

FEDERAL COURT

B E T W E E N

DUFF CONACHER and DEMOCRACY WATCH

Applicants

- and -

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

Respondents

AFFIDAVIT OF PETER H. RUSSELL

I, PETER H. RUSSELL, of the City of Toronto in the province of Ontario, MAKE
OATH AND SAY AS FOLLOWS:

1. I am a University Professor Emeritus at the University of Toronto where I taught political science from 1958 to 1996. Much of my research and teaching has been concerned with Canada's written and unwritten constitutions. I am still actively pursuing research and writing about various areas of political science, including our constitution and elections.
2. Attached to this affidavit as Exhibit "A" is a true copy of my curriculum vitae.

3. The passage of Bill C-16 in May 2007, amending the *Canada Elections Act*, fixed October 19, 2009 as the date for the next federal election, and provided that federal elections would take place every four years after that date. The legislation stated that nothing in it affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.
4. The exercise of the discretionary powers of the Governor General is regulated not by written law but by unwritten constitutional convention. The fixed-date election law implies a change in the conventions governing the Governor General's power to dissolve Parliament. .
5. Prior to the passing of Bill C-16, it was considered constitutional in a conventional sense for a Prime Minister whose government had not been defeated in the House of Commons on a confidence matter to ask for, and be granted, a dissolution of Parliament. Even then there were limits on when such a request would be constitutionally correct. Most constitutional authorities considered that it was necessary for the Governor General to be able to refuse a Prime Minister's request for a dissolution in order prevent a "diet of dissolutions." (in the words of Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, Oxford University Press, 1991, at page 35).
6. Most constitutional authorities consider that it was constitutionally proper for Governor General Byng to refuse Prime Minister Mackenzie King's request for a dissolution in June 1926, eight months after the October 1925 election in which the opposition Conservatives had won more seats than the Liberals and with a motion of censure about to be moved in the House of Commons against Mr.

King's government. This is discussed in the authoritative book by Eugene Forsey, *The Royal Power of Dissolution in the British Commonwealth*, Oxford University Press, 1943. .

7. Aside from circumstances such as those noted above, before the passage of Bill C-16 it was considered that Prime Ministers could call “snap elections” relatively early in the life of a Parliament, without having suffered defeat on a confidence matter in the House and primarily to reap the benefit of political circumstances advantageous to the governing party. For instance, in January 1958, Governor General Massey acceded to Prime Minister Diefenbaker's request for a dissolution even though an election had taken place only six months earlier and the Diefenbaker government had not been defeated on a confidence matter. Prime Minister Diefenbaker wanted to take advantage of what he perceived to be a weak new leader of the opposition and turn his minority government into a majority government (as indicated in the authoritative biography by Denis Smith, *Rogue Tory: The Life and Legend of John B. Diefenbaker*, Mcfarlane, Walter and Ross, 1995.)
8. The parliamentary debate on Bill C-16 makes it clear that this 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.
9. For example, discussing the implications of Bill C-16 in the House of Commons Standing Committee on Legal & Constitutional Affairs, Robert Nicholson, Government House Leader and Minister for Democratic Reform, explained that October 19, 2009 would be the date of the next election “only if the government is

able to retain the confidence of the House until then.” (House of Commons Standing Committee on Constitutional and Legal Affairs, December 6, 2006)

Later, when asked what would happen if the Prime Minister asked for a dissolution when he had not been defeated, Mr. Nicholson said “that would require perusal by the Governor General.” (House of Commons Standing Committee on Constitutional & Legal Affairs, December 6, 2006).

10. In ascertaining what constitutional convention requires, Sir Ivor Jennings, the eminent British constitutional scholar, suggested (in a statement adopted by a majority of the Supreme Court of Canada in *Re Resolution to Amend the Constitution*, (1981) 1.S.C.R. 753) that:

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedent consider 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 a rule.

11. Applying the Jennings test to the issue at hand, it seems clear from a political science perspective that a necessary implication of Bill C-16 is that the conventional rule governing requests for a dissolution has been changed. No longer is it constitutional for a Prime Minister who has not been defeated on a confidence matter to ask for an election before the date fixed by Act of Parliament.

12. The actors involved in the convention governing requests for a dissolution of Parliament are the leaders of our political parties. They all supported Bill C-16 and did not dissent from Mr. Nicholson’s explanation of its constitutional implications. The reason for changing the previous rule governing requests for a

dissolution is very clear. For Prime Ministers to be able to ask for the dissolution of Parliament any time they please, without losing the confidence of the House of Commons, would defeat the primary purpose of the fixed-date election law. That Act of Parliament was intended to stabilize our system of parliamentary government in an era when elections frequently result in minority government (as I discussed in my recent book *Two Cheers for Minority Government: The Evolution of Canadian Parliamentary Democracy*, Emond/Montgomery, 2008).

13. The fixed-date election law left intact the Governor General's discretionary power to dissolve parliament. It did this in order to have a safety valve in the event that parliament really does become unworkable before the date fixed for the next election. In my opinion, based on my research, two conditions must be satisfied to establish that an existing Parliament is unworkable. First, the incumbent government must be defeated on a confidence vote in the House of Commons. Second, neither the Leader of the Opposition nor any other party leader is willing to form a government with a reasonable chance of having the confidence of the House of Commons. The first of these conditions was clearly not satisfied when Prime Minister Harper asked the Governor General for a dissolution on September 7, 2008. His government had not lost a confidence vote. Parliament was not even in session when he made his request.
14. If the Governor General had refused the Prime Minister's request, Mr. Harper would have been obliged by constitutional convention to resign. For the Governor General to accept this consequence of refusing the Prime Minister's advise, there must be another parliamentary leader she can call upon to form a government

with a reasonable chance of having the confidence of the House of Commons. In the circumstances that pertained on September 7, 2008, the Governor General had no way of knowing whether such an alternative was available.

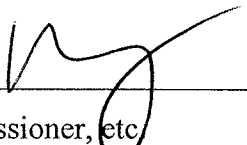
15. The Governor General cannot govern without being advised by ministers responsible to the House of Commons. That is a requirement of the conventions of responsible government. She may have had no choice but to accept Mr. Harper's request for a dissolution even though it was unconstitutional.
16. The fixed-date election law has another purpose that was contravened by Prime Minister's request for a dissolution. Permitting Prime Ministers to call elections any time they please gives the governing party a distinct advantage over opposition parties. The rules of parliamentary democracy should not give incumbent governments a built-in structural advantage in contesting elections over their political opponents. Fairness in the competition between political parties is a key reason why most parliamentary democracies have established fixed-dates for elections. (This is discussed, in particular, in Henry Milner, *Fixing Canada's Unfixed Election Dates*, Institute for Research on Public Policy, 2005).
17. A further point that should be taken into account in considering the reason for the rule that dissolution of Parliament before the date set by legislation should only be permitted when it has been demonstrated that the sitting Parliament is unworkable. In October, 2008, Canada had its third federal election in the last four years, and experienced the lowest level of participation in a federal election in the country's history. That is deep cause for concern. A steady diet of elections, as Eugene Forsey so eloquently argued, is a recipe for lack of public interest in

the electoral process, the key institution of our democratic process. (See Eugene Forsey, *Freedom and Order: Collected Essays*, McClelland & Stewart, 1974, at page 29). Many Canadian voters have indicated that the only reason they could ascertain for the recent election is the Prime Minister's hunch that his party had a good chance of winning a majority of seats in the House of Commons. Conceding to the Prime Minister an untrammelled power to order up an election whenever he pleases is bound to contribute to public cynicism and withdrawal from the democratic process.

18. I swear this affidavit to provide evidence for consideration during the hearing of this application and for no other or improper purpose.

SWORN BEFORE ME at)
the City of Toronto,)
in the Province of Ontario,)
this 21st day of October, 2008)


PETER H. RUSSELL


A Commissioner, etc
Peter Rosenthal