

FEDERAL COURT

BETWEEN

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

**AFFIDAVIT OF PROFESSOR ERROL P. MENDES**

I, Errol P. Mendes, of the City of Ottawa, in the Province of Ontario, MAKE  
OATH AND SAY AS FOLLOWS:

1.1. I am a full Professor of Law at the University of Ottawa, a position which I have held since 2001. Previously, I was Director of the Human Rights Research and Education Centre at the University of Ottawa from 1993 to 2001. From 1979 to 1985, I was an Assistant Professor of Law at the Faculty of Law, University of Alberta. From 1985 to 1991, I was an Associate Professor of Law at the Faculty of Law, University of Western Ontario. In 1991-1992, I was a Visiting Professor of Law at the Faculties of Law, McGill University and Université de Montréal. In 2005-2006, I was a Senior Advisor on

Diversity and Special Projects in the Privy Council Office of the Government of Canada. I have also served in the role of a quasi-judicial human rights adjudicator on the Canadian Human Rights Tribunal and the Ontario Boards of Inquiry under the Ontario Human Rights Code for well over a decade.

1.2. My areas of specialization in the field of Law are Constitutional Law and Democratic Accountability, Human Rights, International Law and Private and Public Sector Governance. I have been teaching, researching and consulting in the above areas since 1979. I am co-author or co-editor of six books dealing with the subjects of Constitutional Law, Democratic Accountability, Human Rights (including the relation to Anti-Terrorism Law and Policy), International Law, and Globalization and Law. I have also written articles on these subjects in a number of leading journals in the field, including the National Journal of Constitutional Law of which I am the Editor-in-Chief. A true copy of my curriculum vita is attached to this affidavit as Exhibit "A".

## ***2. Responsible Government and Timing of elections.***

2.1. Canadian political and constitutional history is based on the principle of Responsible Government, operating within the parameters of the written Constitution and unwritten conventions and prerogative powers. Over time, history demonstrates that an increasing amount of the unwritten component of Responsible Government in the United Kingdom and Canada have become subject to judicial review and oversight. In particular, the history of the development of democratic accountability both in the United Kingdom and in Canada has subjected discretionary powers of the Governor-in-Council and the Crown

to the rule of law and judicial oversight. The limitation of arbitrary discretion by the Crown or the Governor-in-Council (i.e. the Cabinet) is one of the key features of democratic accountability in both the United Kingdom and Canada. This has been achieved by the ability of Parliaments and legislatures in both countries to limit, where necessary for democratic accountability and the rule of law, the unwritten prerogative powers of the Crown, the Prime Minister or the Governor-in-Council and the ambit of conventional rules by duly passed legislation. In Canada, the written constitution that limits the discretionary powers of the Prime Minister, includes the *Canadian Charter of Rights and Freedoms*, which guarantees the right to vote and under Supreme Court of Canada jurisprudence the principle of electoral fairness.

2.2. Canadian political history demonstrates that the most major principle of Responsible Government within the Canadian constitutional framework is that the power to govern is only bestowed upon the Prime Minister and Cabinet if they enjoy the confidence of the House of Commons. If a vote of confidence is lost in the House of Commons, the Prime Minister must either resign to make way for a new cabinet that can have the confidence of the House or advise the Governor General to dissolve Parliament for an election that will produce a new Cabinet that does have the confidence of the House.

2.3. Canadian political history demonstrates that the prerogative powers of the Prime Minister and the Governor-in-Council, which have not been altered by statute, allow the Prime Minister to advise the Governor General to dissolve Parliament even when he or she retains the confidence of the House at times determined by the Prime Minister to seek

electoral advantage as he or she sees fit. While the Governor General has the residual power to refuse such a request, political history in Canada has demonstrated such requests are rarely refused and if so refused can engender a political crisis.

### ***3. The 2007 Amendment to the Canada Elections Act***

3.1. However, the present Prime Minister and his Cabinet has declared that the continuation of the prerogative powers of the Governor-in-Council to seek the dissolution of Parliament in such a fashion, has lead to profound electoral unfairness. The Prime Minister therefore decided to legislate the 2007 Amendment to the *Canada Elections Act*. *Section 56.1*, to limit the prerogative of the Prime Minister to seek dissolution within a four year period except where they have lost the confidence of the House of Commons within the four year period.

3.2. I am in agreement with the Conservative Government of Prime Minister Stephen Harper that fixed election dates will improve the fairness of Canada's electoral system by eliminating the ability of governing parties to manipulate the timing of elections for partisan advantage. I am further in agreement with the Government of the Prime Minister that establishing fixed election dates fulfills one of the present Prime Minister's own key election campaign commitments in the 2006 federal elections and was an important step in improving and modernizing Canada's democratic institutions and practices. Further, I am in agreement with the Government of the Prime Minister that any fixed election law should not affect the prerogative of the Prime Minister to advise dissolution at any time prior to the stipulated date of the third Monday in October, in the event of a

loss of confidence in the House of Commons. I am further in agreement with the Government of the Prime Minister that Section 56.1 of the *Canada Elections Act* explicitly allowed the Governor General to dissolve Parliament where the Government lost the confidence of the House within the four year period. I am in agreement with the views of the Government of the Prime Minister as stated in the Parliamentary debates on the fixed elections law that it would only be when a vote of confidence would be lost in the House of Commons within the four year period that recourse could be made to the residual power of the Governor General to dissolve Parliament.

#### ***4. The Key Aspects of the 2007 Amendment to the Canada Elections Act as it relates to Electoral Fairness***

4.1. There are many key aspects to Section 56.1 of the *Canada Elections Act* as it relates to electoral fairness. First I am in agreement with the Government of the Prime Minister that it is unfair that the governing party should be permitted to time an election to exploit conditions favourable to its re-election. Fixed election dates will level the playing field and provide greater fairness for all parties.

4.2. Second, I am in agreement with the Government of the Prime Minister that electoral fairness, transparency and predictability is enhanced with such a law that allows decisions about election dates not being made behind closed doors such the election date is public knowledge. This is particularly important for smaller parties intending to contest the elections that do not have the more substantial budgets of the established parties and need the time to fundraise and find candidates and volunteers. This may be particularly

true where smaller parties may have participated in by-elections that were quickly followed by a surprise election call by the Prime Minister where no fixed election law exists.

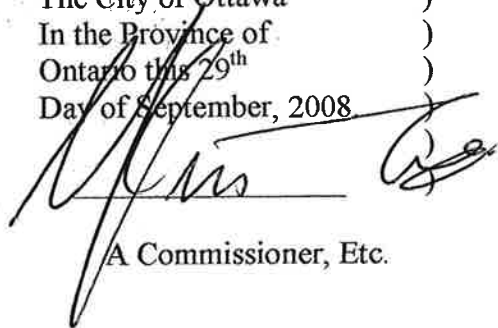
4.3. Third I am in agreement with the Government of the Prime Minister that a fixed election date provides electoral fairness for voters as holding elections in October, other than when a government loses the confidence of the House, could improve fairer voter accessibility and eligibility to vote. Most importantly, I am in agreement with the Government of the Prime Minister that fewer people are transient in October, especially the thousands of students who may be in transition between home and school at the time of any election other than October and may not be able to prove residency at the location of study. This may especially true where students or indeed transient workers may have voted in by-elections that were held that were quickly followed by a surprise election call by the Prime Minister where no fixed election law exists and the students or transient workers do not have the time or resources to establish proof of residency in their new location.

#### ***5. The October 14, 2008 federal election.***

5.1. The Prime Minister undermined both the letter and the spirit of Section 56.1 of the Canada Elections Act when he advised the Governor General on September 7, 2008 to dissolve Parliament over a year before the October 19, 2009 fixed election date. For someone who has devoted his professional life to the rule of law in Canada and internationally this was a stunning development. As Parliament was not sitting, there was

no loss of confidence in the Prime Minister and the Government in the House of Commons. The Prime Minister can not claim that by meeting the opposition party leaders outside the House and by their refusal to commit to not opposing him in the House of Commons until a certain date he has satisfied the spirit and the letter of the fixed elections law. The party of the Prime Minister and his Government may well have obtained unfair electoral advantage given that it was the only party privy to the timing of the election well in advance of the other parties. This may well have been to the detriment of the opposition parties and most likely to the smaller parties who do not have official status or recourse to the public subsidies provided to the established parties. The refusal to observe the letter and spirit of the fixed elections law also calls into question the effectiveness of the provincial fixed election laws in British Columbia, Ontario and Newfoundland. The federal law was modeled on some of these provincial statutes. Finally, the refusal to follow the letter and spirit of the law by the Prime Minister and his government has pulled into the political and potentially the legal controversy, the role of the Governor General of Canada.

Sworn before me at )  
The City of Ottawa )  
In the Province of )  
Ontario this 29<sup>th</sup> )  
Day of September, 2008 )

  
A Commissioner, Etc.

  
ERROL P. MENDES