

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 and
THE GOVERNOR GENERAL OF CANADA**

Respondents

NOTICE OF MOTION

TAKE NOTICE THAT Democracy Watch will make a motion to the Court on Thursday, October 2, 2008 at 9:30 am or as soon thereafter as the motion can be at The D'Arcy McGee Building, 90 Sparks St., Ottawa, Ontario. The duration of the hearing of the motion will be less than two hours.

THE MOTION IS FOR:

1. An expedited hearing of the Application on its merits in Ottawa on October 8 or 9, 2008 and variation of such Rules as are required to permit the hearing on one of those dates;
2. To add the Attorney General of Canada as a Respondent, and;
3. Costs of this motion in any event of the motion and of the cause.

THE GROUNDS FOR THE MOTION ARE:

1. Rule 55 of the Federal Courts Rules which states:

“Varying rule and dispensing with compliance

55. In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule.”

2. The time between the Writs for an election being issued and the holding of the election is never sufficient to permit the question of the legality of the call for the election to be adjudicated following the usual procedures and time lines for the hearings of applications.
3. An illegal election cannot be prevented by an interlocutory injunction, for “the balance of convenience” would always favour proceeding with the election because of the huge expense involved in re-scheduling elections.
4. There is a very strong *prima facie* case that the calling of the election for October 14, 2008 was contrary to the “fixed election date” amendment to the *Canada Elections Act* and that the election, if held as presently scheduled, would contravene the principles of fairness that the Supreme Court of Canada has determined to be required by section 3 of the *Canadian Charter of Rights and Freedoms*.
5. The following essential facts cannot reasonably be contested:
 - (a) The Prime Minister advised the Governor General to dissolve the thirty-ninth Parliament and the Governor in Council advised the Governor General to make an Order issuing Writs of election setting forth October 14, 2008 as the polling day.
 - (b) The Governor General did dissolve Parliament and ordered the issuing of Writs of election in accordance with the advice received.
 - (c) The Governor in Council issued a proclamation that a general election will be held on October 14, 2008.
 - (d) 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

- (e) In introducing the Bill (Bill C-16 in the First Session of the thirty-ninth Parliament) proposing “fixed election dates” and throughout the debates on the Bill, the Government asserted that subsection (1) of section 56.1 is to be interpreted as limiting the Prime Minister’s right to advise the exercise of such discretion only to situations following a vote of “non-confidence” in the Government.
- (f) The dissolution of the thirty-ninth Parliament did not follow a vote of “non-confidence.”
- (g) In the debates in both the House of Commons and the Senate, it was virtually universally agreed by all the Members and Senators who participated in the debates that allowing the Prime Minister to decide when an election shall be held gave the Prime Minister’s political party an unfair advantage in contesting the ensuing election.

6. Although other evidence is tendered by way of Affidavits, it is submitted that the facts enumerated in paragraph 2 above provide sufficient factual foundation for determining whether the calling of the election contravened section 56.1 of the *Canada Elections Act* and whether the circumstances would make the election unfair within the meaning of section 3 of the *Charter*.

7. It is further submitted that the fact that the government had given assurances that the proper interpretation of section 56.1 implied there would not be an election before October 19, 2009 unless there was a “non-confidence” vote obviously increases the unfairness of the Prime Minister’s causing such an election to be held.

8. Determining whether the call for the election contravened section 56.1 will be based on the principles of statutory interpretation, including the effects of Parliamentary debates on such interpretation.
9. Determination of whether the holding of this election as presently scheduled contravenes the electoral fairness required by section 3 of the *Charter* will be based on the jurisprudence, leading cases being *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827; *Figueroa v. Canada (Attorney General)*, 1 S.C.R. 912; and *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569.
10. This case arises in very special circumstances.
11. Rule 303 of the Federal Court Rules governing respondents.
12. Rule 3 of the Federal Court Rules establishing the general principle for interpreting and applying the Rules.
13. This application and this motion are brought in the public interest.
14. Such further grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Affidavit of Duff Conacher, to be filed; the Affidavit of Lawrence LeDuc, to be filed; the Affidavit of Errol Mendes, to be filed; other affidavits to be filed; Government of Canada publications; Hansard reports of the debates on Bill C-16, and; such other materials as counsel may advise and this Honourable Court may permit.

September 29, 2008



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