COURT OF APPEAL

ON APPEAL FROM the order of Mr. Justice Gomery of the Supreme Court of B.C. pronounced on the 21st day of June 2022

BETWEEN:

Democracy Watch and Wayne Crookes (Petitioners)

AND:

The Lieutenant Governor of British Columbia, the Lieutenant Governor in Council of British Columbia, the Premier of British Columbia, the Attorney General of British Columbia, and His Majesty the King in Right of the Province of British Columbia (Respondents)

APPELLANTS' REPLY FACTUM

Democracy Watch and Wayne Crookes

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APPELLANTS' REPLY TO RESPONDENTS' FACTUM ON APPEAL

1. The respondents (collectively, the "**Respondents**") advance three new, alternative, grounds for which they say this Court should dismiss the appeal.[1] None of these arguments bear scrutiny, and the chambers judge was right to reject them.

A. Section 23(2) of the *Constitution Act* displaces prerogative power

2. The Respondents argue this Court can find that s. 23(2) of the *Constitution Act*, RSBC 1996, c 66 (the "***Constitution Act***") did not displace or limit the Crown prerogative. But the Respondents misconstrue the law as to (1) when statutes displace prerogative powers and (2) the relationship between the Lieutenant Governor (the "**LG**") and the Premier's exercise of prerogative power.

1. The Crown prerogative may be displaced by necessary implication

3. The Respondents assert the Supreme Court of Canada's interpretation of the law in *Ross River*[2] is more restrictive than that articulated by this Court in *Delivery Drugs*.[3] It is not. Nothing in *Ross River* takes issue with, or overturns, *Delivery Drugs*. On the contrary, the majority reasons in *Ross River* confirmed that the Crown prerogative can be affected by necessary implication.[4] Moreover, the minority in *Ross River* expanded on the meaning of "necessary implication" in a manner consistent with *Delivery Drugs*: where a statute provides that powers previously within the prerogative must be exercised subject to conditions and limitations contained in the statute, the Crown prerogative is displaced by "necessary implication".[5]

4. Regardless, as the Respondents concede, s. 14(1) of the *Interpretation Act*, RSBC 1996, c 238 reverses the Crown's immunity from statute.[6] The distinction between

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[1] Respondents' Factum at para. 16
[2] *Ross River Dena Council Band v Canada*, 2002 SCC 54
[3] Respondents' Factum at para. 22, citing their own counsel, Karen Horsman, K.C. & Gareth Morley, *Government Liability Law and Practice*, (Canada: Carswell, 2007); *Delivery Drugs Ltd v Ballem*, 2007 BCCA 550
[4] *Ross River Dena Council Band v Canada*, 2002 SCC 54 at para. 54
[5] *Ross River Dena Council Band v Canada*, 2002 SCC 54 at para. 4
[6] Respondents' Factum at para. 52

whether prerogative is expressly or impliedly displaced should not operate in BC.

5. In any event, the correct ambit of "necessary implication" is irrelevant in this case. The chambers judge correctly held that s. 23(2) is "unambiguous" in displacing the statutory power.[7]

6. The Respondents assert that it is rare for courts to find that prerogative power has been displaced.[8] The Respondents' assertion is misleading for the following reasons:

a. The sample size is too small. It proves only that the argument is rarely made. Ultimately, *every* piece of legislation has displaced a piece of the common law prerogative.[9] However, it is not often that the Crown—which assents to new legislation—wishes to assert that the legislation was ineffective to displace its prerogative.

b. The Respondents cast as neutral the four decisions in which the court found a statute "merely limited" prerogative.[10] But these decisions illustrate that courts are entirely prepared to find that a statute limits the Crown prerogative.

c. The Respondents count each of the lower court and appellate court decisions in *Conacher*[11] and *Engel*[12] as separate decisions. By contrast, they only count the appellate decision in *Delivery Drugs*.[13]

d. The Respondents count *Black v Canada (Prime Minister)* as a decision in which the court determined that the prerogative power is not displaced. In *Black*, however, the issue did not arise: no party contended that any statute had

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[7] *Democracy Watch v British Columbia (Lieutenant Governor)*, 2022 BCSC 1037 at para. 47 [Reasons]
[8] Respondents' Factum at para. 23, citing 19 decisions
[9] See generally Peter Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough: Thomson Carswell, 1997) at 1.9; *Black v Canada (Prime Minister)* (2001), 2001 CanLII 8537 (ONCA) at para. 27
[10] Respondents' Factum at footnote 32, citing *Ross River Dena Council Band v Canada*, 2002 SCC 54, *PS Knight Co Ltd v Canadian Standards Association*, 2018 FCA 222, *Democracy Watch v Premier of New Brunswick et al*, 2022 NBCA 21, *Canada (Citizenship and Immigration) v Odynsky* (2001), 196 FTR 1 (Can FCTD)
[11] *Conacher v Canada (Prime Minister)*, 2010 FCA 131
[12] *Engel v Prentice*, 2020 ABCA 462
[13] *Delivery Drugs Ltd v Ballem*, 2007 BCCA 550

displaced Crown prerogative.[14]

2. The Premier's prerogative is reliant on the LG's

7. Throughout their factum, the Respondents attempt to separate the Premier's prerogative power from the LG's. They argue, for example, that the chambers judge did not make an express finding about whether the Premier's prerogative power was displaced.[15] They argue that "although the Premier's prerogative power to advise the LG does not enjoy the same constitutional status…it is also not displaced".[16] They also argue that there is no basis on which to find that the Premier's prerogative power has been "expressly displaced by statute".[17]

8. These arguments misconstrue the relationship between the LG and the Premier's exercise of prerogative power. The Respondents are asking this Court to decide that the Premier's prerogative is independent from the LG's. It is not. The LG exercises the prerogative powers of the Crown, and by convention, the Premier can exercise certain prerogatives of the LG.[18] But it is the Crown's prerogative, *not* the Premier's. If the LG's prerogative is limited or displaced, it follows that any prerogative that can be exercised by the Premier is necessarily so limited or displaced as well.

9. The chambers judge correctly understood that the Premier's exercise of the prerogative is dependant on the LG having that prerogative. He recognized this when he described the Premier's power as "statutory".[19] This follows necessarily from his finding that s. 23(2) displaced the LG's prerogative.[20]

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[14] *Black v Canada (Prime Minister)* (2001), 2001 CanLII 8537 (ONCA) at paras. 27, 36
[15] Respondents' Factum at para. 11
[16] Respondents' Factum at para. 37
[17] Respondents' Factum at para. 40 (emphasis in original)
[18] *Letters Patent Constituting the Office of Governor General of Canada, 1947*, RSC 1985, Appendix II, No. 31. Art. II; Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 71; *Black v Canada (Prime Minister)* (2001), 2001 CanLII 8537 (ONCA) at paras. 31-32
[19] Reasons at paras. 45-47, 75
[20] Reasons at paras. 44-47

B. The Premier and LG's exercise of power is justiciable

10. The Respondents assert the Premier and LG's exercise of prerogative powers are non-justiciable, both generally and under the *Judicial Review Procedure Act*, RSBC 1996, c 241 ("***JRPA***"). Both assertions are flawed.

1. The Premier and LG's exercise of power is justiciable

11. The Respondents suggest that a prerogative power must be entirely displaced to give rise to justiciable questions.[21] But the cases they cite show otherwise. Courts have found that prerogative powers can be limited by statute, even if not fully displaced.[22] The exercise of the prerogative can then be examined for compliance with its statutory limits.[23]

12. Like the chambers judge, the Respondents conflate the *factual situations* in which dissolution may occur with the *legal criteria* for that dissolution.[24] For instance, the Respondents assert that it is "*impossible* to identify a workable legal standard" because they cannot foresee all factual situations in which the Premier may advise dissolution.[25] But as set out in the initial factum of Democracy Watch and Wayne Crookes (the "**Appellants**"), the factual situations are distinct from the legal criteria.[26] Notably, the Respondents make no effort to engage with the legal criteria the Appellants identify.[27]

13. As set out in the Appellants' factum, the question of when—legally—the Premier can advise the LG is justiciable. This Court has the authority, and the responsibility, to

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[21] In its argument, beginning at paragraph 19, the Respondents focus only on complete displacement of the prerogative power. See in particular, Respondents' Factum at paras. 21, 23

[22] *Ross River Dena Council Band v Canada*, 2002 SCC 54 at para. 58, *Democracy Watch v Premier of New Brunswick et al*, 2022 NBCA 21 at para 53; *Canada (Citizenship and Immigration) v Odynsky*, 196 FTR 1 at para 57 (Can FCTD)

[23] *Democracy Watch v Premier of New Brunswick et al*, 2022 NBCA 21 at para 56

[24] Respondents' Factum at paras. 50, 67

[25] Respondents' Factum at para. 67 (emphasis added); compare Reasons at para. 65

[26] Appellants factum at para. 80

[27] Appellants factum at para. 84

enforce statutory constraints on the exercise of public power.[28]

14. Finally, the Respondents assert that the issue is not justiciable because the remedy lies at the ballot box.[29] This argument runs counter to the very purpose of the fixed election statute, which was meant to solve a problem that could *not* be addressed at the ballot box: the timing of elections for political gain.[30]

2. The dissolution powers are justiciable under the JRPA

15. The Respondents assert that because it is the LG that dissolves the Legislature, there is no "direct link" between the Premier's advice and its effect on MLAs. Therefore, the Respondents argue, the advice is outside the scope of the *JRPA*.[31]

16. But the *JRPA* applies even without a "direct link" between the impugned decision and its effect. Advice that rises above a mere "non-binding recommendation", and which is closely tied to the ultimate decision, is subject to judicial review under the *JRPA*.[32] As the Respondents themselves acknowledge, the LG's power to dissolve the Legislature is exercised only on the advice of the Premier.[33] This advice is not merely a "non-binding recommendation": the Premier's advice is necessary for the LG's decision.[34] While, in certain circumstances, the LG may decline to dissolve the Legislature and instead ask the opposition to form government,[35] the LG will not dissolve the Legislature absent the Premier's advice.

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[28] Lorne Sossin, "The Unfinished Project of Roncarelli v. Duplessis: Justiciability, Discretion, and the Limits of the Rule of Law" (2010) 55 McGill LJ 661 at 663 with reference to *Roncarelli v Duplessis*, [1959] SCR 121
[29] Respondents' Factum at para. 72
[30] See generally Appellants' Factum at paras. 59-62
[31] Respondents' Factum at para. 88
[32] *Crook v British Columbia (Director of Child, Family and Community Service)*, 2020 BCCA 192 at paras. 51-52; *Wade v Strangway* (1994), 1994 CanLII 395 (BCSC)
[33] Respondents' Factum at para. 20
[34] See generally Peter Hogg, *Constitutional Law of Canada*, 5th Ed. § 9:19
[35] As, for instance, occurred in BC in 2017 following the Liberal government's defeat in a vote of non-confidence; Peter Hogg, *Constitutional Law of Canada*, 5th Ed. §9:19

C. The chambers judge did not decide compliance

17. Contrary to the Respondents' assertion,[36] the chambers judge made no determination as to whether the Premier complied with the *Constitution Act*. He could not have made such a determination, as he found the question was not justiciable. Rather, the chambers judge expressly stated:

> [78] Because this is an issue that only came to the fore in the course of the hearing, if I had found that the petitioners were on solid legal ground, I would not have dismissed the petition on procedural and evidentiary grounds. I would have offered both parties an opportunity to consider what further materials should be placed before the Court, and to make submissions in light of that material. None of this is necessary in view of the conclusions I have come to. [Emphasis added]

D. The Respondents assert no workable alternative interpretation of s. 23(2)

18. The Respondents advance two alternative interpretations of s. 23(2):

a. It does not have legal effect, but merely creates an "expectation" that the Legislature will be dissolved on a fixed date every four years; or

b. It has legal effect in that it sets a four-year limit on the dissolution of the Legislature.

19. These two interpretations are flawed and conflicting. The Appellants advance the only logical interpretation of s. 23(2): it specifies the day on which elections must be held, unless the LG dissolves the Legislature following a vote of non-confidence.

1. Section 23(2) must have legal effect

20. The Respondents argue that s. 23(2) is not legally binding, but "hoped to initiate a practice" and may "have created an expectation".[37] This interpretation would render s. 23(2) meaningless. Laws are not aspirational. They do not create an "expectation". Section 23(2) does not say an election "may" occur; it says an election "must" occur on a fixed date. If the Legislature wished to state a non-binding opinion, it had other

[36] Respondents' Factum at para. 93
[37] Respondents' Factum at para. 99

mechanisms available: notably, it could have adopted a non-binding motion.[38]

21. Laws set out requirements and are binding instruments, and the government treats them as such. For example, the *Lobbyist Registration Act*, SBC 2001, C 42 (the "***LRA***") was introduced around the same time the *Constitution Act* was amended.[39] The *LRA* created a lobbyists' registry and required that returns be filed. These requirements have not been treated as "expectations" but, rather, as legally enforceable requirements.[40]

22. The Respondents' argument rests on an untenable interpretation of s. 41 of the *Constitution Act, 1982*: that s. 41 prevents the BC Legislature from unilaterally converting the LG's dissolution power into a statutory one. Section 41 provides that "an amendment to the Constitution…in relation to…the office of…the Lieutenant Governor" requires the consent of all provincial legislatures, the federal House of Commons, and the federal Senate. The Respondents argue that converting the LG's dissolution power into a statutory power is *necessarily* "an amendment" to the constitutional "office" of the LG.

23. This argument rests on two prongs: (i) in s. 41, the "office" of the LG includes the *prerogative* power to dissolve the Legislature, and (ii) the amendment to s. 23 is an amendment to that "office". Both are unsupported.

i. The LG's office does not include the prerogative dissolution power

24. The Respondents have not offered any compelling reason as to why the office of the LG necessarily includes the *prerogative* power to dissolve the Legislature. As the chambers judge observed, it makes little practical sense that PEI, for instance, would have a veto over BC's fixed election schedule.[41] Moreover, the Respondents' argument

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[38] Marc Bosc & André Gagnon, *House of Commons Procedure and Practice* (2017) 3rd ed, chapter 21: Private Members' Business (motions can seek the Legislature's declaration or opinion); Kate Ryan-Lloyd, *Parliamentary Practice in British Columbia* (2021) 5th ed at 9.2.2; and see for example, Legislative Assembly of the Province of British Columbia Journals, Volume CXLIV, from May 23, 2008 at 122 (motion to issue an apology for the Komagata Maru incident), and Volume CLXII, from December 14, 2020 (motion to support the government's continued actions to fight the second wave of COVID-19)

[39] Subsequently renamed the *Lobbyist Transparency Act*, SBC 2001, c 42

[40] *Cyr (Re)* (2021), 2020 BCORL 2

[41] Reasons at para. 36

assumes the "office" in s. 41 is a constitutionally-set prerogative, as they assert that "the LG's prerogative power…cannot be displaced without a constitutional amendment".[42] But there is nothing on the face of s. 41 that fixes the LG's *prerogative* powers.

25. The Respondents rely on two decisions. Neither assists them.

26. First, the Respondents rely on *Motard v Attorney General of Canada*.[43] But this case concerns the British law of succession to the throne. *Motard* does not speak of the BC Legislature's ability to convert the LG's dissolution power into a statutory one. It does not support the Respondents' assertion that the "office" of the LG necessarily includes the prerogative power to dissolve Legislature.

27. Second, the Respondents rely on *Re the Initiative and Referendum Act*.[44] This decision concerned Manitoba's enactment of the 1916 *Initiative and Referendum Act*, which allowed voters to "initiate" a proposed law through a petition and present it to the Legislative Assembly. If the Legislative Assembly did not enact the proposed law, then the law had to be submitted to the electorate in a "referendum". If the proposed law was approved by a majority of the votes cast in the referendum, then it became law without any action on the part of the Manitoba Legislature. Contrary to the Respondents' assertion, the Privy Council did not decide whether the "core power" of the office of the LG included the right to dissolve the Legislature.[45] Rather, the Privy Council found the statute purported to alter the "position" (not the "office") of the LG by creating a legislative process in which they played no part.

28. *Re the Initiative and Referendum Act* stands only for the proposition that—in 1916—the Manitoba Legislature could not eliminate the Crown's role in *enacting* legislation. The case did not concern the LG's dissolution power. Moreover, this case was decided long before the *Constitution Act, 1982* was drafted. It does not define the scope of the "office" in s. 41. It does not follow from this 1919 decision that the BC Legislature, *in 2001*, cannot set a cycle of fixed election dates.

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[42] Respondents' Factum at para. 25
[43] *Motard v Attorney General of Canada*, 2019 QCCA 1826
[44] *The Initiative (Re)* (1919), 48 DLR 18 (Can)
[45] Respondents' Factum at para. 28

29. In any event, the constitution is a living tree.[46] A decision over 100 years old about the "legal theory" of the LG in colonial Manitoba should have no bearing in 2023. The LG's office is not static.

30. The UK's *Fixed-term Parliaments Act 2011* also illustrates that the LG's office does not necessarily include the prerogative power of dissolution. This statute converted the British Crown's prerogative power to dissolve Parliament into a statutory one.[47] The British Parliament was able to enact this statute without the very office of the Queen crumbling before them—without, as the Respondents alarmingly write, "fundamentally alter[ing] the democratic and political order".[48] If this Court were to accept the Respondents' argument, the LG's powers in BC would be fixed in a way the British monarch's are not. This makes little sense, given that the LG is the British monarch's representative in BC. They are one and the same Crown.

ii. The amendment to s. 23 did not amend the LG's constitutional office

31. Even if the "office" of the LG includes the power to dissolve the Legislature, converting that power into a statutory one is not an "amendment" to the constitution that would engage the unanimity rule under s. 41. As the chambers judge correctly concluded, the limitation on provincial constitutional amendments under s. 41(a) is only engaged by transformative institutional changes that would undermine "rights which are important in the legal theory of that position".[49]

2. Section 23(2) does not merely set a new four-year limit

32. The Respondents also argue that s. 23(2) does, in fact, have legal effect: they assert the section simply imposes a four-year *limit* on when the Legislature must be dissolved.[50] This argument ignores the plain language of the statute. It is also at odds

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[46] *Reference re Same-Sex Marriage*, 2004 SCC 79 at para. 22; *Henrietta Muir Edwards and others (Appeal No. 121 of 1928) v The Attorney General of Canada (Canada)*, [1929] UKPC 86, [1930] AC 124

[47] *R (on the application of Miller) v The Prime Minister*, [2019] UKSC 41 at para. 5; *Fixed-term Parliaments Act 2011* (UK), 2001 C 14

[48] Respondents' Factum at para. 35

[49] Reasons at para. 26

[50] Respondents' Factum at para. 42

with the Respondents' assertion that no statute can touch the LG's dissolution power.[51]

33. First, the plain language of s. 23(2) sets a specific *day* on which elections must occur—not merely an *outside limit*. The legislation clearly says the election must occur "on" a specific day—not "by" that day.[52] The word "on" is defined as indicating "a time frame during which something takes place" or "or an instant, action, or occurrence when something begins or is done". Conversely, "by" means "no later than".[53]

34. Second, the Respondents' interpretation is inconsistent with their argument that s. 23(2) merely sets a non-binding "expectation". The Respondents cannot assert both: (1) that s. 23(2) limits the LG's power to dissolve the Legislature by setting a four-year maximum, and (2) that any limit to the LG's dissolution power necessarily offends s. 41.

35. As the Appellants noted in their factum, and as the chambers judge held, the Hansard indicates that the purpose of s. 23(2) was to stop snap election calls.[54] There is no support in Hansard for the assertion that s. 23(2)'s purpose is merely to set a new maximum four-year limit. Indeed, the Respondents have not pointed to any.

36. Ultimately, the only logical interpretation of s. 23 is that advanced by the Appellants: s. 23 specifies the day for an election but allows room for an alternative date in the event of a vote of non-confidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 14th day of April, 2023.

Emily MacKinnon, Brodie Noga, Elie Laskin,
Emilie Dillon, and Viktor Nikolov

Appellants' Counsel

[51] Respondents' Factum at paras. 27-31
[52] *Constitution Act*, RSBC 1996, c 66, s. 23(2)
[53] Merriam-Webster, *Merriam-Webster*, (2023) *sub verbo* "on" and "by"
[54] Appellants' Factum at para 58; Reasons at para. 5

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APPENDICES: ENACTMENTS

CONSTITUTION ACT

[RSBC 1996] CHAPTER 66

General elections

23 (1) The Lieutenant Governor may, by proclamation in Her Majesty's name, prorogue or dissolve the Legislative Assembly when the Lieutenant Governor sees fit.

(2)Subject to subsection (1), a final voting day must occur on the third Saturday in October in the fourth calendar year following the final voting day for the most recently held general election.

(3) As an exception to subsection (2), if the campaign period for a general election to be held under that subsection would overlap with the campaign period for a general local election to be held under section 52 of the Local Government Act or the election period for a federal general election to be held under section 56.1 (2) or section 56.2 of the Canada Elections Act, the final voting day for the general election must be held instead on a date to be specified under the Election Act that the Lieutenant Governor in Council determines to be suitable after consulting the Chief Electoral Officer, the Leader of the Official Opposition and each leader of a recognized political party.

(4) In this section, "general election" and "final voting day" have the same meaning as in section 1 of the *Election Act*.

CONSTITUTION ACT, 1982

Schedule B to the Canada Act 1982 (U.K.), Chapter 11

Amendment by Unanimous Consent

41 An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(c) subject to section 43, the use of the English or the French language;

(d) the composition of the Supreme Court of Canada; and

(e) an amendment to this Part.