Federal Court to Decide If P.M. Harper Won an Illegal Election

The 2008 federal election caught many Canadians by surprise. One of them was Duff Conacher, coordinator of a "citizens advocacy" group called Democracy Watch. In the middle of the election campaign, Conacher began insisting that the election was illegal and contrary to the *Canadian Charter of Rights and Freedoms*. He will have a chance to persuade the Federal Court of Canada on September 8, 2009 – a year and a day after the election was called.[1]

Federal Fixed Elections: Proposed and Debated

In April 2004, Stephen Harper, then Leader of the Official Opposition, introduced Bill C-512 (the *Dissolution of Parliament Act*), a private member's bill that died on the order paper a few weeks later. It was intended to place federal general elections on a predictable four-year timetable. Several provinces have similar fixed election laws. The bill's preamble laid out its purpose:

> *[I]n the normal course of events a Parliament would continue for a fixed period, resulting in fixed and certain dates for the holding of a general election of members to the House of Commons, but subject to earlier dissolution, particularly for reasons of non-confidence in the government or as a result of a motion passed by the House of Commons.[2]*

To sidestep any requirement of a constitutional amendment, the wording of Harper's short-lived 2004 bill acknowledged the Governor General's prerogative to call an election on the advice of the Prime Minister. Previous unsuccessful private members' bills had relied on similar language.[3]

In 2006, the new Conservative government led by Prime Minister Harper revived the fixed elections scheme, in the form of a government bill, Bill C-16 (*An Act to amend the Canada Elections Act*[4]). Unlike Harper's 2004 bill, the new C-16 had no preamble to describe its goals. However, a government press release on the day the bill was introduced explained how fixed elections would work:

> *Beyond providing for greater fairness, fixed election dates will improve transparency and predictability. This bill, however, will not change the practice of dissolving Parliament for elections if the government loses the confidence of the House of Commons….*
>
> *The bill also sets out that the date for the next general election will be October*

19, 2009, unless the government loses the confidence of the House prior to this time.[5]

The Minister for Democratic Reform in 2006, the Honourable Rob Nicholson, elaborated on Bill C-16's intended effect when he opened debate at second reading:

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 ... 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.[6]

The Minister also explained why the bill did not state explicitly that an early election could only occur if the government lost a confidence vote:

[I]f the bill were to indicate that the Prime Minister could only advise dissolution in the event of a loss of confidence, it would have to then define confidence and the dissolution of the House of Commons would then be justiciable in the courts.... We do not want the courts to decide what is a confidence measure and what is not.[7]

Fixed Elections Enacted

Bill C-16 became law on May 3, 2007, adding two sections to the *Canada Elections Act*[8] under a new heading, "Date of General Election." Section 56.1 sets out the new rules for election timing:

(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.[9]*

These provisions were in effect in September-October 2008, when the House of Commons was dissolved and a general election held.

The Unfixed 2008 Election

On September 7, 2008, Prime Minister Harper advised Governor General Michaelle Jean to dissolve Parliament. She followed the Prime Minister's advice, in keeping with long-standing constitutional practice. The government had not been defeated in a non-confidence vote; in fact, Parliament was not sitting at the time. The Conservative Party was re-elected in the ensuing general election.

The Library of Parliament published a "Questions and Answers" document on the third day of the election campaign. It explains why the election was a year early, despite the new fixed election provision:

> ***Why is the general election not held on 19 October 2009 as provided by the Canada Elections Act?***
> *Amendments were made to the Canada Elections Act during the 39th Parliament to provide for fixed-term general elections every four years for the Members of Parliament, the first of which was to be held on 19 October 2009. However, the amendments did not affect the power of the Governor General to dissolve Parliament and call for a general election, nor did they affect the prerogative of the Prime Minister to tender advice to the Governor General on those matters.[10]*

Professor Guy Tremblay questions the application of the fixed election provision to a minority Parliament, such as the 39th Parliament that was dissolved in September 2008:

> *In the case of a majority government, the provision in question does indeed deprive the Prime Minister of the power to choose the timing of an election call based purely on opportunism. But is that also true for a minority government?[11]*

Tremblay's answer is no: "The Prime Minister did not in my opinion violate subsection 56.1 of the *Canada Elections Act*" in seeking dissolution on September 7, 2008.[12]

Duff Conacher and Democracy Watch take the contrary view. They believe the

Prime Minister broke the law. According to them, section 56.1 of the *Canada Elections Act* prohibited Harper from asking for an election in 2008 without first losing a confidence vote in the House of Commons. [13]

No Quick Fix: the Federal Court Declines to Cancel the 2008 Election

Rumours of an imminent election in August-September 2008 produced some confusion. Two days before the Prime Minister advised the Governor General to dissolve Parliament, Democracy Watch issued a news release that said it was "false" to claim that federal elections dates were "fixed" by the *Elections Act* amendment: "The simple reality is that federal election dates can only be fixed by making fundamental changes to the Canadian constitution."[14]

The next day, then-Liberal leader Stephane Dion was quoted saying, "Some constitutional experts are saying this election will be illegal."[15] A few days later, another Democracy Watch news release offered a new interpretation of the law, saying the election call was "very likely … illegal (given the new fixed election date law)."[16] Conacher continues to pursue this argument.[17]

On September 26, 2008, the midway point of the 2008 election, Conacher served a notice of application for judicial review on three respondents: the Prime Minister of Canada, the Governor General of Canada, and the Governor in Council (the federal Cabinet). It asked the Federal Court to revoke ("quash") the Prime Minister's advice on dissolution, the Governor General's decision to dissolve Parliament, and the Cabinet's proclamation of a general election to be held on October 14. Short of cancelling the election, it asked the court to at least declare that the election call was contrary to the new section 56.1 of the *Elections Act*, and to the right of Canadian citizens to participate in fair elections, guaranteed by section 3 of the *Canadian Charter of Rights and Freedoms*.[18]

The Federal Court issued an order on October 3, 2008, denying Conacher's motion to hear the application on October 8.[19] The court was not satisfied that it could address the merits of the case in the few days available:

> *The case raises novel and complex, constitutional issues, including a Charter challenge alleging that the rights of Canadians to participate in fair elections is infringed. Expediting the hearing in these circumstances, would require that serious issues be determined, essentially on the fly.... I bear in mind that the applicants are not precluded from pursuing their declarations as to the legality of the election and the alleged breaches of the Charter after the election, and that they stand prepared to do so.[20]*

The election of October 14, 2008 went ahead. The 40th Parliament opened with

the Speech from the Throne on November 18; the Conservative government remains in place.

Democracy Watcher Says: The Fix was In

Duff Conacher and Democracy Watch have revised their judicial review application to "focus on the action of the Prime Minister in advising the Governor General to dissolve Parliament."[21] They are no longer arguing that the Governor General or the federal Cabinet broke the law.

Pointing to Prime Minister Harper's advice to the Governor General on September 7, 2008, they ask the Court for:

> *(1) a declaration that "the holding of the election of October 14, 2008 contravened section 56.1 of theCanada Elections Act,"*
> *(2) a declaration that the election timing "infringed the rights of all citizens of Canada to participate in fair elections pursuant to section 3" of the Charter, and*
> *(3) a declaration that a constitutional convention prohibits an early election (according to the section 56.1 timetable) "unless there has been a vote of non-confidence by the House of Commons."[22]*

Conacher and his advocacy group concede that "it would be impossibly difficult to undo the consequences of the election of October 14, 2008."[23] Still, they argue that unless Prime Minister Harper's request to the Governor General to call an election in the fall of 2008 is declared illegal, the fixed election date legislation "will be rendered absurd and meaningless."[24]

Admitting that they are presenting "a very unusual case," the applicants summarize the political implications of their arguments:

> *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.[25]*

The *Globe and Mail* says the case "should be laughed out of the Federal Court," siding with experts who believe that "only by changing the Constitution could the government have altered the ability of the governor-general to dissolve Parliament on the advice of the prime minister." They insist that it was up to voters to reprimand a prime minister who "made a mockery of his government's pronouncements that it was improving democratic transparency and accountability."[26]

Whether the Federal Court laughs or cries, its decision will surely attract close interest from the three provinces and one territory that have fixed-election laws on their books.

Further Reading

James R. Robertson and Sebastian Spano, "Electoral Rights: Charter of Rights and Freedoms" *Library of Parliament* (29 September 2008).

Brian O'Neal, "Government and Canada's 40th Parliament: Questions and Answers" *Library of Parliament* (9 September 2008).

James R. Robertson, "Bill C-16: An Act to amend the Canada Elections Act" *Library of Parliament* (3 May 2007).

Guy Tremblay, "The 2008 Election and the Law on Fixed Election Dates" *Canadian Parliamentary Review*, volume 31, number 4 (Winter 2008).

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[1] "Harper's snap election call heads to Federal Court" *The Globe and Mail* (24 June 2009), "Federal Court to hear election challenge" *CTV.ca* (23 June 2009).
[2]3rd sess., 37th Parl., 52-53 Eliz. II, 2004.
[3] James R. Robertson, "Bill C-16: An Act to amend the Canada Elections Act" *Library of Parliament* (3 May 2007) at 11-12.
[4]1st Sess., 39th Parl., 55-56 Eliz. II, 2006-2007.
[5]Privy Council Office, "Canada's New Government Proposes Fixed Election Dates" *Canada News Centre*(30 May 2006).
[6]House of Commons, *Hansard* (18 September 2006) at 2876.
[7]*Ibid*. at 2877.
[8]S.C. 2000, C. 9 at sections 56.1, 56.2.
[9]*Ibid*. at section 56.1.
[10] Brian O'Neal, "Government and Canada's 40th Parliament: Questions and Answers" Library of Parliament (9 September 2008) at 4.
[11] Guy Tremblay, "The 2008 Election and the Law on Fixed Election

Dates" *Canadian Parliamentary Review*, volume 31, number 4 (Winter 2008) at 24.
[12]*Ibid*. at 25.
[13]"News Release: Federal Court Will Hear Challenge of Legality of Prime Minister's September 2008 Election Call..." *Democracy Watch* (23 June 2009).
[14] "News Release: Conservatives' False Claims About Fixed-Election-Date Law Bite Back..." *Democracy Watch* (5 September 2008). On September 3, 2009, Duff Conacher, Coordinator of Democracy Watch, sent the Centre for Constitutional Studies a helpful correction of this point. Referring to the September 5, 2008 news release, he wrote:

> *[T]he statement that 'The simple reality is that federal election dates can only be fixed by making fundamental changes to the Canadian constitution' goes on further to state 'and that the ruling party's power during a majority government to choose the next election date is shared with opposition parties during a minority government (whether Prime Minister Harper likes it or not).'*
>
> *The intent of this statement, while not entirely clear, is more understandable if you read the entire news release -- what was intended is to make it clear that because of the possibility of non-confidence votes causing an election, the only way to fix federal election dates in Canada would be to change the Canadian constitution to remove non-confidence votes as a means of forcing an election (essentially, these changes would have to be so fundamental that Canada would no longer be a parliamentary democracy).*
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> *So Democracy Watch didn't change its position in early September ... as our position has always been that non-confidence votes can always cause an election....*

[15]Trish Audette and Mike Blanchfield, "Election call could be illegal: experts" *Calgary Herald* (6 September 2008).
[16]"News Release: Canada Holds 40th Undemocratic Federal Election..." *Democracy Watch* (12 September 2008).
[17]Supra note 13.
[18]Notice of Application for Judicial Review, *Conacher v. Canada (Prime Minister)*, Federal Court of Canada, File No. T-1500-08 (26 September 2008).
[19] *Conacher v. Canada (Prime Minister) 2008 FC 1119.*
[20]*Ibid*. at paras. 4-5.
[21] Applicant's Record, Volume IV: Memorandum of Fact and Law, *Conacher v. Canada (Prime Minister)*, Federal Court of Canada, File No. T-1500-08 (9 April 2008) at para. 1.
[22]*Ibid*. at para. 73.
[23]*Ibid*. at para. 68.

[24]*Ibid*. at para. 60.
[25]*Ibid*. at para. 66.
[26]Editorial, “Unenforceable gesture” *The Globe and Mail* (24 June 2009).