No. S2010710
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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
HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA

RESPONDENTS

WRITTEN ARGUMENT OF THE PETITIONERS, DEMOCRACY WATCH and WAYNE CROOKES

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I. Overview

1. This Petition raises legal issues that go to the very core of British Columbia's democracy.

2. In late August 2001, the Honorable Geoff Plant Q.C., then-Attorney General of British Columbia, stood in the Legislative Assembly to announce an amendment to the *Constitution Act*, RSBC 1996, c 66 (the "***Constitution Act***") that would bring fundamental changes to the way elections were held in British Columbia.

3. The government was delivering on a campaign promise to establish fixed dates for provincial elections, with elections to be held every four years. The Attorney General stated that the purpose of the law was to ensure that the timing of elections could not be manipulated for political or partisan reasons, and that British Columbians would know how long a government would be in power and what timeline the government would have to meet their commitments.

4. The Attorney General also stated that the powers of the Lieutenant Governor to dissolve the Legislative Assembly would be maintained for cases where the government lost a confidence vote in the Legislative Assembly.

5. From 2001 to 2020, four general elections were held in British Columbia, always on the fixed election date set out in the *Constitution Act*. During that period, two different Premiers and three different Lieutenant Governors abided by the requirements of the *Constitution Act.*

6. Following the May 9, 2017 general election, the New Democrat Caucus formed government in coalition with the Green Caucus. The two caucuses entered into a Confidence and Supply Agreement (the "**Confidence and Supply Agreement**"), the duration of which was aligned with the next fixed election date set out in the *Constitution Act.* In the Confidence and Supply Agreement, the Leader of the New Democrats—who, pursuant to the agreement, became the Premier—agreed that he would not request a dissolution of the Legislature during the term of the agreement, except following the defeat of a motion of confidence.

7. Then, in September of 2020, amid the COVID-19 pandemic, the Premier decided to call an election. He did so a year before the statutory fixed date and while holding the confidence of the Legislative Assembly. In so doing, he ignored the Confidence and Supply Agreement, the fixed election provisions of the *Constitution Act*, and the nearly two-decade-long constitutional convention of holding elections on fixed dates in British Columbia.

8. As soon as possible after that election was called, Democracy Watch and Wayne Crookes commenced this Petition. They seek a declaration that the calling of a snap election at a time when the government held the confidence of the legislature was contrary to the *Constitution Act* and the *Election Act*, RSBC 1996, c 106 (the "***Election Act***"). In particular, the Petition seeks a declaration that in dissolving the legislature and calling an election in advance of the legislated date, the Premier, the Lieutenant Governor, or both, acted unlawfully. They seek this declaration on the basis that the *Constitution Act* limits the exercise of the Crown prerogative so that a snap election may not be held for political expediency when the government holds the confidence of the Legislative Assembly.

9. The provisions of the *Constitution Act* and the *Election Act* at issue have never been judicially considered, but the purpose of their enactment was clear: to limit the ability of a governing party to manipulate the timing of elections for political gain. For two decades, successive governments abided by these provisions. The petitioners ask this Court to ensure that future governments will do the same.

II. Facts

A. Provincial Elections in British Columbia

10. Prior to 2001, section 23 of the *Constitution Act* provided that, in the absence of dissolution of the Legislative Assembly, members of the Legislative Assembly would hold their seats for a maximum of five years. This provision echoed section 4(1) of the *Charter*.

11. As a consequence, provincial elections in British Columbia 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.

12. In 2001, section 23 of the *Constitution Act* was amended by Bill 7, the *Constitution (Fixed Election Dates) Amendment Act, 2001*. The new section 23 established a fixed election date, with a general voting day to occur on May 17, 2005, and on the second Tuesday in May every four years thereafter (the "**2001 Amendment**").

13. The purpose of the 2001 Amendment was to eliminate the Premier's discretion to accelerate or delay an election to further a political strategy, with the particular goal of increasing certainty and predictability in the conduct of public affairs and improving public confidence in the political process.

14. This purpose is unambiguously set out in Hansard. At the time, the Honorable Geoff Plant Q.C., then-Attorney General of British Columbia, stated:

    (a) The purpose of the 2001 Amendment was "to ensure that provincial elections in British Columbia *must be held* on a fixed date every fourth year or immediately if a government loses a confidence vote in the Legislature".

        British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 37th Parl., 2nd Sess., No. 21 (August 20, 2001) at 1410 (emphasis added)

    (b) The 2001 Amendment was made so that provincial elections in British Columbia could not be timed "according to the political agenda of a Premier" or "as an aspect of their re-election strategy".

        British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 37th Parl., 2nd Sess., No. 22 (August 21, 2001) at 1010 - 1015

    (c) The 2001 Amendment would strike "at the heart of the power that is concentrated in the Premier's office" and was "about reforming the institutions of government".

        British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 37th Parl., 2nd Sess., No. 22 (August 21, 2001) at 1015

    (d) Subsection 23(1) of the *Constitution Act* preserved the prerogative of the Lieutenant Governor to prorogue or dissolve the Legislative Assembly, so that "should a government be defeated in the Legislative Assembly on a vote of non-confidence,

the Lieutenant-Governor may dissolve the Legislative Assembly and call a general election immediately".

British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 37th Parl., 2nd Sess., No. 22 (August 21, 2001) at 1005

(e) Following the 2001 Amendment, the *Constitution Act* would not allow the timing of a provincial election to be determined based on the Premier's political agenda.

British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 37th Parl., 2nd Sess., No. 22 (August 21, 2001) at 1015

15. No alternative or contradictory purpose was set out or discussed in Hansard.

16. After the enactment of the fixed election provisions in the *Constitution Act* in 2001, the subsequent four elections were held on the dates required by the *Constitution Act*.

17. In November 2017, section 23 was again amended by Bill 5, *Constitution Amendment Act, 2017*, which moved the fixed election date from May to October (the "**2017 Amendment**"). Consequently, the next election was scheduled to occur on the third Saturday of October in 2021.

B. The 2020 Snap Election

18. Nevertheless, on September 21, 2020, after receiving advice from the Premier to dissolve the legislature and to cause the writs to be issued for an election, the Lieutenant Governor issued a Proclamation dissolving the Legislative Assembly.

September 21, 2020, Proclamation, Affidavit of Wayne Crookes, filed on October 23, 2020, Ex "D" ("**Crookes Affidavit**")

19. Also on September 21, 2020, the Lieutenant Governor approved Order in Council No. 567 (the "**OIC**"), in which the Lieutenant Governor in Council, on the recommendation of the Premier and the Attorney General, ordered a general election to be held in all electoral districts for the election of members to serve in the Legislative Assembly in British Columbia (the "**Snap Election**").

OIC, Crookes Affidavit, Ex "E"

20. At the time, the Premier held the confidence of the Legislature—and, as described below, the province was in the early grip of the COVID-19 pandemic. The only rational inference is that the timing of the Snap Election was an opportunity for political gain.

21. The general voting day for the Snap Election occurred on October 24, 2020.

C. British Columbia's COVID-19 State of Emergency

22. On March 17, 2020, the Provincial Health Officer provided notice that the COVID-19 pandemic constituted a regional event that could have a serious impact on public health, pursuant to the *Public Health Act*, SBC 2008, c 28, sections 51 and 52(2).

23. After March 17, 2020, the Provincial Health Officer issued numerous public health orders and provided extensive guidance, including limiting public gatherings, asking individuals to remain physically distant and to stay home if they felt ill.

24. On March 18, 2020, in Ministerial Order No. M073, the Minister of Public Safety and Solicitor General declared a state of emergency throughout the Province, pursuant to subsection 9(1) of the *Emergency Program Act*, RSBC 1996, c 111 (the "***Emergency Program Act***").

Ministerial Order No. M073, Crookes Affidavit, Ex "G"

25. That provincial state of emergency was continuously extended in two-week increments, as required by the *Emergency Program Act*, until it expired on June 30, 2021.

26. The Snap Election was called in the midst of the provincial state of emergency, raising numerous challenges and barriers to citizens' participation in the democratic process. On September 21, 2020, to address the numerous challenges of holding an election during the COVID-19 pandemic, the Chief Electoral Officer issued no less than 16 emergency orders pursuant to the *Election Act*, section 280. These orders modified numerous statutory requirements for the conduct of elections.

September 21, 2020, Emergency Orders, Crookes Affidavit, Ex "J"

27. The timing of the Snap Election during the COVID-19 pandemic, which impeded citizens' ability to vote, compounds the inference that the election was timed for political gain.

D. Proceedings at the Supreme Court of British Columbia

28. The Petitioners commenced this proceeding by way of petition on October 23, 2020, one day before the Snap Election. The Petition is supported by the Crookes Affidavit.

29. The Respondents notified the Petitioners of their intention to bring a motion to strike on November 20, 2020. Ultimately, the motion to strike was unable to be heard on the scheduled date, and the parties consequently agreed to move forward to a hearing on the merits of the Petition.

III. Legal Argument

A. Other Decisions Involving Fixed Election Provisions Are Wholly Distinguishable

30. The provisions of BC's *Constitution Act* and *Election Act* at issue have never been judicially considered. This is a matter of first impression for this Court.

31. The Respondents emphasize, however, that other courts in other jurisdictions have considered *different* fixed election statutes—none of which were embedded in a constitutional enactment. Those other courts held that the fixed election provisions at issue did not legally prevent the Prime Minister or the relevant Premier from calling particular snap elections. While the Respondents make much of these cases, they concern wholly different factual, statutory and constitutional contexts. They are distinguishable and do not bind this Court.

> *Conacher v. Canada (Prime Minister)*, 2009 FC 920, aff'd 2010 FCA 131, leave to appeal ref'd; *Engel v. Alberta (Executive Council)*, 2019 ABQB 490, aff'd 2020 ABCA 462, leave to appeal ref'd; *Democracy Watch v. The Premier of New Brunswick et al*, 2021 NBQB 233 (appealed to NBCA, November 29, 2021)

32. Given the Respondents' heavy emphasis on these decisions, they will be distinguished here, at the outset of this written argument.

33. The *Conacher*, *Engel* and *Democracy Watch (NB)* decisions concern different statutes in different jurisdictions and different contexts. These are non-binding decisions, and their results do not determine the outcome of the Petition. More particularly:

(a) The statutory provisions at issue in *Conacher*, *Engel* and *Democracy Watch (NB)* were nearly identical to each other. BC's statutory language is different. Unlike those provisions, BC's *Constitution Act* does not have a clause expressly preserving the Crown prerogative of dissolution, instead, it crystallizes the dissolution prerogative through subsection 23(1).

(b) None of the statutes at issue in *Conacher*, *Engel*, and *Democracy Watch (NB)* held the constitutional or quasi-constitutional status of the British Columbia *Constitution Act*.

(c) None of the broader statutory contexts in *Conacher*, *Engel* or *Democracy Watch (NB)* included a reference to a fixed election schedule in other pieces of procedural legislation, in contrast to BC's *Election Act*.

(d) The Interpretation Acts applicable in each of those cases required express language to affect the Crown's prerogative and did not allow for the possibility of limiting the Crown's prerogative by necessary implication. By contrast, subsection 14(1) of BC's *Interpretation Act* provides that *unless it specifically provides otherwise*, an enactment is binding on the government.

(e) In each case, the relevant Hansard was ambiguous as to the purpose and intended effects of the provisions at issue. By contrast, BC's Hansard is unambiguous.

(f) The Snap Election occurred in British Columbia, in the particular context of this Province and in a unique set of circumstances, including the Confidence and Supply Agreement that guaranteed that the Premier would hold the confidence of the Legislative Assembly until the next fixed election date; and

(g) In the other jurisdictions considered in each case, there had been no consistent precedent of following the fixed election provisions, precluding the establishment

of a constitutional convention of fixed election dates. By contrast, BC's fixed election provisions have been followed for two decades.

> *Democracy Watch v. The Premier of New Brunswick et al*, 2021 NBQB 223; *Conacher v. Canada (Prime Minister)*, 2009 FC 920, aff'd 2010 FCA 131, leave to appeal ref'd; *Engel v. Alberta (Executive Council)*, 2019 ABQB 490, aff'd 2020 ABCA 462; 2017 Confidence and Supply Agreement, Crookes Affidavit, Ex "B"

34. In other words, the Petitioners are not repeating the legal arguments from the cases brought federally, in Alberta, or in New Brunswick. The situation in BC does not fit into the "unbroken path of jurisprudence" asserted by the Respondents. The provisions of the *Constitution Act* and the *Election Act* at issue deserve the full consideration of this Court.

B. The Crown's Prerogative Powers

35. The declaration sought by the Petitioners—that the calling of the Snap Election, at a time when the government held the confidence of the legislature, was contrary to the *Constitution Act* and the *Election Act*—rests on an understanding of how these statutes have crystallized and limited the Crown's prerogative powers.

36. Prerogative powers comprise those powers and privileges afforded by the common law to the Crown and, by extension, the executive branch of government. In *Canada (Prime Minister) v. Khadr*, the Supreme Court of Canada accepted the definition of prerogative powers as the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown".

> *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at para 34; *Ross River Dena Council Band v. Canada*, 2002 SCC 54 at para 54

37. It is common ground that the Premier's power to advise the Lieutenant Governor to dissolve the Legislative Assembly forms part of the Crown's prerogative powers. Similarly, the Lieutenant Governor's power to dissolve the Legislative Assembly is part of the Crown's prerogative powers. As will be canvassed below, it is clear that prerogative powers can be limited by ordinary statute; it is only the "residue" of such arbitrary authority that remains in the hands of the Crown and the executive branch at any given time.

38. Although the exercise of the prerogative power *within its proper boundaries* is not amenable to judicial review, courts have the authority—and, indeed, the responsibility—to determine the legal limits of the powers and to decide whether any exercise of power has transgressed those limits.

> Peter Hogg, Constitutional Law of Canada, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2019), Part I at §1.9; *Black v. Canada (Prime Minister)* (2001), 54 OR (3d) 215 at para 29; *R. (Miller) v. The Prime Minister*, [2019] UKSC 41 at paras 36, 39; *Hupacasath First Nation v. Canada (Minister of Foreign Affairs),* 2015 FCA 4 at paras 63-66;

39. It is also common ground that prerogative powers are affected by constitutional conventions. Conventions have been defined as "rules of the constitution that are not enforced by the law courts". Conventions "prescribe the way in which legal powers shall be exercised". For example, by convention, royal assent—a Crown prerogative—shall not be withheld from a bill that has been duly enacted by the legislative branch of government. Moreover, it is part of the conventions of responsible government for the Governor General or the Lieutenant Governor to dissolve the legislature and order a general election when the government loses the confidence of the legislature. It would be a breach of that convention for the Governor General or the Lieutenant Governor *not* to exercise the dissolution power in such a case.

> Peter Hogg, Constitutional Law of Canada, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2019), Part I at § 1.10; *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 880

40. While the exercise of prerogative powers is governed *politically* by conventions, the *boundaries* of the prerogative powers can be legally set through legislation. The question of where legislatures have drawn the line, and what "residue" they have left in the hands of the Crown and the executive branch, is a justiciable matter, determinable by the courts. Courts, furthermore, have the jurisdiction to issue legal sanctions when the Crown or the executive branch exceeds the boundaries of the prerogative.

> Peter Hogg, Constitutional Law of Canada, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2019), Part I at § 1.9; *Khadr v. Canada (Prime Minister),* 2010 SCC 3 at para 37; *Black v.*

Canada (Prime Minister) (2001), 54 OR (3d) 215 at para 29; *R. (Miller) v. The Prime Minister*, [2019] UKSC 41 at paras 36, 39

41. Constitutional conventions can also be used as an interpretive tool to shed light on the meaning of a legislative provision that limits a Crown prerogative. Therefore, although conventions themselves are non-justiciable, they may be reduced to writing in—or inform the meaning of—legislation. That legislation may, in turn, impose a legal limit on a prerogative. Therefore, it is within this Court's jurisdiction to consider constitutional conventions as part of a statutory interpretation exercise, to determine the legal boundaries of a prerogative, and to determine whether an exercise of a prerogative power has exceeded such boundaries.

Reference re Secession of Quebec, [1998] 2 SCR 217 at paras 52-54; *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 880

42. The Petitioners' position is that section 23 of the *Constitution Act*, interpreted purposively, as constitutional or quasi-constitutional legislation, and in light of relevant Hansard evidence and constitutional conventions, has carved out of the prerogative power the ability to call a snap election when the government holds the confidence of the legislature.

43. For that reason, in advising the Lieutenant Governor to call the Snap Election, the Premier improperly acted outside the bounds of his prerogative powers, contrary to the *Constitution Act*. This Court has jurisdiction to make a declaration to that effect. Similarly, in issuing a Proclamation to dissolve the Legislative Assembly and in approving the OIC, the Lieutenant Governor acted on improper authority and outside the bounds of the prerogative powers, contrary to the *Constitution Act*. This Court similarly has jurisdiction to make a declaration to that effect.

i. This Court may review exercises of prerogative powers to determine their legal limits

44. It is within this Court's jurisdiction to adjudicate the limits of prerogative powers, as well as to review whether the executive branch exercises its prerogative powers in accordance with the law. Canadian courts can—and have—undertaken such a review. As such, it is open to this Court to determine whether the Premier and the Lieutenant Governor exceeded

the boundaries of the Crown prerogative of dissolution, as narrowed by section 23 of the *Constitution Act*.

> Peter Hogg, Constitutional Law of Canada, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2019), Part I at §1.9; *Black v. Canada (Prime Minister)* (2001), 54 OR (3d) 215 at para 29; *R. (Miller) v. The Prime Minister*, [2019] UKSC 41 at paras 36, 39; *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4 at paras 63-66

45. Indeed, such a review is not unprecedented. In 2019, the UK Supreme Court found that the Prime Minister's decision to advise the Queen to prorogue Parliament was unlawful, in that it had "the effect of frustrating or preventing, *without reasonable justification*, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive" (emphasis added). The court issued a declaration to that effect.

> *R. (Miller) v. The Prime Minister*, [2019] UKSC 41 at paras 50, 61, 70

46. This jurisprudence is not relevant simply by analogy. The Crown prerogative as exercised by the Lieutenant Governor and Premier in BC is *the same prerogative* exercised by the Queen in the UK. Decisions about the reviewability of the prerogative are highly persuasive in the determination of this Petition, even if they are not binding on this Court.

> *Re The Initiative and Referendum Act*, [1919] AC 935 (JCPC), 48 DLR 18 at 24

ii. The Crown prerogative can be limited by ordinary statute

47. Contrary to the Respondents' assertions, limiting the Crown's prerogative powers does not require resolutions of the Senate, the House of Commons, and the legislative assembly of each province. As a branch of the common law, the Crown prerogative is subject to limitations established by both statute and by the common law.

> *Ross River Dena Council Band v. Can.*, 2002 SCC 54 at para 54; *Delivery Drugs Ltd. v. British Columbia (Deputy Minister of Health)*, 2007 BCCA 550 at para 53; *Miller v. The Prime Minister*,

2019 UKSC 41, at para 49; *Interpretation Act*, RSC 1985, c I-21, s 17

48. The lone authority pleaded by the Respondents on this point concerned a potential *abrogation* of the office of the Lieutenant Governor, rather than a mere limitation of the Crown prerogative. For such amendments to "the office" of the Lieutenant Governor, subsection 41(a) of the *Constitution Act, 1982* requires they be made by way of constitutional amendment. The effect is that a province may not *abolish* the office of the Lieutenant Governor by ordinary statute.

In re the Initiative and Referendum Act, [1919] AC 935 (JCPC); *Constitution Act, 1982*, s 41(a), being Schedule B to the Canada Act 1982 (UK), 1982, c 11

49. This provision does not, however, prevent a province from limiting the Crown's prerogative powers by ordinary statute. This was made clear by Barry Strayer, then-Assistant Deputy Minister of the Public Law division of the Department of Justice, in the 1980 Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. At the time, Mr. Strayer clarified that subsection 41(a) of the *Constitution Act, 1982* did not deal with the "functions or office" of the Lieutenant Governor "in any substantive way", and similarly that there was nothing "dealing with the definition of the functions of […] the Lieutenant Governors". In fact, the government *rejected* a proposal to add to subs. 41(a) the language: "*the office, powers and functions* of the [...] Lieutenant Governor". Thus, while a constitutional amendment is required to abolish the role of the Lieutenant Governor, no such amendment is required to place specific limits on her prerogative powers.

In re the Initiative and Referendum Act, [1919] AC 935 (JCPC); *Constitution Act, 1982*, s 41(a), being Schedule B to the Canada Act 1982 (UK), 1982, c 11; Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Thursday, November 13, 1980, 4:46

50. Crucially, interpreting subsection 41(a) as proposed by the Respondents would invalidate decades of common statutory amendments that have limited Crown prerogative powers in Canada without constitutional amendments. For example:

(a) In 1951, Parliament approved Bill 192, *An Act to amend the Petition of Right Act*, in which the Governor General surrendered the authority to permit a citizen to institute proceedings against the Crown in the Exchequer Court.

An Act to amend the Petition of Right Act, SC 1950-1951, c 33

(b) In the national defence context, many prerogative powers have been crystallized and limited by primary and secondary legislation which regulates various operations of the armed forces.

National Defence Act, RSC 1985, c N-5 and associated regulations; see also *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] All ER Rep 80 (HL).

(c) In the indigenous context, the Crown prerogative to create reserves has been limited by the *Indian Act* and the *Territorial Lands Act*.

Ross River Dena Council v. Canada, 2002 SCC 54 at paras 58-59.

51. The specific Crown prerogative at issue here—that of dissolution—has also been limited by ordinary statute:

(a) Various fixed election statutes have, at a minimum, the effect of compelling the Governor General or Lieutenant Governors to dissolve the legislative assemblies after four years, thus limiting the dissolution prerogative.

An Act to Amend the Canada Elections Act, SC 2007, c 10; *Election Amendment Act*, 2011, SA 2011, c 19; *The Legislative Assembly and Executive Council (Fixed Election Dates) Amendment Act*, 2008, SS 2008, c 6; *The Lobbyists Registration Act and Amendments to The Elections Act, The Elections Finances Act, The Legislative Assembly Act and The Legislative Assembly Management Commission Act*, SM 2008, c 43; *Election Statute Law Amendment Act*, 2005, SO 2005, c 35; *An Act to amend the Election Act for the purpose of establishing fixed-date elections*, CQLR 2013, c 13; *An Act to Amend the Legislative Assembly Act*, RSNB 2007, c 57; *An Act to Amend the House of Assembly Act*, SNL 2004, c 44; *Elections and Plebiscites Act*, SNWT 2006, c 15; *An Act to Provide for a Fixed Election Date*, S.Nu. 2014, c 5.

(b) In the UK, dissolution of Parliament as a prerogative power has been overtaken and displaced by statute. The Crown prerogative as exercised by the Lieutenant Governor and Premier in BC is the same prerogative exercised by the Queen in the UK; it follows that such powers may also be limited by statute in Canadian jurisdictions.

> *Miller v. The Prime Minister*, 2019 UKSC 41, at para 5; *Re the Initiative and Referendum Act*, [1919] AC 935 (JCPC), 48 DLR 18 at 24

52. Consequently, BC's Legislative Assembly was entirely competent to limit the Lieutenant Governor's prerogative by enacting section 23 of the *Constitution Act*.

C. Statutory Interpretation: The *Constitution Act* has limited the Crown prerogative

53. Properly interpreted, section 23 of the *Constitution Act* limits the Premier's power to advise the Lieutenant Governor—and the Lieutenant Governor's power to accept the Premier's advice—to dissolve the Legislative Assembly for political reasons when the government holds the confidence of the legislature.

54. Section 23 must be given a large and liberal interpretation, consistent with its purpose as reflected in the Hansard, and in light of the relevant constitutional conventions. This arises from two interpretive rules.

55. First, the modern approach to statutory interpretation requires the words of a statute to be read "in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

> Elmer A. Driedger, *The Construction of Statutes* (Toronto, Butterworths, 1974, at 67); Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed. (Toronto: LexisNexis Canada, 2014) §2.1; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para 21.

56. Second, it is a trite principle of Canadian law that constitutional or quasi-constitutional enactments, including provincial enactments, are to be given a liberal and purposive interpretation. The *Constitution Act* is the constitution of British Columbia. It legislates

constitutional matters, including the role of democratic institutions. The legal principles in the *Constitution Act* must endure the test of time. They must be judicially interpreted with due consideration to the way in which democratic actors have consistently applied them, and they must be given a liberal and purposive interpretation by the courts.

> *Tranchemontagne v. Ontario (Director, Disability Support Program),* 2006 SCC 14 at para 33

57. As set out below, when construed in accordance with these rules, section 23 has narrowed the Crown prerogative of dissolution. The Petitioners assert it does so on its face; however, if this Court disagrees, then the Petitioners assert that it also does so by necessary implication.

58. A statute can limit a Crown prerogative power by necessary implication if it provides for the thing to be done by the Crown in a particular case. The statute need not be a complete code governing that prerogative. In this case, section 23 of the *Constitution Act* addresses certain circumstances of dissolution, and by necessary implication addresses whether dissolution can occur before the fixed election date when a Premier has the confidence of the House.

> *Delivery Drugs Ltd. v. British Columbia (Deputy Minister of Health),* 2007 BCCA 550 at paras 64-66

59. Moreover, the *Constitution Act* must be interpreted in accordance with British Columbia's *Interpretation Act,* RSBC 1996, c 238 (the "***Interpretation Act***"), which provides under section 14 that unless an enactment specifically provides otherwise, it is binding on the government.

> *Interpretation Act,* RSBC 1996, c 238, s 14

60. Section 14 of BC's *Interpretation Act* is opposite to most Interpretation Acts in Canada. Other jurisdictions' Interpretation Acts—unlike BC's—provide that no enactment binds the Crown or affects the Crown's prerogative, *except as expressly provided for* in the

enactment. That BC's *Interpretation Act* is distinct has been expressly recognized by the Supreme Court of Canada.

> *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, at footnote 9; *Interpretation Act*, RSC 1985, c I-21, s 17; *Interpretation Act*, RSA 2000, c I-8, s 14; *Interpretation Act*, SM 2000, c 26, CCSM, c I80, s 49; *Legislation Act*, 2006, SO 2006, c 21, Sched. F, s 71; *Legislation Act*, SS 2019, c L-10.2, s 2-20; *Interpretation Act*, CQLR, c 1-16; *Interpretation Act*, SPEI 2021, c 10, s 20; *Interpretation Act* RSNS 1989, c 235, s 14; *Interpretation Act*, RSNL 1990, c I-19, s 12; *Interpretation Act* RSNB 1973, c I-13, s 32.

61. Therefore, the British Columbia *Constitution Act* is capable of limiting the Crown's prerogative power, not only by express statement, but also by necessary implication. This is consistent with decisions of the Supreme Court of Canada and the British Columbia Court of Appeal, which have both held that the Crown's prerogative powers may be limited through statute by necessary implication. It is also consistent with the special status of BC's *Constitution Act*.

> *Ross River Dena Council Band v. Can*., 2002 SCC 54 at para 54; *Delivery Drugs Ltd. v. British Columbia (Deputy Minister of Health)*, 2007 BCCA 550 at para 53

62. Thus, subsection 23(2) of the *Constitution Act* limits the prerogative power of dissolution, either expressly or by necessary implication. As set out below, it is impossible to give section 23 its full meaning, as elucidated by the plain language of the provision, relevant Hansard evidence, the statutory context, and constitutional conventions, without finding that the 2001 Amendment has limited the prerogative power of dissolution.

i. The plain language of section 23

63. The first step in a statutory interpretation exercise is to consider the plain meaning of the provision's wording. The relevant provisions of section 23 of the *Constitution Act* read as follows:

> **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 general voting day must occur on the third Saturday in October in the fourth calendar year following the general voting day for the most recently held general election.

64. Before the 2001 Amendment, those provisions read as follows:

> **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) In the absence of dissolution the members of the Legislative Assembly hold their seats for 5 years from the day named as the return day in the writs for the election of members to the Legislative Assembly and no longer.

65. Through the 2001 Amendment, the Legislative Assembly took subsection 23(2) a step further than its predecessor. If the intent was merely to change the *maximum* election cycle from five years to four, the 2001 Amendment could have simply changed the number of years in subsection 23(2), leaving the rest of the provision unaltered. Instead, its plain language ("*a general voting day must occur"*) states a legislative intention to *fix* general elections on specified dates every four calendar years.

66. Contrary to the assertions of the Respondents, the plain meaning of subsection 23(2) is not abrogated by the fact that it is made subject to subsection 23(1). Subsection 23(1) does *not* state that the Lieutenant Governor's prerogative powers of dissolution are "unaffected" by section 23. Instead, it crystallizes the prerogative power of dissolution by providing that the Lieutenant Governor may prorogue the Legislative Assembly when she "*sees fit*". In so doing, subsection 23(1) does not preserve or reinstate a boundless conception of the common law prerogative powers: rather, it crystallizes the prerogative power of dissolution as it has been legally narrowed by statute and politically narrowed by convention. In this way, the wording of subsection 23(1) differs significantly from the wording of the statutes considered in the *Conacher*, *Engel*, and *Democracy Watch (NB)* cases (all of which stated that the Crown prerogative was "unaffected").

> *Conacher v. Canada (Prime Minister)*, 2009 FC 920 at para 15, aff'd 2010 FCA 131, leave to appeal ref'd; *Engel v. Alberta (Executive Council)*, 2019 ABQB 490 at para 1, aff'd 2020 ABCA 462, leave to appeal ref'd; *Democracy Watch v. The Premier of*

New Brunswick et al, 2021 NBQB 233 at para 12 (appealed to NBCA, November 29, 2021)

67. Section 23 must be read as a whole, and the meaning of "sees fit"—which is not defined in subsection 23(1) or elsewhere in the *Constitution Act*—must be understood in that context. The only way to make sense of the interplay of subsections 23(1) and (2) is to read the Lieutenant Governor's exercise of discretion to dissolve (or not dissolve) the Legislative Assembly as being *narrowed* by the fixed election calendar in subsection 23(2). In other words, the fixed election dates in subsection 23(2) limit when the Lieutenant Governor "sees fit" to exercise the dissolution power found in subsection 23(1).

68. By contrast, interpreting subsection 23(2) as having no bearing on the "sees fit" analysis—as the Respondents argue—would render the fixed election provision legally meaningless and merely aspirational. This contravenes the principle that every word in a provision should be interpreted in a manner that gives it meaning. It ignores the legislative processes that duly enacted the 2001 Amendment and the further 2017 Amendment, and it ignores the two decades of elections that occurred on the fixed schedule. Furthermore, as discussed below, section 23 does not stand alone: it is expressly relied on in section 24 of the *Election Act*.

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed. (Toronto: LexisNexis Canada, 2014) §8.23; *R. v. Proulx*, 2000 SCC 5 at para 28

69. Plainly, the words "subject to subsection (1)" indicate that abiding by the fixed election schedule in subsection (2) is not the only consideration that may ground the Lieutenant Governor's exercise of the dissolution power. It does not follow, however, that the language "when the Lieutenant Governor sees fit" grants unbridled discretion to the Lieutenant Governor, such that he or she has the authority to dissolve the legislature on a whim.

70. Adopting the Respondents' interpretation of section 23(1)—that there are no constraints on the Lieutenant Governor's prerogative power to dissolve the legislature—would be untenable.

71. First, as stated by Professor Andrew Heard, laws are often "crafted with the full knowledge and intent that the bare bones of the law will be modified by supporting conventions". The plain language of the section must be read as taking into account, in particular, the conventions of responsible government. Those conventions dictate in part that in most circumstances, the dissolution power will be exercised on the advice of the first minister and cabinet (for example, following a non-confidence vote). At the very least, the words "when the Lieutenant Governor sees fit" in subsection 23(1) must be read as recognizing this limit on the Lieutenant Governor's discretion.

> Andrew Heard, "Conacher Missed the Mark on Constitutional Conventions and Fixed Election Dates," Constitutional Forum, Spring 2010, Vol. 19(1), pp. 129-130

72. Furthermore, in the prior version of subsection 23(1), the Lieutenant Governor's power of dissolution was already limited by subsection 23(2). Before the 2001 Amendment, subsection 23(2) established that assembly members would hold their seats for a maximum term of five years. If the Lieutenant Governor did not *see it fit* to exercise her power of dissolution under subsection 23(1) within five years, there would be legal consequences: according to the former subsection 23(2), the members of the Legislative Assembly would no longer hold their seats. Therefore, in the absence of a dissolution under subsection 23(1) within five years, the Lieutenant Governor would have been legally required to dissolve the legislature and issue writs for an election. Thus, even prior to the 2001 Amendment, subsection 23(1) was limited legally by former subsection 23(2) and by convention.

73. Similarly, a purposive reading of current subsection 23(1) indicates that subsection 23(2) informs the types of situations in which the Lieutenant Governor may *see fit* to dissolve the Legislative Assembly. As explained below, this is supported by other indicators of legislative intent.

74. Failing to read subsection 23(1) as being informed by subsection 23(2) would denude the 2001 Amendment of its legal force. The 2001 Amendment did not merely provide that elections must be held *at least* every four years; the new subsection 23(2) fixes the actual date on which elections must be held. Reading subsection 23(2) as a mere aspirational goal

or a mere maximum limit on the terms of MLAs would fail to give meaning to each word in the provision, contrary to time-worn principles of statutory interpretation.

75. In any event, even if this Court finds that the Lieutenant Governor need not comply with subsection 23(2), the Premier is unequivocally bound by that provision.

ii. Hansard

76. Section 23 of the *Constitution Act* must be interpreted in light of the relevant Hansard. Hansard is routinely used to assist in statutory interpretation. As part of the modern approach to statutory interpretation, it may properly assist this Court in determining a statute's purpose.

> *Sohal v. Lezama*, 2021 BCCA 40, at paras 56-61; *Reference re Firearms Act (Canada)*, 2000 SCC 31, at para 17; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed. (Toronto: LexisNexis Canada, 2014) §23.88-89

77. Hansard is of particular importance and should be given greater weight where it is clear, and where it specifically and clearly addresses the issues before the court. In this case, the Hansard is unambiguous. It specifically and clearly addresses the issues of statutory interpretation before this Court.

> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed. (Toronto: LexisNexis Canada, 2014) §23.88-89

78. The Hansard evidence in this case supports the Petitioners' interpretation of section 23 of the *Constitution Act*: that the fixed election schedule has narrowed the scope of the Crown prerogative of dissolution. In fact, the Hansard evidence goes further and sheds light on the interplay of subsections 23(1) and 23(2).

79. First, the overall purpose of the 2001 Amendment is clear from the statements of the then-Attorney General. As set out in paragraph 14 above, the Hansard concerning the 2001 Amendment sets out an unequivocal choice by the Legislative Assembly to remove the Premier's power to use the timing of an election to serve his or her political agenda:

> [O]ur political history indicates, at least in British Columbia, that premiers use their power to determine the timing of the calling of an election as an aspect of their re-election strategy…This bill will make a change in that historical practice by ensuring that the general elections of British Columbia will not be held according to the political agenda of a Premier but rather according to a timetable which is fixed, which is certain and predictable.
>
> British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 37th Parl., 2nd Sess., No. 22 (August 21, 2001) at 1014-1015.

80. In fact, the then-Attorney General stated that the 2001 Amendment would strike "at the heart of the power that is concentrated in the Premier's office", and that it was "about reforming the institutions of government". He stated that the 2001 Amendment was brought "to ensure that provincial elections *must be held* on a fixed date every fourth year *or immediately if* a government loses a confidence vote in the Legislature" (emphasis added).

> British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 37th Parl., 2nd Sess., No. 22 (August 21, 2001) at 1015; British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 37th Parl., 2nd Sess., No. 21 (August 20, 2001) at 1415

81. Hansard makes two things clear: (a) that the fixed election schedule was meant to have binding effect, and not to create a merely aspirational objective; and (b) that the fixed election schedule was meant to stop premiers from calling politically motivated snap elections when their government held the confidence of the Legislative Assembly.

82. Subsection 23(2) of the *Constitution Act* is subject to subsection (1), which states that the Lieutenant Governor may prorogue or dissolve the Legislative Assembly when the Lieutenant Governor sees fit. As noted above, "sees fit" is not defined in the legislation. However, the statements of the then-Attorney General in Hansard address the interplay between the sections and set out when the Lieutenant Governor may appropriately "see fit" to dissolve the Legislative Assembly outside of the fixed election schedule:

> It's important, however, to emphasize that this bill is drafted in a way that preserves the constitutional prerogative of the Lieutenant-Governor to prorogue or dissolve the Legislative Assembly, and in so doing, ensures

> that should a government be defeated in the Legislative Assembly on a vote of non-confidence, the Lieutenant-Governor may dissolve the Legislative Assembly and call a general election immediately. Those are the traditional powers of the Crown.
>
> British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 37th Parl., 2nd Sess., No. 22 (August 21, 2001) at 1005

83. The legislation does not set out all instances when the dissolution power in subsection 23(1) properly may be exercised outside of the fixed election schedule, and it is beyond the scope of this Petition to exhaustively determine the legislated limits of the prerogative. Nevertheless, Hansard makes it clear that the legislation was intended to limit the prerogative and legally prohibit politically motivated exercises of the dissolution power outside the fixed election schedule when the Premier's government holds the confidence of the legislature. It was intended to have binding effect.

iii. Statutory Context

84. Statutory provisions must be interpreted in their entire context, which includes other statutes dealing with the same subject. Related legislative provisions are to be read together, and courts must bear in mind the presumption of coherence and the principle of harmonization when interpreting them. Furthermore, the legislature is presumed to know its own statute book and to draft each new provision with regards to the substance of other legislative provisions.

> Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th Ed. (Toronto: LexisNexis Canada, 2014) §13.25-26, §13.35; *Vancouver Oral Centre for Deaf Children Inc. v. British Columbia,* 2002 BCCA 667, at para 17; *65302 British Columbia Ltd. v. Canada*, [1999] 3 SCR 804, at paras 7-8; *R. v. Ulybel Enterprises Ltd.,* 2001 SCC 56, at para 30.

85. It is necessary, then, to consider section 23 of the *Constitution Act* in conjunction with section 24 of the *Election Act*. Section 24 prescribes the procedural steps that the Lieutenant Governor must follow for a general election to be held:

> 24 (1) For a general election to be held, the Lieutenant Governor in Council must issue an order under this section that

> (a) directs the chief electoral officer to issue writs of election for all electoral districts,
>
> (b) sets the date of issue for the writs of election, which must be the same for all writs,
>
> (c) specifies the general voting day for the election in accordance with section 27 of this Act and section 23 of the *Constitution Act*, and
>
> (d) directs that the writs of election be returned in accordance with this Act.
>
> (2) If a general election is called before general voting day for a by-election that is in progress, the by-election is cancelled and the election for that electoral district is to take place as part of the general election.

86. Subsection 24(1)(c) provides that the general voting day must be specified in accordance with section 23 of the *Constitution Act*. It follows that the fixed election schedule in subsection 23(2) of the *Constitution Act*, and its necessary limitation on the dissolution prerogative power, are not merely aspirational. Instead, the fixed election schedule informs the procedural requirements for an election to be held. Notably, none of the jurisdictions considered in the *Conacher*, *Engel*, or *Democracy Watch (NB)* cases had enacted procedural requirements analogous to section 24 of the *Election Act* in BC.

87. While section 27 of the *Election Act* contemplates that some elections may be held in accordance with subsection 23(1)—not 23(2)—of the *Constitution Act*, this plainly refers to situations such as those in which the government has lost the confidence of the legislature. As noted above, it is clear from both the plain language of section 23 and from the relevant Hansard that there are situations in which the Crown prerogative of dissolution may be exercised outside of the fixed election schedule. This does not change the fact that section 24 of the *Election Act* recognizes the legal significance of section 23 of the *Constitution Act* – including the significance of section 23(2), where it is applicable.

88. Section 27 of the *Election Act* sets the general voting day for all elections, and therefore must provide for the timing of all elections following dissolution under subsection 23(1) of the *Constitution Act*, including those that lawfully depart from the fixed election schedule in subsection 23(2).

iv. Conventions

89. On a proper understanding of conventional context, subsection 23(1) of the *Constitution Act* cannot be interpreted as widely as the Respondents suggest. Contrary to the Respondents' assertions, the Petitioners do not seek to judicially enforce constitutional conventions. Rather, the Petitioners seek merely to follow the established rule that constitutional conventions my inform statutory interpretation.

> *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 880; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 52-54

Conventions of Responsible Government

90. As noted above, the Lieutenant Governor has no freestanding ability to dissolve the Legislative Assembly. As a consequence of the well-established and long-standing constitutional conventions of responsible government, the Lieutenant Governor will dissolve the Legislative Assembly and call an election only on the advice of the Premier or when the Premier's government has lost the confidence of the Legislative Assembly.

> Peter Hogg, Constitutional Law of Canada, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2019), Part I at 1.9, 9.3, and 9.19

91. Section 23 of the *Constitution Act* incorporates these conventions: as noted above, laws are often "crafted with the full knowledge and intent that the bare bones of the law will be modified by supporting conventions".

> Andrew Heard, "Conacher Missed the Mark on Constitutional Conventions and Fixed Election Dates," Constitutional Forum, Spring 2010, Vol. 19(1), pp. 129-130

92. As discussed above, the Lieutenant Governor's breach of the responsible government conventions, alone, would not be justiciable. Nevertheless, the conventions inform this Court's reading of section 23 of the *Constitution Act*. Subsection 23(1) does not claim to reinstate a boundless version of the Lieutenant Governor's dissolution power, instead, it crystallizes the Crown prerogative *as it has been narrowed* by the responsible government conventions. If the Lieutenant Governor acts contrary to these conventions, for example by

dissolving the Legislature on her own initiative, she would exceed the power codified in subsection 23(1), thus breaching the *Constitution Act.*

93. Understanding subsection 23(1) of the *Constitution Act* through the prism of the responsible government conventions—in other words, that "sees fit" does not create unbounded Crown discretion—supports the view that subsections 23(1) and (2) are to be read harmoniously and in a way that gives effect to all the words of the provision. Subsection 23(1) implicitly recognizes that there are factors informing the "sees fit" analysis; the responsible government conventions supply one of these factors (that dissolution should follow a vote of non-confidence), and subsection 23(2) provides another (that dissolution should follow the schedule fixed by the *Constitution Act*). To ignore these considerations in exercising the dissolution power is to breach the *Constitution Act*.

The Fixed Election Convention

94. Furthermore, the codified prerogative in subsection 23(1) is also limited by the convention that elections will be held on the dates prescribed by subsection 23(2). Four provincial elections over close to 20 years have been held on the dates prescribed by subsection 23(2) of the *Constitution Act*. These precedents established a constitutional convention that elections in British Columbia are to be held on a fixed date every four years, unless the government loses the confidence of the legislature (the "**Fixed Election Convention**").

95. The Supreme Court of Canada has established a three-pronged test to determine whether a constitutional convention has been established: (1) demonstrating that precedents exist; (2) that actors in the precedents believed they were bound by a rule; and (3) that there was a reason for the rule. Sir Ivor Jennings, who developed this test, stated that "[a] single precedent with a good reason may be enough to establish the rule."

> *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at p. 888, 125 DLR (3d) 1 (SCC); Andrew Heard, "Conacher Missed the Mark on Constitutional Conventions and Fixed Election Dates," Constitutional Forum, Spring 2010, Vol. 19(1), at 132 and 134, citing Sir Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959) at 136

96. In addition, a constitutional convention may be established by mere agreement.

> Peter Hogg, Constitutional Law of Canada, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2019), Part I at 1.13; Andrew Heard, "Conacher Missed the Mark on Constitutional Conventions and Fixed Election Dates," Constitutional Forum, Spring 2010, Vol. 19(1)

97. On either formulation of the test, the Fixed Election Convention has been established. First, the pattern of four subsequent governments following the statutorily fixed election date establishes the requisite precedents and reflects that the Premiers in each case believed themselves to be bound by the rule. As a further precedent, the Confidence and Supply Agreement between the New Democrat Caucus and the Green Caucus recognized the fixed election schedule and set the agreement's duration accordingly. The reason for the rule is clearly set out in the 2001 Hansard: to prevent the executive branch of government from calling elections for purely political reasons, which would damage the relationship of trust between the government and the electorate.

> 2017 Confidence and Supply Agreement, Crookes Affidavit, Ex "B"; British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 37th Parl., 2nd Sess., No. 22 (August 21, 2001) at 1015

98. The conduct of actors in other provinces does not inform whether the actors in British Columbia considered themselves bound to a British Columbian convention.

99. The test for establishing conventions under the second formulation is met as well. In 2001, the relevant political actors involved in enacting the statutory provision reached an agreement to bind themselves and future governments. This agreement had the effect of creating a convention that the Premier would not exercise the prerogative of dissolution for political purposes, outside the fixed election schedule, when the government holds the confidence of the Legislative Assembly.

100. This convention, regardless of the test by which it is established, assists in the interpretation of subsection 23 of the *Constitution Act*. The fact that political actors followed the Fixed Election Convention for nearly two decades, in four successive election cycles, indicates

that the fixed election schedule established by subsection 23(2) is, and was always meant to be, a binding legal obligation.

101. To be clear, the Petitioners are not asking this Court to enforce the breach of the Fixed Election Convention. Rather, the Petitioners rely on the uncontroversial principle that constitutional conventions can inform the interpretation of statutes.

Re Resolution to Amend the Constitution, [1981] 1 SCR 753 at 880;
Reference re Secession of Quebec, [1998] 2 SCR 217 at paras 52-54

102. When considered alongside the provision's ordinary meaning, relevant Hansard, and the relevant statutory context, these constitutional conventions further support the Petitioners' interpretation of the purpose and legal force of section 23 of the *Constitution Act.*

D. The Premier and the Lieutenant Governor acted outside the bounds of the prerogative, breaching the *Constitution Act* and the *Election Act*

103. In calling the Snap Election, the Premier and the Lieutenant Governor each breached section 23 of the *Constitution Act* and section 24 of the *Election Act*.

104. As noted above, the Confidence and Supply Agreement ensured that the government would hold the confidence of the legislature until the next election, which was to be held on the date fixed by subsection 23(2). Moreover, in 2020 the province was in the early grip of the COVID-19 pandemic, which imposed challenges and barriers to citizens' participation in the democratic process. The only logical inference is that the Snap Election was called for political gain—the very mischief the 2001 Amendment was designed to prevent.

105. The Respondents have provided no evidence to counter this inference.

IV. Relief Sought

106. For all these reasons, the Petitioners seek a declaration that:

(a) the Premier, in advising the Lieutenant Governor to dissolve the Legislative Assembly in the circumstances, breached section 23 of the *Constitution Act*;

(b) the Lieutenant Governor, by acting on the Premier's advice, breached section 23 of the *Constitution Act*; and

(c) the Lieutenant Governor in Council breached section 24 of the *Election Act*, by calling an election that was not in accordance with section 23 of the *Constitution Act*.

107. To be clear, the Petitioners do not seek to overturn the results of the Snap Election, nor to invalidate the current legislative session. To avoid such a result, the declaration sought, if granted, may be suspended until the next election is held.

108. Declaratory relief alone is an effective remedy, settling constitutional questions while affording the government discretion in deciding how to respond going forward. The relief sought here is similar to that provided by the UK Supreme Court after finding that the Prime Minister's advice to the Queen to prorogue Parliament without "reasonable justification" was unlawful.

R v Miller, [2019] UKSC 41, at para 70; *Khadr v Canada (Prime Minister)*, 2010 SCC 3, at paras 2, 46

V. Conclusion

109. When the 2001 Amendment was introduced, the then-Attorney General stated in no uncertain terms that the amendment would strike at the heart of the power that is concentrated in the Premier's office and that it would reform the institutions of government.

110. In enacting the 2001 Amendment, the Legislative Assembly placed certain limits on the Premier's ability to accelerate or delay an election to further their political strategy. For nearly two decades—until the Snap Election was called—BC's Premiers and Lieutenant Governors complied with these limitations.

111. It is of no moment that the declarations sought by the Petitioners would be made long after the election occurred. As noted above, the Petitioners commenced this Petition as soon as possible after the election was called.

112. The reason snap elections are criticized, and the reason section 23 sought to eliminate them, is that they do not allow time for anyone but the party in power to prepare. This means not only that political opponents do not have time to prepare, but also that voters like the Petitioners cannot find *pro bono* counsel, assemble materials, and come to court in time to obtain a declaration before the election occurs. This is particularly true during a pandemic.

113. The Petitioners ask this Court to rehabilitate their faith in BC's democratic process by holding the government to account for its breach of BC's *Constitution Act*.

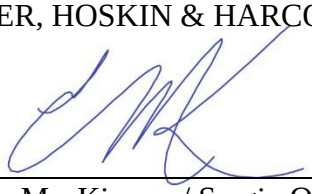
VI. Costs

114. As this Petition is brought in the public interest, the Petitioners ask that no costs be awarded against them and seek no costs against the Respondents. If necessary, the Petitioners ask for a further opportunity to address costs following the disposition of this Petition.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 11th day of February 2022

OSLER, HOSKIN & HARCOURT LLP



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