

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20100525

Docket: A-427-09

Citation: 2010 FCA 131

**CORAM: LÉTOURNEAU J.A.
LAYDEN-STEVENSON J.A.
STRATAS J.A.**

BETWEEN:

DUFF CONACHER and DEMOCRACY WATCH

Appellants

and

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

Respondents

Heard at Ottawa, Ontario, on May 25, 2010.

Judgment delivered from the Bench at Ottawa, Ontario, on May 25, 2010.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on May 25, 2010)

STRATAS J.A.

[1] This is an appeal from the judgment of the Federal Court dismissing the appellants' application for judicial review: 2009 FC 920.

[2] Before that court, the appellants applied for various declarations. These focused on the conduct of the Prime Minister in advising the Governor General of Canada to dissolve the 39th Parliament of Canada and to set an election date. The Governor General dissolved Parliament and set an election date of October 14, 2008.

[3] The appellants submit that, in giving the advice he gave to the Governor General, the Prime Minister contravened section 56.1 of the *Canada Elections Act*, S.C., 2000, c. 9. That section provides as follows:

Powers of Governor General preserved

56.1 (1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.

Election dates

(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.

Maintien des pouvoirs du gouverneur général

56.1 (1) Le présent article n'a pas pour effet de porter atteinte aux pouvoirs du gouverneur général, notamment celui de dissoudre le Parlement lorsqu'il le juge opportun.

Date des élections

(2) Sous réserve du paragraphe (1), les élections générales ont lieu le troisième lundi d'octobre de la quatrième année civile qui suit le jour du scrutin de la dernière élection générale, la première élection générale suivant l'entrée en vigueur du présent article devant avoir lieu le lundi 19 octobre 2009.

[4] Section 56.1 must be interpreted in light of the constitutional status and role of the Governor General. Section 56.1 does not prohibit the Governor General from dissolving Parliament and setting an election date. In fact, this discretion and power (enshrined in section 50 of the

Constitution Act, 1867) is specifically preserved by subsection 56.1(1). The Governor General's status, role, powers, and discretions are unaffected by section 56.1.

[5] Various conventions are associated with the Governor General's status, role, powers, and discretions. Some of these conventions, which are open to debate as to their scope, concern the Prime Minister's advice to the Governor General about the dissolution of Parliament and how the Governor General should respond: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., v. 1, looseleaf (Toronto: Carswell, 2007) at 9-29 to 9-33. In our view, given the connection between the Governor General and the Prime Minister in this regard, the preservation of the Governor General's powers and discretions under subsection 56.1(1) arguably may also extend to the Prime Minister's advice-giving role. In any event, it seems to us that if Parliament meant to prevent the Prime Minister from advising the Governor General that Parliament should be dissolved and an election held, Parliament would have used explicit and specific wording to that effect in section 56.1. Parliament did not do so. In saying this, we offer no comment on whether such wording, if enacted, would be constitutional.

[6] The appellants forcefully argued that this interpretation leaves section 56.1 with no meaning. We disagree. Subsection 56.1(2) is a clear expression of the will of Parliament, a will that, on the express terms of subsection 56.1(1), in no way binds the Governor General. But under our constitutional framework and as a matter of law, the Governor General may consider a wide variety of factors in deciding whether to dissolve Parliament and call an election. In this particular case, this may include any matters of constitutional law, any conventions that, in the Governor General's

opinion, may bear upon or determine the matter, Parliament's will as expressed in subsection 56.1(2), advice from the Prime Minister, and any other appropriate matters.

[7] If the section were interpreted in the manner suggested by the appellants, the Prime Minister would be prohibited from advising the Governor General that an election should be held because of dire need or an event of grave importance. We do not accept that section 56.1 has that result. Such a drastic result would require the clearest of statutory wording. This is a further indication that section 56.1, as drafted, does not affect the Prime Minister's ability to give advice to the Governor General.

[8] The appellants urge this Court to have regard to the purpose of section 56.1, as exemplified by Parliamentary statements in *Hansard*. We see no need to have resort to Parliamentary statements, as the wording of section 56.1 is clear. In any event, the Court below found the Parliamentary statements concerning the purpose of section 56.1 to be unhelpful, as there are statements that go in opposite directions. Based on our review of this material, we see no reason to disagree with and interfere with that finding of the court below.

[9] In any event, the purpose behind section 56.1 that the appellants proffer – to prohibit dissolution of Parliament and the calling of a “snap election” at times other than those set out in subsection 56.1(2) – is not reflected in the wording chosen by Parliament in section 56.1. As we have held above, the wording of section 56.1 expresses the will of Parliament but leaves the Prime Minister and the Governor General able to act in the way they did.

[10] Therefore, based on our interpretation of section 56.1, the court below was correct in declining to issue a declaration that the Prime Minister contravened section 56.1.

[11] Likewise, we agree with the court below that the Prime Minister's act in advising the Governor General did not infringe the rights of Canadian citizens to vote and to run for office under section 3 of the Charter. In this regard, the appellants submitted that the Prime Minister caused the election to take place before the times set out in subsection 56.1(2) and this may have caught certain political parties unprepared. To the extent that this may have caused any infringement of section 3 of the Charter, as a matter of law it was the Governor General that called the election, not the Prime Minister. Further, on this issue, the political parties allegedly affected by this are not before this Court. We query the appellants' standing to litigate those parties' section 3 rights; those parties were well-placed to bring such a claim themselves: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 254-256.

[12] Finally, we decline to make a declaration that there is a new constitutional convention that limits the ability of the Prime Minister to advise the Governor General in these circumstances. The court below found as a fact that no such convention exists. That finding is amply supported by the evidentiary record in this case.

[13] As a result, we will dismiss the appeal. In these unusual circumstances and given the novel issues involved, we will not order costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-427-09

APPEAL FROM THE ORDER OF THE HONOURABLE JUSTICE MICHEL M.J. SHORE DATED SEPTEMBER 17, 2009, DOCKET NO. T-1500-08

STYLE OF CAUSE: Duff Conacher and Democracy Watch
v. The Prime Minister of Canada, The
Governor in Council of Canada, The
Governor General of Canada and The
Attorney General of Canada

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: May 25, 2010

REASONS FOR JUDGMENT OF THE COURT BY: Létourneau J.A.
Layden-Stevenson J.A.
Stratas J.A.

DELIVERED FROM THE BENCH BY: Stratas J.A.

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