions.

The Royal Proclamation of 1763 formed one of the initial 'agreements' between the Crown and First Nations. The text of the Proclamation recognized one version of Aboriginal sovereignty and title – yet, like other documents of this nature, was ambiguous with respect to what was truly agreed upon.[11] Most Aboriginals claim the written text of these early treaties gave them control over their own affairs, whereas Europeans claimed they had title to the land and only promised small payments and certain rights to hunt and fish in return.[12]

At Confederation, the federal government acquired the power to make the laws related to "Indians and Lands reserved for the Indians" pursuant to the provision of section 91(24) of the *British North America Act, 1867*.[13] One of the major pieces of legislation enacted under this power was the *Indian Act*,[14] which provided a method for registering entitled persons as "Indians". Prior to the mid 1900's, Aboriginal people could only cast a vote if they discounted their Indian status.[15] Enfranchisement was essentially about citizenship, and it required, in effect, "that Indians choose between being 'Indian' citizens or Canadian ones."[16] However, in the 1960's, amendments were made to the Act to extend the franchise to status Indians.[17] Also noteworthy is that the federal department currently known as Indian and Northern Affairs did not becomes a full-fledged ministry until 1966.[18]

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[11] Hamar Foster, "Indian Administration from the Royal Proclamation of 1763 to Constitutionally Entrenched Aboriginal Rights" in Paul Havemann, ed., *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 1999) 351 at 355 [Foster].

[12] See Shin Imai, *Aboriginal Law Handbook,* (Toronto: Thomson Canada Ltd., 1993) at 25 [Imai].

[13] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91, reprinted in R.S.C. 1985, App. II, No. 5.

[14] R.S.C. 1985, c. I-5.

[15] RCERPF, *supra* note 5 at 4.

[16] Foster, *supra* note 11 at 361.

[17] RCERPF, *supra* note 5 at 4.

[18] Foster, *supra* note 11 at 361.

As early as the 1970s, Aboriginal organizations began explicitly to discuss the possibility of more concrete participation and representation for Aboriginal persons within the Canadian legislature.[19] In 1978, major proposals for constitutional reform were initiated and representatives of three national Aboriginal organizations were invited to participate at a First Ministers' meeting. These representatives wanted Aboriginal rights guaranteed in a new constitution and were concerned that the implementation of the *Charter* would modify or deny the existence of these rights.[20] The lobbying that occurred on behalf of Aboriginal groups for a constitutional provision enshrining Aboriginal rights demonstrated that Aboriginal people were "seeking recognition […] within Canadian federalism; the goal – to achieve power by being political actors in the [c]onstitutional game."[21]

Nothing officially occurred until January 30, 1981, when members of a Joint Senate and House of Commons committee agreed with the leaders of three national Aboriginal organizations on a Constitutional provision recognizing Aboriginal and treaty rights.[22] The text of this provision would become section 35 of Canada's *Constitution Act, 1982*, the language of which read:

> s.35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.[23]

The entrenchment of Aboriginal rights formally within the Constitution has generated much debate, commentary, and jurisprudence. One scholar notes that section 35 was meant to offer an "opportunity for Aboriginal people to participate in, and to influence directly, a process which would fundamentally restructure the institutions and rules gov-

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[19] See generally The Report Submitted by the Native Council of Canada found in RCERPF, *supra* note 5 at 7.

[20] William F. Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982* (Saskatchewan: Native Law Centre, 1987) at 1 [Pentney].

[21] *Ibid.* at 12.

[22] RCERPF, *supra* note 5 at 8.

[23] *Constitution Act, 1982, supra* note 2.

erning Canadian affairs."[24] However, as will be discussed, section 35 has proven somewhat unsuccessful in terms of incorporating Aboriginals into Canada's governance.

There have been several negotiations and conversations held around the incorporation of Aboriginal perspectives into Canadian political institutions, specifically in terms of guaranteed seats in the House of Commons or Senate. For example, the Royal Commission on Electoral Reform and Party Financing (RCEFPF) conducted a comprehensive study on Aboriginal peoples and electoral reform, in which Aboriginal people proposed the creation of special electoral districts and guaranteed representation in a reformed Senate.[25] Certain Aboriginal groups opposed these suggestions, due to a fear that any such changes might infringe on their treaty rights.[26] The report of the RCEFPF recommended a process of incorporating Aboriginal constituencies in each province, in the form of "Aboriginal Electoral Districts". These districts would allow a portion of each province's share of legislative seats to be designated as special Aboriginal constituencies. The size and number of these constituencies would be based on numbers of self-identifying Aboriginals.[27] These recommendations were never implemented.

Another important event was the Charlottetown Accord in August 1992. Present at this constitutional discussion were the federal, provincial and territorial governments, and representatives from the Assembly of First Nations, the Native Council of Canada, the Inuit Tapirisat of Canada and the Metis National Council.[28] Issues raised during these negotiations included the possibility of constitutionally recognizing an inherent right of Aboriginal self-government, a dramatic enhancement of Aboriginal representation in both the House of Commons and in a reformed Senate, and an entrenched role for Aboriginal peoples in the appointment of justices to the Supreme Court.[29] The discussion on allocating parliamentary seats to Aboriginals suggested making these seats additional to any existing provincial and territorial seats, rather than

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[24] Pentney, *supra* note 20 at 22.

[25] RCERPF, *supra* note 5 at 41.

[26] RCERPF, *supra* note 5 at 46.

[27] RCERPF, *supra* note 5 at 48-49.

[28] Williams, *supra* note 9 at 98.

[29] Williams, *supra* note 9 at 98.

drawing from a province's current allocation of seats. This accord did not specify the number of seats to be held.[30]

Finally, the Royal Commission on Aboriginal Peoples (RCAP) explored increasing Aboriginal participation, but in the context of self-government. The RCAP final report advocated the creation of a third chamber of parliament – the "House of First Nations" – which would have 'real power' to initiate legislation and require a majority vote on matters crucial to Aboriginal people. This suggestion, however, would have required a constitutional amendment and faced the problem of how this House would ever win a vote when the other houses of Parliament could outvote it.[31]

While the improvement of Aboriginal political participation has been an ongoing discussion, Canada has not made much progress in the achievement of any meaningful mechanism for this participation. Aboriginal people constitute a special community of interest, one which has not been adequately reflected in the House of Commons, the Senate, the judiciary or the federal bureaucracy. Their under-representation not only weakens the validity of our legislative process, but indeed, "calls into question the legitimacy of Parliament itself."[32]

II. From oppressive creation to progressive participation – The example of New Zealand

New Zealand is both a constitutional monarchy and a liberal democracy, with a Parliament of elected representatives.[33] New Zealand's government structure is similar to Canada's, where Parliament is the central institution and the executive branch requires the Parliament's confidence in order to govern. The main source of the New Zealand constitution is the *Constitution Act 1986*, but their constitutional framework is also found in customary practices, conventions, court decisions and other acts of Parliament and legal documents.[34] Perhaps due to its constitu-

30 Williams, *supra* note 9 at 99.

31 Williams, *supra* note 9 at 101.

32 RCERPF, *supra* note 5 at 48.

33 Geoffrey Palmer, *New Zealand's Constitution in Crisis – Reforming Our Political System* (Dunedin: McIndoe Ltd., 1992) at 5 [Palmer].

34 *Constitution Act 1986* (N.Z.). See also Palmer, *Ibid* at 5: "New Zealand does

tion's fluid nature, New Zealand has not explicitly recognized the rights of Maori. In fact, it has taken a different approach to forming a workable 'partnership' between the *pakeha* (persons of European descent) and the Maori, in order to increase the political participation of this indigenous population.

Before the arrival of settlers, Maori tribes lived in self-sufficient communities of *whanau* (extended families). Multiple *whanau* together made up their political units called the *iwi* (the tribes).[35] After years of conflict with European settlers over land, the Maori population had been significantly reduced and they agreed to participate in discussions to negotiate an agreement over land use and government.

In 1840, the *Treaty of Waitangi*[36] was signed between several Maori chiefs and the Crown – a document which was formally referred to as New Zealand's "ancient constitution"[37] and which has now been constitutionally recognized as a founding document of New Zealand.[38] Article 2 of the Treaty gave the right of *tino rangatiratanga* to Maori. The Maori people interpreted this article as the right of "entire chieftainship" – essentially meaning control over their lands and treasured things.[39] Much of the Maori demands for increased share in the governing of New Zealand, stem from this perceived right of chieftainship.

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not have a constitution in the way that Canada does. The New Zealand constitution establishes the major institutions of government, but it is more of 'an idea, a conception or series of conceptions found in the law' ".

35 RCERPF, *supra* note 5 at 69.

36 *Treaty of Waitangi*, Lieutenant Governor of New Zealand (on behalf of her Majesty the Queen of the United Kingdom and Great Britain and Ireland) and the Maori Chiefs and Tribes of New Zealand, 6 February 1840.

37 J.G.A. Pocock, "Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi" (1997-1998) 43 McGill L.J. 481 at 497 [Pocock].

38 Palmer, *supra* note 33 at 6.

39 Alan Ward and Janine Hayward, "Tino Rangatiratanga, Maori in the Political and Administrative System" in Paul Havemann ed., *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 1999 378 at 380 [Ward].

1. Representation in Parliament

After years of conflict and struggle between the Maori and the *pakeha*, it was determined that "avoidance of conflict and protection of Maori lay in incorporating them ultimately…into mainstream institutions."[40] In 1845, the number of settlers was growing in New Zealand and discussions ensued on the possibility of creating municipalities and voting rights. The right to vote was designed to include Maori, as Europeans realized the Maori population posed a formidable adversary, whose co-operation would facilitate in the orderly development of New Zealand society. The Secretary of the Colonies tried to contain the franchise of Maori by restricting it to possession of property and ability to read and write in English.[41] Representative government was then granted in the *Constitution Act 1852*, with a property qualification on the franchise which was intended to block Maori participation.[42] It succeeded to some extent, as only eight Maori individuals qualified for the vote. However, the *Waiarapa* chief, who did hold property at this time, registered as a voter and the electoral meeting for the district was actually held at his home. [43]

In 1860, Maori chiefs complained that they were not receiving equal treatment with the settlers in the councils of the state. They asked that Maori be enabled to participate in the General Assembly, regardless of language difference.[44] A politician named Fitzgerald requested that no law be passed that did not give Maori equal civil and political privileges, and proposed that Maori be brought into the Government, Parliament and the provincial councils without delay. Although the motion was rejected at this stage, it remained a live issue.[45] Finally, in an attempt to end the ongoing conflict between cultures, Fitzgerald was asked to draft a bill, which would provide for Maori representation, entitled the *Maori Representation Act 1867*.[46] At the time of its enactment, the act

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40 *Ibid.* at 379.

41 Ward, *supra* note 39 at 381.

42 Ward, *supra* note 39 at 382.

43 Ward, *supra* note 39 at 383.

44 Ward, *supra* note 39 at 385.

45 Ward, *supra* note 39 at 385.

46 *Maori Representation Act (N.Z.), 1867.*

divided the entire country into four electoral districts.[47] The bill was meant to last only five years and allocated four seats to Maori. It was thought that by allocating this space to Maori in Parliament, and giving the Maori the ability to vote for fellow members of the indigenous population, the government could appear culturally tolerant, appease Maori and yet maintain social control over this segment of the population.[48] If anything, reserved seats were used as a mechanism to prevent any attempt by the Maori to set up a separate power base to circumvent parliamentary authority.[49]

Despite this motivation, guaranteed seats have, over time, become a positive re-enforcement for Maori values and identity. Although the first elections for Maori seats were not well publicized – or hotly contested – Maori were quick to apprehend the importance of parliamentary representation. The two distinct types of representation – the Maori and the general – were eventually integrated into a single, comprehensive system.[50] Maori representatives did not sit in a separate chamber, rather, they possessed full voting rights on all issues and by 1974, any person of any degree of Maori could choose to opt for the Maori or general election roll.[51] Indeed, as Ward acknowledges, "a measure that was intended to be transitional and temporary was renewed and has remained to the present day."[52]

Throughout the 1970's and 1980's there were two major political parties in the House of Representatives: the Labour Party and the National Party. At this time, elections were conducted through a first-past-the-post-system.[53] The Labour Party realized the strength of the Maori movement and formed an alliance with the nominees for the Maori seats, who became official "Labour" candidates for a period of time. The first Maori political party was *Ratana*, but, as one author notes, Maori continued to align themselves with the Labour party in order reap

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47 RCERPF, *supra* note 5 at 71.

48 RCERPF, *supra* note 5 at 72: "Did separate representation convey an enlightened response to protect Maori interests? Or was it nothing more than a deceptively manipulative ruse of political expediency for social control?"

49 RCERPF, *supra* note 5 at 72.

50 RCERPF, *supra* note 5 at 70.

51 Ward, *supra* note 39 at 397

52 Ward, *supra* note 39 at 386.

53 RCERPF, *supra* note 5 at 73-74.

the benefits of certain social programs.[54] A new Maori party emerged in the early 1980s, which reflected the Maori disenchantment with Labour policies of market liberalization. This party was called *Mana Motuhake*, and although it diminished total support for Labour, it failed to pry Maori seats away from the Labour party.[55] In fact, it was not until 1993, that a new political party, New Zealand First, won the Northern Maori constituency, breaking the half-century Labour monopoly of Maori seats.[56]

2. A Change of Electoral System

In a move that proved to further promote Maori representation, New Zealand adopted a system of proportional representation called Mixed Member Proportional (MMP) in 1996. A Royal Commission formed to study the Electoral System believed that MMP would provide "fairer, provide better representation and allow for wide participation in New Zealand politics than First-Past-the-Post."[57] One of the main reasons given for why MMP was a more 'fair' electoral system was its ability to increase the election of individuals from minority groups, such as Maori. To a small but notable extent, this has actually occurred. The new MMP system changed the Electoral Act[58] to make the number of Maori electorates based on the numbers of New Zealanders of Maori descent choosing to enter their names of the Maori roll.[59] The result at the time was to increase the number of reserved electoral districts for Maori from four to five and the total number of Maori elected that year was fifteen.[60]

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[54] RCERPF, *supra* note 5 at 73. One of the major pieces of the Labour Government's platform was their comprehensive social security system encompassing the Maori people.

[55] Jeffrey Karp, Jack Vowles, Peter Aimer & Susan Banducci, eds., *Voter' Victory? New Zealand's First Election Under Proportional Representation* (Auckland, New Zealand: Auckland University Press, 1998) at 173 [Karp].

[56] *Ibid.* at 171.

[57] Karp, *supra* note 55 at 192.

[58] *Electoral Act 1993* (N.Z.), 1993/87.

[59] Karp, *supra* note 55 at 171.

[60] Karp, *supra* note 55 at 171.

Presently, the manner in which the system functions is as follows: New Zealand's unicameral Parliament has increased in size to 120 members, sixty-five of which are elected as candidates under first past the post rules, where the candidate who receives the greatest number of votes wins the seat. The remaining Members of Parliament are elected by means of a party vote from closed national lists supplied by political parties, which includes the current six Maori districts. The list Members are allocated so as to "top up the party share of seats in the House to ensure proportionality according to the overall distribution of party votes cast."[61]

3. The Bureaucracy and Local Government

Participation in government, of course, extends beyond the election of Parliamentarians. In the early 1900s, not only could Maori national representation be found on local or regional councils and committees in New Zealand, but the General Assembly attempted to give official recognition to *runangas* (Maori councils) by empowering local *runangas* with the ability to pass by-laws to regulate civil issues with the local resident magistrate.[62] Although this initiative may be classified as something closer to self-government, it marks an important attempt at cooperation between the *pakeha* and Maori, in an effort to make 'space' for the Maori concerns. These concerns have also garnered greater attention through the Waitangi Tribunal, a board specifically designed to hear Maori claims arising out of performance or non-performance of provisions under the *Treaty of Waitangi*. The tribunal makes recommendations that go to the Ministry and in the last few decades, the tribunal has served to strongly influence the courts, legislature and the executive branch of government.[63]

The bureaucracy also recognizes the importance of incorporating a Maori perspective in areas of governance and policy. Almost all gov-

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[61] Karp, *supra* note 55 at 2.

[62] Ward, *supra* note 39 at 389.

[63] Paul Havemann, "Administering Indigenous Affairs Citizenship and Self-Determination" in Paul Havemann, ed. *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 1999) at 334 [Havemann].

ernment departments have a Maori division and the Ministry of Maori Affairs "acts as a legislative watchdog for Maori interests,"[64] incorporating a Maori perspective into all enacted legislation. As early as 1948, the Secretary of Maori Affairs was of Maori descent[65] – a far cry from Canada's selection record for the position of Minister of Indian and Northern Affairs. [66]

Maori participation in local government has continued to expand in recent years. The *Local Government Act*,[67] enacted in 2002, requires all councils to establish and maintain opportunities for Maori to contribute to decision-making processes. Specifically, if a council is making a decision involving a body of water, it must take into account the relationship of Maori and their culture and traditions with their ancestral land.[68] Since 1997, there has been an increase in the number of councils that formally engage with Maori.[69] The New Zealand Department of Internal Affairs published a study in 2004 which found that councils with formal consultation processes with Maori increased from 16 in 1997, to 69 in 2004.[70]

Although the system of Maori guaranteed seats started from a premise of control, this assertive method to include Maori in mainstream politics proved to successfully combat inequalities within the political arena. As one author notes,

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64 Ward, *supra* note 39 at 394.

65 Ward, *supra* note 39 at 394.

66 See generally Ward, *supra* note 39 at 364.

67 *Local Government Act 2002* (N.Z.), 2002/84.

68 Government of New Zealand. "Maori Participation in Local Government" Government of New Zealand, online: <http://www.localcouncils.govt.nz/LGIP.nsf/wpg_URL/About-Local-Government-Participation>.

69 *Ibid.*

70 New Zealand: Department of Internal Affairs and Te Puni Kokiri, "Local Authority Engagement with Maori", (July 2004) Government of New Zealand, online: <http://www.lgnz.co.nz/library/files/store_005/Localauthorityengagementwithmaori2004.pdf>. It is acknowledged that there are many local governments that consult with Aboriginal Canadians. However, this description of New Zealand is meant to demonstrate how they have blended these consultations into almost every government decision, whereas in Canada, aboriginal questions have largely remained a 'separate' sphere.

> the main avenues by which Maori engaged with the processes of government and administration were through the four seats in the national Parliament, [eventually] this led to having members on the Legislative Council and through the local councils dealing with health and sanitation.[71]

In other words, the inclusion of Maori through reserved legislative seats has broader participation, not only in a formal representative institution, but throughout New Zealand's public sphere.

III. A Successful System…

In order to evaluate the success guaranteed seats have had in terms of increasing Maori participation, an empirical measurement must be made of any improvement seen to the lives of indigenous people. For the purposes of this paper, "improvement to the lives of indigenous people" will be limited to benefits commonly associated with public participation, such as increased voter participation, and augmented numbers of representatives in traditional political institutions.

The system of reserved seats in New Zealand has transcended the context of oppression and control in which it was created, becoming a tool of participation which Maori embrace and value. In fact, there have been occasions over the past few decades where the government considered abolishing these seats; however Maori strongly opposed these proposals, claiming the seats were central to their identity and survival.[72] Electoral reform has helped to increase the number of seats reserved, making the number more proportionally representative of the percentage of the populations that self-identifies as Maori.

Additional improvements to the political lives of the Maori – which, have arguably grown from the initial system of reserved seats – include the recognition of Maori structures, mainstreaming federal agencies to ensure a Maori dimension to the public service, acceptance of the *Treaty of Waitangi* as a solemn contract between the founding partners of the country, and inclusion of Maori at all levels of governance.[73] All members of the public service also receive "Maori training," a cultural

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[71] Ward, *supra* note 39 at 391.

[72] RCERPF, *supra* note 5 at 81-82.

[73] See generally Havemann, *supra* note 63.

awareness program comprised of learning (among other things) key Maori linguistic terms, and appropriate greeting behaviours.[74] Certainly, this training is a strong indication of the progress made in terms of the Maori population being viewed as a governing partner and sets New Zealand apart from Canada, where very few Aboriginal representatives have even been elected in the House of Commons.[75] Even beyond this pure 'numbers' game, many Aboriginal people feel disconnected and discontented with traditional Canadian structures. One Aboriginal writer notes that under-representation in an institution as central to the Canadian democratic system as Parliament will inevitably result in fewer benefits for Aboriginal persons and less access to benefits the democratic system provides.[76]

Overall, while the rights guaranteed in section 35 of the Charter have provided some justice for Aboriginal people, it would be a mistake to rely solely on section 35 to remedy all inequalities Aboriginal people face, particularly under-inclusive democratic structures. A better tool for this task is section 3.

The constitutional choices New Zealand made – although perhaps unintended – have ultimately had the effect of increasing the political voice of Maori. New Zealand did not initially enshrine rights for their indigenous population in their constitution, choosing instead to implement a system of reserved seats. It is contended that this allowed other means of political participation to develop, proving to be exactly what was needed to combat the inequalities, economic injustices and power imbalances which have existed in New Zealand's public space.

The subsequent portion of this paper will outline why, constitutionally, the most ideal method to increase Aboriginal participation in Canada is a system of reserved seats. Although there will be some discussion as to how these seats could be implemented, the exact electoral mechanics fall outside the scope of this analysis. The specific argument presented here is that, as compared to solutions which some might term less drastic, only directly "saving space" in our legislature

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[74] Interview with Fiona McDonald, Doctoral Law Student from New Zealand. Interview: 03/11/05 0900. Note McDonald underwent such Maori training personally.

[75] Knight, *supra* note 6 at para. 6.

[76] James Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev. 241 at 325 [Henderson].

for Aboriginals has sufficient force to combat existing inequalities and meet the right of effective representation as guaranteed under section 3 of the Charter.

IV. Constitutionality of Aboriginal Seats

1. What Does Section 3 Protect and How Has This Right Been Denied to Aboriginal People?

Section 3 of the *Charter* states: "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."[77] In *Reference Re Provincial Electoral Boundaries (Sask.)*[78], the Supreme Court of Canada, in considering section 3's purpose, held that the right to vote is the right to "effective representation."[79] One of the major conditions needed to achieve such representation is relative parity of voting power – meaning that everyone has a vote of relative equal weight. However, the Court has declared that deviations from absolute voter parity in the creation of electoral districts are not only acceptable – such factors that may be taken into consideration include geography, community history, community interests and minority representation - but also necessary, as it is impossible to draw boundary lines which guarantee exactly the same number of voters in each district.[80] More will be said with respect to deviating from strict voter parity and how additional considerations under 'effective representation' relate to Aboriginal participation, however a full understanding of section 3 requires looking to jurisprudence that has considered this right in other contexts beyond electoral districts.

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[77] *Charter, supra* note 3.

[78] *Saskatchewan Boundaries, supra* note 4.

[79] *Saskatchewan Boundaries, supra* note 4 at para. 49.

[80] See generally *Saskatchewan Boundaries, supra* note 4 at paras. 50-56. (Canada does not maintain a strict interpretation of 'one-person-one vote' – as there are many competing factors to consider and a contextual analysis is necessary).

In *Figueroa v. Canada (Attorney General)*,[81] the Supreme Court found a law that restricted official registered party status to political parties with candidates in at least fifty electoral districts violated section 3. Parties without status could not enjoy certain benefits, most notably the right of their party's candidates to list their party affiliation on the ballot paper.[82] The Court's analysis expanded the understanding of the rights in section 3, moving beyond the simple ability to cast a vote; towards a broader right of meaningful participation:

> [T]he purpose of section 3 includes not only the right of each citizen to have and to vote for an elected representative in Parliament or a legislative assembly, but also to the right of each citizen to play a meaningful role in the electoral process. This, in my view, is a more complete statement of s.3 of the Charter.[83]

In other words, section 3 protects the electoral process, but this process is not limited to the selection of elected representatives. It includes the ability to voice concerns, to share an identity in a governing system and create a space for, "the open debate that animates the determination of social policy."[84]

Harper v. Canada (Attorney General)[85] further illustrates the rights that section 3 aims to protect through a discussion around the relationship between the Charter's sections 3 and 2(b) (the right to free expression). This case involved a challenge to laws which limited the advertising expenses of third parties in electoral campaigns. The majority of the court held that while section 2(b) was violated, the restrictions were nevertheless justified under section 1 because the ability of third parties to fund certain political activities was restricted; therefore, it was justifiable in order to promote equal dissemination of political views. While the right of freedom of expression found in section 2(b) of the *Charter* protects the ability of each individual to express themselves,[86] no internal check exists within this right to cope with the reality that the more

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[81] [2003] 1 S.C.R. 912 [*Figueroa*].

[82] *Ibid.* at para. 4.

[83] *Figueroa, supra* note 81 at para. 25.

[84] *Figueroa, supra* note 81 at para. 29.

[85] [2004] 1 S.C.R. 827 [*Harper*].

[86] See, R.J. Sharpe & K. Roach, eds. *The Charter of Rights and Freedoms,* 3rd ed. (Toronto: Irwin Law, 2005) [Sharpe].

powerful and wealthy may be able to express themselves more effectively than others. Conversely, Bastarache J. recognized in *Harper* that laws challenged under section 3 are permitted to recognize the power imbalances that exist in the political sphere and society in general. Laws will not infringe section 3 if they attempt to create a level playing field for those who wish to engage in the electoral discourse.[87] Thus, section 3 is meant to protect and enforce the level playing field which, ideally, democracy should be based on.

The structure of Canadian society, including the historical relationship Aboriginal people hold within the Canadian state, is such that Aboriginal people are not receiving the full rights guaranteed under section 3 as these democratic rights have been defined in the jurisprudence. Although a proponent of individual rights might argue that no claim exists for Aboriginals under section 3 – as each Aboriginal person has the right to cast a vote, and theoretically could participate to any extent they desire – the Court has held that the democratic rights under section 3 are about more than simply ensuring everyone is legally entitled to vote. A 'formal' approach to equality – where every person has one vote and one equal 'chance' to put their representative in the House of Commons – should give way to a more substantively equal system of truly effective representation.[88] This was the effect of *Saskatchewan Boundaries*, as it "[began] to recognize concerns for the kind of substantive justice that Charter s.15 jurisprudence has recognized, […] as real equality sometimes demands different treatment."[89]

Not only is the bare ability to vote achieve substantive equality, but the democratic rights protected in section 3 are comprised of much more than simply electing a representative. While there have been a small number of Aboriginals elected to Parliament, the components of effec-

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[87] *Ibid.*

[88] See generally Iris Marion Young, *Justice and the Politics of Difference,* (Princeton, New Jersey: Princeton University Press, 1990) at 158. Young's theory of the 'politics of difference' holds that true representation and equality of participation and inclusion of all groups sometimes requires different treatment for oppressed or disadvantaged groups.

[89] K. Roach, "Chartering the Electoral Map Into the Future" in J. Courtney, P. MacKinnon & D.E. Smith, eds., *Drawing Boundaries: Legislatures, Courts, and Electoral Values,* (Saskatoon: Fifth House, 1992) at 200 [Roach].

tive representation have never been a reality for Aboriginals. As one author notes,

> Aboriginal people have no true voice to assert their rights in Parliament or in the legislative assemblies. They are still organized lobbyists or plaintiffs outside the formal structure of government."[90]

This lack of effective representation can be addressed in a way that meets the demands of section 3 of the Charter.

2. Reserved Seats will Address the Rights Found in Section 3

Although most of the section 3 jurisprudence has not arisen out of a traditional minority rights context, a strong argument can be made based on the Court's interpretation of section 3 that electoral laws and the drafting of electoral district boundaries must begin to embrace the representation of minorities, and in particular, Aboriginal Canadians. Traditionally, rural voters were thought to have different concerns than urban voters, and electoral boundaries were drawn accordingly. However, as Sharpe notes:

> [W]ith the increasing ethnic diversity in Canadian society, it might be argued that electoral lines should be drawn so as to maximize the opportunity for an ethnic or religious group to vote for a member of its community.[91]

Using the success that New Zealand has had in terms of incorporating their indigenous population into mainstream politics as an example, coupled with the Court's interpretation of section 3, Canada's electoral system should be re-visited to incorporate Aboriginal interests through reserved legislative seats in Parliament.

3. The Jurisprudence Supports a Vision of Minority Seats

Section 3 case law has been clear that minority groups should be given greater consideration. As Spafford notes, "a theme that can be read into

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[90] Henderson, *supra* note 76 at 244.

[91] Sharpe, *supra* note 86 at 183.

the Court's discussion of effective representation without much difficulty is that of minority representation."[92] One source for this statement is found in the list of factors to be consideredby the court when determining effective representation. These include geography, community history, community interests and minority representation.[93] If we consider these factors in the context of Aboriginal Canadians, it becomes evident that the current electoral system has not resulted in effective or equal representation.[94]

i. Geography

In designing the electoral system, geographic divisions in Canada play an important role and 'natural' geographic boundaries, such as provincial or city lines, should certainly be taken into account. The characteristics of Aboriginal communities, however, present a specific 'geographic' concern. Aboriginal Canadians form a collective group that is dispersed over Canada in such a way that rarely results in any electoral constituency having a dominant Aboriginal voice.[95] If one purpose of the democratic rights enshrined in the Constitution is to provide effective representation, we should not define boundaries solely on provincial or city lines. The reality of Aboriginal geographic dispersion must be acknowledged and remedied.

ii. Community history and interests

That the Court has identified these two factors indicates that, although many rights guaranteed under the Charter are individual rights, those accorded under section 3 and our notion of 'democracy' encompasses more than strictly individual rights. Indeed, Henderson argues that "without a proficiency within the House of Commons of indigenous worldviews, languages, rights and treaties, the Canadian legal system

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[92] Duff Spafford, "Effective Representation: Reference Re Provincial Electoral Boundaries", Case Comment (1992), 56 Sask. L. Rev. 197 at 207 [Spafford].

[93] *Saskatchewan Boundaries, supra* note 4 at para. 54.

[94] Committee for Aboriginal Electoral Reform, "The Path to Electoral Equality" in Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report*, vol. 4 (Ottawa: Minister of Supply and Services, 1991) at 241-245.

[95] One of the few exceptions is the riding of Nunavut.

cannot equitably talk about authentic democracy."[96] Thus, by only considering the history and interests of individuals, Parliament will not be adequately reflective of Canadian society, as society is also comprised of collective groups. The interests and history of Aboriginals, as individuals and as a collective society are inadequately represented in our current electoral system.

iii. Minority representation

This factor demonstrates that the Court has acknowledged that minority interests should be considered when determining whether an electoral system passes constitutional muster. For a multitude of reasons, very few aboriginal persons are elected to the House of Commons or provincial assemblies, or are appointed to the Senate. Beyond sheer numbers, Aboriginal concerns and perspectives are not engrained into mainstream policy discussions and public debate – instead, the 'Aboriginal question' has always remained a side issue.[97] As the majority held in *Saskatchewan Boundaries*, if we are going to "ensure that our legislative assemblies effectively represent the diversity of our social mosaic,"[98] the electoral system requires minority seats. The absence of such seats creates the absence of effective representation for Aboriginal Canadians. In the words of a Native Council representative:

> Only an Aboriginal person and only an Aboriginal representative can speak about whether the proposed legislation is justifiable in light of what it will do or what its effect on the Aboriginal people of Canada will be.[99]

Taking into consideration all of the factors listed above, Aboriginal Canadians should be given guaranteed seats in Parliament. In fact, academics have welcomed the

> extent to which the Saskatchewan Boundaries decision may facilitate progressive developments such as enhanced democratic

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96 Henderson, *supra* note 76 at 245.

97 See generally, Henderson, *supra* note 76.

98 *Saskatchewan Boundaries, supra* note 4 at para. 54.

99 RCERPF, *supra* note 5 at 38.

> power for groups of people who have suffered from an historic lack of representation.[100]

Some have even suggested that there is language in the decision which Aboriginal communities, or others, might use in an attempt to force legislatures to provide a special system of representation, such as guaranteed seats. This argument follows that absent such special considerations, those communities would be denied effective representation.[101]

4. Reserved Seats are the Best Alternative to Serve the Interests Protected in Section 3 of the Charter.

Reserved seats are the best mechanism to begin to incorporate Aboriginal people into mainstream political institutions, as this will not only achieve the rights afforded to Aboriginals under section 3, but it abides by the principle that people should be represented in the institutions that have power over their lives. Kymlicka argues that because many people see western democracies as "unrepresentative," it has led to the idea that a certain number of seats should be reserved for members of disadvantaged groups. [102]

However, some may view a system that sets aside guaranteed seats as a drastic solution and may believe that that under-representation of Aboriginals in the public sphere can be overcome without resorting to the idea of guaranteed representation.[103] One alternative to guaranteed seats could be an entirely new electoral system, meant to facilitate the representation of all minority groups.[104] Indeed, according to one author, the "primary factor for the under-representation of Aboriginal People in Parliament is the operation of the Canadian electoral system – single member plurality."[105] However, although a proportional system is spe-

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[100] Roach, *supra* note 89 at 200.

[101] R.G. Richards and T. Irvine, "Reference Re Provincial Electoral Boundaries: An Analysis" [unpublished].

[102] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights,* (Toronto: Oxford University Press, 1995) at 132.

[103] *Ibid.* at 133.

[104] Kymlicka, *supra* note 102 at 133.

[105] Trevor Knight, "Unconstitutional Democracy? A *Charter* Challenge to Canada's Electoral System" (1999) 57 U.T. Fac. L. Rev. 1 at para. 29 [Knight].

cifically designed to better allocate seats in proportion to votes, which in turn can better represent minorities, Aboriginals and all Canadians cannot and should not depend on a change of electoral system alone to remedy this problem.

First, an extensive study, which canvassed all forms of electoral systems, found that there was "no simple and clear-cut picture relating the type of electoral system directly to differences in minority political support."[106] In a public space filled with power inequalities and historically engrained positions and norms, something more than just a different electoral system is required.

Second, the distrust that unfortunately may characterize the relationship some Aboriginals have with the state could prevent an electoral system – even one with proportional representation – from addressing Aboriginal concerns. Despite the fact that a proportional representative system is more conducive to the election of minorities, there is still no guarantee, and outcomes continue to depend on the perspectives and relationship between the state and Aboriginal people. A more assertive change than a new electoral system is needed in order to forcefully shake off the historical perspectives of distrust. As one author notes, "the roots of distrust in government lie in something other than the rules used to translate votes into seats […] the electoral system, while important, remains only one component in consociational systems of democracy."[107] Although guaranteeing seats might seem as though the electoral system provides Aboriginals too much assistance in terms of getting elected, Canada will never make any progress on this issue without admitting the great inequalities that exist within the political sphere. In the absence of reserved seats, this paper is sceptical whether a change to the electoral system alone would remedy this situation.

A separate suggestion that is commonly put forth is to lessen or remove barriers to entrance into the political system. This could include placing a cap on nomination campaign expenses and supplying public funding for political parties.[108] Yet, even when proposing this, Kymlicka adds that specific identification of candidates from disadvantaged

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[106] Pippa Norris, *Electoral Engineering – Voting Rules and Political Behaviour* (Cambridge: Cambridge Press, 2004) at 224 [Norris].

[107] *Ibid.* at 215 & 228.

[108] Kymlicka, *supra* note 102 at 133.

groups is needed, which sounds similar to selecting individuals from these groups to be placed in the House of Commons.

Guaranteed seats would enhance Aboriginal representation better than other mechanisms for enhancing minority participation. Parliamentarians would continuously exist in the House of Commons for the purpose of voicing Aboriginal viewpoints. Although there are presently Members of Parliament with Aboriginal history, the structure of the system may view them as simply an individual parliamentarian, who is not there to speak for a group.[109] Even if this point was debatable, there is surely no question that additional Aboriginal Members of Parliament will assist those currently there to voice an Aboriginal perspective. If aboriginal rights were important enough to recognize in section 35 of the Constitution, should Canada not have legitimate spokespersons for these rights? And if the Constitution provides that Aboriginal people have a right to participate at constitutional conferences with respect to issues that directly affect them,[110] it is not time to consider extending them an invitation to participate in the governing of a country that directly affects them, as New Zealand did?

5. Guaranteed Seats Will Make a Difference

The argument this paper presents must inevitably endure the response that a few Aboriginal seats will not make a substantive difference for the inclusion of Aboriginals in the political process and will not meet the definition of effective representation the Supreme Court of Canada identifies. Any comparison to New Zealand always faces the argument that characteristics specific to New Zealand (such as the smaller land mass and a higher percentage of the population identified as indigenous) were a necessary element of the progress New Zealand has made in partnering with the Maori. Indeed, Maori make up a large cultural minority – "and this single fact gives political weight to Maori claims, a dignity often denied indigenous people."[111] However, it is the position of this paper that if Aboriginal Canadians have endured a weaker rela-

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[109] Henderson, *supra* note 76 at 319.

[110] *Constitution Act, 1982, supra* note 2 at s. 35.1(b). See also, RCERPF, *supra* note 5 at 48.

[111] Palmer, *supra* note 33 at 74.

tionship vis-à-vis the Canadian government, as compared to the Maori and the New Zealand Crown, this only serves to reinforce (as oppose to detract from) the argument that something drastic and concrete must be done in Canada to increase Aboriginals in Parliament.

Critics have also noted that Maori parliamentarians were viewed as 'token' parliamentarians. These critics challenge why Aboriginals should be given guaranteed seats, if this is likely to happen in the House of Commons as well. In *Figueroa*, it was similarly argued that smaller parties cannot influence policy in Parliament, so why should they be given guaranteed party status? Nevertheless, a few Aboriginal Parliamentarians is better than none at all. If the criticism is that a few seats will not be enough, than certainly the lack of reserved seats that Aboriginals currently have are not serving Aboriginals any better. As the Court noted in *Figueroa*, "irrespective of their capacity to influence the outcome of an election, [smaller] political parties act as both a vehicle and outlet for the meaningful participation of individual citizens in the electoral process."[112] Similarly, the increased numbers of Aboriginal people in Parliament (even if they are not the majority) creates an atmosphere where the Aboriginal perspective can be given greater consideration. Also, although Maori seats initially suffered from the criticism that they were essentially 'powerless', these seats eventually evolved into a mechanism that allowed Maori to take part in many functions and levels of government. There is no reason why this evolution could not occur in Canada as well.

All of the arguments made above contribute to the overarching notion that the political sphere is inherently unequal. This inherent inequality is precisely why guaranteed seats will make a difference in creating a more effective method of representation, because achieving democratic equality means combating power imbalances. It is contended that society does not police who expresses themselves the loudest under the right of freedom of expression. This is the major distinction between that fundamental right and the democratic rights guaranteed under section 3. Political expression and participation will only function fairly, and the rights under section 3 will only be maintained, if various groups and individuals have relatively equal abilities to participate.

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[112] *Figueroa, supra* note 81 at para. 49.

The courts do not concern themselves with this level of equality with certain other rights in the *Charter*, however under section 3, certain groups may require a very overt method to have the opportunity to "shout" as loud as others in the political arena. This may explain why a system, which may appear paternalistic, can be completely justifiable and can eventually led to fairer results. The current structure of Canada's electoral system is faulty in terms of incorporating Aboriginals and in terms of meeting their section 3 rights. In order to provide Aboriginal people the representation that section 3 promises, a guarantee is needed and anything less will fall short of achieving these rights.

6. Such an Idea can Withstand Justification Under Section 1 of the Charter and Under an Individualistic Theory of Rights.

i. Individual Rights

In adopting the notion of "effective representation," the Supreme Court of Canada has rejected the strict American model of "one person one vote."[113] American jurisprudence would likely not be as open to collectivist perspective on voting rights; in construing the term "effective," the United States Supreme Court has closed the door to qualitative judgements concerning representation and specifically, considerations of group interests.[114] As Sharpe notes,

> we see a distinctive Canadian approach that takes into account concerns about the effectiveness of representation as well as sensitivity to the interests of groups and that can be contrasted with the American courts' insistence on the more individualistic principle of one person one vote.[115]

The distinction between rights accorded to a group and rights accorded to individuals is somewhat nebulous, and are often inter-related. As one author argues, a member of the collective simultaneously benefits from rights as an individual as well as group rights, and many times, individ-

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113 *Saskatchewan Boundaries, supra* note 4 at para. 57.

114 Spafford, *supra* note 92 at 198.

115 Sharpe, *supra* note 86 at 186.

ual rights are often meaningless unless group rights are guaranteed.[116] This rings true for Aboriginal persons. As a distinct and identifiable group, their individual right to vote has been fairly meaningless in terms of achieving effective representation for all types of Aboriginal groups.

One common criticism is that equality in Canada's individualist political culture does not allow for special representation of groups and a liberal theory of individual equality cannot be reconciled with reserving electoral seats for some, but not others.[117] This argument would contend that all Canadians have the same 'legal citizenship' and should therefore, live under the same electoral system. However, as Carens notes, even when people share a common legal citizenship (such as Canadian) the assessment of representational legitimacy requires the need for judgment about the fit between electoral mechanisms and particular political identities – and in some cases, special forms of representation may be appropriate.[118]

Indeed, Canada's political tradition has never taken the primacy of the individual as its only starting point. Examples such as section 35 itself, or the inclusion of language rights guarantees in the Constitution, demonstrate that historically, certain sub-sets of the population have been collectively protected or supported.[119] In fact, Kymlicka holds that "group representation is not inherently illiberal or undemocratic and indeed is consistent with many features of our existing systems of representation."[120] Since the Supreme Court has indicated that factors such as communities of interest and minority groups are be taken into account when drawing electoral boundaries, our democracy should be very hospitable to the incorporation of these non-population based factors into systems of electoral distribution.[121]

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[116] Pentney, *supra* note 20 at 45-47.

[117] See Knight, *supra* note 6 at paras. 45-50. And see generally, Margaret Moore, "Political Liberalism and Cultural Diversity" (1995) 8 Can. J.L. & Juris. 297.; Larry N. Chartrand, "Re-Conceptualizing Equality: A Place for Indigenous Political Identity" (2001) 19 Windsor Y.B. Access Just. 243.

[118] Joseph Carens, *Culture, Citizenship, and Community – A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000) at 176.

[119] Pentney, *supra* note 20 at 2.

[120] Kymlicka, *supra* note 102 at 133.

[121] See generally F.L. Morton and Rainer Knopff's discussion of federalism and bicameralism as attesting to the importance of group representation in "Does the

Patricia Hughes' notion of substantive equality is of particular importance here, as she questions what it really means to be politically equal: "[a]ll citizens have one vote; yet not everyone has the same access to resources to influence the political system."[122] According to Hughes, substantive equality demands recognition and affirmation of group differences. Guaranteed seats would begin to remedy that which has been lacking for Aboriginal people – an equal foundation for political representation.

ii. Section 1

This paper has discussed why Aboriginal groups may be able to ground a demand for increased representation in an action challenging the constitutionality of the current electoral system under section 3, and more specifically, why a system similar to New Zealand's provides an ideal solution. However, the analysis cannot end there. If the electoral system were found to infringe the section 3 rights of Aboriginal persons, the government could still justify this infringement under section 1 of the Charter.[123]

The government, arguing in support of the current system, could contend that it is preferable to have pluralistic, rather than race-based elected seats. However, Canada already divides its electoral seats on the basis of communities of interests. Certainly, it cannot be fair to provide 'effective representation' to rural communities or linguistic communities - as current electoral boundaries do - but not Aboriginal communities.[124]

Not only is this specific argument not persuasive but, additionally, section 3 violations are generally difficult to justify due to the nature of the right itself. Under a section 3 analysis, a many section 1-style considerations are conducted, leaving very little room for argument in

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Charter Mandate "One Person, One Vote"?" (1992) 30 Alta. L. Rev. 669.

[122] Patricia Hughes "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22 Dalhousie L.J. 5 at 7.

[123] *Charter, supra* note 3 at section 1. The language of section 1 states: "The Canadian *Charter* of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[124] Knight, *supra* note 6 at paras. 110 –111.

favour of justification.[125] As one author states, "given the internal balancing that occurs within section 3, the Oakes test does not seem to have much of a role to play.[126]

Notable, however, is the argument that, should changes to the electoral system be made, other groups or individuals might feel their section 3 rights have been infringed. In other words, non-Aboriginals could argue that a system of guaranteed seats disrupts voter parity beyond what is constitutionally permissible. As the jurisprudence under section 3 shows, courts point to several factors to justify diverging from perfect voter parity. If a challenge to reserved seats was initiated, it would be incumbent upon a complainant to "anticipate which of the countervailing factors the government might point to as being served by this inequality, and to undermine that argument."[127]

For many of the reasons previously discussed, it is unlikelythat an attack on guaranteed seats as constitutionally unsound would succeed. Substantive equality and democratic fairness demand the existence of guaranteed seats in order for Aboriginals to achieve effective representation. Further, it seems illogical that a program could both fulfill Abo-

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[125] Knight, *supra* note 6 at para. 109.

[126] Knight, *supra* note 6 at para. 109. (Under most *Charter* sections, a determination that an infringement occurred takes into account the right protected within the specific context of the case. Broad, societal considerations are usually reserved for analysis under section 1 where it must be decided if the deleterious effects of the infringed Charter right can be outweighed by competing public concerns. However, section 3, as the courts have interpreted it, envelops broad factors such as equality in political discourse and minority rights – and thus, many of the 'typical' section 1 considerations are dealt with at this stage. If these large-scale considerations lead to the conclusion that section 3 has been breached, it will be very difficult to later find these same societal concerns can be used to justify the prolongation of this infringement).

[127] Mark Carter, "Reconsidering the Charter and Electoral Boundaries" (1999) 22 Dalhousie L.J. 53 at 16. Note that the court has also found that electoral districts went beyond what section 3 will allow; see *Friends of Democracy v. Northwest Territories (Commissioner)* (1999), 171 D.L.R. (4th) 551 (N.W.T.S.C.), leave to appeal to the C.A. refused, 176 D.L.R. (4th) 661. (In this case, the changes made to electoral boundary lines caused gross under-representation to other groups, violating the right of those groups under section 3. Therefore, any seats guaranteed to Aboriginal persons would have to be accorded in such a way to minimally infringe the representation of others).

riginal democratic rights and violate the section 3 rights of others at the same time.

If faced with having to justify a change to an electoral system with guaranteed seats, the government would have to point to an objective this change was attempting to meet, as well as demonstrate that this system is both rationally connected to that objective, and impairs the rights of others as minimally as possible. Comments the Court made in *Harper* could be instructive. In *Harper*, the Court noted that laws which limited third party spending were addressed at the harm of electoral unfairness. It was found that one of the objectives of such legislation were to promote equality in the political discourse.[128] An argument could be made that a similar objective of equality in political discourse is behind the system of guaranteed seats. As previously discussed, the government could demonstrate how this system was connected to the goal of political equality, and most importantly, that no other method would fully realize the democratic rights of Aboriginals – thus, making guaranteed seats the most minimally impairing option. Finally, the government would have to show that the salutary effects of promoting equality and accessibility in the electoral system for Aboriginal people outweigh the any deleterious effects to the electoral system or other voters.

Additional fertile arguments can be found in *Saskatchewan Boundaries*, where the urban populations contended that it was unfair that different district allotments were drawn for rural constituents. The Court found that the section 3 rights of urban voters were not violated, as voter parity is not the only consideration and effective representation is the ultimate goal. If "effective representation" is the ultimate goal, reserved seats for Aboriginals can be justified, as can the re-drawing of electoral boundaries to include a riding with a lower population but comprised mainly of Aboriginal people.

In the *Saskatchewan Boundaries* case, the court stated that rural constituents are 'harder' to serve because of difficultly of communications and transport and therefore the goal of effective representation may justify somewhat lower voter populations in these ridings.[129] This reasoning can be related to the creation of guaranteed seats. In some ways,

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[128] *Harper, supra* note 85 at para. 90. (Note that the section 1 analysis conducted in *Harper* was undertaken pursuant to a finding that section 2(b) of the *Charter* had been violated).

[129] *Saskatchewan Boundaries, supra* note 4 at para. 78.

Aboriginal Canadians are equally "hard to serve," as it is difficult for Aboriginal perspectives to be considered in the mainstream policy discourse. Indeed, it is almost impossible to rely on the normal allocation of electoral seats to combat the inherent inequalities of politics, break the historic and unfortunate cycle of aboriginal distrust with the Crown, and give Aboriginals fair representation in the House of Commons

Conclusion

This paper should not be read as an attempt to argue that section 35 of Constitution was enacted as a specific tool to increase Aboriginal political participation, and has failed. Clearly, the broader goal of section 35 was recognition of the importance and distinctiveness of Aboriginal rights. However, Aboriginals have always been under-represented in mainstream political institutions and thus this paper has argued it is time to look beyond section 35 as a solution to this problem, given that it has not provided Aboriginals with increased opportunity for representation and participation in the public sphere. The analysis should instead turn to section 3, as this continuing lack of opportunity constitutes a breach of the democratic right of "effective representation" guaranteed to Aboriginals under the Charter.

In comparison, New Zealand did not initially insert a general 'rights' clause pertaining to the Maori in their constitution, and the absence of constitutional recognition left a space for other required action. In order to appease the Maori population, New Zealand took action in the form of guaranteeing seats to Maori in their House of Representatives. As this paper has depicted, this mechanism has ultimately had very positive – even if originally unintended effects in terms of providing Maori an opportunity to meaningfully participate in the governance of New Zealand.

A comparison of these two approaches, taken by comparable liberal democracies, enlightens the analysis of Canadian Aboriginal political participation in two ways. The first of these is that a guarantee of seats in mainstream political institutions is a legitimate method, even in a liberal democracy, to increase the overall participation of a minority group; and second, that only such an assertive method has sufficient force to combat the inequalities of the political sphere and meet the right of effective representation that section 3 of the Charter guarantees.