Justice Centre
for Constitutional Freedoms

March 31, 2015

Sent by facsimile to 780-422-5134
and by email to: LTGov@gov.ab.ca

The Honourable Colonel (Ret'd) Donald S. Ethell
Office of the Lieutenant Governor of Alberta
3rd Floor, legislature Building
10800-97 Ave
Edmonton, AB, T5K 2B 6

Your Honour,

Re: Upholding the Constitutional Principle of the Rule of Law

As you are no doubt aware, in 2012, the Legislative Assembly of Alberta passed legislation requiring elections to be held once every four years, in the March-to-May window. Promoting this measure, then Attorney-General Verlyn Olson argued that our political process requires integrity, transparency, predictability and fairness. Requiring elections to be held every four years would allow the government and civil service to work within clearly established time lines, leading to improved governance. PC and opposition MLAs agreed that, aside from the $25 million cost of holding an election, manipulating the political process by calling unscheduled elections created a very unfair advantage for the governing party.

The relevant section of Alberta's *Election Act*, Section 38.1, states:

> **General election dates**
>
> **38.1(1)** Nothing in this section affects the powers of the Lieutenant Governor, including the power to dissolve the Legislature, in Her Majesty's name, when the Lieutenant Governor sees fit.
>
> **(2)** Subject to subsection (1), a general election shall be held within the 3-month period beginning on March 1, 2012 and ending on May 31, 2012, and afterwards, general elections shall be held within the 3-month period beginning on March 1 and ending on May 31 in the 4th calendar year following polling day in the most recent general election.

The interpretation of Section 38.1 of the *Election Act* is now the subject of Court Action No. 1503-04488 (*Tom Engel v. James Prentice*) in the Alberta Court of Queen's Bench, with the initial hearing having taken place yesterday, March 30. I attach a copy of the Summary of Submissions by Mr. Prentice, President of Executive Council, in *Engel v. Prentice*.

In his Submissions, Mr. Prentice argues that the Lieutenant Governor can dissolve the Legislature when he "sees fit". Mr. Prentice argues that your decision is not justiciable because you exercise the royal prerogative. Mr. Prentice goes on to argue that, "as a matter of convention, the Lieutenant Governor follows the advice of the Premier but his decision to follow (or indeed not to do so) is not justiciable."

I write to urge you to exercise your discretion in accordance with the constitutional principle of the rule of law, which stipulates (among other things) that governments are not above the law, and that governments are required to follow and obey their own laws. You alone have the legal authority to ensure that Section 38.1 of the *Election Act*, passed into law by the Legislative Assembly of Alberta, is complied with. You alone have the legal authority to ensure that the Alberta Government obeys its own legislation, passed as valid and binding law by the Legislative Assembly of Alberta.

The rule of law is a constitutional principle enshrined in both the *Charter* as well as Canada's pre-*Charter* constitutional framework. The rule of law is one of the pillars of Western civilization, with roots dating back to pre-Christian times. Plato argued that "if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state." In similar fashion, Aristotle stated that "[i]t is more proper that law should govern than any one of the citizens." The Roman statesman Cicero noted the connection between the rule of law and freedom: "We are all servants of the laws, in order that we may be free." Closer to home and closer in time, the *Magna Carta* made it clear in 2015 that not even the King of England is above the law.

Most Canadians take it for granted that the law applies to everyone, even when we disagree with a law. Yet Premier Prentice seems bent on ignoring the rule of law, by disobeying clear provisions of the *Election Act* that were passed into law by the Legislative Assembly of Alberta.

You alone have the legal authority to ensure that Alberta does not become a jurisdiction where there are two sets of laws: one for the governing elite, and another for the rest of us.

The Alberta Government has argued correctly in Court that the Lieutenant-Governor has sole authority and discretion to dissolve the Legislature. **But the Alberta Government has provided neither explanation nor justification as to why the Premier and cabinet should not have to obey the law**.

If you allow the *Election Act* to be ignored and violated, it makes a mockery of legislation as well as the rule of law.

Thank you for your attention to this matter.

Yours truly,

John Carpay, B.A., LL.B.
Barrister and Solicitor

cc. Premier James Prentice

SUMMARY OF SUBMISSIONS

for

James Prentice, PC, QC,
President of Executive Council
Respondent to Originating Application

Overview

The Respondent submits that the law is clear and this Application should be dismissed in its entirety.

The Applicant advances two central arguments which involve:

(1) the interpretation and application of s.38.1 of the *Election Act*, RSA 2000, c. E-1 **[Tab 1]**, and

(2) section 3 of the *Charter* **[Tab 10]**.

In addition, the Applicant raises:

(3) the doctrines of legitimate expectation and promissory estoppel.

These arguments are addressed below.

There is also an issue of standing.

Preliminary Point

Although the named Respondent is Mr. Prentice, it is the Lieutenant Governor who dissolves the Legislature pursuant to s. 38.1 of the *Election Act* **[Tab 1]** so that an election may actually be held. The provision specifically allows the Lieutenant Governor to take this step when he "sees fit" and that decision is not justiciable as the Lieutenant Governor exercises the royal prerogative to dissolve:

- Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 70 **[Tab 3]**

The Lieutenant Governor takes the advice of the Premier on this point but it is the Lieutenant Governor who decides. As a matter of convention, the Lieutenant Governor follows the advice of the Premier but his decision to do so (or indeed not to do so) is not justiciable.

- *Bert Brown v. Alberta*, 1998 ABQB 665, [1998] A.R. 225 (Q.B.) at 333 **[Tab 4]**, aff'd 1999 ABCA 256, [1999] A.J. No. 1066 (Alta. C.A.) **[Tab 5]**

The convention that the Lieutenant Governor acts on the advice of the Premier leads to the corollary that the Premier has a role in providing that advice. His decision to give advice to the Lieutenant Governor on whether and when to dissolve the Legislature is likewise a convention. Neither convention is restricted by statute. Neither convention is justiciable.

Specific points in Response

1. *Election Act*, RSA 2000, c. E-1

The *Elections Act* does not the prohibit calling of an election prior to 4 years. Section 38.1(1) of the Act expressly preserves the power of the Lieutenant Governor to dissolve the Legislature at any time.

> 38.1(1) Nothing in this section affects the powers of the Lieutenant Governor, including the power to dissolve the Legislature, in Her Majesty's name, when the Lieutenant Governor sees fit.

The Applicant's suggestion at paragraph 30 of his Originating Application that there is a qualifier on the absolute discretion of the Lieutenant Governor to dissolve the Legislature "when (he) sees fit" is not supported by case law. To the contrary, parallel and virtually identical provisions in federal legislation have been upheld and confirm that this power is clear and unqualified by any restrictions.

- *Conacher v. Canada*, 2010 FCA 131 (application for leave to appeal to the SCC dismissed January 20, 2011) **[Tab 6]**.

Further, any legislative attempt to qualify the Lieutenant Governor's power would be unconstitutional.

2. *Charter*, s. 3

The Federal Court of Appeal in *Conacher* held that the Governor General's calling an early election did not breach section 3 of the *Charter*: paragraph 11 **[Tab 6]**.

In *Taft v. Alberta*, 2011 ABQB 769 at paragraph 18 **[Tab 7]**, this Court said that "the government of the day has the duty of taking *reasonable* steps to ensure that the rights of eligible voters and those running for office are reasonably facilitated and not unreasonably impeded". [Emphasis in the original.] There is no evidence that the rights of any eligible voters or those running for office would in any way be impeded if an election were called early.

3. Legitimate Expectation and Promissory Estoppel

These doctrines do not apply to the matter before this Court. The Supreme Court of Canada has stated that "it is fundamental to our system of government that a government is not bound by the undertakings of its predecessor. The doctrine of legitimate expectations would place a fetter on this essential feature of democracy."

- *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525, paragraph 72 **[Tab 8]**

4. Standing

In any event, the Applicant has failed to show that his rights would be affected by an early election call, and he has no standing: *Conacher*, paragraph 11 **[Tab 6]**.

David Phillip Jones, Q.C.
de Villars Jones
Barristers & Solicitors
of Counsel for the Respondent
27 March 2015

Engel v. Prentice