

**FEDERAL COURT**

**B E T W E E N**

**DUFF CONACHER and DEMOCRACY WATCH**

**Applicants**

**- and -**

**THE PRIME MINISTER OF CANADA,  
THE GOVERNOR IN COUNCIL OF CANADA,  
THE GOVERNOR GENERAL OF CANADA and  
THE ATTORNEY GENERAL OF CANADA**

**Respondents**

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**APPLICANT'S RECORD  
VOLUME IV  
MEMORANDUM OF FACT AND LAW**

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**APPLICANTS' MEMORANDUM OF FACT AND LAW**

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**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, the Governor General issued a proclamation dissolving Parliament, the Governor in Council issued a proclamation for a general election to be held, and an election was held on October 14, 2008. This is a judicial review of the decisions that resulted in that election being held. It is submitted that the holding of 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*. Although the Notice of Application for Judicial Review impugned all three of the actions that resulted in the election, the Applicants have narrowed their application to focus on the action of the Prime Minister in advising the Governor General to dissolve Parliament.

## **PART I: CONCISE STATEMENT OF FACTS**

### **A) The legislation and its history**

2. 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 Applicants' Record, Volume V, Tab F at page 59.***

3. 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, Applicants’ Record, Volume I, Tab F at page 59.***

4. "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, Applicants’ Record, Volume I, Tab F at page 59.***

5. 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, Applicant’s Record, Volume V, Tab 12.***

6. 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:

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.” , and;

“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, Applicants’ Record, Volume I, Tab F at pages 64-65.***

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

The 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. For example, if the government were to be defeated tomorrow, a general election would be held according to the normal practice.”

***Exhibit “K” to the Affidavit of Duff Conacher, Applicants’ Record, Volume I, Tab K at page 98 (3rd para.).***

8. 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.”, and;

“... 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.”, and;

“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, Applicants' Record, Volume I, Tab K at page 99 (6th and 7th paras.) and page 100 (3rd last and last paras.).***

9. 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, Applicants' Record, Volume I, Tab K at page 102 (4th and 5th paras.).***

10. 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 that a vote of non-confidence is required before a Prime Minister can advise the Governor General to dissolve Parliament. These members from the 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, subsequently 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, Applicants' Record, Volume I, Tab 4 at page 32.***

11. 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 from the opposition parties spoke in support of the general principles of Bill C-16.

***Affidavit of Duff Conacher, paragraph 18, Applicants' Record, Volume I, Tab 4 at pages 32-33.***

12. 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, Applicants' Record, Volume I, Tab 4 at page 33.***

13. 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, Applicants' Record, Volume I, Tab K at page 100 (7th para.).***

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

***Affidavit of Duff Conacher, paragraph 34, Applicants' Record, Volume I, Tab 4 at page 37.***

15. On September 7, 2008, the Prime Minister advised the Governor General to dissolve Parliament, the Governor General issued a proclamation dissolving Parliament, 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, Applicants' Record, Volume I, Tab 4 at page 37; Affidavit of Professor Lawrence Leduc, paragraph 4, Applicants' Record, Volume II, Tab 1 at page 124.***

#### **B) Unfairness of “snap elections”**

16. Before the passage of Bill C-16, it was considered that Prime Ministers could call “snap elections” without having suffered defeat on a confidence matter, primarily to reap the benefit of political circumstances advantageous to the governing party.

***Affidavit of Professor Peter H. Russell, paragraph 7, Applicants' Record, Volume II, Tab 2 at page 149.***

17. 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, Applicants' Record, Volume II, Tab 2 at page 152.***

18. 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 untrammelled 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, Applicants' Record, Volume II, Tab 2 at page 153.***

19. Giving the Government the power to determine when elections will be held has always been thought by political scientists to confer considerable political advantages on a governing political party; fixed election dates are often proposed as a means of leveling the playing field.

***Affidavit of Professor Lawrence Leduc, paragraph 2, Applicants' Record, Volume II, Tab 1 at page 123.***

20. 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, Applicants' Record, Volume II, Tab 1 at page 124.***

21. 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, The Honourable Sinclair Stevens, Applicants' Record, Volume II, Tabs 3, 4, 5 and 6.***

22. 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, Applicants' Record, Volume II, Tab 7 at pages 183-185.***

### **C) Provincial Precedents**

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

***Exhibits F and H to the Affidavit of Duff Conacher, Applicants' Record, Volume I, Tab F at pages 59-60 and Tab H at page 80-82.***

24. One of the points that was often made in introducing fixed election dates in both the federal and provincial contexts was that fixing election dates 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, Applicants' Record, Volume III, Tab 1 at page 240.***

25. 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, Applicant's Record, Volume V, Tab 13.***

26. 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, Applicants' Record, Volume V, at page 461.***

27. 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, Applicants' Record, Volume III, Tab 2 at page 377.***

28. 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, Applicants' Record, Volume III, Tab 2 at pages 389-390.***

29. The elections that have taken place in British Columbia and Ontario 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 425 – 429, Applicants' Record, Volume III, Tab 2 at pages 390-391.***

30. In recent years, there have been “fixed election dates” amendments to election statutes in several other Canadian provinces.

***Cross-examination of Professor Patrick Monahan, questions 427 - 429; Cross-examination of Professor John C. Courtney, questions 67 – 74, Applicants' Record, Volume III, Tab 1 at pages 241-242.***

#### **D) Constitutional conventions**

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

***Cross-examination of Professor Patrick Monahan, questions 283, 284 and 296, Applicants' Record, Volume III, Tab 2 at pages 349-350 and 353.***

32. 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 312, Applicants' Record, Volume III, Tab 2 at pages 360-361; excerpt of “Canadian Constitutional Conventions: The Marriage of Law and Politics” by Andrew Heard, Exhibit 6 to the Affidavit of Professor Monahan, page 11, Applicants' Record, Volume IV, Tab 11.***

33. Once explicit acceptance is expressed, there can be little doubt that the convention is firmly established.

***Cross-examination of Professor Patrick Monahan, question 309, Applicants' Record, Volume III, Tab 2 at page 359; excerpt of "Canadian Constitutional Conventions: The Marriage of Law and Politics" by Andrew Heard, Exhibit 6 to the Affidavit of Professor Monahan, page 10, Applicants' Record, Volume IV, Tab 11***

34. 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 and 343, Applicants' Record, Volume III, Tab 2 at pages 368-370; excerpt of "Canadian Constitutional Conventions: The Marriage of Law and Politics" by Andrew Heard, Exhibit 6 to the Affidavit of Professor Monahan, page 8, Applicants' Record, Volume IV, Tab 11.***

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

***Cross-examination of Professor Patrick Monahan, question 353, Applicants' Record, Volume III, Tab 2 at page 372.***

36. 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 B C-16 is to apply is what established the new constitutional convention.

***Affidavit of Peter H. Russell, paragraph 8, Applicants' Record, Volume II, Tab 2 at page 149; Cross-examination of Professor Peter H. Russell, questions 4 – 6.***

37. 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, Applicants' Record, Volume II, Tab 2 at pages 150-151.***

38. 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, Applicants' Record, Volume I, Tab K at page 103 (2<sup>nd</sup> last para.).***

39. 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, Applicants' Record, Volume I, Tab I at page 90 (3<sup>rd</sup> para.).***

40. 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.

**PART II: POINTS IN ISSUE**

41. It is submitted that the points in issue in this judicial review 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 Bill C – 16 unless there has been a vote of non-confidence by the House of Commons?**

**ISSUE 2: Did Prime Minister Harper's September 7<sup>th</sup> 2008 advising the Governor General to dissolve Parliament contravene the principles of fairness in elections that are required by section 3 of the *Canadian Charter of Rights and Freedoms*?**

**ISSUE 3: Did Prime Minister Harper's September 7<sup>th</sup> 2008 advising the Governor General 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 Bill C – 16 unless there has been a vote of non-confidence by the House of Commons?***

42. 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.

43. 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* (5<sup>th</sup> 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, Applicant's Record, Volume V, Tab 1.**

44. As the Government stated before and during the parliamentary debates, the federal change to fixed election dates was modeled 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 in the legislation only after there has been a

vote of non-confidence.

45. 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<sup>th</sup> 2008 request for an election.

46. 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.

47. It is therefore submitted that a new constitutional convention was established when Bill C-16 received Royal Assent.

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

48. 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."

49. As the Court observed in *Libman*, supra, at para. 47, 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, paragraphs 49-51, Applicant's Record, Volume V, Tab 2.**

50. 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 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 all citizens who support political parties other than that of the Prime Minister to play a meaningful role in the electoral process.

51. 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, Applicant's Record, Volume V, Tab 3.**

52. It is submitted that Bill C - 16, as promoted and interpreted by the Government, 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 choosing October 14, 2008 as the date for the election was exacerbated by his Government's having passed legislation and given assurances that s. 56.1 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.

53. 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.**

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

55. It is therefore submitted that the calling of 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 September 7<sup>th</sup> 2008 advising the Governor General to dissolve Parliament contravene section 56.1 of the Canada Elections Act?***

56. 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, the values of section 3 of the *Charter*, and the precedents of the corresponding statutes of British Columbia and Ontario, 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, 2007.

57. 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, Applicant's Record, Volume V, Tabs 4 and 5.**

58. 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*, Applicant's Record, Volume V, Tab 5.**

59. 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, Applicant's Record, Volume V, Tab 6.**

60. 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.

61. Constitutional conventions may be used to interpret statutes.

***Carltona v. Commissioner of Works*, [1943] 2 All England L.R. 560, Applicant's Record, Volume V, Tab 7; *Att. Gen. Quebec v. Blaike*, [1979] 2 S.C.R. 1016, Applicant's Record, Volume V, Tab 8.**

62. 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*.

63. 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 Rights and Freedoms*.

***Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, Applicant's Record, Volume V, Tab 9.**

64. 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, Applicant's Record, Volume V, Tab 5.**

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

66. 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 was enacted, 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 application, 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 for the future of democracy in Canada that this Honourable Court declare that the election of October 14, 2008 was illegal.



67. While the power of the Governor General may not be limited by section 56.1, it is submitted that the section limits the power of the Prime Minister to cause an election to be held in the circumstances. It is therefore submitted that the Prime Minister contravened section 56.1 by advising the Governor General to dissolve Parliament.

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

68. It is recognized that it would be impossibly difficult to undo the consequences of the election of October 14, 2008. 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 holding of the election of October 14, 2008 contravened section 56.1 of the *Canada Elections Act*.

69. In addition or in the alternative, it is respectfully requested that this Honourable Court issue a declaration that the holding of the election of October 14, 2008 in the circumstances 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*.

70. 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's 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**

71. It is respectfully requested that costs be awarded to the Applicants in any event of the application. The Applicants are a public interest organization and its coordinator; they are bringing this application solely out of concern for the quality of Canadian

democracy.

***Stevens v. Conservative Party of Canada*, 2005 FCA 383 (CanLII) Applicant's Record, Volume V, Tab 10.**

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

#### **PART IV: ORDERS SOUGHT**

73. The Applicants respectfully request the following orders:

- a) An Order that this Honourable Court issue a declaration that the holding of 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 holding of the election of October 14, 2008 in the circumstances 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 been established that prohibits a Prime Minister's 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 cause or, in the alternative, an Order that no costs are awarded if the application is dismissed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of April, 2009.**



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## PART V: AUTHORITIES

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. Excerpt from *Canadian Constitutional Conventions: The Marriage of Law and Politics* by Andrew Heard (Oxford University Press: Toronto, 1991)
12. *Hansard of May 30, 2006 of the House of Commons*
13. *Constitution Act*, RSBC 1996, Chapter 66