Court File No. A-427-09

FEDERAL COURT OF APPEAL

B E T W E E N

DUFF CONACHER and DEMOCRACY WATCH

Appellants

- and –

THE PRIME MINISTER OF CANADA,

THE GOVERNOR IN COUNCIL OF CANADA

THE GOVERNOR GENERAL OF CANADA and

THE ATTORNEY GENERAL OF CANADA

Respondents

Memorandum of Fact and Law

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Solicitors for the Appellants

TO:

THE PRIME MINISTER OF CANADA,

THE GOVERNOR IN COUNCIL OF CANADA

THE GOVERNOR GENERAL OF CANADA and

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APPELLANTS' MEMORANDUM OF FACT AND LAW

OVERVIEW

1. In 2007, the *Canada Elections Act* was amended to provide for "fixed election dates." The amendment had the purpose of requiring that general federal elections be held on dates fixed by the legislation unless there is a prior vote of "non-confidence." The amendment specified that the first fixed election date was to be October 19, 2009. In spite of the fact that there had not been a non-confidence vote, on September 7, 2008 the Prime Minister advised the Governor General to dissolve Parliament and call an election for October 14, 2008. The Appellants seek declarations that the Prime Minister's decision to advise the Governor General to dissolve Parliament and call the election of October 14, 2008 contravened the amendment to the *Canada Elections Act* and also infringed the right of all citizens of Canada

to participate in fair elections pursuant to section 3 of the *Canadian Charter of Rights and Freedoms*. Moreover, it is submitted that the decision of the Prime Minister contravened the new constitutional convention that had been created by the agreement of the leaders of all political parties represented in Parliament to the fixed election date legislation.

2. Although the Notice of Application for Judicial Review impugned the actions of the first three of the Respondents that resulted in the election, at the Court below the Appellants narrowed their application to focus on the decision of the Prime Minister to advise the Governor General to dissolve Parliament and call an election. This was a consequence of evidence tendered by the Respondents that it would have been both legally and politically unacceptable for the Governor General to refuse the Prime Minister's request.
Affidavit of Professor Patrick J. Monahan, Appeal Book, Volume II, Tab 9, question 16 at page 260; Hogg, pages 9 – 31 and pages 9 – 33, Book ofAuthorities

3. The application for judicial review was dismissed. The Court below held that "it would be simpler to interpret Section 56.1 as not being binding on the Prime Minister than to interpret it as having two unwritten clauses, the first to bind the Prime Minister to the dates in Subsection 56.1(2) and the other to exempt the Prime Minister when a vote of non-confidence, which Section 56.1 neither defines nor mentions, occurs." This "simpler" interpretation chosen by the Court renders the amendment meaningless and contradicts what was asserted by the Government to be the purpose for introducing that section of the *Canada Elections Act*.

4. The Court below held that "the Applicants do not provide any legal reasons to support their submission that the election of 2008 was unfair." The judgment does not refer to the many statements in Hansard explaining the unfairness of "snap" elections, nor to the affidavit evidence that the calling of this "snap" election was particularly unfair because of the fact that the same Prime Minister who called the election had given assurances that the legislative changes that his government had introduced would preclude such elections.

PART I: CONCISE STATEMENT OF FACTS

A) The legislation and its history

5. Section 56.1 of the *Canada Elections Act* came into force on May 3, 2007. Section 56.1 reads:

> **56.1** (1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.
>
> (2) Subject to subsection (1), each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election, with the first general election after this section comes into force being held on Monday, October 19, 2009. 2007, c. 10, s. 1.
>
> ***Canada Elections Act, (2000, c.9), s. 56.1***

6. The Conservative Party's election platform for the January 23, 2006 federal election indicated that it would "introduce legislation modeled on the BC and Ontario laws requiring fixed election dates every four years, except when a government loses the confidence of the House (in which case an election would be held immediately, and the subsequent election would follow four years later)." The Government's press release issued on May 30, 2006 (the day Bill C-16, the bill providing for fixed election dates, was introduced in the House of Commons) quoted the Honourable Rob Nicholson, Leader of the Government in the House and Minister for Democratic Reform, as having said that:

> "Establishing fixed election dates fulfills one of this government's key campaign commitments. It is an important step in improving and modernizing Canada's democratic institutions and practices." The press release also stated "It is unfair that the governing party should be permitted to time an election to exploit conditions favourable to its re-election."

Canada's New Government Proposes Fixed Election Dates, Exhibit F to Affidavit of Duff Conacher, Appeal Book, Volume I, Tab F at page 105.

7. The Conservative government's May 30, 2006 news release also stated that:

> "the bill provides that general elections must be held on the third Monday in October in the fourth calendar year following polling day for the last general election" and that "The bill also sets out that the date for the next general election will be October 19, 200, unless the government loses the confidence of the House prior to this time."

Canada's New Government Proposes Fixed Election Dates, Exhibit F to Affidavit of Duff Conacher, Appeal Book, Volume I, Tab F at page 105.

8. On the same day, the Prime Minister stated the following in the House of Commons:

> "Mr. Speaker, the government is clear that it will not be seeking an early election. At any time Parliament can defeat the government and provoke an early election, if that is what the opposition irresponsibly chooses to do", and;
>
> "(1420) Mr. Speaker, the government's position is clear. We brought in legislation, modelled on those of the provinces, to set elections every four years and set the next election for October 2009."

Hansard of May 30, 2006 of the House of Commons, Book of Authorities, Item #14.

9. The Honourable Rob Nicholson, Leader of the Government in the House of Commons and Minister for Democratic Reform, stated, as he introduced Bill C-16 for second reading:

> (1210)
> Currently it is the prerogative of the prime minister, whose government has not lost the confidence of the House of Commons, to determine what he or she regards as a propitious time for an election to renew the government's mandate. It could be three years into a majority government, which is what we saw in the year 2000 when the government felt it was to its advantage to call a snap election to get another mandate. I also could go back to the early nineties when another government, with which I am very familiar, decided not to go in 1992 but waited until 1993. That particular Parliament lasted almost five years. There is quite a bit of leeway.
>
> When the prime minister, under the current system, requests the dissolution of the House, the governor general, unless there are unusual circumstances, agrees and the country finds itself in an election. What we have is a situation where the prime minister is able to choose the date of the election, not based necessarily on the

best interests of the country but on the best interests of his or her political party. I believe Bill C-16 would address those concerns.

Before going into the details of the bill I would like to discuss the key advantages of a fixed date election. Fixed date elections would provide for greater fairness in election campaigns, greater transparency and predictability."

...

-"There would be improved governance, I believe higher voter turnout rates and it would assist in attracting qualified candidates to public life.

Let me discuss the issue of fairness. Fixed date elections would help to level the playing field for general elections. The timing of the general election would be known to everyone. Since the date of the next election would be known to all political parties, they would have equal opportunities to make preparations for the upcoming election campaign. Instead of the governing party having the advantage of determining when the next election will take place and being the single party that may know for up to several months when it will occur, all parties would be on an equal footing.

That has to be of particular interest to opposition parties that have not had the opportunity to call an election. Every party would know when the election will take place and would be able to make the appropriate plans.

Another key advantage of fixed date elections is that this measure would provide transparency as to when general elections would be held. Rather than decisions about general elections being made behind closed doors, general elections would be public knowledge. Instead of the prime minister and a small group of advisers being the only ones who know when the country will move into the next general election, once this bill is passed, all Canadians will have that knowledge, which makes it fair.

I said that it would improve governance and I think it would. For example, fixed date elections would provide for improved administration of the electoral machinery by Elections Canada. The Chief Electoral Officer, in a majority situation, would know with certainty when the next election would occur and would be able to plan accordingly. This would certainly give greater efficiency to the work of Elections Canada and, quite frankly, would save money. All of us know the situation where Elections Canada is trying to make a reasonable guess as to when the election will be called, scrambling to rent space and come up with locations for voting. All these things cost money. It seems to me that this would save money if we knew with certainty when the election would be called.

Another good reason for this bill is that I believe we would have higher voter turnouts. We are suggesting that the elections be held on the third Monday in October, except when the government loses the confidence of the House. That is a time when the weather in most parts of the country is generally the most

favourable. Indeed, in my riding of Niagara Falls it is pretty well still summer. I appreciate that it is at the southern end of the country and it is not quite the same for others, but nonetheless the weather is still pretty reasonable in October.

Canadians would be able to plan in advance. Those who are thinking of taking a vacation or who might be outside of their constituencies can make plans to get their votes in when they know with some certainty. That is not the case if they are out of the country or visiting somewhere and the election gets called. Those things pose some difficulty. For those individuals who know well in advance when the election is coming, this is a step in the right direction.
(1215)

This is not just important to the people who are voting. How about candidates? All of us know people who want to or are prepared to get into public life but who want to know when the election is. Right now we do not have a particularly good idea. It could be three years, as it was in the year 2000, or it could be five years, as it was in 1993. This can be very difficult for candidates. People have other lives and they want to know with some certainty when they will be called upon to put their name forward. It would help to attract candidates to the next election.

Let me give some of the details of the bill. Legislation providing for fixed date elections has to be structured to meet certain constitutional realities of responsible government. They include the requirement that the government have the confidence of the House of Commons and we respect the Queen and the Governor General's constitutional power to dissolve Parliament. The bill before us was drafted carefully to ensure that these constitutional requirements continue to be respected. The bill does not in any way change the requirement that the government must maintain the confidence of the House of Commons. Moreover, all the conventions regarding the loss of confidence remain intact.

In particular, the prime minister's prerogative to advise the Governor General on the dissolution of Parliament is retained to allow him or her to advise dissolution in the event of a loss of confidence. Moreover, the bill states explicitly that the powers of the Governor General remain unchanged, including the power to dissolve Parliament at the Governor General's discretion.

We looked at other legislation across Canada when we were putting this together and the bill is very similar to legislation that is in British Columbia, Ontario and Newfoundland and Labrador. It should be noted that the legislation in those provinces is working.

. . .

For those who think this is too much or have some problems with this, all they have to do is look at the experience. For instance, British Columbia had its first fixed day election on May 17, 2005, and it went well. The election in Ontario will be on October 4, 2007 and in Newfound and Labrador it will be on October 9,

2007. In British Columbia there was no suggestion that it had a lame duck government, as that expression is sometimes used. It worked well and people were able to plan with certainty.

...

In conclusion, this bill providing for fixed election dates is an idea whose time has come. I remember recently, I believe in June, there was a poll taken and 78% of Canadians supported this particular idea. It is good to note that the third week in October is already citizenship week in Canada. It is a time when we celebrate what it means to be a Canadian. That is another reason for putting it at that particular time. Of course, fundamental to being a Canadian citizen is our civic responsibility and duty to vote.

This legislation provides greater fairness, increased transparency and predictability, improved policy planning, increased voter turnout, and will help to attract the best qualified Canadians to public life. I hope that my colleagues will join with us in the House to pass this important piece of legislation.

Exhibit "G" to the Affidavit of Duff Conacher, Appeal Book, Volume I, Tab G at pp. 110-112.

10. Minister Nicholson also stated before the Standing Senate Committee on Legal and Constitutional Affairs on December 6, 2006:

> The government's bill provides that the date for the next general election will be Monday, October 19, 2009. Of course, that will be the date only if the government is able to retain the confidence of the House until then. The bill does not affect the powers of the Governor General to call an election sooner if a government loses the confidence of the House.

Exhibit "K" to the Affidavit of Duff Conacher, Appeal book, Volume I, Tab K at page 142 (3rd para.)

11. Minister Nicholson further explained:

> The Governor General's powers remain those that are held under the Constitution: to dissolve Parliament at any time within the five-year constitutional limit. However, by providing that elections are to be held every four years in October, the bill establishes a statutory expectation that the relevant political and administrative officers will govern themselves accordingly to accomplish this end — working within the rules and conventions of parliamentary and responsible government.
>
> The aim of the bill is to ensure, to the extent possible within the framework of our

> constitutional system, that the date on which an election will be held may be known in advance, thereby increasing fairness, transparency, predictability, efficiency and forward planning.
>
> ...
>
> Ultimately, if a government were orchestrating its own defeat it would have to be a decision of the House. Again, it would be a situation in which the government, for whatever reason, had lost the confidence of the House. There would have to be non-confidence votes taken by the opposition parties.
>
> ...
>
> I would expect that any government, in presenting legislation that it hoped would be passed by the House of Commons, would do so believing it to be in the best interests of the country; and that should certainly be its guiding principle. If it was the decision of the opposition parties to defeat the government, the confidence convention as preserved by this bill would apply and, again, it would be within the discretion of the Governor General.

Exhibit "K" to the Affidavit of Duff Conacher, Appeal Book, Volume I, Tab K at page 143 (6th and 7th paras.) and page 144 (3rd from last and last paras.).

12. Senator Zimmer posed the following specific question to Minister Nicholson concerning what constitutes a loss of confidence of the House of Commons in the Government of Canada: "It is my understanding that the bill ensures that an election could be held before the end of a four-year period in the event that the government clearly does not have the support of the majority of the House of Commons. Would this be determined only through a vote of confidence, or does this bill provide for other means of interpreting a loss of confidence?" Minister Nicholson confirmed that a vote of non-confidence of some sort would have to occur before the Prime Minister advised the Governor General to dissolve Parliament and call an election, stating:

> "It could be done in several ways, senator. You are quite correct that on what we call opposition days, there could be a motion specifically that the government has lost the confidence of the House. On the other hand, in the example I gave to you of the budget implementation bill that we intend to call on Friday of this week, if at some point that bill is rejected by the House of Commons, that will be a clear indication that the government has lost the confidence of the house and an election will ensue."

Exhibit "K" to the Affidavit of Duff Conacher, Appeal Book, Volume I, Tab K at page 146 (4th and 5th paras.).

13. On September 18, 2006, in the House of Commons, the main representatives concerning the bill from the opposition parties [the Liberal Party of Canada (Hon. Stephen Owen), the New Democratic Party of Canada (Joe Comartin), and the Bloc Quebecois (Michel Gauthier)] all made statements expressing their agreement with the positive effects of fixing election dates through the Bill C-16 as summarized by Minister Nicholson, and also expressed their agreement with Minister Nicholson's assertion that passage of the Bill means a vote of non-confidence is required before a Prime Minister can advise the Governor General to dissolve Parliament. These members from opposition parties expressed their support, and their party's support, for the passage of the Bill. Tom Lukiwski, Parliamentary Secretary to the Leader of the Government in the House of Commons and Minister for Democratic Reform, later made an extensive statement setting out in different words the same positive reasons for the changes made by Bill C-16 as those stated earlier by Minister Nicholson.

Affidavit of Duff Conacher, paragraph 17, Appeal Book, Volume I, Tab 7 at page 78.

14. On September 19, 2006, the debate at Second Reading of Bill C-16 continued in the House of Commons. On that day, the Hon. Carol Skelton, Minister of National Revenue and Minister of Western Economic Diversification, stated "With the passage of Bill C-16, elections will become predictable and stable while still keeping governments accountable. B.C. and Ontario, under Liberal governments, have both adopted fixed dates for elections, with other provinces considering doing the same. These governments remain accountable because they still allow for votes of non-confidence." As well, Russ Heibert, Parliamentary Secretary to the Minister of National Defence, set out a similar summary list of the benefits of fixed election dates, and several members of opposition parties spoke in support of the general principles of Bill C-16.

Affidavit of Duff Conacher, paragraph 18, Appeal Book, Volume I, Tab 4 at pages 78-79.

15. Throughout the debates at Second Reading of Bill C-16 in the House of Commons on September 18 and 19, 2008, members expressed concern that the Bill did not define what constitutes a vote of confidence (or, conversely, a vote of non-confidence). However, all

members' statements made it clear that their understanding of the legal effect of Bill C-16 was that a vote of non-confidence in the Government would have to occur in the House of Commons before the Prime Minister could advise the Governor General to dissolve Parliament and call an election.

Affidavit of Duff Conacher, paragraph 19, Appeal Book, Volume I, Tab 4 at page 79.

16. Warren J. Newman, General Counsel, Constitutional and Administrative Law Section, Department of Justice Canada, stated to the Senate Committee:

> - "The preamble [to the Constitution of Canada], in speaking of a Constitution similar in principle to the United Kingdom, reflects the principles of parliamentary and responsible government. Although the preamble has no enacting force, it can be used to interpret the provisions of the Constitution. I think the minister is correct in saying that there is nothing in the bill that in principle violates parliamentary government. On your specific point about whether the confidence rule remains, it does in fact; it remains entirely intact because it is preserved expressly, insofar as legislation can preserve a constitutional convention, which is an unwritten rule. It is preserved in the opening provision, section 56.1(1), which states that: "Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion." If confidence is lacking in the government, it is always open to the opposition parties to move a vote of non-confidence, and the legislation takes that into account."

Exhibit "K" to the Affidavit of Duff Conacher, Appeal Book, Volume I, Tab K at page 144 (7th para.).

17. Bill C-16 received Royal Assent on May 3, 2007.

Affidavit of Duff Conacher, paragraph 34, Appeal Book, Volume I, Tab 7 at page 83.

18. On September 7, 2008, the Prime Minister advised the Governor General to dissolve Parliament, the Governor General issued a proclamation dissolving Parliament, and the Governor in Council issued a proclamation for a general election to be held. There had not been a non-confidence vote; Parliament was not even in session.

Affidavit of Duff Conacher, paragraph 2, Appeal Book, Volume I, Tab 4 at page 71; Affidavit of Professor Lawrence Leduc, paragraph 4, Appeal Book, Volume II, Tab 1 at page 168.

B) Unfairness of "snap elections"

19. A "snap election" is an election called by the Prime Minister because he or she thinks it's a good time to have one. Before the passage of Bill C-16, it was considered that Prime Ministers could call "snap elections", primarily to reap the benefit of political circumstances advantageous to the governing party.

Cross-examination of Professor Peter H. Russell, Appeal Book, Volume III, questions 252 and 253 at page 429; Affidavit of Professor Peter H. Russell, paragraph 7, Appeal Book, Volume II, Tab 2 at page 193.

20. Permitting Prime Ministers to call elections any time they please gives the governing party a distinct advantage over opposition parties. The rules of parliamentary democracy should not give incumbent governments a built-in structural advantage in contesting elections. Fairness in the competition between political parties is a key reason why most parliamentary democracies have established fixed dates for elections.

Affidavit of Professor Peter H. Russell, paragraph 16, Appeal Book, Volume II, Tab 2 at page 196.

21. Many Canadian voters have indicated that the only reason they could ascertain for the election of October 14, 2008 was the Prime Minister's hunch that his party had a good chance of winning a majority of seats in the House of Commons. Conceding to the Prime Minister an untrammeled power to order up an election whenever he pleases is bound to contribute to public cynicism and withdrawal from the democratic process.

Affidavit of Professor Peter H. Russell, paragraph 17, Appeal Book, Volume II, Tab 2 at page 197.

22. The Government having the power to determine when elections will be held is thought by political scientists to confer considerable political advantages on a governing political party; fixed election dates are seen as a means of leveling the playing field.

Affidavit of Professor Lawrence Leduc, paragraph 2, Appeal Book, Volume II, Tab 1 at page 167.

23. Because of the fixed election dates amendment, the calling of the election for October 14, 2009 came as a surprise to the opposition parties and to most political observers. The advantages gained by the Conservative Party were substantial: it was well prepared for an election in terms of organization, funding, preparation of campaign materials and nomination of candidates while the opposition parties were not. In some respects, the advantages gained by the governing party were even greater than would have been the case under former practice since the opposition parties had no reason to expect an election unless they precipitated one by means of a non-confidence vote.

Affidavit of Professor Lawrence Leduc, paragraphs 4 and 5, Appeal Book, Volume II, Tab 1 at pages 168 - 169.

24. The abilities of the Green Party of Canada and of the Progressive Canadian Party to nominate candidates and prepare campaign materials were significantly impaired due to the lack of notice that there would be an election.

Affidavits of John Bennett, Sebastien Theriault, Amanda Judd and The Honourable Sinclair Stevens, Appeal Book, Volume II, Tabs 3, 4, 5 and 6.

25. The Green party's ability to recruit and nominate candidates, to organize a leader's tour and to inform voters of its policies were all impaired due to lack of advance notice that the election was to occur.

Affidavit of John Bennett, Appeal Book, Volume II, Tab 3, paragraphs 5, 9, 10, pages 211 – 212.

26. The Progressive Canadian Party relied on the fixed election dates legislation and the assertions of Minister Nicholson; when the snap election was called, it devastated the party because it had to face an election in thirty seven days instead of a year later as it had planned.

Affidavit of Sinclair McKnight Stevens, Appeal Book, Volume II, Tab 6, paragraphs 4, 5, 6, 8, 11 and 12.

27. The election of October 14, 2008 fell on the Jewish holiday of Succot, the Jewish day of thanksgiving. This limited the ability of some Jews to participate in the election.

Affidavit of Gail Florence Nestel, paragraphs 2, 8 and 10, Appeal Book, Volume II, Tab 7 at pages 227 - 229.

C) Provincial Precedents

28. Bill C-16 was modeled on previous legislation that had established fixed election dates for provincial elections in British Columbia, Ontario and Newfoundland and Labrador.

Exhibit G to the Affidavit of Duff Conacher, Appeal Book, Volume I, Tab G at page 111.

29. One of the points that was often made in introducing fixed election dates in both the federal and provincial contexts was that it would combat the perceived unfairness of allowing the Prime Minister or the Premier, as the case may be, to call an election in order to benefit that person's party.

Cross-examination of Professor John Childs Courtney, question 64, Appeal Book, Volume III, Tab 4 at page 585.

30. The fixed election dates provision for the Legislative Assembly of British Columbia reads as follows:

> 23 (1) The Lieutenant Governor may, by proclamation in Her Majesty's name, prorogue or dissolve the Legislative Assembly when the Lieutenant Governor sees fit.
>
> (2) Subject to subsection (1), a general voting day must occur on May 17, 2005 and thereafter on the second Tuesday in May in the fourth calendar year following the general voting day for the most recently held general election.
>
> (3) In subsection (2), "general election" and "general voting day" have the same meanings as in section 1 of the Election Act.

***Constitution Act*, RSBC 1996, Chapter 66.**

31. The Ontario legislation reads as follows:

> 9. (1) Nothing in this section affects the powers of the Lieutenant Governor, including the power to dissolve the Legislature, by proclamation in Her Majesty's name, when the Lieutenant Governor sees fit. 2005, c. 35, s. 1 (3).
>
> (2) Subject to the powers of the Lieutenant Governor referred to in subsection (1),
>
> (a) a general election shall be held on Thursday, October 4, 2007, unless a general election has been held, after the day on which the Election Statute Law Amendment Act, 2005 receives Royal Assent and before October 4, 2007,

because of a dissolution of the Legislature; and

(b) thereafter, general elections shall be held on the first Thursday in October in the fourth calendar year following polling day in the most recent general election. 2005, c. 35, s. 1 (3).

***Election Act*, R.S.O. 1990, Chapter E.6.**

32. With respect to the calling of provincial elections, the position of the Lieutenant Governor of a province is broadly similar to that of the Governor General in the federal context.

Cross-examination of Professor Patrick Monahan, question 371, Appeal Book, Volume III, Tab 5 at page 731.

33. The fixed election date legislation in both British Columbia and Ontario had the purpose of requiring fixed election dates except in situations where the government had lost the confidence of the legislature.

Cross-examination of Professor Patrick Monahan, question 423, Appeal Book, Volume III, Tab 5 at pages 744-745.

34. The elections that have taken place in British Columbia, Ontario and Newfoundland and Labrador since the provincial fixed election dates amendments were passed have been held on the dates fixed by the legislation.

Cross-examination of Professor Patrick Monahan, questions 424 – 429, Appeal Book, Volume III, Tab 5 at pages 745 - 746.

D) Constitutional conventions

35. Professor Andrew Heard is a political scientist with expertise on Canadian constitutional conventions.

Cross-examination of Professor Patrick Monahan, questions 283, 284 and 296, Appeal Book, Volume III, Tab 5 at pages 700 - 701 and 704.

36. There is general agreement that conventions can arise in at least two ways: through some practice acquiring a strong obligatory character over time or through the explicit agreement of

the relevant actors.

Cross-examination of Professor Patrick Monahan, question 309, Appeal Book, Volume III, Tab 5 at page 711; excerpt of "Canadian Constitutional Conventions: The Marriage of Law and Politics" by Andrew Heard, Exhibit 6 to the Affidavit of Professor Monahan, Appeal Book, Volume III, Tab 5 at page 779.

37. Although conventions are not enforced as a matter of law, conventions can be used to provide guidance in interpreting statutes.

Cross-examination of Professor Patrick Monahan, questions 340 to 344, Appeal Book, Volume III, Tab 5 at pages ; excerpt of "Canadian Constitutional Conventions: The Marriage of Law and Politics" by Andrew Heard, Exhibit 6 to the Affidavit of Professor Monahan, page 8, Appeal Book, Volume III, at page 778.

38. Professor Peter Russell is one of Canada's leading experts in the area of constitutional conventions.

Cross-examination of Professor Patrick Monahan, question 353, Appeal Book, Volume III, Tab 5 at page 726.

39. The parliamentary debate on Bill C-16 makes it clear that this legislation changed the constitutional convention that in the past permitted a Prime Minister to call a snap election without having suffered defeat in the House of Commons. The discussion and agreement of the politicians on how Bill C-16 is to apply is what established the new constitutional convention.

Affidavit of Peter H. Russell, paragraph 8, Appeal Book, Volume II, Tab 2 at page 193; Cross-examination of Professor Peter H. Russell, questions 4 – 6, Appeal Book, Volume III, Tab 1, page s 361 - 362.

40. The actors involved in the convention governing requests for a dissolution of Parliament are the leaders of our political parties. They all supported Bill C-16 and did not dissent from Mr. Nicholson's explanation of its constitutional implications. The reason for changing the previous rule governing requests for dissolution is very clear. For Prime Ministers to be able to ask for the dissolution of Parliament any time they please, without losing the confidence of the House of Commons, would defeat the primary purpose of the fixed-date election law. That Act of Parliament was intended to stabilize our system of parliamentary government in

an era when elections frequently result in minority government.

Affidavit of Peter H. Russell, paragraph 12, Appeal Book, Volume II, Tab 2 at pages 194-195.

41. Warren J. Newman, General Counsel, Constitutional and Administrative Law Section of the Department of Justice stated that Bill C – 16 creates " an expectation that political actors and administrative officials will govern themselves in accordance with a rule, which has been stated as emphatically as any constitutional convention, that there will be elections every four years."

Proceedings of Standing Senate Committee on Legal and Constitutional Affairs, December 6, 2006, Exhibit "K" to Affidavit of Duff Conacher, Appeal Book, Volume I, Tab K at page 147 (2nd last para.).

42. Mr. Nicholson explicitly told the Standing Committee on Procedure and House Affairs that Bill C – 16 " … will begin a new convention about when and how Canadian elections will take place."

Exhibit "I" to Affidavit of Duff Conacher, Appeal Book, Volume I, Tab I at page 134B.

43. When considering whether or not a convention has been established, one considers all the jurisdictions that have similar Westminster-style written and unwritten constitutions, including the ten provinces in Canada.

Cross-examination of Patrick Monahan, questions 417 to 421, Appeal Book, Volume III, Tab 5 at page 744.

PART II: POINTS IN ISSUE

44. It is submitted that the points in issue in this appeal are the following:

ISSUE 1: Has a constitutional convention been established that prohibits the Prime Minister's advising the Governor General to dissolve Parliament before the term mandated by section 56.1 unless there has been a vote of non-confidence by the House of Commons?

ISSUE 2: Did Prime Minister Harper's decision to advise the Governor General on September 7th 2008 to dissolve Parliament contravene the principles of electoral fairness that are required by section 3 of the *Canadian Charter of Rights and Freedoms*?

ISSUE 3: Did Prime Minister Harper's decision to advise the Governor General on September 7, 2008 to dissolve Parliament contravene section 56.1 of the *Canada Elections Act*?

ISSUE 4: What is the appropriate remedy?

PART III: LAW AND ARGUMENT

ISSUE 1: **Has a constitutional convention been established that prohibits a Prime Minister's advising the Governor General to dissolve Parliament before the term mandated by section 56.1 unless there has been a vote of non-confidence by the House of Commons?**

45. As Professor Russell deposed, the agreement evidenced by the parliamentary debates concerning Bill C-16 changed the constitutional convention concerning the situations under which a Prime Minister may seek dissolution of Parliament by the Governor General.

46. Determining if a convention has been established by precedent includes asking three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule.

Sir W. Ivor Jennings, The Law and the Constitution (5th ed. 1959) at p. 136, as adopted in Re: Objection by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793 at page 802.

47. As the Government stated before and during the parliamentary debates, the federal change to fixed election dates was modelled on similar changes in the elections laws of British Columbia and Ontario. The changes to the provincial statutes were based on the concern that allowing Provincial Premiers unfettered discretion to call elections gave their political parties an unfair advantage; Bill C-16 had the same purpose. The first elections in both British Columbia and Ontario were held on the dates mandated by the Provincial Elections Acts. The examples of British Columbia and Ontario provide precedents that established the convention that restricting the ability of a leader of a parliamentary government to call elections can be accomplished by passing fixed election date legislation with the understanding that elections can be held on days other than those specified only following a vote of non-confidence.

48. There are other jurisdictions in which fixed elections laws have been introduced into parliamentary systems. There does not appear to have been any case in which a fixed elections statute was violated other than Prime Minister Harper's September 7, 2008 request for an election.

49. It is therefore submitted that this change in constitutional convention was accomplished in both of the ways discussed by Professor Andrew Heard: There was explicit agreement during the discussion of Bill C-16, as revealed by the Parliamentary debates and as noted by Professor Russell, and there were also the precedents of the fixed election dates established by British Columbia and Ontario.

50. It is therefore submitted that a new constitutional convention was established when Bill C-16 received Royal Assent, which indicated that the Governor General accepted the amendment.

ISSUE 2: **: Did Prime Minister Harper's decision to advise the Governor General on September 7th 2008 to dissolve Parliament contravene the principles of electoral fairness that are required by section 3 of the *Canadian Charter of Rights and Freedoms*?**

51. Section 3 of the *Canadian Charter of Rights and Freedoms* states:

> "Every 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."

52. S. 3 imposes on Parliament an obligation not to enhance the capacity of one citizen to participate in the electoral process in a manner that compromises another citizen's parallel right to meaningful participation in the electoral process. Where legislation extends a benefit to some citizens, but not to others, it is necessary to consider carefully the impact of that legislation on the citizens who have not received the benefit. If the legislation interferes with the right of certain citizens to play a meaningful role in the social discourse and dialogue that the electoral process engenders, it is inconsistent with s. 3 of the Charter.
***Figueroa v. Canada (Attorney General),* [2003] 1 S.C.R. 912, paragraph 50.**

53. It is submitted that the Prime Minister's calling of the snap election of 2008 enhanced the capacity of members of his own political party to participate in the electoral process in a manner that compromised the parallel rights of members of other parties to meaningful participation in that process.

54. As the Court observed in *Libman*, ... electoral fairness is a fundamental value of democracy:

> The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens. . . . Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions. . . .
>
> Importantly, this requirement of fairness is not synonymous with formal equality: see the Saskatchewan Reference, supra, in which the Court determined that s. 3 does not require absolute voter parity. It is not enough to offend s. 3 that the legislation differentiates between one citizen and another, or one political party or another. It also is necessary that the differential treatment have an adverse impact upon the applicant's right to play a meaningful role in the electoral process.

***Figueroa v. Canada (Attorney General),* [2003] 1 S.C.R. 912, paragraph 51.**

55. It was universally agreed during the Parliamentary debates on Bill C–16 and is generally agreed among political scientists that allowing a Prime Minister to call a snap election gives the Prime Minister's political party an unfair advantage. It is submitted that this evidence supports the conclusion that allowing the Prime Minister unfettered discretion as to when to call an election differentiates between the political parties in a way that does have an adverse impact on the ability of competing political parties to play a meaningful role in the electoral process.

56. Under the egalitarian model of elections, Parliament must balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters.
***Harper v. Canada (Attorney General),* [2004] 1 S.C.R. 827, at paragraph 87.**

57. It is submitted that Bill C-16, as promoted and interpreted by the Government during its consideration by Parliament, was a measure that achieved such a balance. However, the calling of this election destroyed that balance. It is further submitted that the unfairness caused

by the Prime Minister's calling this election was exacerbated by his Government's having introduced s. 56.1 and given assurances that the amendment precluded an election call in these circumstances. It is particularly unfair for a Prime Minister to call a snap election after reinforcing a promise not to do so by introducing legislation that was said to ensure that the promise would be kept.

58. Maintaining confidence in the electoral process is essential to preserve the integrity of the electoral system which is the cornerstone of Canadian democracy. In *R. v. Oakes*, 1986 CanLII 46 (S.C.C.), [1986] 1 S.C.R. 103, at p. 136, Dickson C.J. concluded that faith in social and political institutions, which enhance the participation of individuals and groups in society, is of central importance in a free and democratic society. If Canadians lack confidence in the electoral system, they will be discouraged from participating in a meaningful way in the electoral process. More importantly, they will lack faith in their elected representatives.

***Harper v. Canada (Attorney General), supra*, at paragraph 103.**

59. It is submitted that holding an election in the circumstances substantially lessened faith in the electoral process.

60. Interference with the capacity of citizens to play a meaningful role in the electoral process is inconsistent with section 3 of the *Charter*.

***Figueroa v. Canada (Attorney General),* [2003] 1 S.C.R. 912, at paragraphs 33 to 36.**

61. The Court below held that "the Applicants do not provide any legal reasons to support their submission that the election of 2008 was unfair" and referred (with apparent approval) to the Respondents' assertion that "there is no evidence that the Applicants, or the political parties whose interests they purport to defend, were disadvantaged by the dissolution of Parliament on September 7, 2008."

Reasons for Judgment and Judgment, Appeal Book, Volume I, Tab 2, paragraph 61 at pages 28 – 29.

62. However, the judgment below did not refer to the evidence in Hansard and in the affidavits tendered on behalf of the Applicants that demonstrated the general unfairness of snap elections. Moreover, the judgment ignored the affidavit evidence of the specific disadvantages to the Green Party of Canada and to the Progressive Canadian Party that were caused by the Prime Minister's call for the 2008 election. Thus the Court below did not measure the evidence of unfairness of the Prime Minister's decision against the standards of electoral fairness established by the Supreme Court of Canada in cases such as *Libman*, *Figueroa*, and *Harper*.

63. It is submitted that the totality of the evidence does support the submission that the Prime Minister's decision to call the election of 2008 unfairly disadvantaged at least some parties and some candidates.

64. It is therefore submitted that the Prime Minister's decision to call the election for October 14, 2008 contravened section 3 of the *Canadian Charter of Rights and Freedoms*. It is further submitted that this violation of electoral fairness cannot be justified within the meaning of section 1 of the *Charter*.

ISSUE 3: **Did Prime Minister Harper's decision to advise the Governor General on September 7, 2008 to dissolve Parliament contravene section 56.1 of the *Canada Elections Act*?**

65. It is acknowledged that interpretation of section 56.1 of the *Canada Elections Act* is made somewhat complex because the powers of the Governor General are part of Canada's unwritten constitution. However, with the aid of the Parliamentary debates, it is submitted that section 56.1 was clearly contravened by the Prime Minister's advising the Governor General to dissolve Parliament in the circumstances that obtained on September 7, 2008. Moreover, this conclusion is reinforced by the values of section 3 of the *Charter*, and the precedents of the corresponding statutes of British Columbia, Ontario and Newfoundland and Labrador.

66. The preferred approach to statutory interpretation is that:

> ... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

***Rizzo & Rizzo Shoes Ltd*, [1998] 1 S.C.R. 27 at para 21; *Bell ExpressVu v. Rex*, [2002] 2 S.C.R. 559 at para 26.**

67. In considering federal legislation, the *Interpretation Act* provides that every enactment "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

Bell ExpressVu v. Rex, supra.

68. Absurd or meaningless interpretations of statutory provisions must be rejected.

***Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539 at paras. 8, 31 and 38.**

69. The sole object of Bill C – 16 was to preclude the calling of "snap elections" such as that of October 2008. The clear intention of Parliament was to prohibit Prime Ministers from requesting early dissolution of Parliament unless there was a vote of non-confidence. If Prime Minister Harper's request for dissolution is not declared to be illegal, section 56.1 of the *Canada Elections Act* will be rendered absurd and meaningless, as will the corresponding fixed-election date sections of the election acts of the provinces that have enacted such legislation.

70. Constitutional conventions may be used to interpret statutes.

***Carltona v. Commissioner of Works*, [1943] 2 All England L.R. 560, Appl; *Att. Gen. Quebec v. Blaike*, [1979] 2 S.C.R. 1016.**

71. It is submitted that the new constitutional convention limiting the right of a Prime Minister to seek dissolution of Parliament should be used to interpret section 56.1 of the

Canada Elections Act.

72. Constitutional conventions that have been incorporated into legislation are enforceable by the courts as ordinary statutes, and can be challenged as being inconsistent with the *Canadian Charter of Right and Freedoms*.
***Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69.**

73. If there is ambiguity as to the meaning of a provision of a statute, *Charter* values may be used to aid in the interpretation of the provision.
***Bell ExpressVu v. Rex*, *supra*, at paragraph 28.**

74. It is submitted that the *Charter* value of fairness in elections implies that section 56.1 of the *Canada Elections Act* should be interpreted to preclude snap elections.

75. This appears to be a very unusual case. The Government led by Prime Minister Harper proposed Bill C - 16 for the express purpose of limiting the circumstances in which Prime Ministers could call elections. After the Bill became law, the same Prime Minister called an election in the precise circumstances that he and his Government had said would be precluded by the Bill. The present Attorney General of Canada, representing the Prime Minister and the other Respondents to this appeal, is the Honourable Rob Nicholson, the same person who presented Bill C – 16 to Parliament in his former position as Leader of the Government in the House and Minister for Democratic Reform. In many respects, this case is truly unprecedented. It is respectfully submitted that it is essential to the future of Canadian democracy that this Honourable Court declare that the Prime Minister contravened section 56.1 on September 7, 2008 when he advised the Governor General to dissolve Parliament.

76. The Court below concluded that the Hansard record was "ambiguous". The Court relied upon assertions by Minister Nicholson that "the bill establishes a statutory expectation that the relevant political and administrative officers will govern themselves accordingly to accomplish this end – working within the rules and conventions of parliamentary and responsible government" and that the Bill "is crafted in a way that the prerogatives of the

Prime Minister to advise the Governor General, and the Governor General's prerogatives, are in no way diminished."

Reasons for Judgment and Judgment, Appeal Book, Volume I, tab 2, paras 56 and 57, pages 25 and 26.

77. While a couple of quotes may give a different impression if taken out of context, it is respectfully submitted that there is no ambiguity in the Hansard record when all statements are considered in context. Minister Nicholson was consistent on numerous occasions in asserting that the amendment would prevent the Prime Minister from advising the Governor General to dissolve Parliament before the fixed date unless there was a vote of non-confidence. His introduction of Bill C – 16 to Parliament and many other statements were unequivocal. Even the assertions relied upon by the Applications Justice in support of his conclusion of ambiguity are not really inconsistent with the same meaning. For example, the last quote in the previous paragraph is preceded and followed by indications that the amendment changes the convention as to when a Prime Minister will seek dissolution of Parliament, as follows:

> "So if Mr. Chrétien went at three, and Ms. Campbell went at five, **that was the existing state of law**. I think this is a fair way to do that. This is crafted in a way that the prerogatives of the Prime Minister to advise the Governor General, and the Governor General's prerogatives, are in no way diminished. That being said, it seems to me that a Prime Minister who has indicated a certain date to the public would be very hard pressed to unilaterally pull the plug for no other reason than that he or she felt there was an electoral advantage.
>
> "You probably are aware, Monsieur Guimond, that conventions are something that build over time. **Having legislation like this--that again in no way constrains the Governor General--will begin a new convention about when and how Canadian elections will take place.** But this is not in any way meant to fetter those prerogatives that exist in our current system." (emphasis added)

Standing Committee on Procedure and House Affairs, September 26, 2006, Exhibit I to Affidavit of Duff Conacher, Appeal Book, Volume I , Tab I, page 134B.

78. Thus Minister Nicholson always assured Parliament that this legislation was changing the law so as to preclude snap elections in the future, and would begin a new convention about when elections would take place.

79. All of the statements by Minister Nicholson and other members of the Government, including the Prime Minister, in Parliament and otherwise, before and during its consideration by Parliament, assured all Canadians that passage of the amendment had the purpose and would have the effect of preventing the Prime Minister from advising the Governor General to call an election in circumstances such as those that obtained on September 7, 2008. There may have been some ambiguity in the descriptions of the manner in which the amendment would be interpreted to accomplish its purpose, but there was consistency about the conclusion that the amendment would achieve that purpose.

80. It is submitted that, given their statements in Parliament and otherwise, the Respondent Prime Minister and the Respondent Attorney General of Canada are estopped from now arguing that section 56.1 did not prevent the Prime Minister from advising the Governor General to call an election in the circumstances that obtained on September 7, 2008.
***Ryan v. Moore*, [2005] 2 S.C.R. 53 (CanLII).**

81. While the power of the Governor General may not be limited by section 56.1, it is submitted that the section must be interpreted so as to prevent the Prime Minister from causing an election to be held in the circumstances. As long as the discretion of the Governor General to dissolve Parliament in the event that the government loses the confidence of the House of Commons is preserved, fixed election dates are not inconsistent with responsible government.
Hogg at pages 9 – 29, Book of Authorities, Item #13

***ISSUE 4:* What is the appropriate remedy?**

82. It is recognized that it would be impossibly difficult to undo the consequences of the election of October 14, 2008 and it is not suggested that this Honourable Court consider that possibility given the constitutional powers of the Governor General. However, it is of great importance to Canadian democracy that such snap elections not be called in future, federally and in the provinces that have adopted fixed election dates legislation. It is therefore

respectfully requested that this Honourable Court issue a declaration that the Prime Minister's decision to advise the Governor General to dissolve Parliament and call the election of October 14, 2008 contravened section 56.1 of the *Canada Elections Act*.

83. In addition or in the alternative, it is respectfully requested that this Honourable Court issue a declaration that the Prime Minister's decision to advise the Governor General to dissolve Parliament and call the election of October 14, 2008 infringed the right of all citizens of Canada to participate in fair elections pursuant to section 3 of the *Canadian Charter of Rights and Freedoms*.

84. In addition or in the further alternative, it is respectfully requested that this Honourable Court declare that a constitutional convention has been established that prohibits a Prime Minister from advising the Governor General to dissolve Parliament before the term mandated by section 56.1 of the *Canada Elections Act* unless there has been a vote of non-confidence by the House of Commons.

COSTS

85. It is respectfully requested that costs be awarded to the Applicants in any event of the appeal. The Applicants are a public interest organization and its coordinator, and they are bringing this application solely out of concern for the quality of Canadian democracy. This case is completely unprecedented, and is of considerable public importance that the issues it raises be determined at the appellate level. Moreover, even if this appeal is dismissed and the Prime Minister is found not to have contravened the law, there is no doubt that the Respondent Prime Minister violated his promise to the Canadian people not to call an election prior to October 19, 2009 .

***Stevens v. Conservative Party of Canada*, 2005 FCA 383 (CanLII).**

86. In the alternative, it is requested that there be no costs awarded if the appeal is dismissed.

PART IV: ORDERS SOUGHT

87. The Appellants respectfully request the following orders:

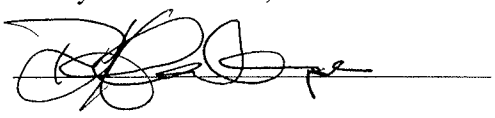
a) An Order that this Honourable Court issue a declaration that the Prime Minister's decision to advise the Governor General to dissolve Parliament and call the election of October 14, 2008 contravened section 56.1 of the *Canada Elections Act*;

b) In addition or in the alternative, an Order that this Honourable Court issue a declaration that the Prime Minister's decision to advise the Governor General to dissolve Parliament and call the election of October 14, 2008 infringed the right of all citizens of Canada to participate in fair elections pursuant to section 3 of the *Canadian Charter of Rights and Freedoms*;

c) In the further addition or alternative, an Order that this Honourable Court declare that a constitutional convention has been established that prohibits a Prime Minister from advising the Governor General to dissolve Parliament before the term mandated by section 56.1 of the *Canada Elections Act* unless there has been a vote of non-confidence by the House of Commons;

d) An Order that costs are awarded to the Applicants in any event of the appeal or, in the alternative, an Order that no costs are awarded if the appeal is dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of December, 2009.



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PART V: AUTHORITIES

Canada Elections Act (2000, c.9)

Ontario *Election Act*, R.S.O 1990, c. E.6

British Columbia *Constitution Act* [RSBC 1996] Chapter 66

New Brunswick *Legislative Assembly Act*, R.S.N.B. 1973, c.L-3

Saskatchewan *Legislative Assembly and Executive Council Act*

1. *Re: Objection by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793*
2. *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912
3. *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827
4. *Rizzo & Rizzo Shoes Ltd*, [1998] 1 S.C.R. 27
5. *Bell ExpressVu v. Rex*, [2002] 2 S.C.R. 559
6. *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539
7. *Carltona v. Commissioner of Works*, [1943] 2 All England L.R. 560
8. *Att. Gen. Quebec v. Blaike*, [1979] 2 S.C.R. 1016
9. *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69
10. *Stevens v. Conservative Party of Canada*, 2005 FCA 383 (CanLII)
11. *Ryan v. Moore*, [2005] 2 S.C.R. 53 (CanLII)
12. Excerpt from *Canadian Constitutional Conventions: The Marriage of Law and Politics,* Andrew Heard (Oxford University Press: Toronto, 1991)
13. Excerpt from *Constitutional Law of Canada*, Peter Hogg (5th ed) 2006
14. *Hansard of May 30, 2006 of the House of Commons*