Conacher v. Canada (Prime Minister): Taking the 2008 Federal Election to Court

On September 8, 2009 the legality of the 2008 federal election will be debated in the Federal Court, one year and one day after Stephen Harper advised the Governor General to call an election. Duff Conacher and Democracy Watch, a "citizens advocacy" group, contend that the Prime Minister broke not only his own fixed-date election law (section 56.1 of the *Canada Elections Act*), but also the *Canadian Charter of Rights and Freedoms*.[1]

The background to this case was outlined in an earlier article. In brief, Canadian law has left the decision to dissolve Parliament – that is, to call a general election – in the hands of the Governor General. In all but very rare circumstances, the Governor General is expected to follow the advice of a prime minister to dissolve Parliament. However, in 2006 Parliament passed Bill C-16, which added section 56.1 to the *Canada Elections Act*. This new section provided for elections at four-year intervals, beginning in October 2009, but also explicitly preserved the "power to dissolve Parliament at the Governor General's discretion."[2]

Under the new provision, it was generally understood that when a government lost a confidence vote in the House of Commons, the Governor General would still follow advice and grant dissolution. However, it was a surprise to some, including Conacher, to learn in September 2008 that without any vote of confidence, the Prime Minister still could advise dissolution and the Governor General would grant it. Questions immediately arose about the legality and the propriety of Prime Minister Harper's advice on September 7, 2008. Conacher has pursued those questions in the Federal Court since last fall.

Mr. Conacher and Democracy Watch filed their written arguments with the Federal Court on April 9, 2009. The Government of Canada filed its response on May 11. The two sides offer sharply differing interpretations of election law and constitutional theory.

This article highlights the key points of disagreement between Conacher, the applicant, and the government as respondent. All of these disputes are now before the court. The court will have to consider the issues and decide at least some of them. Of course, there may be an appeal to a higher court. The outcome could prove to be an important milestone in Canadian constitutional doctrine.

DOES THE FEDERAL COURT HAVE JURISDICTION TO DECIDE THE CASE?

Duff Conacher and Democracy Watch are asking the Federal 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."[3]*

The Government of Canada responds to these arguments on their merits, and also argues that the Federal Court does not have jurisdiction to grant any of the remedies Conacher is seeking. The arguments about jurisdiction concern the Federal Court in particular and Canadian courts in general. The next two sections of this article outline arguments over the court's ability to consider the case. Subsequent sections describe the issues the court will have to consider if it concludes that it has jurisdiction to decide them.

The *Federal Courts Act* and Prerogative Powers

The jurisdiction of the Federal Court is defined by statute. According to the Government of Canada, the Federal Court may only grant a declaration, as Conacher requests, if the Prime Minister's advice to the Governor General was a "decision" under section 18.1 of the *Federal Courts Act*.[4] (Section 18.1 refers to "decision, order, act or proceeding."[5])

The government's interpretation of the Act is that *advice* (or a recommendation) is not a "decision." Nor was Prime Minister Harper's advice the exercise of a power under a federal statute, as section 2(1) of the Act requires. The government says instead that "[t]he decision is that of the Governor General," and it was made under the royal prerogative rather than any statute.[6]

The royal prerogative, according to the government's arguments, is beyond the Federal Court's jurisdiction under statute.[7] It may indeed be outside the jurisdiction of *any* court: the government cites the 2000 Ontario Court of Appeal decision in *Black v. Chrétien*, where the royal prerogative to grant honours was found to be beyond judicial review.[8] (In that case, the court agreed with British precedent that also mentioned "the dissolution of Parliament" as a prerogative power that was not "susceptible to judicial review."[9])

Justiciability

The Government of Canada makes a more fundamental argument about the court's lack of jurisdiction to consider the case. It argues that the case revolves around "political considerations" that are not justiciable. Specifically, the government contends that the court must be sensitive to the separation of functions in the constitutional structure, and be careful to not "intrude inappropriately into the spheres reserved to the other branches."[10]

An issue is not justiciable if the subject matter is not suitable for determination by the courts. If a court agrees that an issue before it is not justiciable, it must decline to decide the issue, leaving it for political resolution.[11]

The written arguments of the applicants, Conacher and Democracy Watch, did not anticipate the government's arguments about jurisdiction. Conacher will have an opportunity in Federal Court to respond to the government's position that their application should not be reviewed. If the court does not accept the argument that the entire case is beyond its jurisdiction, it will have to consider Conacher's three arguments for a declaration about the 2008 election. These arguments will lead the court into an analysis of fundamental constitutional questions.

A NEW CONSTITUTIONAL CONVENTION?

Mr. Conacher and Democracy Watch ask the Federal Court to:

> *...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.[12]*

The Government of Canada argues that there is no such constitutional convention, that existing conventions point to the opposite conclusion, and that in any event conventions are "political" and unenforceable by a court.[13]

Both parties refer to the same criteria for a constitutional convention, adopted by the Supreme Court of Canada:

> *We have to ask ourselves 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. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.[14]*

Although they argue from the same authority, Conacher and the government present starkly different explanations of how a convention may arise and be recognised by the courts.

Convention by Agreement?

Mr. Conacher and Democracy Watch argue that a new constitutional convention can be established quickly, as long as there is "explicit agreement of the relevant actors."[15] They claim that this explicit agreement is clear from the parliamentary debate leading up to the enactment of the fixed election provision in Bill C-16:

> *[T]his 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 [Bill] C-16 is to apply is what established the new constitutional convention.[16]*

In the records of parliamentary debate, Conacher finds agreement among federal party leaders, who, he says, are the "relevant actors" in establishing this constitutional convention, and who "did not dissent" from the government's account of its "constitutional implications." [17] Conacher's written arguments provide quotes from the 2006 parliamentary debates on the fixed election provision to illustrate agreement on its purpose and effect.[18]

The Government of Canada does not dispute what parliamentarians intended to accomplish, or why they thought a change was a good idea. Instead, it responds that the "relevant political actors" in respect of the alleged convention are not party leaders or participants in parliamentary debate, but the Prime Minister and the Governor General, in their meeting on September 7, 2008.[19] Neither of them, the government points out, acted as though a new convention was "obligatory or binding upon them."[20]

> *It would be necessary … for there to be statements by one or more Prime Ministers supporting the existence of this alleged new restriction…. The fact that the Governor General was prepared to follow the advice indicates that neither the Prime Minister nor the Governor General believe that there was any convention requiring the government to be defeated in the House before dissolution could be sought or granted.[21]*

Besides, according to the Government, a loss of confidence in the government on the part of the House of Commons is "a political question to be determined initially by the Prime Minister."[22] According to this view, Harper was entitled to conclude that his government had lost the confidence of the House without waiting for the formality of a non-confidence vote.

Precedents for a Convention?

In their factum, Conacher and Democracy Watch rely on authority that: "A single precedent with a good reason may be enough to establish the rule."[23] Citing the "explicit agreement" of political actors on the reason for Bill C-16, they say the new constitutional convention, as of the enactment of the fixed election provision, is that a prime minister can advise the Governor General to dissolve Parliament *only* after a vote of non-confidence in the House of Commons.[24]

The Government of Canada, referring to the Governor General's acceptance of the Prime Minister's request for dissolution in 2008, replies that the sole precedent is cold comfort to Conacher:

> *There are no precedents to support nor evidence to satisfy the requirements to demonstrate the existence of an alleged new convention. In fact, the only precedent is to the contrary, since the Prime Minister sought and obtained dissolution of Parliament on September 7, 2008 without having lost a vote of non-confidence in the House of Commons.[25]*

The government concludes that evidence of a new convention would need to be in the form of "statements by one or more Prime Ministers supporting the existence of the alleged new restriction" on prime ministerial discretion.[26]

Mr. Conacher argues that the new precedent for federal elections is reinforced by precedents in provinces with fixed-date election laws.

> *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 accompanied 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.[27]*

The Government of Canada suggests that Conacher's own witness, Peter Russell, took a contrary view when he said that the convention immediately prior to the enactment of section 56.1 "allowed the Prime Minister to advise the Governor General to dissolve Parliament without a vote of non-confidence."[28] (This response by the government may misconstrue Conacher's argument: there does not seem to be any allegation that provincial practices created a new federal convention on their own, only that they bolster a new convention established by Parliament in 2006.) The government also points out that the fixed-date election laws in B.C. and Ontario explicitly maintain the power of the Lieutenant Governor to dissolve the legislature, much as section 56.1 does with the power of the Governor General to dissolve Parliament.[29]

These questions – who must agree and what is a precedent – go to the heart of the "unwritten constitution" which governs much of the work of Parliament. If the court decides to consider them – over the objections of the government, which insists they are non-justiciable and outside its jurisdiction – it will be venturing into relatively uncharted territory.

Enforceability of a Convention?

Mr. Conacher and Democracy Watch ask the Federal Court for three declarations, as described above. Two of them – discussed below – would declare what the *Elections Act* and the written Constitution mean. They also ask for a declaration of a constitutional convention – specifically, the alleged new convention that a vote of confidence must precede a request for dissolution and a general election.

The Government of Canada argues that no such declaration is available to the applicants:

> *The realm of constitutional convention is a political one that is not enforceable by the Courts. Sanction for any alleged violation of a constitutional convention lies in the political, not the legal, domain, and the Courts have recognized that legal sanction in this area is not justiciable.[30]*

The government submits that whatever the applicable constitutional convention is, no convention is*enforceable* by the courts.

> *Constitutional conventions are non-legal rules or norms that prescribe limits on the manner in which legal powers of public office holders are to be exercised. Conventions are non-legal in the sense that they are not enforced by the courts and there is no legal sanction for their breach.[31]*

Peter Hogg, a constitutional scholar cited by the government, calls conventions "rules of the constitution that are not enforced by the law courts … [a]lthough … the existence of a convention has occasionally been recognized by the courts."[32] Peter Russell apparently conceded this point under cross-examination, stating that if a convention is violated "the court does not give a legal remedy or a legal penalty."[33]

In the *Patriation Reference*,[34] the Supreme Court of Canada recognized a long-standing constitutional convention. However, the Court "held that there was no legal obligation" to abide by the convention; they articulated the convention, but did not use the power of the Court to require anyone to follow it.[35]Specifically, the Court's statement about a constitutional convention did not come in the form of a *declaration*. Here, the dispute between Conacher and the government appears to centre on the question of whether a*declaration* amounts to *enforcement*, or a *remedy*.

Mr. Conacher and Democracy Watch appear to recognise that they are arguing a difficult point in asking for a declaration of a convention. They return to the point that Parliament legislated the fixed election date: "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*."[36]

They cite *Osborne v. Canada (Treasury Board)*, where the Supreme Court determined that a provision of the*Public Service Employment Act*, which legislated a long-standing convention against public servants engaging in work for political parties, could be subject to *Charter* scrutiny.[37] The Court found:

> *[W]hile conventions form part of the Constitution of this country in the broader political sense, i.e., the democratic principles underlying our political system and the elements which constitute the relationships between the various levels and organs of government, they are not enforceable in a court of law unless they are incorporated into legislation.[38]*

However, Conacher is asking the court to recognize a *new* constitutional convention, which allegedly emerged from debate on the new section 56.1 of the *Elections Act*. Apparently, if the new convention pre-dated the enactment of the new section, it only dated back to some point during debate on that section. The government insists that there has been "no enactment of a constitutional convention," so there "is no legal basis … on which the alleged new constitutional convention can be enforced."[39]

CHARTER, SECTION 3

Duff Conacher and Democracy Watch ask for a declaration that the election of October 14, 2008 violated section 3 of the *Charter*. They say that this declaration would require future prime ministers to abide by the fixed-date election provision. They argue that this declaration is "essential for the future of democracy in Canada."[40] The Government of Canada, on the other hand, warns the court that a declaration under the *Charter* "would mean that every federal and provincial election since April 17, 1982 [when the *Charter* came into force] has infringed the section 3 rights of the electorate."[41]

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.[42]*

The courts have considered the purpose of this section, and applied it to various electoral rules and practices. Conacher quotes the Supreme Court's articulation of "electoral fairness" in the 2003 case of *Figueroa v. Canada (Attorney General)*:

> *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.... It is also necessary that the differential treatment have an adverse impact upon the applicant's right to play a meaningful role in the electoral process.[43]*

The next year, in *Harper v. Canada (Attorney General)*, the Supreme Court referred to the Canadian electoral system as an "egalitarian model," under which "Parliament must balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters."[44]

Mr. Conacher and the Government of Canada seem to be in general agreement about the principles that govern the application of the *Charter* to elections. The government says that under section 3 of the *Charter*, "A fair election is one that provides voters with the opportunity to become 'reasonably informed of all possible choices' so that they can meaningfully participate in the electoral debate and cast a reasonably informed vote."[45]

However, Conacher and the government part company on the application of the *Charter* to Prime Minister Harper's advice to the Governor General on September 7, 2008. The government also questions Conacher's evidence and his legal status to bring a claim under the *Charter*.

The Fairness of Snap Elections

Mr. Conacher and Democracy Watch contend that a prime minister's ability to call a "snap

election" grants the governing party "a distinct advantage over opposition parties," and that eliminating this "structural advantage" in the name of electoral fairness is "a key reason why most parliamentary democracies have established fixed dates for elections."[46]

They say that this "distinct advantage" violates Canadians' right to participate meaningfully in a fair election, as protected by section 3 of the *Charter*:

> *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.[47]*

Referring to the 2004 *Harper* precedent, Conacher argues that the fixed-election legislation achieved a balance of "the rights and privileges of the participants in the electoral process."[48] Accordingly, he contends that it was "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."[49]

The Government of Canada offers historical evidence to dispute that a prime minister's power to request dissolution confers a built-in electoral advantage on the governing party.[50] It adds that media reports and statements from politicians in the summer of 2008 made it "clear that there was going to be an election called for the Fall."[51] In any case, the government states that the minimum 36-day election period eliminates any advantage; it observes that the applicants are not challenging the election period as too short to "reasonably inform the electorate."[52]

In particular, the government argues that there is no evidence that Conacher's *Charter* rights as a voter were infringed by the early election call. To Democracy Watch's claim that its rights were infringed, the government replies that "there is no evidence that it could not perform any of its normal functions during the election period."[53] The Government of Canada concludes that the dissolution request was "not in any way constitutionally unfair":

> *The Applicants have not demonstrated that they did not have an opportunity to be reasonably informed of the parties and the candidates during the 37 day period of the election nor have they shown that they were denied a right to play a meaningful role in the electoral process.[54]*

Do Conacher and Democracy Watch Have Standing?

The Government of Canada questions whether an advocacy organization can claim democratic rights: "Democracy Watch does not have standing to bring a section 3 claim as it is not a citizen capable of exercising the right to vote, and there is no evidence from the individual Applicant, Duff Conacher, to support the allegation of a breach."[55]

The government notes that the "general rule is that the provisions of the *Charter* may only be invoked by those who enjoy its protection."[56] Democracy Watch should not be granted standing to bring a section 3 claim because "a corporation … does not possess the rights protected by section 3."[57] They claim it does not represent any community's voting interest and "cannot claim violation of a *Charter* right of third parties."[58]

The government also submits that this is "not an appropriate case" for Democracy Watch to be granted public interest standing before the court.[59] It sets out the test for public interest standing:

> *A court may exercise its discretion to grant public interest standing where the claimant establishes: (1) that the action raises a serious legal question; (2) that the plaintiff has a genuine interest in the resolution of the question; and (3) that there is no other reasonable and effective manner in which the question may be brought to the court.[60]*

The federal government argues there is "no serious issue to be tried" because Conacher, the only applicant with a right to vote, does not raise any evidence to show his right was infringed. [61] Even if the first two requirements were met, the government claims that Democracy Watch cannot meet the third requirement: "There are any number of other litigants, such as opposition parties and candidates who would have been affected in a direct way by the dissolution of Parliament and calling of an election who would be better suited to bring a [section 3 *Charter*] challenge."[62]

Does the *Charter* Apply to the Governor General?

The Government of Canada takes the position that a declaration limiting prime ministers' ability to advise the Governor General would, in substance, be a limitation of the Governor General's constitutional prerogatives. It applies this argument to the *Charter* issue: "The Governor General's power to dissolve Parliament is a core constitutional power that is immune from *Charter* review on the basis that one part of the Constitution cannot abrogate another." [63] The government claims that if the court were to accept the applicants' arguments, the Governor General would be forced to "wait until some *Charter* appropriate time" to dissolve Parliament and call an election.[64] According to the government, under accepted constitutional doctrine the *Charter* does not give a court the power to "interfere with the relationship between the Governor General and the Prime Minister."[65]

INTERPRETATION OF THE *ELECTIONS ACT*

In 2006, Bill C-16 added a new section 56.1 to the *Canada Elections Act*:

> *(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 in 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.[66]

Mr. Conacher and Democracy Watch argue that Prime Minister Harper recommended the 2008 federal election in clear defiance of section 56.1(2). Although the language of section 56.1(1) preserves the Governor General's power to dissolve Parliament, they say that it does not leave intact a prime minister's power to*advise* dissolution. The Government of Canada responds that section 56.1 places no legal limit on a prime minister's ability to advise the Governor General, and that any such limit would require a constitutional amendment.

Statutory Interpretation and the *Interpretation Act*

Mr. Conacher and Democracy Watch submit that the proper interpretation of section 56.1 prohibits a prime minister from "requesting early dissolution of Parliament unless there was a vote of non-confidence."[67]They cite the Supreme Court of Canada, which in 1998 endorsed the following approach to statutory interpretation: "[T]he 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."[68]

Conacher also points to section 12 of the *Interpretation Act*, which applies to all federal statutes: "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[69]

The government responds that section 56.1 "does not explicitly or implicitly impose any legal restriction on the Prime Minister's ability to advise the Governor General" to dissolve Parliament and call an election.[70] In fact, the legislation explicitly states that Governor General's powers are unaffected, "including the power to dissolve Parliament at the Governor General's discretion."[71]

Anticipating the government's argument, Conacher's written arguments insist that Parliament's "sole object" in enacting section 56.1 was to prohibit prime ministers from calling "snap elections":

> *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.[72]*

In a 2005 case cited by Conacher, the Supreme Court rejected a proposed interpretation of a section of the*Immigration and Refugee Protection Act* which the Court deemed would render it "absurd, illogical or redundant."[73]

The Government of Canada claims in response that the purpose of section 56.1 is not to prohibit "snap elections" but "to create a 'statutory expectation' of a certain date for election, without making it legally enforceable."[74] The government's written arguments do not explain what a "statutory expectation" is, or give any other examples of

unenforceable statutory expectations.

The Constitution as a Guide to Statutory Interpretation

As described above, Conacher and Democracy Watch ask the Federal Court to recognize a new constitutional convention which would prohibit a prime minister from advising the Governor General to dissolve Parliament*unless* there had been a vote of non-confidence in the House of Commons. They also ask the court to use this new convention to interpret section 56.1.[75] In other words, if the constitutional convention itself is not enforceable, it may nonetheless be used to guide the court in interpreting section 56.1 as applying to a prime minister's advice on dissolving Parliament.

Conacher also argues that "the *Charter* value of fairness in elections implies that section 56.1 of the *Canada Elections Act* should be interpreted to preclude snap elections."[76] In this context, Conacher and Democracy Watch cite a 2002 Supreme Court decision: "[T]o the extent this Court has recognized a '*Charter* values' interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations."[77]

The Government of Canada responds that there is no ambiguity in section 56.1, so there is no basis for consulting other sources to resolve an ambiguity.[78] The government argues that the applicants' interpretation of section 56.1 would limit the ability of a prime minister to advise the Governor General, and therefore it would unconstitutionally restrict the powers of the Governor General:

> *The power to dissolve Parliament is part of the Office of the Governor General of Canada…. Amendments to the Office of the Governor General of Canada … require amendments authorized by section 41 of the Constitution Act, 1982…. For the same reason, an attempt to legally limit the ability of the Prime Minister to advise the Governor General to dissolve Parliament risks the need for a constitutional amendment under section 41. By convention, the Governor General can only exercise the power of dissolution on the advice of the Prime Minister. Therefore, limiting the ability of the Prime Minister to request dissolution would likely constitute a fetter on the Office of the Governor General.[79]*

Section 41 of the *Constitution Act, 1982* refers to "the office of … the Governor General…." The powers the Governor General exercises on the advice of the prime minister are very extensive. The government's written arguments appear to say that *none* of these powers, which are effectively exercised at the prime minister's personal discretion, can be altered by an ordinary statute, passed by Parliament. Parliament, therefore, would apparently have its legislative power drastically curtailed if the courts accepted the government's interpretation of the Constitution. The government will have the opportunity to elaborate on its position in the Federal Court.

CONCLUSION

A Federal Court judge will have reviewed these written arguments prior to the hearing on September 8, 2009. Conacher and Democracy Watch will have an opportunity to respond to the arguments presented by the Government of Canada in response to their application, and the judge will be able to question lawyers for both sides on their arguments. The court's decision will be rendered some weeks or months later.

FURTHER READING

Dan Shouldice and Ken Dickerson, "Federal Court to Decide If P.M. Harper Won an Illegal Election" *Centre for Constitutional Studies* (3 July 2009).

* Dan Shouldice is a student in the Faculty of Law, University of Alberta. The author's views do not necessarily reflect those of the Management Board and staff of the Centre for Constitutional Studies.

[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] S.C. 2000, c. 9, section 56.1(1).

[3] 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. 73 ("*Applicant Factum*").

[4] Respondents' Record, Volume II of III: Memorandum of Fact and Law, *Conacher v. Canada (Prime Minister)*, Federal Court of Canada, File No. T-1500-08 (11 May 2009) at paras. 39-41 ("*Respondent Factum*").

[5] *Federal Courts Act*, section 18.1(3)(b).

[6] *Respondent Factum* at paras. 40 and 42.

[7] *Ibid*. at paras. 40-43

[8] *Ibid*. at para. 43, citing *Black v. Chretien* (2001) 54 O.R. (3d) 215 at para. 59.

[9] *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374 (H.L.) at 418.

[10] *Respondent Factum* at paras. 45-46.

[11] Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) at v-vi and 1-5.

[12] *Applicant Factum* at para. 73.

[13] *Respondent Factum* at para. 18

[14] *Applicant Factum* at para. 43 and *Respondent Factum* at para. 51, citing

respectively *Re. Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 888 and *Re. Objection by Quebec to a Resolution to Amend the Constitution* [1982] 2 S.C.R. 793 at 802, both citing Sir W. Ivor Jennings, *The Law and the Constitution* (5thed., 1959) at 136.

[15] *Applicant Factum* at para. 30.

[16] *Ibid*. at para. 36.

[17] *Ibid*. at para. 37.

[18] *Ibid*. at paras. 3-13.

[19] *Respondent Factum* at para. 53.

[20] *Ibid*. at para. 51.

[21] *Ibid*. at para. 54.

[22] *Ibid*. at para. 23.

[23] *Applicant Factum* at para. 43.

[24] *Ibid*. at para.s 32 and 47.

[25] *Respondent Factum* at para. 52.

[26] *Ibid*. at para. 54.

[27] *Applicant Factum* at para. 44.

[28] *Respondent Factum* at para. 48.

[29] *Ibid*.; *Constitution Act*, R.S.B.C. 1996, c. 66, section 23; *Election Act*, R.S.O. 1990, c. E-6, section 9.

[30] *Respondent Factum* at para. 18.

[31] *Ibid*. at para. 20.

[32] Hogg, Peter W., *Constitutional Law of Canada*, 2008 Student ed., (Toronto: Thomson Carswell) at 22-23.

[33] *Respondent Factum* at para. 21.

[34] *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

[35] Hogg, *supra* note 32 at 24.

[36] *Applicant Factum* at para. 63.

[37] *Ibid*., citing *Osborne v. Canada (Treasury Board)* [1991] 2 S.C.R. 69 ("*Osborne*").

[38] *Osborne, ibid*. at 25 (emphasis added).

[39] *Respondent Factum* at para. 26.

[40] *Applicant Factum* at para. 66.

[41] *Respondent Factum* at para. 78.

[42] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, section 3.

[43] *Applicant Factum* at para. 49, citing *Figueroa v. Canada (Attorney General)* 2003 SCC 37 at paras. 49-51, citing *Libman v. Quebec (Attorney General)* [1997] 3 S.C.R. 569 at para. 47.

[44]*Applicant Factum*at para. 51, citing *Harper v. Canada (Attorney General)* 2004 SCC 33 at para. 87.

[45] *Respondent Factum* at para. 72.

[46] *Applicant Factum* at para. 17.

[47] *Ibid*. at para. 50.

[48] *Ibid*. at para. 51.

[49] *Ibid*. at para. 52.

[50] *Respondent Factum* at para. 84.

[51] *Ibid*. at para. 81.

[52] *Ibid*. at para. 89.

[53] *Ibid*. at para. 74.

[54] *Ibid*. at para. 59.

[55] *Applicant Factum* at para. 3.

[56] *Respondent Factum* at para. 63.

[57] *Ibid*. at para. 64.

[58] *Ibid*.

[59] Public interest standing is discussed in Jim Young, "Court Affirms Morgentaler's Standing in Constitutional Challenge" *Centre for Constitutional Studies* (29 May 2009).

[60] *Respondent Factum* at para. 65.

[61] *Ibid*. at para. 66.

[62] *Ibid*.

[63] *Ibid*. at para. 60.

[64] *Ibid*.

[65] *Ibid*. at para. 62.

[66] S.C. 2000, c. 9, s. 56.1.

[67] *Applicant Factum* at para. 60.

[68] *Ibid*. at para. 57, citing *Rizzo & Rizzo Shoes Ltd. (Re.)*, [1998] 1 S.C.R. 27 at para. 21.

[69] R.S.C. 1985, c. I-21, section 12.

[70] *Respondent Factum* at para. 10.

[71] *Ibid*. at para. 11.

[72] *Applicant Factum* at para. 60.

[73] *Ibid*. at para. 59, citing *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para. 8.

[74] *Respondent Factum* at para. 38.

[75] *Applicant Factum* at paras. 61-62.

[76] *Ibid*. at paras. 64-65.

[77] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 62 (emphasis in original).

[78] *Respondent Factum* at para. 33.

[79] *Respondent Factum* at paras. 27-29.