Federal Court Rules on P.M. Harper's Premature Election

On September 17, 2009 – just nine days after it heard arguments in court – the Federal Court issued its decision in *Conacher v. Canada (Prime Minister)*.[1] The outcome is a victory for Prime Minister Harper, a disappointment for Democracy Watch (the "citizens advocacy" group that argued the case), and a ruling on constitutional issues that seldom come before the courts.

The case has its background in a 2007 amendment to the *Canada Elections Act*,[2] and an election call the following year that caught many by surprise. Legal arguments in the case addressed the royal prerogative, the office of the Governor General, the jurisdiction of the courts to consider political issues, the creation and enforceability of constitutional conventions, the reach of the *Charter*, and the approach of the courts to ambiguities in legislation. The court outlined the arguments of Duff Conacher and Democracy Watch:

- *That the new section 56.1(2) of the Elections Act "eliminated the convention that the Prime Minister has unlimited discretion when advising the Governor General and replaced it with a new convention" to the effect that a prime minister may only advise dissolution according to the legislated timetable, or in the event of a vote of non-confidence in the House of Commons;*
- *That Prime Minister Harper contravened the Elections Act on September 7, 2008 when he advised the Governor General to dissolve the House; and*
- *That an election like the 2008 general election, held before the date specified in the Elections Act (that is, October 19, 2009) without a non-confidence vote to trigger it, was unfair and contrary to democratic rights in section 3 of the Charter.[3]*

The decision expresses a preoccupation with the fragility of the separation of powers. At the outset of the decision, the judge says:

> *If the executive, legislative and judicial branches of government adhere to their respective obligations within their respective lines of demarcation, the result is responsible government.... [P]aralysis would ensue if the Charter would simply be invoked in advocating one political view, advancing a particular interest, over another; that would simply stymie government actions devolves from responsibilities and rights granted through constitutional supremacy.*

> *In regard to each and every matter submitted in judicial review to the Federal Court, it depends on who acts on what, how and under what authority: in that vein, there exists a balancing act of necessity between judicial interference and judicial abdication.[4]*

The decision analyzes four issues.

Issue 1: Can the Federal Court Review the Prime Minister's Advice?

The court's answer to this question is guided the Ontario Court of Appeal's decision in *Black v. Chrétien*.[5]*Charter* claims, such as Conacher's claim that Prime Minister Harper's advice was contrary to section 3, are "appropriate subject-matter for judicial review [because] it has been ruled that prerogative powers are subject to judicial review if the exercise of such powers violates Charter rights."[6] The court concludes that "advisory decisions can be reviewed as exercises of prerogative," even if the actual decision is made formally by the Governor General.[7] The "advisory power" of a prime minister is not reviewable "in and of itself," in the circumstances of this case, "because it does not affect the rights or legitimate expectations of an individual and is a matter of high policy that is only reviewable on Charter grounds."[8] However, the court finds that the Federal Court has jurisdiction to review the Prime Minister's advice to dissolve Parliament in 2008 because of the allegation that Harper used his advisory power in defiance of a federal statute, the *Elections Act*. This feature – the allegation that prime ministerial power was exercised against the law – places his advice within the court's jurisdiction under the *Federal Courts Act*.[9] The court's finding that it has jurisdiction to hear the arguments about statutes has a downside for Conacher and Democracy Watch. Because the court is reviewing whether the Prime Minister acted "contrary to law," it concludes that the Federal Court apparently has no authority to determine the existence of constitutional conventions – which, by definition, are not law:

> *A finding that a decision-maker acted contrary to a convention does not necessarily mean that the decision-maker acted "contrary to law."[10]*

The Federal Court concludes very cautiously on the issue of constitutional convention:

> *In this particular case, at this specific time, based on precedents before this Court, the matter of convention, in this set of circumstances … is political in nature and is outside the jurisdiction of the Court, bearing in mind the separation of powers under constitutional supremacy.[11]*

Issue 2: Did the Prime Minister Violate a Constitutional Convention?

The Federal Court's reasons nonetheless turn to the question of whether the Prime Minister's advice was contrary to constitutional convention. It accepts that conventions may take shape in either of two ways: by consistent usage or by "explicit agreement of the political actors to the effect that they would behave in certain ways."[12] The court is

unable to find that a convention had formed by 2008 in either of these ways. It agrees with the government that the "relevant actors" who might establish precedents are the Prime Minister and the Governor General:

> *The Applicants' submission that the relevant actors consist of the leaders of the federal political parties does not stand to reason because the leaders of the political parties have no power, be it conventional or legal, to dissolve Parliament.[13]*

Having identified the two "relevant actors," the court notes that "there are no statements from either of the actors to the effect that a new convention had been created."[14] The lack of such statements also dooms the argument that an agreement established the new convention:

> *[T]he intention of the political actors, seen primarily through statements of Cabinet members, has not been explicit. Even if, in fact, it is explicit, it is doubtful that a domestic convention can be initiated solely through the explicit agreement of the parties; recognizing that such agreement has only been acknowledged on an international level within the Commonwealth framework.[15]*

The Federal Court again expresses its conclusion on this issue with a note of caution about constitutional conventions and the fragility of the separation of powers:

> *A court must exercise extreme caution when deciding whether a convention exists. Although courts have not given legal sanctions when a convention has been breached, the opinions of courts on these matters have historically had enormous repercussions. In this specific case, the Applicants' evidence is ambiguous and does not lead the Court to the conclusion that a convention exists.[16]*

Issue 3: Was the Prime Minister's Decision Contrary to the *Elections Act*?

The Federal Court accepts the Government of Canada's underlying argument about the new section of the*Elections Act*:

> *[T]he Governor General has discretion to dissolve Parliament pursuant to Crown prerogative and Section 50 of the Constitution Act, 1867. Any tampering with this discretion may not be done via an ordinary statute, but requires a constitutional amendment under Section 41 of the Constitution Act, 1982, which requires unanimous consent of all provincial governments as well as the federal government….[17]*

The court acknowledges that this interpretation of constitutional law is hard to reconcile with the wording of section 56.1(2) of the *Elections Act*. It finds the record of legislative debate ambiguous: it "does not establish an intention to bind the Prime Minister."[18] The court thus faces a dilemma in interpreting the legal effect of the new section. The decision of the court comes down to the silence of the new section on votes of non-confidence.

> *A government losing the confidence of the House of Commons is an event that does not have a strict definition and often requires the judgment of the Prime Minister. If this Court is to interpret Section 56.1 in the manner the Applicants suggest, this Court would have to define a "vote of non-confidence" or else leave Section 56.1 ambiguous. It is the Court's conclusion that votes of non-confidence are political in nature and lack legal aspects. The determination of when a government has lost the confidence of the House should be left to the Prime Minister and not be turned into a legal issue for the courts to decide.[19]*

Concluding on this issue, the Federal Court says that Conacher and Democracy Watch "do not demonstrate a proper understanding of the separation of powers…. The remedy for the Applicants' contention is … for the count of the ballot box." The court again emphasizes its concern "to ensure that political issues (in time and context) are not made to be legal ones."[20]

Issue 4: Was the Prime Minister's Advice Contrary to the *Charter*?

The Federal Court finds two problems with the argument of Conacher and Democracy Watch that the 2008 "snap election" was contrary to standards of electoral fairness under section 3 of the *Charter*. First, the court finds no "legal reasons" that "the Applicants, or the political parties whose interests they purport to defend, were disadvantaged by the dissolution of Parliament on September 7, 2008."[21] Second the court accepts the government's argument that the 2008 election was no more a "snap election," and therefore no more unfair, than any other federal election.[22] In conclusion on this issue, the court notes a lack of evidence of a *Charter* breach:

> *Although the Applicants allege surprise and disruption prior to the election, it is insufficient to ground a claim on such an issue because, as the Respondents submit, there is no evidence that Democracy Watch could not perform its normal functions during the election period.[23]*

The Federal Court found no legal basis for any of the three declarations that Conacher and Democracy Watch sought. In other words, it found Prime Minister Harper's request for an election in 2008 legal under the *Charter*, the *Elections Act*, and existing constitutional convention. Interestingly, the court did not order that Conacher and Democracy Watch pay costs in the action: the judge explains this by saying that "the proceeding … necessitated that the separation of powers … be explained for the understanding of the public."

So What? What Next?

The decision illustrates the judiciary's traditional reluctance to review decisions of political actors when those decisions have a strong political flavour. It also shows the challenge a judge may face in finding clear criteria to separate the political from the legal. The Federal Court finds and applies a variety of careful distinctions in its decision, any of which may provide grounds for an appeal. The overall logic of the decision emphasizes the separation

of powers and the difficulty of altering the prerogatives of the Crown. This logic appears to apply directly to the several provinces which have enacted “fixed-date election” amendments in the past decade. If so, the enforceability of these provincial laws must now be in some doubt.

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[1] 2009 FC 920. [2] S.C. 2000, c. 9. [3] *Supra* note 1 at para. 13. [4] *Ibid*. at paras. 4 and 7. [5] *Black v. Chretien et al.,* (2001) 54 O.R. (3d) 215. [6] *Supra* note 1 at para. 25. [7] *Ibid*. at paras. 26-27. [8] *Ibid*. at para. 29. [9] *Ibid*. at paras. 29-33; *Federal Courts Act*, R.S.C. 1985, c. F-7, section 18 [10] *Supra* note 1 at para. 31. [11] *Ibid*. at para. 69. [12] *Ibid*. at para. 44. [13] *Ibid*. at para. 46. [14] *Ibid*. at para. 47. [15] *Ibid*. at para. 47. [16] *Ibid*. at para. 72. [17] *Ibid*. at para. 53. [18] *Ibid*. at para. 55. [19] *Ibid*. at para. 59. [20] *Ibid*. at para. 75. [21] *Ibid*. at para. 61. [22] *Ibid*. at para. 62. [23] *Ibid*. at para. 76.