Court File No.: T-1402-21

FEDERAL COURT

BETWEEN:

DEMOCRACY WATCH and WAYNE CROOKES

Applicants
(Responding Parties)

-and-

PRIME MINISTER OF CANADA
COMMITTEE OF THE PRIVY COUNCIL
ATTORNEY GENERAL OF CANADA

Respondents
(Moving Parties)

MEMORANDUM OF FACT AND LAW OF THE APPLICANTS/RESPONDING PARTIES ON RESPONDENTS ’MOTION TO STRIKE

I. OVERVIEW

1. The bar for striking an application for judicial review is high. The Application should proceed because it has a chance of success. First, this Court and the Federal Court of Appeal have both ruled that the impugned decision of the Prime Minister advising the Governor General to call a snap election is a reviewable matter. Second, the Application raises several significant and new legal issues not considered in these two precedents, including the question of how the British Supreme Court’s 2019 unanimous ruling on an analogous situation affects these precedents and applies in this proceeding. Third, despite the issue in

this case being moot, this Court should exercise its discretion to decide this case of high public importance, given that it would otherwise be elusive of judicial review given the short timelines of elections. Fourth, the Applicant Wayne Crookes should be granted private interest standing, and the Applicant Democracy Watch should be granted public interest standing in keeping with past judicial review applications it has filed and relevant law.

2. Therefore, the Respondents ' motion to strike should be dismissed in its entirety and the Application allowed to proceed.

II. FACTS

a) The Notice of Application

3. On September 14, 2021, the Applicants issued a Notice of Application in Federal Court file T-1402-21 (the "Application"), a judicial review application of the decision of Prime Minister Justin Trudeau (the "Prime Minister") to advise the Governor General of Canada ("Governor General") to call a snap election.[1]

4. The decision was in the form of Order in Council 2021-0892 on August 15, 2021.[2] On August 16, 2021, the Governor General issued a proclamation dissolving Parliament,[3] and issued a proclamation of election writs setting September 20, 2021 as election day.[4]

5. The Application is for a declaration that the Prime Minister's decision violated subsection

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[1] Notice of Application issued September 14, 2021 in Federal Court File No. T-1402-21, **Motion Record (**"***MR***") ***Tab 1***.
[2] Affidavit of Duff Conacher (affirmed January 11, 2022), ***MR Tab 3***, Exhibit A, p. 39 (hereinafter "Conacher Affidavit").
[3] Conacher Affidavit, *supra* note 2, ***MR Tab 3,*** Exhibit B, p. 42.
[4] Conacher Affidavit, *supra* note 2, ***MR Tab 3,*** Exhibit C. p. 49.

56.1(2) of the *Canada Elections Act* (S.C. 2000, c. 9).

b) The Motion to Strike's Scope

6. A motion to strike is limited to a holistic and practical reading of the notice of application, with the facts pled accepted as true. No evidence can be heard on a motion to strike that is based on an alleged failure to disclose a reasonable cause of action or defence.[5] Further, the motion should not involve guesswork as to what future evidence might show.[6]

III. ISSUES

7. The issues in this motion are:

   a) Should the Application be struck as having no merit and being an abuse of this Court's process?
   b) Should the Application be struck for mootness?
   c) Should the Application be struck because the Applicants lack standing?

IV. ARGUMENT

a) Judicial review applications should only be struck if they have no chance of success

8. The bar for striking an application for judicial review because it lacks merit is high. Applications follow the same threshold as actions —— they should only be struck if it is "plain and obvious" that if true, they would be doomed to fail.[7] This occurs "in very

[5] *Federal Court Rules*, SOR 98/106, Rule 221(2), ***BOA, Tab 5***.
[6] *Wenham v Canada (Attorney General)*, 2018 FCA 199 (CanLII), ***BOA Tab 25***, paras. 30, 34 (hereinafter "*Wenham*").
[7] *Federal Court Rules*, SOR 98/106, Rule 221, ***BOA, Tab 5***; *Wenham*, *supra* note 6, ***BOA Tab 25***, para. 33.

exceptional cases" and only if an application is "so clearly improper as to be bereft of any chance of success."[8]

9. Further, the Respondents 'motion is not an opportunity to argue the odds of the Application ultimately succeeding on its merits. As summarized by Justice Stratas, "[w]agering on whether the cause of action will cross the finish line is no part of the court's task".[9]

10. The Application has a chance of success because: (i) it raises serious legal issues for review; (ii) the legal issues are not moot; and; (iii) the Applicants should be granted private and public interest standing. As such, the Application should proceed.

i. *It is an open question whether 2021 snap election decision complies with s. 56.1 of the Canada Elections Act as informed by all constitutional conventions*

11. At paragraphs 38 and following of its written submissions, the Respondents argue that this Application has no hope of success due to a binding 2010 Federal Court of Appeal ("FCA") precedent arising out of a case challenging Stephen Harper's snap-election call in 2008.[10]

12. Thirteen years later, a different factual and legal matrix presents itself to this Court for the review of the 2021 snap-election call, which gives rise to live legal issues meriting a full hearing with the benefit of evidence.

13. In the binding precedent relied on by the Respondent, Stratas J.A. of the Federal Court of Appeal held that part of the assessment to be made by the Governor General on the advice of the Prime Minister under s. 56.1:

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[8] *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 (CanLII), ***BOA Tab 1***, para. 16.
[9] *Wenham*, *supra* note 6, ***BOA Tab 25***, para. 29.
[10] *Conacher v Canada (Prime Minister)*, 2009 FC 920 (hereinafter "*Conacher* (FC 2009)"), ***BOA Tab* 11,** affirmed by *Conacher v Canada (Prime Minister)*, 2010 FCA 131, ***BOA Tab 12*** (hereinafter "*Conacher* (FCA 2010)").

> 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**.[11] [emphasis added]

14. Although the first election following this court precedent concerning the 2008 election occurred in 2011, before the every-four-years fixed election date, it was not a snap election because then-Prime Minister Stephen Harper advised the Governor General to call the election in compliance with the unwritten responsible government and confidence constitutional conventions as a vote of non-confidence in the government had occurred in the House of Commons on March 25, 2011. Prime Minister Harper then advised the Governor General to call the next election on the fixed election date in October 2015, and Prime Minister Justin Trudeau then advised the Governor General to call the election after that on the fixed election date in October 2019. Thus, given they were not snap election calls, in respect of these three elections there was no question of compliance with the spirit and letter of s. 56.1 of the *Canada Elections Act* ("*CEA*") by the Prime Minister's advice to the Governor General leading to these elections.

15. The Applicants intend to submit arguments and evidence that the enactment of the fixed election date measures in 2006, together with the tradition established through the practice of two different Prime Ministers in advising the elections of 2011, 2015 and 2019, and the Governor General acting on that advice, established and demonstrated recognition of a constitutional convention that the Prime Minister may only advise the Governor General to call an election on the every-four-years fixed election date, or after a vote of non-confidence

[11] *Conacher* (FCA 2010), *supra* note 10, ***BOA Tab 12***, para. 6.

in the House of Commons (the "Fixed Election Convention"). This is a new live legal issue distinct from the issues in the 2010 FCA precedent.

16. The Canadian courts have applied a three-question test to determine if a convention has been established: 1. Is there a reason for the rule? 2. What are the precedents? 3. Did the actors in the precedents believe that they were bound by a rule?[12] Sir Ivor Jennings, who developed the three-part test for conventions, stated that "A single precedent with a good reason may be enough to establish the rule."[13]

17. Given that two different Prime Ministers advised the Governor General to call three consecutive elections on dates that comply with the plain meaning, intent and larger context of s. 56.1, and the responsible government and confidence conventions that underlie it, it is more than arguable that their actions established the Fixed Election Convention. It is not at all plain and obvious that the Applicant has no chance of success concerning this new legal issue.

18. The Applicants will argue that the Fixed Election Convention informs the interpretation of s. 56.1 of the *CEA*. To be clear, the Applicants are not asking this Court to enforce the breach of the Fixed Election Convention. Rather, the Applicants rely on the uncontroversial

[12] *Conacher* (FC 2009), *supra* note 10, ***BOA Tab 11***, para. 37.
[13] Sir Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959) at p. 136, as cited in Andrew Heard, "*Conacher* Missed the Mark on Constitutional Conventions and Fixed Election Dates," *Constitutional Forum*, Spring 2010, Vol. 19(1), online: <https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/17260/13861> (hereinafter "Heard"), ***BOA Tab* 26,** pp. 132 and 134.

principle that constitutional conventions can inform the interpretation of statutes, and that the Fixed Election Convention should inform this Court's interpretation of s. 56.1.[14]

19. The practice of two different Prime Ministers advising the calling of the 2011, 2015 and 2019 elections that has established the Fixed Election Convention, as well as the longstanding responsible government and confidence conventions, and larger context in which s. 56.1 was enacted as well as its consistent purpose,[15] all suggest that this Court should come to a different conclusion than it did in its 2009 precedent,[16] and than the FCA did in its 2010 precedent,[17] concerning the intent, meaning and effect of Bill C-16 which enacted the new s. 56.1 of the *CEA*. The Court concluded that:

    a. The Hansard concerning s. 56.1 was ambiguous;

    b. The plain meaning and intent of s. 56.1 was only to require that an election be called every four years because its wording did not explicitly set out and include the responsible government and confidence conventions to restrict the Prime Minister from calling an early snap election;

    c. However, even though the wording of s. 56.1 also does not explicitly set out the convention concerning the Prime Minister's prerogative to advise the Governor General to call an election at any time, s. 56.1 definitely includes this convention and upholds the Prime Minister's prerogative, and;

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[14] *Reference re Secession of Quebec*, [1998] 2 SCR 217, ***BOA Tab 23***, paras. 32, 52-54; *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753, ***BOA Tab 24***, pp. 880-881.
[15] All of which courts are required to take into account, in a fair, large and liberal way, when interpreting a statutory provision: *Oakville (Town) v Clublink Corporation ULC*, 2019 ONCA 826 (hereinafter "*Clublink*"), ***BOA Tab 20***, para. 37, citing E.A. Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983), p. 87; and *Clublink*, para. 38, citing Ruth Sullivan, *Statutory Interpretation*, 3d ed (Toronto: Irwin Law, 2016) at p. 46; and *Interpretation Act*, R.S.C., 1985, c. I-21, ***BOA Tab 6***, s. 12.
[16] *Conacher* (FC 2009), *supra* note 10, ***BOA Tab 11***.
[17] *Conacher* (FCA 2010), *supra* note 10, ***BOA Tab 12***.

d. Even though the wording of s. 56.1 also does not explicitly set out the convention that the Governor General never dissolves Parliament without being advised by the Prime Minister to do so, s. 56.1 also definitely includes that convention.

20. In arguing this case anew on a new factual matrix, thirteen years after it was originally argued, this case will put forward different arguments than those considered by this Court in 2009 and by the FCA in 2010.

21. First, the wording of s. 56.1 states plainly that "**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…" [emphasis added]. If each, which means every, election "must be held" every four years, then early snap election calls are plainly and clearly prohibited by s. 56.1.

22. However, as with all federal and provincial statutes, Bill C-16's fixed election date provisions incorporated automatically *all* the constitutional conventions that apply in the situations addressed by the provisions. The courts can't pick and choose which conventions are incorporated into a statute. As Andrew Heard makes clear:

> Some laws, such as Bill C-16, are crafted with the full knowledge and intent that the bare bones of the law will be modified by supporting conventions. Indeed, a number of statutes passed by the United Kingdom Parliament that now serve as Canada's bedrock constitutional documents granted personal powers to the governor general or lieutenant governors. And yet, it was understood at the time that those powers would usually be exercised according to constitutional conventions that deprive a governor of any personal choice in most circumstances.
> …
> Had that understanding not existed, those statutes would have been drafted in a very different fashion.
> …
> Hundreds of federal and provincial statutes providing powers to the governor in council assume that the governor will in fact neither take part in nor reject the decisions of their council.
> …

> A great irony of both decisions in *Conacher*[18] arises from their emphatic recognition of the conventional right of the prime minister to advise the governor general on an election, while steadfastly refusing to recognize any convention that might constrain when that election might be called.[19]

23. The Applicants will raise in this proceeding the new legal issue of whether the Court erred in its precedent, and the FCA in its precedent, by failing to acknowledge that s. 56.1 automatically incorporates the responsible government and confidence conventions.[20]

24. The Applicants will raise in this proceeding this and other new legal issues concerning the precedent's application of statutory interpretation principles. As the Applicants will introduce as evidence in this proceeding, every statement made by representatives of the government in proposing and introducing Bill C-16, and by every member of the House of Commons in debating Bill C-16, said that the intent of s. 56.1 was to restrict the prerogative of the Prime Minister to call an election any time s/he wants, and to fix election dates for every four years, with the only exception being that the Prime Minister will be able to advise the Governor General to dissolve Parliament when the government loses the confidence of the House of Commons. This Court erred in fact and law in concluding that the statements were ambiguous.[21]

25. As the Applicants will also introduce as evidence in this proceeding, no one in Parliament said that the only intent of Bill C-16 was to require that a federal election be called every four years. The larger context of Bill C-16 when it was enacted in 2006 shows clearly that there

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[18] *Conacher* (FC 2009), *supra* note 10, ***BOA Tab 11***; *Conacher* (FCA 2010), *supra* note 10, ***BOA Tab 12***.
[19] Heard, pp. 129-130, *supra* note 13, ***BOA Tab 26***.
[20] *Conacher* (FC 2009), *supra* note 10, ***BOA Tab 11***, paras. 57-59. *Conacher* (FCA 2010), *supra* note 10, ***BOA Tab 12***, para. 9.
[21] *Conacher* (FC 2009), *supra* note 10, ***BOA Tab 11***, paras. 54-57.

was no reason at all to reduce the already existing *Constitution* provisions that required a dissolution of Parliament and federal election every five years[22] to four years, which this Court concluded was the only reason for s. 56.1. Only three of the previous 19 Parliaments had run for more than four years, and none had since 1993.

26. As well, if the only intent was to reduce the time period from five to four years, there was no reason to do more in s. 56.1 than change the maximum number of years for each Parliament. Instead, s. 56.1 also states that every election "must be held" on the every-four-years fixed election date.

27. In addition, before Bill C-16 was enacted in 2006, three of the previous four federal elections had been snap-election calls by the Prime Minister. There was, therefore, plainly and clearly a larger context that gave Parliament ample reason to restrict, with s. 56.1, the Prime Minister's prerogative to call a snap election whenever s/he wants, which was its intent.

28. It was also self-contradictory and inconsistent for another significant reason for this Court's precedent to conclude, based on only one Hansard statement by the responsible Minister quoted out of context, that s. 56.1 was not intended to, and did not, diminish the Prime Minister's prerogative to advise the calling of an election at any time. In fact, s. 56.1 clearly diminished the Prime Minister's prerogative because the existing *Constitution* provisions allowed the Prime Minister to wait five years before calling an election, and s. 56.1 restricted the Prime Minister's prerogative by reducing that time period to four years. As the Applicants will show in this proceeding, the meaning of the Minister's statement was clearly that the

[22] *Constitution Act, 1867*, ***BOA Tab* 2**, s. 50. *Constitution Act, 1982*, ***BOA Tab* 3**, ss. 4(1).

Prime Minister's prerogative to advise the Governor General to call an election is not diminished by s. 56.1 *if a vote of non-confidence in the government occurs in Parliament*.

29. Given the above, this Application raises several live legal issues concerning whether the Prime Minister complied with s. 56.1 as properly interpreted and informed by the Fixed Election Convention and all other constitutional conventions.

ii. *Unanimous 2019 British Supreme Court precedent also informs interpretation and application of s. 56.1 of the CEA*

30. In addition to the new live legal issues of the proper interpretation of s. 56.1 of the *CEA*, including concerning how that interpretation is informed by the constitutional convention established by the 2011, 2015 and 2019 election calls, another new live legal issue is raised by the British Supreme Court's unanimous 2019 ruling that a decision by the Prime Minister to advise the Monarch to suspend (in that case, prorogue) Parliament:

> will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.[23]

31. The evidence is entirely clear and consistent that Prime Minister Trudeau advised the Governor General, as the representative of the Monarch, to suspend Parliament and call the 2021 federal election against the clear and express will of Parliament. The following evidence shows clearly that the will of Parliament was to continue to operate and fulfill its constitutional functions as a legislature:

    a. A 327-1 vote in the House of Commons on May 25, 2021 in favour of a resolution not to hold an election during COVID;[24]

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[23] *R. (Miller) v The Prime Minister*, [2019] UKSC 41, ***BOA Tab 22,*** para. 50 (hereinafter "*R. (Miller)*").
[24] Conacher Affidavit, *supra* note 2, ***MR Tab 3,*** Exhibit D, p. 56, and Exhibit E, p. 61.

b. Parliament was adjourned at the time the Prime Minister advised the Governor General to call a snap election, and no vote of non-confidence in the government had occurred before the adjournment on June 23, 2021. In fact, opposition parties had clearly expressed confidence in the government by voting to approve the government's Speech from the Throne, and every other matter of confidence proposed by the government after that, including voting to approve the government's budget bill on June 23, 2021;[25]

c. On July 27, 2021, New Democratic Party ("NDP") Leader Jagmeet Singh sent an open, public letter to Governor General Mary May Simon calling on her to reject advice by the Prime Minister to dissolve Parliament and call an election because the House of Commons had expressed clear confidence in the government, and had voted overwhelmingly not to hold an election during COVID;[26]

d. On August 9, 2021, NDP Leader Singh sent an open, public letter to Prime Minister Trudeau expressing confidence in the Liberal government and asking the Prime Minister to open Parliament again and govern.[27] Given the party standings in the House of Commons at the time of the adjournment of Parliament on June 23, 2021,[28] with the NDP's support the Liberals had the support of a majority of MPs in Parliament and, therefore, the NDP Leader's expression of support shows clearly that Parliament had confidence in the government;

e. On August 9, 2021, Official Leader of the Opposition Erin O'Toole was quoted in a media article saying "My biggest concern right now is the potential fourth wave of COVID-19. We shouldn't be rushing to an election".[29]

f. On July 29, 2021, the caucus of the Green Party of Canada issued an open, public letter to the Governor General calling on her to reject advice by the Prime Minister to dissolve Parliament and call an election because the House of

[25] Conacher Affidavit, *supra* note 2, ***MR Tab 3,*** Exhibit G, p. 67.
[26] Conacher Affidavit, *supra* note 2, ***MR Tab 3,*** Exhibit H, p. 72.
[27] Conacher Affidavit, *supra* note 2, ***MR Tab 3,*** Exhibit I, p. 75, and Exhibit J, p. 78.
[28] Conacher Affidavit, *supra* note 2, ***MR Tab 3,*** Exhibit F, p. 64.
[29] Conacher Affidavit, *supra* note 2, ***MR Tab 3,*** Exhibit K, p. 81.

Commons had expressed clear confidence in the government by passing 24 government bills, including two confidence votes, and because of the danger to voters of holding an election during the COVID crisis.[30]

g. On August 3, 2021, Bloc Québécois Leader Yves-François Blanchet was quoted in media articles saying "Parliament is functioning, and can function" and "The Bloc Québécois did not ask for an election" and that calling an election would be "irresponsible" and would "increase the level of danger" for voters.[31]

h. On August 15, 2021, Official Leader of the Opposition Erin O'Toole was quoted in a media article saying Prime Minister Trudeau's snap election call that day was "unnecessary" and "dangerous" and for "political gain."[32] That same day, giving similar reasons, the NDP issued news release denouncing the snap election call,[33] as did the Bloc Québécois.[34]

32. The British Supreme Court's unanimous ruling mirrors but lends greater precision to the holding of Stratas J.A. in the precedent relied on by the Respondent, that to be considered under s. 56.1 of *Canada Elections Act* are "**constitutional law**, any **conventions**, … **Parliament's will** … and **any other appropriate matter** [emphasis added]."

33. The British Supreme Court's unanimous ruling makes it clear that the courts can and should not only intervene in, but also rule that is unlawful for, a decision by the Prime Minister to have "the effect of frustrating or preventing … the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive."

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[30] Conacher Affidavit, *supra* note 2, ***MR Tab 3,*** Exhibit L, p. 89.
[31] Conacher Affidavit, *supra* note 2, ***MR Tab 3,*** Exhibit M, p. 92, and Exhibit N, p. 97.
[32] Conacher Affidavit, *supra* note 2, ***MR Tab 3,*** Exhibit O, p. 100.
[33] Conacher Affidavit, *supra* note 2, ***MR Tab 3,*** Exhibit P, p. 106.
[34] Conacher Affidavit, *supra* note 2, ***MR Tab 3,*** Exhibit Q, p. 109.

34. The new factual-legal question to be considered by this Court in this proceeding will be how the evidence to be tendered in this case in relation to the 2021 snap election (that the ***convention*** was affirmed over the course of years until it was violated here, that ***Parliament's will*** was disregarded, and ***other appropriate matters*** such as the pandemic were not considered) measures up against the Canadian precedent, new legal arguments concerning the interpretation and application of s. 56.1, and the clarity and force of the standard set by the 2019 unanimous British precedent.

35. Therefore, this Application should be allowed to proceed as it clearly has a chance of success, and it is in no way plain and obvious that it will fail.

iii. The Application should not be struck based on abuse of process

36. The Application raises standing, justiciability, and review issues concerning the interpretation and application of the *Canada Elections Act* ("*CEA*") which have not been adjudicated by the courts. No circumstances exist in this matter that would give rise to striking the Application based on an abuse of process. Similarity with previous litigation does not render this challenge with unique components abusive of the court's process.

37. Since, as outlined above, the case has a chance of success, it does not meet the higher bar of constituting an abuse of process. Therefore, there is no basis to strike the Application in whole or in part.

b) <u>The Application is not moot</u>

38. The Respondents/Moving Parties claim that the Application by Wayne Crookes and Democracy Watch is moot because the 2021 federal election has now concluded and the

relief would have no practical effect on the parties (at paragraph 23-27). They further claim that this Court should not exercise its discretion to decide the case (paragraphs 28-36).

39. The Respondents are correct that this case is technically moot, given that the 2021 federal election has now concluded and the application seeks only declaratory relief. However, this Court should exercise its discretion to decide this case of high public importance. The case meets all three factors set out in *Borowski*.[35]

40. First, as conceded by the Respondents, there exists an adversarial context in which both sides take opposing positions and are represented by counsel.[36]

41. Second, the case raises "an important question of a recurring nature but of brief duration making it elusive of review … [and] a matter of public importance, the resolution of which is in the public interest."[37] There is no doubt that the scope of the fixed election date measure and ability of the Prime Minister to call an election where a non-confidence vote has not occurred (s. 56.1) in the *CEA* is a matter of public importance. In fact, the Federal Court and Federal Court of Appeal ruled on a situation of the Prime Minister calling a snap election (over one decade ago), despite it being technically moot at that time.[38] The issue is no less important today. The court should consider it anew, particularly given the additional legal issues and evidence to be raised, outlined above.

42. The issue in this case is also a question of a recurring nature but of brief duration, making it elusive of review. Elections are frequent, though short. The 2021 federal election, in

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[35] *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342, ***BOA Tab 8***, pp. 358-363.
[36] *Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67, ***BOA Tab 10***, para 10.
[37] *McCauley v the Ontario Parole Board*, 2021 ONSC 1874, ***BOA Tab 19***, para. 5.
[38] *Conacher* (FC 2009), *supra* note 10, ***BOA Tab 11***; *Conacher* (FCA 2010), *supra* note 10, ***BOA Tab 12***.

particular, was very short: its 36-day duration was the shortest possible period under our electoral law.[39] It is not practicable to judicially review the Prime Minister's decision during the election period itself (given the court delays under the rules, the need to marshal appropriate evidence in support of the judicial review, and the need for fairness to the respondent). Thus, the hearing of the issue after the fact is the only realistic way to proceed. In *Conacher v Canada (Prime Minister)*, for example, the hearing of the issue took place eleven months after the federal election.[40]

43. Third, it is well within the proper law-making function of the court to hear the matter. Certainly, the Court seemed to accept that it was well within its proper law-making function to hear the matter in *Conacher v Canada (Prime Minister)*, finding:

> it stands to reason that prerogative powers must be exercised in accordance with the law and this application asks whether section 56.1 has been violated. It appears that the Federal Court has jurisdiction over this limited issue pursuant to paragraph 18.1(4)(*f*) of the Federal Courts Act, if, as the applicants allege, that decision was made in contravention of a federal statute.[41]

44. Fundamentally, this case concerns the issue of when the Prime Minister can call an election, as circumscribed by the *CEA*. If courts are unable to review the Prime Minister's decision, it is effectively left up to the Prime Minister to interpret s. 56.1 of the *CEA*, despite the great potential for self-interested abuses.

c) Wayne Crookes and Democracy Watch should be granted private or public interest standing

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[39] *Canada Elections Act*, SC 2000, c 9, ss. 57(1.2)(c), ***BOA Tab 1***.
[40] *Conacher* (FC 2009), *supra* note 10, ***BOA Tab 11***.
[41] *Conacher* (FC 2009), *supra* note 10, ***BOA Tab 11***, para. 29.

45. The Applicant Wayne Crookes should be granted private standing, as he is a qualified elector. Under s. 18.1 of the *Federal Courts Act,* only those who are "directly affected" can ask this Court to review a decision. To be "directly affected" under s. 18.1, the decision at issue must be "one which directly affects the party's rights, imposes legal obligations on it, or prejudicially affects it directly". The focus at this stage of the inquiry is on the impact that the decision will have "on the rights and interests of the applicants".[42] In this case, the issue is whether the Prime Minister violated the *CEA* by improperly advising the Governor General to call an election. The Prime Minister's decision to effectively initiate the process that will necessarily result in an election impacts Mr. Crookes 'rights and interests by dissolving Parliament (Canada's legislative branch), effectively preventing it from carrying out its functions for Canadians such as Mr. Crookes; and by acting as a trigger to the possible exercise of Mr. Crookes 'right to vote.

46. The Applicant Democracy Watch should furthermore be granted public interest standing. It is well-established law that, even if a specific member of the public is not affected by an administrative action, an entity can receive public interest standing to apply for judicial review of the action, and the test for public interest standing is to be applied purposively and flexibly.[43]

47. In a series of cases involving similar administrative tribunal decisions to those at issue in the Application, the Federal Court of Appeal and Federal Court granted Democracy Watch

[42] *P & S Holdings Ltd v Canada*, 2015 FC 1331, ***BOA Tab* 21**, para. 31.
[43] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, ***BOA Tab 9***, paras. 33 and 37.

public interest standing.[44] Further, the Applicant satisfies the criteria for public interest standing because: the Application raises serious justiciable issues; the Applicant has a real stake or genuine interest in the Application's issues; and the Application is a reasonable and effective means of bringing the issues before the courts.

i. The Application raises serious justiciable issues

48. As detailed above, the Application raises serious justiciable issues concerning the interpretation of s. 56.1 of the *CEA*. While the courts decided similar issues in *Conacher v. Canada (Prime Minister)*,[45] these issues were decided on a different evidentiary record than what is proposed in the present case, and new legal issues have arisen since given the constitutional convention that has been established, and the British Supreme Court's unanimous 2019 ruling on an analogous situation.[46]

ii. The Applicant has a real stake or genuine interest in the issues

49. In its factum, the Respondents concede that Democracy Watch "may have an interest in the issues raised" (paragraph 58).

50. There is no doubt that Democracy Watch has been genuinely interested and continuously engaged in the Application's issues. As noted above, it has been an applicant in *Conacher v.*

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[44] *Democracy Watch v Canada (Attorney General) and Dominic Leblanc*, 2018 FCA 194, ***BOA, Tab 17***; *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195, ***BOA, Tab 13***; *Democracy Watch v Canada (Attorney General)*, 2018 FC 1291, ***BOA, Tab 14***; *Democracy Watch v Canada (Attorney General)*, 2019 FC 388, ***BOA, Tab 15***; *Democracy Watch v Canada (Attorney General)*, 2021 FC 613, ***BOA, Tab 16***.
[45] *Conacher* (FC 2009), *supra* note 10, ***BOA Tab 11***, para. 29.
[46] *R. (Miller)*, *supra* note 23, ***BOA Tab 22***.

Canada (Prime Minister),[47] which previously dealt with the same issue. It has also sought to litigate a similar issue in relation to a recent New Brunswick provincial election in *Democracy Watch v New Brunswick (Attorney General)*.[48]

51. Democracy Watch has also demonstrated "a real and continuing engagement with …questions of democratic reform and ethical behaviour in government."[49] Simply put, it is precisely this sort of issue with which Democracy Watch concerns itself.

52. Allowing the Application to proceed is furthermore in the public interest, as it enables to public to understand whether the Prime Minister acted lawfully in advising the calling of a snap election against the will of Parliament.

iii. The Application is a reasonable and effective way of bringing the issues before the courts

53. Providing that this Court accepts Democracy Watch's argument that it intends to bring a fresh look to an issue decided more than a decade ago, this Application is a reasonable and effective way of bringing the issue before the Court, due to the following factors:

    a. The Applicant has the capacity to bring forward the claim, including resources and expertise. It has demonstrated a consistent engagement with this type of issue meant to check the powers of government actors.[50] In fact, it has previously brought this same issue before the court.

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[47] *Conacher* (FC 2009), *supra* note 10, ***BOA Tab 11***, para. 29.
[48] *Democracy Watch v New Brunswick (Attorney General)*, 2021 NBQB 233, ***BOA Tab 15***.
[49] *Democracy Watch v Canada (Attorney General)*, 2021 FC 613, ***BOA, Tab 16,*** para. 68.
[50] *Democracy Watch v Canada (Attorney General) and Dominic Leblanc*, 2018 FCA 194, ***BOA, Tab 17***; *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195, ***BOA, Tab 13***; *Democracy Watch v Canada (Attorney General)*, 2018 FC 1291, ***BOA, Tab 14***; *Democracy Watch v Canada (Attorney General)*, 2019 FC 388, ***BOA, Tab 15***; *Democracy Watch v Canada (Attorney General)*, 2021 FC 613, ***BOA, Tab 16***.

b. The case constitutes public interest litigation and transcends the interests of those most directly affected. As noted above, it provides an opportunity for the Court to determine whether Prime Minister acted lawfully in advising the calling of a snap election against the will of Parliament.

c. The involvement of Wayne Crookes ensures that the perspective of an elector will be considered by the Court in its decision. Therefore, there is no way to bring this case forward in a way that would more comprehensively canvass the interests of those directly affected. Furthermore, to date, no other elector has applied for judicial review of the decision (nor has any other individual).

54. Therefore, Democracy Watch should be granted public interest standing.

V. CONCLUSION

55. For the reasons outlined above, the Respondents ' motion should not be allowed, and the Application should proceed in whole.

ALL OF WHICH IS SUBMITTED THIS 11th day of January 2022.

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List of Authorities

Legislation

1. *Canada Elections Act*, SC 2000, c 9, s. 56.1, ss. 57(1.2)(c)

2. *Constitution Act, 1867*, 30 & 31 Vict, c 3, s. 50

3. *Constitution Act, 1982*, ss. 4(1)

4. *Federal Courts Act*, RSC 1985, c F-7, ss. 18, 18.1

5. *Federal Courts Rules*, SOR 98/106, Rule 221

6. *Interpretation Act*, RSC 1985, c I-21, s. 12

Jurisprudence

7. *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 (CanLII)

8. *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342

9. *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45

10. *Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67

11. *Conacher v Canada (Prime Minister)*, 2009 FC 920

12. *Conacher v Canada (Prime Minister)*, 2010 FCA 131

13. *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195

14. *Democracy Watch v Canada (Attorney General)*, 2018 FC 1291

15. *Democracy Watch v Canada (Attorney General)*, 2019 FC 388

16. *Democracy Watch v Canada (Attorney General)*, 2021 FC 613

17. *Democracy Watch v Canada (Attorney General) and Dominic Leblanc*, 2018 FCA 194

18. *Democracy Watch v New Brunswick (Attorney General)*, 2021 NBQB 233

19. *McCauley v the Ontario Parole Board*, 2021 ONSC 1874

20. *Oakville (Town) v Clublink Corporation ULC*, 2019 ONCA 826

21. *P & S Holdings Ltd v Canada*, 2015 FC 1331

22. *R. (Miller) v The Prime Minister*, [2019] UKSC 41

23. *Reference re Secession of Quebec*, [1998] 2 SCR 217

24. *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753

25. *Wenham v Canada (Attorney General)*, 2018 FCA 199 (CanLII)

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26. Andrew Heard, "*Conacher* Missed the Mark on Constitutional Conventions and Fixed Election Dates," *Constitutional Forum*, Spring 2010, Vol. 19(1), online: <https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/17260/13861>.