

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

WRITTEN REPRESENTATIONS ON MOTION TO BE HEARD OCTOBER 2, 2008

OVERVIEW

1. The primary order sought in this motion is for an expedited hearing of the application to judicially review the calling of the General Federal Election for October 14, 2008. In 2007, the *Canada Elections Act* was amended to provide for “fixed election dates.” It is submitted that the amendment implies that the next General Federal Election will take place on October 19, 2009 unless there is a prior “non-confidence” vote. There has not been a “non-confidence” vote. Nonetheless, 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 is scheduled to be held on October 14, 2008. It is submitted that, in addition to contravening the amendment to the *Canada Elections Act*, the calling of the

election infringes the right of all citizens of Canada to participate in fair elections pursuant to section 3 of the *Canadian Charter of Rights and Freedoms*.

2. The Motion requests 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. The motion also seeks to add the Attorney General of Canada as a Respondent.

FACTUAL FOUNDATION FOR THE APPLICATION

3. It is submitted that the following 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 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 on the amendment 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.

4. The Affidavit of Duff Conacher, filed as part of the motion record, gives a history of the “fixed election dates” amendment by reference to Hansards and other government documents which are attached to his affidavit as exhibits. It is submitted that the facts alleged above are clearly established by those documents.
5. For example, on the question of whether the amendment implied that a non-confidence vote was required for an election to be held before October 19, 2009, the Honourable Rob Nicholson, Leader of the Government in the House of Commons and Minister for Democratic Reform, testified before the Senate Committee 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. 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, Hansard of December 6, 2007 of the Senate Committee, p.2, para.3.

6. Minister Nicholson further stated:
 - “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.” (p.3, para.6), 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.” (p.4, 3rd last para.), 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.” (p.4, last para.)

Ibid

7. On that same day, 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?” (p.6, para.4) 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.”

Ibid, (p.6, para.5)

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

“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, Hansard of September 18, 2006 of the House of Commons, pp.10-11, between markers 1210 and 1220.

9. There does not appear to have been any Member of Parliament who expressed disagreement with Minister Nicholson’s description of the unfair advantage that a Prime Minister’s political party obtains when a Prime Minister is free to call an election whenever she or he chooses to.

OUTLINE OF ARGUMENT ON THE MERITS OF THE APPLICATION ITSELF

10. It is acknowledged that interpretation of some aspects 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 statements by the Government, it is absolutely clear that section 56.1 precludes the calling of an election as a consequence of the Prime Minister’s advising the Governor General to dissolve Parliament in the absence of a vote of “non-confidence”. Defining a vote of “non-confidence” may not be easy in some circumstances. However, with respect

to the calling of this election, there was no vote at all (in fact, Parliament was not even sitting), so the question of definition does not arise. While the power of the Governor General in such circumstances may not be limited by section 56.1, the section clearly limits the power of the Prime Minister and of the Governor in Council 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, and that the Governor in Council contravened section 56.1 by issuing a proclamation that a general election shall be held.

11. In the application it is therefore respectfully requested that this Honourable Court issue a declaration that the holding of the election of October 14, 2008 contravenes section 56.1 of the *Canada Elections Act*.
12. 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 infringes the right of all citizens of Canada to participate in fair elections pursuant to section 3 of the *Canadian Charter of Rights and Freedoms*.
13. Put differently, one might say that s. 3 imposes on Parliament an obligation not to interfere with the right of each citizen to participate in a fair election. As the Supreme Court of Canada 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 SCC 37 (CanLII)

14. It is submitted that allowing the Prime Minister unfettered discretion as to when to call an election has 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.

15. 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 SCC 33 (CanLII), at paragraph 87.

16. It is submitted that section 56.1, 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 arbitrary choice of an election date is exacerbated by his Government's having given assurances that s. 56.1 precluded an election call in these circumstances.

17. 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), 2004 SCC 33 (CanLII) at paragraph 103.

18. It is submitted that holding an election in the circumstances will substantially lessen faith in the electoral process.

19. It is therefore submitted that the calling of this election contravenes section 3 of the *Canadian Charter of Rights and Freedoms*, whether or not the election is determined to contravene section 56.1 of the *Canada Elections Act*.

SHOULD THERE BE A HEARING OF THE APPLICATION ON ITS MERITS ON OCTOBER 8 OR OCTOBER 9, 2008?

20. It is submitted that it is of substantial importance to Applicants, and to all Canadians, to have the legality of the election be determined before it takes place. Moreover, it is submitted that there is a very strong *prima facie* case that the election is illegal.

21. Although other evidence has been tendered by way of Affidavits, it is submitted that that facts enumerated in paragraphs 3 through 9 above suffice for determining the Application on its merits. It is further submitted that, while it may be complex to apportion responsibility among the Respondents, the determination of whether the election contravenes section 56.1 and/or section 3 of the *Charter* is not very complex. The Applicant's legal argument is outlined in some detail above. It is submitted that the short time frame proposed will allow the Respondents sufficient time to appropriately argue the case on its merits.

22. 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.

23. 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 complexity and huge expense involved in re-scheduling elections.

Harper v. Canada (Attorney General), 2000 SCC 57 (CanLII)

24. Rule 55 allows varying a rule or dispensing with compliance with a rule "in special circumstances." It is submitted that the circumstances of this application are extraordinarily special.

25. Rule 3 provides that the Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of each proceeding on its merits. It is respectfully submitted that Rules 3 and 55, when read together, support the conclusion that the application should be heard on its merits before the election takes place. It is respectfully requested that the application be heard on October 8 in case it is necessary to continue the hearing for a second day.

COSTS

26. It is respectfully requested that costs be awarded to the Applicants in any event of the motion and of the application. The Applicant is a public interest organization, making this application out of concern for the quality of Canadian democracy.

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

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


ADDING THE ATTORNEY GENERAL OF CANADA AS A RESPONDENT

28. Upon reflection since the filing of the Notice of Application, the Applicant takes the position that the Attorney General of Canada is directly affected within the meaning of Rule 303 by the Orders sought.

ORDERS SOUGHT

29. The Applicants respectfully seek the following orders:
- a) There will be an expedited hearing of the Application on its merits in Ottawa on October 8 or 9, 2008 and there will be variation of such Rules as are required to permit the hearing on one of those dates;
 - b) Adding the Attorney General of Canada as a Respondent; and
 - c) Awarding the Applicants costs of this motion in any event of the motion and of the cause or, in the alternative, if either the motion or the application is dismissed, an order that no costs be awarded.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th Day of September, 2008.



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