COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

126-21-CA

DEMOCRACY WATCH

APPELLANT

- and -

PREMIER OF NEW BRUNSWICK

RESPONDENT

Democracy Watch v. Premier of New Brunswick, 2022 NBCA 21

CORAM:
The Honourable Justice Drapeau
The Honourable Justice French
The Honourable Justice LeBlond

Appeal from a decision of the Court of Queen's Bench:
October 29, 2021

History of Case:

Decision under appeal:
2021 NBKB 233
2022 NBKB 164

Preliminary or incidental proceedings:
Referral back for determination of preliminary issue of public interest standing:
2022 NBCA 21

Appeal heard:
May 24, 2022 and September 29, 2022

Judgment rendered:
December 8, 2022

Reasons for judgment by:
The Honourable Justice Drapeau

DÉMOCRATIE EN SURVEILLANCE

APPELANTE

- et -

LE PREMIER MINISTRE DU NOUVEAU-BRUNSWICK

INTIMÉ

Démocratie en surveillance c. le Premier ministre du Nouveau-Brunswick, 2022 NBCA 21

CORAM :
l'honorable juge Drapeau
l'honorable juge French
l'honorable juge LeBlond

Appel d'une décision de la Cour du Banc de la Reine :
le 29 octobre 2021

Historique de la cause :

Décision frappée d'appel :
2021 NBBR 233
2022 NBBR 164

Procédures préliminaires ou accessoires :
Renvoi pour détermination de la question préliminaire de la qualité pour agir dans l'intérêt public :
2022 NBCA 21

Appel entendu :
le 24 mai 2022 et le 29 septembre 2022

Jugement rendu :
le 8 décembre 2022

Motifs de jugement :
l'honorable juge Drapeau

COURT OF APPEAL OF N.B.
RECEIVED AND FILED
DEC 0 8 2022
REÇU ET DÉPOSÉ
COUR D'APPEL DU N.-B.

Concurred in by:
The Honourable Justice French
The Honourable Justice LeBlond

Counsel at hearing:

For the appellant:
Jamie Simpson

For the respondent:
Isabel Lavoie Daigle and
E. Rose Campbell

THE COURT

Democracy Watch's public interest standing is confirmed.

The application judge's interpretation of ss. 3(3) and 3(4) of the *Legislative Assembly Act*, the so-called "fixed-election-date" legislation, is set aside. That is, as well, the case for his finding of non-justiciability and his conclusion the Premier could lawfully provide the Lieutenant-Governor with the dissolution and election advice that led to the September 14, 2020 election. Just as there is no evidence the Premier's advice contravened ss. 3(3) and 3(4), there is no evidence that it conformed to those provisions.

Notwithstanding the foregoing, the dismissal of the application for a declaration that the Premier's advice contravened ss. 3(3) and 3(4) is upheld, albeit for reasons that materially differ from those the application judge put forward.

However, the appeal against the order of costs made in the court below is allowed. That order is set aside, and the Court directs the parties bear their own costs throughout.

Souscrivent aux motifs :
l'honorable juge French
l'honorable juge LeBlond

Avocats à l'audience :

Pour l'appelante :
Jamie Simpson

Pour l'intimé :
Isabel Lavoie Daigle et
E. Rose Campbell

LA COUR

La qualité pour agir dans l'intérêt public de Démocratie en surveillance est confirmée.

L'interprétation donnée par le juge saisi de la requête aux par. 3(3) et 3(4) de la *Loi sur l'Assemblée législative*, appelés communément les « dispositions législatives sur les élections à date fixe », est rejetée. Il en va de même de sa conclusion de non-justiciabilité et de sa conclusion selon laquelle le premier ministre pouvait légalement donner à la lieutenante-gouverneure la recommandation de dissolution et d'élection qui a amené l'élection du 14 septembre 2020. Tout comme il n'y a aucune preuve que la recommandation du premier ministre contrevenait aux par. 3(3) et 3(4), il n'y a aucune preuve qu'elle était conforme à ces dispositions.

En dépit de ce qui précède, le rejet de la requête dans laquelle était sollicitée une déclaration portant que la recommandation du premier ministre contrevenait aux par. 3(3) et 3(4) est confirmé, quoique pour des motifs considérablement différents de ceux qui ont été donnés par le juge saisi de la requête.

Toutefois, l'appel à l'encontre de l'ordonnance d'adjudication des dépens rendue par la cour d'instance inférieure est accueilli. Cette ordonnance est annulée et la Cour ordonne que les parties assument leurs propres frais dans toute l'affaire.

The judgment of the Court was delivered by

DRAPEAU, J.A.

I. Introduction, Overview and Preview of Decision

[1] On August 17, 2020, the Premier, whose government was then in a minority position in the Legislative Assembly, advised the Lieutenant-Governor to dissolve the Assembly and order a general election for September 14, 2020. The Lieutenant-Governor executed an Order-in-Council pursuant to s. 13 of the *Elections Act*, R.S.N.B. 1973, c. E-3 and issued a Proclamation to that end. As a result of the election, the Premier's party was returned to power with a majority of the seats in the Assembly. Democracy Watch contends the Premier's dissolution and election advice to the Lieutenant-Governor breached the explicit obligation imposed upon the Premier by the *Legislative Assembly Act*, R.S.N.B. 2014, c. 116, to recommend an election in accordance with the schedule established in s. 3(4), which reads as follows:

3(4) Subject to the power of the Lieutenant-Governor referred to in subsection (3), the Premier shall provide advice to the Lieutenant-Governor that the Legislative Assembly be dissolved and a provincial general election be held on the following dates:	3(4) Sous réserve du pouvoir du lieutenant-gouverneur visé au paragraphe (3), le premier ministre recommande au lieutenant-gouverneur que l'Assemblée législative soit dissoute et qu'une élection générale provinciale soit tenue aux dates suivantes :
(a) on Monday, September 24, 2018, and	a) le lundi 24 septembre 2018;
(b) subsequently, on the third Monday in October in the fourth calendar year following the ordinary polling day for the most recently held provincial general election.	b) par la suite, le troisième lundi d'octobre de la quatrième année civile qui suit le jour ordinaire du scrutin de l'élection générale provinciale la plus récente.

Importantly, s. 3(4) is subject to s. 3(3). It states that nothing "in this section affects the power of the Lieutenant-Governor to [...] dissolve the Legislative Assembly at the

Lieutenant-Governor's discretion". As will be seen, the interplay between these provisions is key in settling the interpretative debate on appeal.

[2] In Democracy Watch's submission, Premiers' previously unfettered discretion to call an election when they deemed fit was legally constrained by the adoption of s. 3(4): absent a vote of non-confidence in the Legislative Assembly, the Premier could only lawfully advise the Lieutenant-Governor to dissolve the Assembly and order a "scheduled" general election. In accordance with the schedule established in s. 3(4), the election of September 14, 2020 should have been held on the third Monday in October 2022.

[3] After the election, Democracy Watch applied for judicial review under Rule 69 of the *Rules of Court*, seeking an order declaring the Premier's dissolution and election advice to the Lieutenant-Governor contravened s. 3(4). That would be so because the Premier gave the impugned advice for purely partisan electoral advantage. Democracy Watch also sought an order declaring: (1) the Lieutenant-Governor "improperly" exercised her discretion under s. 3(3) by dissolving the Assembly; and (2) the Lieutenant-Governor in Council "improperly" exercised her power under s. 13 of the *Elections Act* by executing the Order-in-Council providing for an unscheduled general election on September 14, 2020.

[4] It is acknowledged Democracy Watch lacks private interest standing in the litigation. Accordingly, Democracy Watch invoked the superior court's inherent jurisdiction and made the case for an order granting it public interest standing, in its Notice of Application and affidavit in support, as well as its pre-hearing brief. The Premier objected and filed a Notice of Motion for an order denying the sought-after public interest standing. At the outset of the hearing in the court below, both sides endeavored to resolve the question of standing before debating the merits of the application. However, the judge chose to hear the parties on the merits and to dispose of the application without determining whether Democracy Watch should be granted public interest standing: *Democracy Watch v. The Premier of New Brunswick, et al.*, 2021 NBQB 233, [2021] N.B.J. No. 302 (QL). On appeal, the issue of standing was addressed

in both the written and oral submissions and, in the course of the debate on the subject, the panel questioned Democracy Watch's entitlement to litigate the issues raised in its application, absent an order granting it standing in the public interest. The issue was referred back to the application judge and he has since rendered a decision in which he recognizes Democracy Watch's standing in the public interest: *Democracy Watch v. The Premier of New Brunswick, et al.*, 2022 NBQB 164.

[5] On the resumption of the hearing on appeal, the Premier submitted the judge erred in law in recognizing public interest standing after finding, in his original decision dismissing the application, that it bordered on the frivolous. Given the discretionary nature of an order recognizing public interest standing and our view that the application is far from frivolous, we dismissed the Premier's objection, and declined to intervene. As for Democracy Watch, it confirmed relief was no longer sought against the Lieutenant-Governor and the Lieutenant-Governor in Council, and asked for leave to discontinue its appeal against those parties. Leave was granted and, as a result, the Premier stands as the only respondent. Democracy Watch also sought leave to amend its Notice of Application to plead Rule 16 with a view to expanding, beyond Rule 69, the pool of procedural sources for the claimed standalone declaratory relief. The motion was granted, with the Premier's consent.

[6] In first instance, the Premier opposed the application primarily on the ground that the legality of his advice to the Lieutenant-Governor was not an issue that should be considered by the courts; it was non-justiciable. The Premier's fallback position was that s. 3(4) does not set election dates; it does no more than set dates <u>by which</u> elections must be called. Before this Court, the latter contention was jettisoned in favor of the following: s. 3(4) is not legally binding on the Premier because it is subject to s. 3(3), and that provision preserves the Lieutenant-Governor's discretion to dissolve the Legislative Assembly, which implicitly embraces the Premier's unfettered discretion to provide dissolution and election advice as he or she deems appropriate. That said, non-justiciability remains the centerpiece of the Premier's answer to the application and the appeal.

[7] The judge dismissed the application on the ground of non-justiciability. Despite this finding, he went on to deal with the merits of the application by agreeing with the Premier that s. 3(4) merely sets a date by which an election is to be held, and determining the Premier was at liberty to advise the Lieutenant-Governor to dissolve the Assembly and order an unscheduled election on September 14, 2020.

[8] In my respectful view, the judge erred in dismissing the application on the basis of non-justiciability, and I would set aside his ruling on the question. Despite the political significance of the Premier's prerogative with respect to dissolution and election advice under ss. 3(3) and 3(4), its scope and the legitimacy of its exercise are justiciable questions. By applying the multifactorial interpretative approach favored by *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 (QL) and s. 17 of the *Interpretation Act*, R.S.N.B. 1973, c. I-13, I conclude that, by virtue of ss. 3(3) and 3(4), the Premier is not only honor bound but, as well, legally bound to provide dissolution and election advice to the Lieutenant-Governor in accordance with the Legislature's sovereign will, as manifested, explicitly and implicitly, in those provisions. The application judge erred in law in finding s. 3(4) merely sets dates by which elections are to be held. Rather, its wording and object, and the context, compel the conclusion that ss. 3(3) and 3(4) bind the Premier to provide advice that accords with the latter's schedule for elections, while preserving his or her right to derogate from that obligation in certain circumstances. Accordingly, I would set aside the judge's interpretation of ss. 3(3) and 3(4).

[9] As well, I would quash the judge's finding that the Premier's dissolution and election advice conformed with s. 3(4). It may have, but the record does not permit an affirmative finding on the subject. Conversely, there is no admissible evidence the Premier initiated the process leading to the unscheduled election of September 14, 2020 for purely partisan electoral advantage. It is axiomatic courts may not make a finding of statutory breach or compliance without substantiating evidence.

[10] Notwithstanding the above, I would confirm the dismissal of the application. I would do so on the ground that there is no evidence the Premier's advice

contravened s. 3(4), as interpreted in the text that follows. I would, however, overturn the award of costs against Democracy Watch. My reasons for disposing of the appeal in this fashion are fleshed out in the text that follows.

[11] I conclude these introductory remarks by emphasizing I offer no views on the legality of the Premier's August 17, 2020 dissolution and election advice, the Lieutenant-Governor's dissolution of the Legislative Assembly or the September 14, 2020 election.

II. Context

A. *Uncontested primary facts and legislative history*

[12] Prior to 2007, s. 2 of the *Legislative Assembly Act* provided that, absent dissolution of the Legislative Assembly, members of the Assembly would hold their seat for a maximum of five years. Provincial general elections could occur at any time, on the Premier's advice and at the Lieutenant-Governor's discretion, as long as the five-year maximum window between elections was not exceeded.

[13] In 2007, s. 2 was amended by Bill 75. As a result, a schedule for general elections was established, with general voting on September 27, 2010, and on the third Monday in September four years thereafter, and so forth. In the court below, the Premier countered Democracy Watch's argument that s. 3(4) categorically prohibits unscheduled elections by relying on the Government House Leader's May 30, 2007 statements in the Legislative Assembly confirming the legislation's object was to set the date for future elections while preserving the Premier's dissolution and election advice in certain circumstances:

> This bill has been well thought out and thought through. It is to set the date for future elections. It does not take away any of the traditional powers of the Lieutenant-Governor, if [...] major circumstances were to arise so that the government would need to seek a mandate from the people, or if the people's House became unworkable, we would

request to go to the people, and the Lieutenant-Governor would exercise his or her discretion.

[14] Since 2007, every provincial election (2010, 2014 and 2018), except the election of September 14, 2020, has been held in conformity with the schedule established in s. 3(4).

[15] In 2010, the Legislature amended the *Elections Act* to provide, in s. 2, the following definition of "scheduled general election": a "general election held in accordance with the schedule established in subsection 2(4) [now s. 3(4)] of the *Legislative Assembly Act*". It also amended s. 13 to recognize general elections may be either "scheduled" or unscheduled. Section 13 provides:

13(1) Every election shall be commenced by an order of the Lieutenant-Governor in Council.	13(1) Toute élection doit commencer par un décret du lieutenant-gouverneur en conseil.
13(2) An Order-in-Council under subsection (1) shall do the following:	13(2) Le décret en conseil visé au paragraphe (1) est établi de la manière suivante :
(a) direct the issue of a writ of election for each electoral district in which an election is to take place;	a) il ordonne l'émission d'un bref d'élection pour chaque circonscription électorale où une élection doit avoir lieu;
(b) fix the date on which the writs will be issued, which shall be as follows:	b) il indique la date d'émission des brefs d'élection :
(i) for a scheduled general election, the thirty-second day before ordinary polling day; and	(i) pour des élections générales programmées, le trente-deuxième jour avant le jour ordinaire du scrutin,
(ii) for all other elections, not more than 38 nor less than 28 days before ordinary polling day;	(ii) pour toutes les autres élections, la date d'émission du bref ne peut être plus de 38 jours ni moins de 28 jours avant le jour ordinaire du scrutin;
(c) fix the date and time for the close of nominations of candidates, which shall be as follows:	c) il indique la date et l'heure de clôture pour la production des déclarations de candidature, déterminées selon ce qui suit :

(i) for a scheduled general election, 2 p.m. on the twentieth day before ordinary polling day; and	(i) pour des élections générales programmées, 14 heures le vingtième jour avant le jour ordinaire du scrutin,
(ii) for all other elections, 2 p.m. on the seventeenth day before ordinary polling day;	(ii) pour toutes les autres élections, 14 heures le dix-septième jour avant le jour ordinaire du scrutin;
(d) fix the date for the ordinary polling day in accordance with section 14;	d) il indique la date du jour ordinaire du scrutin conformément à l'article 14;
(e) fix the date for the advance polling days, which shall be the ninth and seventh days before ordinary polling day;	e) il indique les dates du scrutin par anticipation, lesquelles doivent tomber le neuvième jour et le septième jour avant le jour ordinaire du scrutin;
(f) fix the date on which candidates will be declared elected, which shall be the fourth day following ordinary polling day; and	f) il indique la date à laquelle les candidats seront déclarés élus, date qui tombe le quatrième jour qui suit le jour ordinaire du scrutin;
(g) fix the date on which the writs will be returnable, which shall be the eleventh day following ordinary polling day.	g) il indique la date à laquelle le rapport des brefs doit être fait, laquelle tombe le onzième jour après le jour ordinaire du scrutin.

[16] Evidently, the proposition that s. 3(4) establishes a schedule for elections became part of the explicit legislative context with the adoption of s. 13. Equally plain is the conclusion that the Legislature has explicitly confirmed, by way of s. 13, that a general election may be "other" than a scheduled general election.

[17] On August 17, 2020, the Lieutenant-Governor approved Order-in-Council No. 187, in which the Lieutenant-Governor in Council, on the recommendation of the Premier and the Executive Council, ordered an unscheduled general election to be held in all electoral districts for the election of members to serve in the Legislative Assembly. The ordinary voting day for the provincial election was set for September 14, 2020. The Order-in-Council states:

AUGUST 17, 2020

2020-187

THE HONOURABLE BLAINE HIGGS, THE PREMIER, RECOMMENDS TO THE EXECUTIVE COUNCIL:

THAT the Legislative Assembly be dissolved; that writs of election for each electoral district of the Province be issued on the 17th day of August, 2020, and be returnable on the 25th day of September, 2020; that the 8th day of August, 2020 at 2:00 p.m. be appointed as the day for nomination of candidates; that the 5th and 8th days of September, 2020 be appointed as advanced polling days; that the 18th day of September, 2020 be appointed as the day candidates are declared elected; and that the 14th day of September, 2020, be appointed polling day; and that a meeting of the Legislative Assembly be held at Fredericton on the 27th day of October, 2020.

AND the Executive Council concurring in said Recommendation.

IT IS ACCORDINGLY SO ORDERED.
Brenda L. Murphy
Lieutenant-Governor

This is to certify that the foregoing is a true copy of an Order of the Lieutenant-Governor in Council of the Province of New Brunswick, made on the

Je certifie que le document qui précède est une copie conforme d'un décret du lieutenant-gouverneur en conseil de la province du Nouveau-Brunswick, pris le

17 August 2020.
Clerk of the Executive Council/
Greffier du Conseil executive
Cheryl Hansen

[18] As can readily be seen, the Order-in-Council conforms with the provisions of s. 13 of the *Elections Act* that pertain to unscheduled elections.

[19] On August 17, 2020, the Lieutenant-Governor also issued a Proclamation dissolving the Legislative Assembly and prescribing an unscheduled general election for September 14, 2020, in accordance with the Premier's advice. The Proclamation reads:

> BY HER HONOUR. BRENDA L. MURPHY
> LIEUTENANT-GOVERNOR OF NEW BRUNSWICK
>
> PROCLAMATION
>
> WHEREAS I have thought fit to dissolve the Legislative Assembly of this Province, the same is hereby dissolved accordingly, effective August 17, 2020.
>
> AND I have thought fit further to order and direct that Writs of Election for each Electoral District of the Province be issued on the 17th day of August, 2020, and be returnable on the 25th day of September, 2020; that the 28th day of August, 2020 at 2:00 p .m. be appointed as the day for nomination of candidates; that the 5th and 8th days of September, 2020 be appointed as advanced polling days; that the 18th day of September, 2020 be appointed as the day candidates are declared elected; and that the 14th day of September, 2020, be appointed polling day; and that a meeting of the Legislative Assembly be held at Fredericton on the 27th day of October, 2020.
>
> Given under my hand and the Great Seal of the Province at Fredericton on the 17th day of August, in the year of our Lord Two Thousand and Twenty and in the sixty-nine the year of Her Majesty's reign.
>
> BY COMMAND OF THE LIEUTENANT-GOVERNOR
>
> Andrea Anderson-Mason, Q.C. — Brenda L. Murphy
> Attorney General — Lieutenant-Governor

[20] The last general election prior to the September 14, 2020 election occurred on September 24, 2018. In that election, no party won a majority of seats. The incumbent Liberal government was subsequently defeated on a non-confidence vote. The

Progressive Conservative party then formed a minority government and, on November 9, 2018, the Honorable Blaine Higgs was sworn in as Premier.

[21] In 2017, s. 3 of the *Legislative Assembly Act* was amended with the adoption of Bill 62. As a result, the four-year cycle, with the election falling on the third Monday in September, was changed to a four-year cycle, with the election falling on the third Monday in October.

[22] Looking solely at the schedule established in s. 3(4), the next election following the 2017 amendment stood to take place on the third Monday of October in 2022.

[23] The record is mute on whether the Premier actually held the confidence of the Legislative Assembly on August 17, 2020. Nonetheless, one can infer the Premier provided dissolution and election advice on that date without a prior vote of non-confidence in the Legislative Assembly. If such a vote had taken place, the underlying application would not have been filed.

[24] No person entitled to vote in the election and none of the opposition parties or members of the Legislative Assembly sought judicial review of the Premier's dissolution and election advice to the Lieutenant-Governor. Democracy Watch sought public interest standing to do so. It is a not-for-profit organization founded and federally incorporated in 1993 that advocates for democratic reform, citizen participation in public affairs, government and corporate accountability, and ethical behaviour in government and business in Canada. Democracy Watch claims to have more than 43,000 supporters from across Canada who are members of its Democracy Watcher Network, including more than 250 in New Brunswick. Its mandate includes the pursuit of "changes in the ways citizens participate in government and business decision-making, including elections". Democracy Watch appeared as an intervener before the Supreme Court of Canada in *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, and has filed proceedings concerning, *inter alia*, the Prime Minister's "snap" federal election

call in 2008, and, more recently, concerning the "snap" election call by the Premier of British Columbia. Democracy Watch has been granted public interest standing by the courts on several occasions.

B. *The animating complaint and the grounds for the standalone declaratory relief sought in the Notice of Application*

[25] Rule 69.09(2) provides no ground may be relied upon except as set out in the original or amended Notice of Application for judicial review. Rule 38.04, which governs applications under Rule 16, requires the Notice of Application state the grounds to be argued. In the Notice of Application, Democracy Watch reveals its understanding of s. 3(4) as "fixed-election-date" legislation designed to prevent "governing parties from calling elections purely for reasons of political strategy". It also articulates the following grounds for the standalone declaratory relief it seeks:

> Subsection 3(3) of the *Legislative Assembly Act* states that the Lieutenant Governor has the power to dissolve the Legislative Assembly at the Lieutenant Governor's discretion.
>
> By constitutional convention, the Lieutenant Governor will only dissolve the Legislative Assembly and cause a general election on the advice of the Premier. The Lieutenant Governor may decline to follow the Premier's advice, but she will not otherwise dissolve the Legislative Assembly.
>
> The "confidence convention" establishes that the Legislative Assembly may be dissolved if a vote of non-confidence in the presiding government of New Brunswick has occurred in the Legislative Assembly.
>
> Subsection 3(3) is limited by section 3(4) of the *Act*, which provides that a general voting day must occur on the third Monday in October in the fourth calendar year following the mostly recently held general election.
>
> The provisions of fixed election dates in section 3(4) of the *Act* reflects the legislative intent that provincial elections will be held on a fixed date every fourth year. This

provision increases certainty and predictability in the electoral process and prevents governing parties from calling elections purely for reasons of political strategy.

Since 2007, every New Brunswick provincial election has been held as prescribed by the *Act*, creating constitutional conventions that fixed elections will be held on the fixed date, and that the Legislative Assembly will not be dissolved by the Lieutenant Governor and writs will not be ordered by the Lieutenant-Governor in Council for a provincial election unless the government has lost the confidence of the Legislative Assembly.

During that four-year period, subsection 3(4) of the *Act*, informed by these constitutional conventions, prohibits the Premier from advising the Lieutenant Governor to dissolve – and limits the Lieutenant Governor's discretion to dissolve – the Legislative Assembly, unless the government loses the confidence of the legislature.

Also, during that four-year period, subsection 3(4) of the *Act*, together with [s. 13] of the *Elections Act* and informed by the constitutional conventions, prohibits the Premier from advising the Lieutenant-Governor in Council to order – and prevents the Lieutenant-Governor in Council from ordering – a general election to be held, unless the government loses the confidence of the legislature.

The dissolution of the Legislative Assembly and the issuing of the writs and election-related dates, including an ordinary voting day of September 14, 2020, occurred at a time when the government held the confidence of the Legislature. These actions, advised by the Premier and the Executive Council, and undertaken by the Lieutenant Governor and the Lieutenant-Governor in Council, were contrary to the *Legislative Assembly Act*. [Emphasis added]

The applicant relies on the following:

(a) *Constitution Act, 1867*
(b) *Legislative Assembly Act* (R.S.N.B. 2014, c. 116);
(c) *Elections Act* (R.S.N.B. 1973 c. E-3);
(d) Rule 69 of the Rules of Court;
(e) Rule 38 of the Rules of Court; and
(f) The inherent jurisdiction of this Court.

[26] In applications for declaratory relief, the focus should be on the underlying complaint so that the process and the court's adjudicative role remain true to their case-specific purpose in an adversarial context. Applications for declaratory relief should not be used to convert the court into a commission of inquiry. Democracy Watch's complaint regarding the Premier's dissolution and election advice is formulated in the supporting affidavit filed by its Coordinator:

> In my opinion, as someone who has dedicated my professional life to advocating for fairness in governance, the New Brunswick provincial election was called for partisan reasons. I believe that the Premier and his Cabinet believed that their Progressive Conservative party was in good public favour, particularly in light of the provincial governments handling of the COVID-19 pandemic. I believe the Premier and his Cabinet are concerned that by the fixed election date in 2022, the public may be unhappy with continuing restrictions due to COVID-19 and a potential economic downturn, and so the Premier and his Cabinet took political advantage by calling an election now.

[27] The judge ruled those statements of opinion and belief were inadmissible to establish the Premier's motivation for calling the election. I agree, and note issue is not taken with that ruling. The statements are nevertheless evidence of the complaint underlying the application: the September 14, 2020 election was called for purely partisan electoral advantage.

C. *Relief sought in the Notice of Application*

[28] Rule 69.09(2) prevents the court on judicial review from granting relief except as claimed in the original or amended Notice of Application. Rule 38.04(a) provides a Notice of Application under Rule 16 must state the precise order sought. In its Notice of Application, Democracy Watch claimed an order declaring:

> 1. The Premier of New Brunswick's action advising the Lieutenant Governor New Brunswick ("Lieutenant Governor") to dissolve Parliament on August 17, 2020

and to hold a general election on September 14, 2020 contravened subsection 3(4) of the *Legislative Assembly Act*, (RSNB 2014, c 116) (the "*Act*");

2. The Lieutenant Governor improperly exercised her discretion under subsections 3(2) and 3(3) of the *Act* by dissolving Parliament on August 17, 2020;

3. The Lieutenant Governor in Council improperly exercised her power under subsection 13(1) of the *Elections Act* (RSNB 1973, c E-3) on August 17, 2020 by issuing an Order-in-Council directing the issuing of writs and fixing various dates for a general election including the ordinary polling day of September 14, 2020.

[29] Significantly, in the Notice of Application, Democracy Watch does not seek an order quashing the Premier's August 17, 2020 advice to the Lieutenant-Governor or the Order-in-Council dissolving the Legislative Assembly and prescribing a general election on September 14, 2020. If the latter relief had been sought, non-justiciability might be a compelling answer (see Lord Roskill's dicta in *Attorney General v. DeKeyser's Royal Hotel Ltd.*, [1920] U.K.H.L. 1, [1920] A.C. 508, pp. 526-528 that the dissolution of the U.K. Parliament was not justiciable). See, as well, the caution expressed by Lord Justice Sedley regarding this dicta in *Secretary of State for Foreign and Commonwealth Affairs v. R. (on the application of Bancoult) (No. 2)*, [2007] E.W.C.A. Civ. 495, [2008] Q.B. 365, and the landmark case of *R (Miller) v Prime Minister*, [2019] UKSC 41, where the U.K. Prime Minister's prorogation advice and the ensuing Order-in-Council were set aside. Note, as well, Lord Roskill's dicta was made at a time when dissolution was not subject to any statutory restrictions such as those imposed by the *Fixed Term Parliaments Act 2011* (U.K.), now repealed, or ss. 3(3) and 3(4) of the *Legislative Assembly Act*. Whether any of this matters, remains to be debated.

[30] Moreover, Democracy Watch did not seek an order declaring the election invalid. If it had, s. 122.1 of the *Elections Act* might be in the mix and militate against public interest standing. Indeed, s. 122.1 permits an application to set aside a member's election, specifies the grounds that may be invoked and limits standing to a person who

had a right to vote at the election in the relevant electoral district, or a person who was a candidate for election in that district. The Premier does not contend s. 122.1 weighs in the balance in resolving any of the issues that remain outstanding, and the parties did not make representations on its relevance. I will say no more on the subject.

D. *Relief sought on appeal*

[31] Democracy Watch no longer seeks declaratory relief against the Lieutenant-Governor and the Lieutenant-Governor in Council. Its claim for standalone declaratory relief targets only the Premier's decision to advise the Lieutenant-Governor to dissolve the Legislative Assembly and to hold a general election on September 14, 2020. As noted in my introductory remarks, the Court granted Democracy Watch's motion for leave to discontinue its appeal against those parties. Additionally, the Court granted Democracy Watch's motion for leave to amend the Notice of Application to plead Rule 16, as an alternative to Rule 69, in its quest for standalone declaratory relief.

[32] Furthermore, Democracy Watch seeks reversal of the order of costs in first instance. It also requests no costs on appeal be awarded in its favor or against it.

F. *Reasons for dismissing the application in first instance*

[33] The kernel of the application judge's interpretation of ss. 3(3) and 3(4) is found in the following excerpts from his reasons for decision:

> Let me make two initial observations on the above provisions that arise based on what I find to be the plain and ordinary meaning of the language. First, the wording of s. 3(4) does not alter the discretionary power of the Lieutenant-Governor defined in s. 3(3). Her discretion to dissolve the Legislative Assembly remains intact. Second, the wording of s. 3(4) directs the Premier to advise the Lieutenant-Governor to dissolve the Legislative Assembly and hold an election by a set date following the most recently held provincial general election. Subsection 3(4) does not say that the Premier can only advise the

Lieutenant-Governor to dissolve the legislative assembly for an election on the date specified.

The Applicant argues that the provisions of the *Act* categorically prohibit the Premier from offering advice to the Lieutenant Governor to hold an election on a date other than as specified in the *Act* (s. 3(4)). The Respondents argue otherwise. At para. 58 of their joint brief, the Respondents set out the remarks made in the Legislative Assembly (as recorded in Hansard) by then House Leader, Stuart Jamieson, on May 30, 2007:

> This bill has been well thought out and thought through. It is to set the date for future elections. It does not take away any of the traditional powers of the Lieutenant-Governor. If a major circumstances were to arise so that the government would need to seek a mandate from the people, or if the people's House became unworkable, we would request to go to the people, and the Lieutenant-Governor would exercise his or her discretion. [Emphasis in original.]

The obvious, if not realistic, merit of the Respondents' point is reflective of the comments of the Federal Court of Appeal in *Conacher et al v. Prime Minister et al*, 2010 FCA 131, where the court wrote at para. 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 great 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.

[34] On the issue of justiciability, the judge quoted the following from the reasons in *Engel v. Prentice*, 2020 ABCA 462, [2020] A.J. No. 1405 (QL), (leave to appeal to the Supreme Court denied, [2021] S.C.C.A. No. 47):

> The appellants concede that an early election can be called when necessary or justified. That begs the question of who is to decide when an early election is called for. In 2015, the Premier concluded that the precipitous state of Alberta's public accounts required an early election. That was a quintessentially political decision based on prerogative powers, not one that is justiciable. By convention the Lieutenant Governor acts on the Premier's advice, and the preservation of the Lieutenant Governor's powers must, by implication, have preserved the power of the Premier to give that advice: *Conacher* FCA at para 5. [Emphasis by application judge.]

[35] The judge added:

> To repeat, I find that, based on the plain meaning of the legislation and the underlying public policy as noted above, the authority of the Premier, to have advised the Lieutenant Governor to dissolve the Legislative Assembly and to set a date for a general provincial election, is not restricted as suggested by the Applicant. Nor, on the same basis, is the Lieutenant-Governor's discretion to accept it fettered as suggested by the Applicant. The matter is, as noted above, "... a quintessentially political decision based on prerogative powers, not one that is justiciable." The decisions by the Premier in this case to seek the dissolution of the Legislative Assembly, and the Lieutenant-Governor's acceptance of that advice, are political decisions and therefore, as noted in *Conacher*, not justiciable.

[36] In dismissing the application, the judge observed "the matter borders on being considered frivolous". In his opinion, there was "little reasonable hope that the facts and applicable legislation in this case would produce a result different from the consistent pattern of jurisprudence existing in other jurisdictions", specifically the cases of *Conacher v. Canada (Prime Minister)*, 2010 FCA 131, [2010] F.C.J. No. 701 (QL) and *Engel v. Prentice*. The judge concluded the Premier "was free to advise the Lieutenant-Governor that the Legislative Assembly should be dissolved, and an election called at a date other than has been identified in the Act. The Lieutenant-Governor was free to exercise her discretion in response to such advice". Democracy Watch was

ordered to pay one set of costs in the amount of $2,500 (inclusive of any applicable HST and disbursements).

G. *Grounds of appeal*

[37] In the Notice of Appeal, Democracy Watch seeks reversal of the application judge's entire decision.

[38] With respect to the substantive issues, Democracy Watch contends the judge erred in law by: (a) concluding the Premier's August 17, 2020 dissolution and election advice to the Lieutenant-Governor is an executive prerogative that may not be reviewed by the courts; (b) deciding the Premier did not act contrary to s. 3(4) in providing that advice; (c) failing to appreciate s. 3(4) is worded differently, and thereby distinguishable, from the topically-related legislation considered in *Conacher v. Canada (Prime Minister)* and *Engel v. Prentice*; (d) failing to consider the entire context of ss. 3(3) and 3(4), including the larger context in which the provisions stand to be read, and the object of the provisions; (e) failing to give a fair, large and liberal construction and interpretation as best ensures the attainment of the object of ss. 3(3) and 3(4), in accordance with s. 17 of the *Interpretation Act*; and (f) failing to consider the constitutional convention created by the enactment of s. 3(4) and the subsequent compliance with the schedule it established by three Premiers and two Lieutenant-Governors through three elections.

[39] As will appear, I find grounds (a)-(e) are generally well founded, which is not the case for ground (f). In my view, no constitutional convention of the kind alleged in ground (f) has ever existed in this Province. Moreover, the alleged convention is contradicted by the provisions of the *Elections Act* that allow general elections on dates other than those in the schedule established in s. 3(4). Nothing further need be said on this topic.

[40] With respect to the request for reversal of the order of costs, the Notice of Appeal omits to articulate any ground for intervention. However, in Part 6 of the Appellant's Submission, under "Order sought", Democracy Watch requests reversal of the costs award and that no further costs be awarded for or against it, "given that the case is unprecedented and it is in the public interest for the courts to decide the issues that this case raises concerning the fundamental democratic right of the people of New Brunswick to fair elections". For the sake of procedural thoroughness, I would amend the Notice of Appeal accordingly.

II. Analysis and Decision

[41] In the text that follows, I address the following issues: (1) the need and timing for a decision determining a dispute over public interest standing, and the standard of review on appeal from any such decision; (2) the justiciability of the scope of the Premier's prerogative to provide dissolution and election advice to the Lieutenant-Governor, and Democracy Watch's allegation that the Premier's advice contravened s. 3(4); (3) the proper interpretation of ss. 3(3) and 3(4); (4) the availability of standalone declaratory relief on judicial review under Rule 69; (5) the conditions for declaratory relief under Rule 16; (6) the relevance of the decision in *Acadian Society of New Brunswick v. Right Honourable Prime Minister of Canada*, 2022 NBQB 85, [2022] N.B.J. No. 74 (QL) and the observations therein regarding the constitutionality of the Lieutenant-Governor's appointment by the Prime Minister of Canada; and (7) the issue of costs.

A. *Public interest standing*

[42] In his original decision, the application judge noted the respondents "raise a preliminary issue seeking an order declaring that [Democracy Watch] does not have public or private interest standing to bring the present application". The judge acknowledged "it may be appropriate to rule on the motion before dealing with the merits of the Application", but declined for the following reasons:

> First, on its face, the Application seeks to challenge the legitimacy of a provincial general election. The subject matter, by its nature, could be considered of prime importance in our democracy. In certain circumstances, like this, it may serve the public interest to just answer the questions raised in the underlying Application than to leave such questions unanswered due to strict application to the *Rules*. Second, given the disposition I am about to make on the merits of the Application, the question of standing will be of no consequence. [para. 5]

[43] The issue of public interest standing was fully addressed by the Court in *Province of New Brunswick v. Morgentaler*, 2009 NBCA 26, 344 N.B.R. (2d) 39. Regrettably, that decision was not brought to the application judge's attention. Had it been, I have no doubt he would have disposed of Democracy Watch's request for public interest standing as a threshold issue.

[44] In *Morgentaler*, the Court noted the common law has traditionally recognized two categories of standing in civil proceedings: (1) private standing or standing as of right: and (2) public interest standing. The Court underscored that, absent legislation stipulating otherwise, only the court can grant public interest standing. It is hornbook law that, without standing, a party is not entitled to have his or her case determined. In *Morgentaler,* the Province argued the motion judge erred in granting Dr. Morgentaler public interest standing prior to the hearing on the merits. The Court rejected this contention, holding public interest standing may be granted in the exercise of the superior court's inherent jurisdiction, whenever it is just to do so.

[45] The correctness of that proposition was recently confirmed in *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27, [2022] S.C.J. No. 27 (QL), at para. 78. In that case, Chief Justice Wagner, writing for the Court, described the purpose of a hearing regarding public interest standing in a way that points to the advisability of an early judicial intervention. Such a hearing: (1) plays a "gatekeeping" or "screening" role (paras. 36 and 42); (2) focuses, in a preliminary way, on the justiciability and seriousness of the issue raised. Unless a justiciable issue is raised, the dispute should not be heard (para. 50). Moreover, an early determination of a request

for public interest standing allows courts to "screen out" both "mere busybodies" and unmeritorious claims (paras. 42, 51 and 57); and (3) allows the court to "ensure that judicial resources remain available to those who need them most" (para. 48). In doing so, the court plays a helpful role in the allocation of scarce judicial resources (paras. 42 and 57).

[46] While the interests of justice may require deferring a decision regarding public interest standing to the hearing on the merits, the court, assuming it is invested with subject-matter jurisdiction, may not decline to settle the issue. In *Morgentaler*, the Court held public interest standing may be granted "whenever it is just to do so, whether before the commencement of the proceeding or at any time during its pendency" (para. 51). The Court added:

> Ideally, applications for public interest standing should be made before the commencement of proceedings. If the application is denied, time, effort and money otherwise wasted will become available for some other worthy public interest cause or to assist a like-minded claimant with standing as of right. If the application is allowed, the claimant will have original rights including the right to initiate the litigation, "develop its factual underpinning" and control its unfolding within the applicable procedural framework (see Sharon Levine, *Advocating Values: Public Interest Intervention in Charter Litigation* (1993), 2 N.J.C.L. 1-410, p. 37). Moreover, and just as importantly, the parties' energies will be channeled, sooner rather than later, in the direction of an "expeditious determination of [the] proceeding on its merits" (see Rule 1.03(2)). [para. 52]

[47] Public interest standing should be dealt with as a preliminary or threshold issue. In essence, it is a decision "about whether an applicant is entitled to have the courts consider the merits of an arguable legal claim" (see *Corp. of the Canadian Civil Liberties Assn. v. Canada (Attorney General)*, [1998] O.J. No. 2856 (C.A.) (QL), at para. 101). At any rate, any decision regarding public interest standing must be made during the pendency of the proceeding: *Morgentaler*, at para. 51. There is one exception to that rule, and it is where the court finds it lacks jurisdiction to hear and determine the dispute. That

is not what occurred in first instance. The application judge erred in law in declining to determine whether Democracy Watch should be granted public interest standing, hence the Court's referral back of that question for determination.

[48] In the ruling that followed, the judge carefully considered the salient parts of the decisions in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 and *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, and applied the test those cases articulate in concluding:

> The question posed by the Application was serious. I find it to be a justiciable question upon which the court could opine. As Democracy Watch has a demonstrated history of being involved in the courts on various matters involving proper governance, including the issue of "fixed election" timing, I am satisfied and find that it has a genuine interest in the issue. Finally, I was satisfied that the process utilized was a reasonable way to bring the matter forward. [...]
>
> Had I answered the question of standing in the first instance, I would have, in the circumstances of this case, granted Democracy Watch public interest standing for the reasons herein. [paras. 33-34]

The judge's decision to recognize public interest standing in Democracy Watch was made in the exercise of a discretionary power. It attracts great deference on appeal. The Premier has not shown the judge's decision is the product of any error of law or principle. Nor has he demonstrated the decision is unreasonable. In my view, the judge did not commit reversible error in concluding the test adopted in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* and confirmed in *British Columbia (Attorney General) v. Council of Canadians with Disabilities* is satisfied in this case.

B. *Justiciability*

[49] In *Conacher*, the sought-after declarations were "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" (para. 2). The applicants in that case contended the Prime Minister contravened s. 56.1 of the *Canada Elections Act*, S.C. 2000, c. 9 in advising the Governor General to order an election on a date at variance with the schedule established by s. 56.1(2). Significantly, the Court underscored the wording of s. 56.1 did not "prevent the Prime Minister from advising the Governor General that Parliament should be dissolved and an election held", and, if that had been Parliament's intention, it "would have used explicit and specific wording to the effect in s. 56.1". The Court noted Parliament did not do so. That is likewise the case for the statute under consideration in *Engel*. The legislation under consideration here features wording that purports to explicitly define the dissolution and election advice the Premier is lawfully entitled to provide. Democracy Watch rightly submits *Conacher* and *Engel* are distinguishable on that basis alone.

[50] The question raised by Democracy Watch's application, as amended, is whether the Premier's dissolution and election advice of August 17, 2020 contravened ss. 3(3) and 3(4). A justiciable question is a question that is appropriate for judicial determination: *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, at para. 47. In that case, Chief Justice Wagner made the following observations on how the principle of legality informs the doctrine of justiciability:

> The legality principle encompasses two ideas: (i) state action must conform to the law and (ii) there must be practical and effective ways to challenge the legality of state action (*Downtown Eastside*, at para. 31). Legality derives from the rule of law: "[i]f people cannot challenge government actions in court, individuals cannot hold the state to account - - the government will be, or be seen to be, above the law" (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 40).

> Access to justice, like legality, is "fundamental to the rule of law" (*Trial Lawyers*, at para. 39). As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230). [paras. 33-34]

[51] Legality lies at the heart of the underlying application, and tips the scales in favor of justiciability.

[52] In *Black v. Canada (Prime Minister),* [2001] O.J. No. 1853 (C.A), the Crown prerogative with respect to honours was under consideration. The narrow issue was whether the Prime Minister's advice to the Queen regarding Canada's policy on the conferral of an honour on a Canadian citizen was judicially reviewable. Before concluding it was not because the advice did not affect individual rights, the Court offered a comprehensive assessment of the doctrine of justiciability under Canadian prerogative law. The Court began its analysis with a description of the Crown's prerogative power:

> [...] According to Professor Dicey, the Crown prerogative is "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown". Dicey, Introduction to the Study of the Law of the Constitution 10th ed. (London: Macmillan, 1959) at p. 424. Dicey's broad definition has been explicitly adopted by the Supreme Court of Canada and the House of Lords. See *Re The Effect of the Exercise of the Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] S.C.R. 269 at 272-73 and *A.G. v. DeKeyser's Royal Hotel*, [1920] A.C. 508 at 526. See also Peter Hogg and Patrick Monahan, *Liability of the Crown* 3rd ed. (Toronto: Carswell, 2000) at p. 15.
>
> The prerogative is a branch of the common law because decisions of courts determine both its existence and its extent. In short, the prerogative consists of "the powers and privileges accorded by the common law to the Crown." Peter Hogg, *Constitutional Law in Canada* Loose-Leaf Edition (Toronto: Carswell, 1995) at 1.9. See also *Case of*

> *Proclamations* (1611), 77 E.R. 1352 (K.B.). The Crown prerogative has descended from England to the Commonwealth. As Professor Cox has recently observed, "it is clear that the major prerogatives apply throughout the Commonwealth, and are applied as a pure question of law". N. Cox, *The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity*, 14 Australian Journal of Law and Society (1998-99) 15 at 19. [paras. 25-26]

[53] The Court went on to confirm a Crown prerogative may be altered, and even displaced by statute:

> Despite its broad reach, the Crown prerogative can be limited or displaced by statute. See *Parliament of Canada Act*, R.S.C. 1985 c. P-1 s. 4. Once a statute occupies ground formerly occupied by the prerogative, the prerogative goes into abeyance. The Crown may no longer act under the prerogative, but must act under and subject to the conditions imposed by the statute. *A.G. v. DeKeyser's Royal Hotel*, *supra*. In England and Canada, legislation has severely curtailed the scope of the Crown prerogative. Dean Hogg comments that statutory displacement of the prerogative has had the effect of "shrinking the prerogative powers of the Crown down to a very narrow compass". Professor Wade agrees:
>
> > [I]n the course of constitutional history the Crown's prerogative powers have been stripped away, and for administrative purposes the prerogative is now a much-attenuated remnant. Numerous statutes have expressly restricted it, and even where a statute merely overlaps it the doctrine is that the prerogative goes into abeyance. E.C.S. Wade, Administrative Law, 6th ed. (Oxford: Clarendon Press, 1988) at pp. 240-41. [para. 27]

[54] The Court then acknowledged the long-accepted view that the following questions were justiciable: whether a claimed prerogative exists; whether it has been superseded by statute; whether any subsisting prerogative was exercised and; if so, its scope. The Court remarked the honours prerogative has neither been superseded nor

altered by the imposition, by virtue of statute or common law, of any conditions for its lawful exercise.

[55] The Court also took note of the evolution of judicial thinking on the application of the doctrine of justiciability to the exercise of any prerogative power: courts are willing to review the exercise of a prerogative power where it affects the rights of an individual:

> Under the law that existed at least into the 1960s, the court's power to judicially review the prerogative was very limited. The court could determine whether a prerogative power existed and, if so, what its scope was, and whether it had been superseded by statute. However, once a court established the existence and scope of a prerogative power, it could not review how that power was exercised. See S. DeSmith, H. Woolf and J. Jowell, DeSmith, *Woolf & Jowell's Principles of Judicial Review* (London: Sweet & Maxwell, 1999) at p. 175 and *DeKeyser's Royal Hotel*, *supra*. The appropriateness or adequacy of the grounds for its exercise, even whether the procedures used were fair, were not reviewable. The courts insisted that the source of the power – the prerogative – precluded judicial scrutiny of its exercise. The underlying rationale for this narrow review of the prerogative was that exercises of prerogative power ordinarily raised questions courts were not qualified or competent to answer.
>
> Even this narrow view of the court's role in reviewing the prerogative power now has to be modified in Canada because of the Canadian *Charter of Rights and Freedoms*. By s. 32(1)(a), the *Charter* applies to Parliament and the Government of Canada in respect of all matters within the authority of Parliament. The Crown prerogative lies within the authority of Parliament. Therefore, if an individual claims that the exercise of a prerogative power violates that individual's *Charter* rights, the court has a duty to decide the claim. See *Operation Dismantle*, *supra*. [...].
>
> Apart from the *Charter*, the expanding scope of judicial review and of Crown liability make it no longer tenable to hold that the exercise of a prerogative power is insulated from judicial review merely because it is a prerogative and not a statutory power. The preferable approach is that

adopted by the House of Lords in *the Civil Service Unions case*, [1985] 1 A.C. 374]. There, the House of Lords emphasized that the controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter, not its source. If, in the words of Lord Roskill, the subject matter of the prerogative power is "amenable to the judicial process", it is reviewable; if not, it is not reviewable. Lord Roskill provided content to this subject matter test of reviewability by explaining that the exercise of the prerogative will be amenable to the judicial process if it affects the rights of individuals. Again, in his words at p. 417:

> ... If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order-in-Council of 1982, so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive. ...

[...]

Under the test set out by the House of Lords, the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.

[...]

So characterized, it is plain and obvious that the Prime Minister's exercise of the honours prerogative is not judicially reviewable. Indeed, in the *Civil Service Unions*

> case, Lord Roskill listed a number of exercises of the prerogative power whose subject matters were by their very nature not justiciable. Included in the list was the grant of honours. [...]
>
> [...]
>
> The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of a passport or a pardon has real adverse consequences for the person affected. Here, no important individual interests are at stake. Mr. Black's rights were not affected, however broadly "rights" are construed. No Canadian citizen has a right to an honour. [Emphasis added; paras. 45-48, 51, 58 and 60]

[56] Unlike the situation under consideration in *Black*, the present case concerns a prerogative that has been altered by statute. The Legislature, in the exercise of its sovereign authority, has reconfigured, through ss. 3(3) and 3(4), the Premier's prerogative to provide dissolution and election advice to the Lieutenant-Governor. Moreover, an important individual right, specifically the right of a sitting government or opposition member of the Legislative Assembly to continue in office, is affected by the Premier's exercise of the prerogative by virtue of which dissolution and election advice is provided to the Lieutenant-Governor. That being so, not only is the scope of what remains of the prerogative a justiciable question, but so is the legality of its exercise.

C. *Sections 3(3) and 3(4) of the* Legislative Assembly Act

[57] Section 3(3) reads as follows:

3(3) Nothing in this section affects the power of the Lieutenant-Governor to prorogue or dissolve the Legislative Assembly at the Lieutenant-Governor's discretion.	3(3) Rien dans le présent article ne porte atteinte au pouvoir du lieutenant-gouverneur de proroger ou de dissoudre l'Assemblée législative lorsqu'il l'estime opportun.

This provision explicitly preserves the Lieutenant-Governor's prerogative to dissolve the Legislature and, relatedly, to prescribe a general election. There is no mention in s. 3(3) of the Premier's prerogative to provide dissolution and election advice to the Lieutenant-Governor. However, by convention, the Lieutenant-Governor will not dissolve the Legislative Assembly and prescribe an election without the benefit of the Premier's advice.

[58] In my view, s. 3(3) has two components. The first is explicit: the preservation of the discretionary power of the Lieutenant-Governor to dissolve the Legislative Assembly. The second is implicit: the continued existence, in some form, of the Premier's prerogative to provide dissolution and election advice to the Lieutenant-Governor. At the time ss. 3(3) and 3(4) were adopted, the *Elections Act* did not contain a definition of "scheduled general election", as it does now. Nor did the *Elections Act* provide general elections could be either scheduled or unscheduled, as it does now. Yet, the Government House Leader clearly understood the Premier could provide advice in favor of an unscheduled general election. In the statutory context then existing, this option could only arise by implication from the preservation of the Lieutenant-Governor's powers under s. 3(3), and this was precisely the point made by the Government House Leader in the Legislative Assembly on May 30, 2007:

> [The amendment] does not take away any of the traditional powers of the Lieutenant-Governor, if [...] major circumstances were to arise so that the government would need to seek a mandate from the people, or if the people's House became unworkable, we would request to go to the people, and the Lieutenant-Governor would exercise his or her discretion.

[59] Of course, we now have, since 2010, a definition of "scheduled general election" in s. 2 of the *Elections Act*. By virtue of that definition, the Legislature confirms s. 3(4) <u>establishes</u> a schedule for general elections. Moreover, s. 13 of the *Elections Act* makes plain a general election may be unscheduled, which implicitly recognizes the Premier's election advice to the Lieutenant-Governor may be in favor of an election that is not in accordance with the schedule established in s. 3(4). The definition of "scheduled

general election" and s. 13 confirm the accuracy of the Government House Leader's May 30, 2007 observations on the purpose of s. 3(4) and the effect of s. 3(3).

[60] Section 3(4) reads as follows:

3(4) Subject to the power of the Lieutenant-Governor referred to in subsection (3), the Premier shall provide advice to the Lieutenant-Governor that the Legislative Assembly be dissolved and a provincial general election be held on the following dates:	3(4) Sous réserve du pouvoir du lieutenant-gouverneur visé au paragraphe (3), le premier ministre recommande au lieutenant-gouverneur que l'Assemblée législative soit dissoute et qu'une élection générale provinciale soit tenue aux dates suivantes :
(a) on Monday, September 24, 2018, and	a) le lundi 24 septembre 2018;
(b) subsequently, on the third Monday in October in the fourth calendar year following the ordinary polling day for the most recently held provincial general election.	b) par la suite, le troisième lundi d'octobre de la quatrième année civile qui suit le jour ordinaire du scrutin de l'élection générale provinciale la plus récente.

Like s. 3(3), s. 3(4) has two components: (1) it is subject to s. 3(3); and (2) it establishes a schedule for elections.

[61] If one were to consider only the wording of ss. 3(3) and 3(4), the interpretative result would be, as Democracy Watch argued in first instance, that the Premier is bound to provide dissolution and election advice in accordance with the schedule prescribed by s. 3(4), reserving unto the Lieutenant-Governor his or her historical discretion to accept or reject that advice. Given the longstanding convention that the Lieutenant-Governor will give effect to the Premier's dissolution and election advice, the result would be elections held in accordance with the schedule established in s. 3(4).

[62] However, it is now well-settled that statutory interpretation "cannot be founded on the wording of the legislation alone" and that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously

with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, at para. 21. Section 17 of the *Interpretation Act* is also in play. It provides:

17 Every Act and regulation and every provision thereof shall be deemed remedial, and shall receive such fair, large and liberal construction and interpretation as best ensures the attainment of the object of the Act, regulation or provision.	**17** Toute loi, tout règlement et toute disposition de ceux-ci sont réputés réparateurs et doivent faire l'objet de l'interprétation large, juste et libérale, la plus propre à assurer la réalisation de leurs objets.

[63] Three related tenets of statutory interpretation are particularly relevant here: (1) the Legislature does not intend courts to settle upon an interpretation that contradicts the object of a provision: *Rizzo & Rizzo Shoes Ltd. (Re)*, at para. 23; (2) legislation stands to be read in a manner that harmonizes its components "in as much as possible, in order to minimize internal inconsistency": *Willick v. Willick*, [1994] 3 S.C.R. 670, [1994] S.C.J. No. 94 (QL), at para. 24; and (3) the legislation must be considered as a whole, and it behooves the judicial interpreter to "try to make all its parts fit and work together": *R. v. W. (C.K.)*, 2005 ABCA 446, [2005] A.J. No. 1753 (QL), at para. 40.

[64] In furtherance of s. 17 of the *Interpretation Act*, s. 3(4) is deemed remedial, and it must be interpreted in a manner that best ensures the attainment of its object. When interpreting ambiguous legislation that concerns the rights and privileges of members of the Legislative Assembly, such as their entitlement to continue sitting in the Legislative Assembly, it makes eminent good sense to consider statements in the Assembly that shed light on the object of the legislation. At the time of the adoption of s. 3(4)'s predecessor in 2007, members of the Legislative Assembly decried the practice of snap election calls and described s. 3(4) as fixed-election-date legislation. As mentioned, the Government House Leader explained the object of s. 3(4) was "to set the date for future elections". However, he cautioned the provision was not designed to prevent dissolution and election advice prompted by "major circumstances [as a result of which] the government would need to seek a mandate from the people" or where the Legislative Assembly has become "unworkable". The Government House Leader's statements in the

Legislative Assembly are indisputably admissible; after all, they were tendered in the court below by the Premier, without objection from Democracy Watch.

[65] As mentioned, the application judge interpreted s. 3(4) as a direction to the Premier to advise the Lieutenant-Governor to dissolve the Legislative Assembly and hold an election *by* a set date, rather than *on* a set date. He erred in doing so. Before this Court, the Premier submitted s. 3(4) is not legally binding on him because it is subject to s. 3(3), and that provision implicitly preserves his unfettered discretion to provide dissolution and election advice as he deems appropriate. There is no merit to this submission. If it carried the day, s. 3(4) would be rendered inoperative.

[66] The object of s. 3(4) is to set a date for future elections, which it accomplishes by establishing a schedule for elections. However, s. 3(4) is subject to s. 3(3), which preserves the Lieutenant-Governor's discretionary power to dissolve the Legislative Assembly. That power is exercisable on the Premier's advice. By making s. 3(4) subject to s. 3(3), the Legislature intended to preserve the Premier's prerogative to provide dissolution and election advice to the Lieutenant-Governor, but only to the extent that it did not render s. 3(4) inoperative. Both provisions can be reconciled if account is taken of the object of ss. 3(3) and 3(4), as described by the Government House Leader in 2007. Section 3(4) sets the date for future elections, subject to the Premier's prerogative to provide election advice at variance with the schedule established in s. 3(4) where, for example, "major circumstances" bring about "a need" to seek a mandate from the voters or where the Legislative Assembly has become "unworkable". What s. 3(4), contextually interpreted, prohibits is dissolution and election advice driven by purely partisan electoral advantage.

D. *The availability of standalone declaratory relief under Rule 69 of the* Rules of Court

[67] Unlike corresponding provisions in other jurisdictions, Rule 69 has not enlarged the court's jurisdiction beyond the remedies available at common law by way of prerogative writs and orders. In *Port of Dalhousie Inc. v. Maltais*, 2011 NBCA 84, 377

N.B.R. (2d) 312, Richard J.A., now C.J.N.B., made the following related observations on the Court's behalf:

> It is noteworthy that, in some provinces, statutes or rules provide for relief in an "application for an order in the nature of *mandamus*, prohibition or *certiorari*", words which, according to Brown and Evans, "have been held to enlarge the court's jurisdiction beyond the common law boundaries of the remedy" (1:2255 at p. 1-27, referring to Ontario's *Judicial Review Procedure Act*, R.S.O. 1990, c. J. 1, s. 2(1)). However, Rule 69 in New Brunswick contains no such words. Rule 69.01 provides as follows:
>
> > **69.01 Application for Judicial Review**
> >
> > Notwithstanding any Act, remedies formerly obtained by way of certiorari, mandamus, prohibition, quo warranto or notice of motion to set aside or remit an award, may be obtained only on an application for judicial review made under this rule.
>
> In my view, nothing in the Rule can be read as enlarging the court's jurisdiction beyond the boundaries of the remedies available at common law. Lest there be ambiguity in this regard, it would be clearly resolved by reference to the orders available under Rule 69, which generally correspond to the types of orders traditionally available at common law:
>
> > **69.13 Form of Order**
> >
> > (1) An order to quash a conviction, order, commitment, warrant or other proceeding, or part thereof shall declare the same to have been removed into the court and quashed.
> >
> > (2) Where an applicant is imprisoned under a conviction or order which is quashed, the order (Form 69A) shall direct that he be immediately discharged from custody in respect of such conviction or order and the commitment thereunder.

> (3) An order may direct a court, tribunal or authority to forthwith hear and determine the matter under review.
>
> (4) An order may provide that a court, tribunal or authority be prohibited from proceeding further in a matter.
>
> (5) An order may provide that a person shall not occupy an office and shall not perform the duties or exercise the rights pertaining thereto.
>
> (6) An order may set aside or remit the award of an arbitrator or arbitrators.
>
> (7) When the court deems it proper to do so, it may remit a matter under review to the court, tribunal or authority to be heard again or otherwise dealt with as the court directs.
>
> (8) An order may provide that the application be dismissed.
>
> None of these orders have any application in the present case. There is no conviction, order, commitment, warrant or other proceeding to quash. [Emphasis in original; paras. 19-21]

Democracy Watch does not seek a remedy formerly obtained by way of any of the prerogative writs and orders mentioned in Rule 69.01. Specifically, it does not seek a quashing order. It seeks only declaratory relief. Unlike the situation in other jurisdictions (see, for example, s. 18(1)(a) of the *Federal Courts Act*, R.S.C. 1985, c. F-7), standalone declaratory relief is not available under Rule 69. However, it is available pursuant to Rule 16 if four pre-conditions are satisfied.

E. *Declaratory relief under Rule 16*

[68] Rule 16.04(e) provides a proceeding by way of Notice of Application may be commenced for the determination of rights which depend upon the interpretation of a statute. A declaration is a "narrow" discretionary remedy that is available where the

following conditions are met: (1) the court has jurisdiction to hear the issue; (2) the dispute is real and not theoretical; (3) the party raising the issue has a genuine interest in its resolution; and (4) the respondent has an interest in opposing the sought-after declaration: *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 81. Condition (2) is not satisfied in the present case.

[69] As a general rule, the party making an allegation bears the burden of its proof. That fundamental proposition applies to the disposition of applications for judicial review (see, for example, *R. v. Inland Revenue Commissioners, ex parte Rossminster Ltd.*, [1980] A.C. 952, [1980] 1 All E.R. 80 (H.L. (Eng)), at pp. 1013 and 1022-23, and Paul Daly, *A Critical Analysis of the Case of Prorogations* (2021) 7 CJCCL 256, at p. 279). It also bears on the resolution of applications for declaratory relief under Rule 16 (see *Blood Tribe v. Canada (Attorney General)*, 2012 ABCA 206, [2012] A.J. No. 679 (QL), at para. 41).

[70] The Premier does not bear the burden of justifying the legality of his August 17, 2020 dissolution and election advice. Rather, it is incumbent on Democracy Watch to make its case for declaratory relief on the balance of probabilities.

[71] For a dispute to be real, as opposed to theoretical, the complaint underlying the application for declaratory relief must be established on the balance of probabilities by evidence or admissions. Democracy Watch's complaint is that the Premier provided dissolution and election advice purely for partisan electoral advantage. There is no evidence to substantiate that complaint, and the application cannot succeed for that reason alone. That said, I am not blind to the reality that the case for breach of s. 3(4) will not be easy to make. Indeed, it will be rare that the evidence and admissions will establish the Premier provided dissolution and election advice purely for partisan electoral advantage. As a judge, I can only interpret and apply the law: my remedial toolbox does not include the power to legislate. If legislators would prefer a more robust approach to judicial scrutiny of the Premier's dissolution and election advice, it is within their power, subject to any constitutional imperative, to adopt suitable amendments to ss. 3(3) and 3(4).

E. *The relevance of Acadian Society of New Brunswick v. Right Honourable Prime Minister of Canada*

[72] In *Acadian Society of New Brunswick v. Right Honourable Prime Minister of Canada*, 2022 NBQB 85, [2022] N.B.J. No. 74 (QL), DeWare C.J.K.B. ventured the opinion that the Lieutenant-Governor's appointment by the Prime Minister of Canada was unconstitutional. The panel invited the parties to address the impact, if any, of that opinion on the Lieutenant-Governor's prescription of the September 14, 2020 general election. Both sides take the position that the *Acadian Society* decision does not invalidate the Lieutenant-Governor's election-authorizing order. At the time we invited input from the parties on this point, the Lieutenant-Governor and the Lieutenant-Governor in Council were respondents. They have since been removed as parties to the appeal and, accordingly, the issue raised by the panel is no longer a live one.

F. *Costs*

[73] Democracy Watch seeks reversal of the costs award in the court below and it urges the Court to make no order of costs for or against it "given that the case is unprecedented and it is in the public interest for the courts to decide the issues that this case raises concerning the fundamental democratic right of the people of New Brunswick to fair elections". There is merit to this submission, however I prefer to dispose of the issue of costs on the following basis.

[74] The award of costs against Democracy Watch was made in connection with the dismissal of the application, without regard to the issue of standing. Indeed, when dismissal was ordered, Democracy Watch lacked standing, the judge having declined to determine the controversy over its standing in the public interest. It is doubtful whether, in those circumstances, the impugned order of costs could be made.

[75] At any rate, the order of costs in question appears to have been made largely on the view, both erroneous and unreasonable, that the application bordered on

the frivolous. In my opinion, the application was far from frivolous and, as emerges from the foregoing text, the grounds upon which it was dismissed in first instance are not sustainable. Further, most of Democracy Watch's grounds of appeal are well founded. Finally, Democracy Watch was successful in resisting the Premier's challenge of the judge's second decision, which recognized its standing in the public interest.

[76] Taking the totality of those circumstances into account, I conclude this is one of those rare cases where it is just to derogate from the general rule that the litigation's ultimate winning party is entitled to costs.

IV. Conclusion and Disposition

[77] In my respectful view, the judge in first instance erred in dismissing Democracy Watch's application on the basis of non-justiciability, and I would set aside his ruling on the question. The Premier's prerogative in respect of dissolution and election advice under ss. 3(3) and 3(4) of the *Legislative Assembly Act* is undoubtedly political to some extent, but its scope and the legality of its exercise are legal questions subject to judicial review. By adopting ss. 3(3) and 3(4) the Legislature rendered those questions justiciable.

[78] Applying *Rizzo & Rizzo Shoes Ltd. (Re)*, and s. 17 of the *Interpretation Act*, I conclude the Premier is not only honor bound but, as well, legally bound to provide dissolution and election advice to the Lieutenant-Governor in accordance with ss. 3(3) and 3(4). The application judge erred in law in finding s. 3(4) merely sets dates by which elections are to be held. Rather, its wording and object, and the context, compel the conclusion that s. 3(4), in conjunction with s. 3(3), binds the Premier to provide advice that accords with the former's schedule for elections, while preserving his or her right to derogate from that obligation in certain circumstances. Sections 3(3) and 3(4) operate in tandem to foreclose dissolution and election advice purely for partisan electoral advantage. Accordingly, I would set aside the judge's interpretation of ss. 3(3) and 3(4).

[79] I would also quash the judge's finding that the Premier's dissolution and election advice conformed with s. 3(4). It may have, but the record does not permit an affirmative finding on the subject. Conversely, there is no admissible evidence the Premier initiated the process leading to the unscheduled election of September 14, 2020 for purely partisan electoral advantage.

[80] Despite the foregoing, I would confirm the dismissal of Democracy Watch's application. I would do so on the ground there is no admissible evidence to substantiate the allegation that informs it, which is that the Premier's dissolution and election advice to the Lieutenant-Governor was actuated by the pursuit of purely partisan electoral advantage.

[81] I close the discussion pertaining to the substantive relief sought on appeal by emphasizing, once again, that no view is offered on the legality of the Premier's August 17, 2020 dissolution and election advice, the Lieutenant-Governor's dissolution of the Legislative Assembly on that date or the September 14, 2020 election.

[82] Finally, I would allow the appeal against the order of costs made in the court below, set aside that order and direct the parties bear their own costs throughout.

J. ERNEST DRAPEAU, J.A.

WE CONCUR:

RAYMOND F. FRENCH, J.A.

CHARLES A. LEBLOND, J.A.