Court File Number: 33848

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

DUFF CONACHER AND DEMOCRACY WATCH

Applicants

-and-

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

Respondents

REPLY OF THE APPLICANTS

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Conacher v. The Prime Minister of Canada et al.
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1. The Respondents assert (in paragraph 1 of their memorandum) "This matter involves the application of well established and uncontroversial criteria used for statutory interpretation..." On the other hand, the Respondents also state (in their paragraph 22) "The purpose of section 56.1 is to create a 'statutory expectation' of a certain date for election, without making it legally enforceable."

2. It is submitted that there are no "well established and uncontroversial criteria" concerning statutes that create "statutory expectations" that are not legally enforceable. In fact, the concept of such a statute is not known to Canadian law.

3. The interpretation of section 56.1 of the Canada Elections Act is made complex because of the interaction between the words of the section and the

constitutional convention of responsible government.

4. The Respondents do not respond to the submission that the enactment of this amendment established a new constitutional convention; Minister Nicholson made that assertion in presenting section 56.1 to Parliament (see paragraph 63 of the Applicant's Memorandum of Fact and Law).

5. It is submitted that none of the statements that Minister Nicholson made to Parliament implied that section 56.1 could be contravened after it was enacted. On several occasions, Minister Nicholson reiterated his view that the convention concerning responsible government required that the section be drafted in the form in which he presented it. He offered different reasons in support of that view in response to different questions asked by opposition members of Parliament. However, he consistently maintained that this amendment to the *Canada Elections Act* would ensure that subsequent general federal elections would be held on the dates specified by section 56.1 unless the government was dissolved earlier as a consequence of a non-confidence vote.

6. The Respondents assert "The allegation by the Applicants of a breach of section 3 of the *Charter* does not raise any new criteria for its application. The Applicants rely on well-established jurisprudence from the Supreme Court in cases such as *Harper* and *Figueroa*." (See paragraph 3 of the Respondents' Memorandum of Fact and Law).

7. However, all of the jurisprudence delineating the elements of electoral fairness that are implicit in section 3 of the *Charter* is quite recent. The nature of the kind of unfairness considered in *Harper* is quite different from that of the unfairness in *Figueroa*. Furthermore, the unfairness of a Prime Minister's calling a snap election is very different from the kinds of unfairness considered in *Harper* and *Figueroa*; the question of whether it contravenes

section 3 of the *Charter* is not readily determined from any of the existing jurisprudence.

8. There was widespread agreement that the unfairness of snap elections was sufficiently important to warrant legislative remedy. Indeed, this was agreed to by all of the members of Parliament who spoke to the issue during the debates on section 56.1 and also by the members of the provincial legislatures who voted for fixed election dates amendments to their elections acts. In addition, although they differed on the extent of the unfairness, all of the expert witnesses in the present case, including those proffered by the Respondents, agreed that there is at least a perception that the ability to call a snap election gives the Prime Minister's party an unfair advantage in the ensuing election. Moreover, the unfairness of the calling of the election of 2008 was exacerbated by the fact that the same Prime Minister who called the election had given the opposition parties the assurance that snap elections couldn't occur after the enactment of section 56.1.

9. There does not appear to have ever before been a statute that a Canadian government led by a given Prime Minister had enacted for an specific purpose that was subsequently contravened by that same Prime Minister. It is submitted that it is important for the rule of law that this Court consider the Prime Minister's action.

10. It is submitted that it is also of substantial national importance that this Honourable Court consider whether the nature and the extent of the electoral unfairness caused by the snap election of 2008 contravened section 3 of the *Charter*. Any decision that this Court renders on this issue will provide guidance to the further development of fairness in elections.

11. The Respondents state (in paragraph 5 of the Respondents' Memorandum of Fact and Law) "That a decision by this Court may have some relevance to

some later case before a provincial superior court interpreting provincial legislation does not in and of itself raise an issue of public importance warranting review by this Court."

12. However, the movement to increase electoral fairness by precluding snap elections was initiated in Canada by the provincial legislatures of British Columbia and Ontario. It was then continued by Parliament and taken up by other provincial legislative assemblies. If this Court does not review the decision of the Federal Court of Appeal, then the provincial statutes will all be rendered meaningless and the democratic reform of precluding snap elections will be reversed. Moreover, unless this Court provides some guidance on how such a reform could be accomplished in the context of the convention concerning responsible government, no such reform would ever again be attempted in Canada, no matter how egregiously unfair the calling of snap elections had been. It is therefore submitted that it is of very substantial national importance that leave to appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa this 27th Day of October, 2010.

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