2021 Court File No.: 126-21-CA

New Brunswick Court of Appeal

BETWEEN:

DEMOCRACY WATCH

APPELLANT [Applicant]

-and-

PREMIER OF NEW BRUNSWICK,

and THE ATTORNEY GENERAL OF NEW BRUNSWICK REPRESENTING HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK

and LIEUTENANT GOVERNOR OF NEW BRUNSWICK

RESPONDENTS [Respondents]

SUPPLEMENTAL SUBMISSION OF THE APPELLANT

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PART 1: Overview

1. As requested by the Court of Appeal, the Appellant Democracy Watch files this supplemental submission, responding to the April 14, 2022 ruling *Acadian Society of New Brunswick v. Right Honourable Prime Minister of Canada*, 2022 NBQB 85 (CanLII) (hereinafter "*Acadian Society of New Brunswick*").

2. The Appellant's application for judicial review does not seek to overturn or nullify the results of the 2020 New Brunswick provincial election, but instead seeks a ruling that declares such a snap election call illegal, to prevent such an election call in the future. As a result, the Appellant generally endorses the remedy set out in paras. 65-73 and 75 of *Acadian Society of New Brunswick*, a remedy which is also future-focused.

3. The Appellant respectfully submits that the Reviewing Court erred in para. 33 of *Acadian Society of New Brunswick* when seeming to suggest that the action of a Prime Minister (or Premier) exercising a prerogative power unlawfully is not justiciable when the action violates a statutory, as opposed to constitutional, provision or principle. In fact, the Federal Court ruled in *Conacher v. Canada (Prime Minister)*, 2009 FC 920 (CanLII), [2010] 3 FCR 411 that the issue of the lawfulness of the action is justiciable even when the action only violates a statute, and the FCA did not overturn that ruling.

4. The Appellant agrees entirely with the Reviewing Court's conclusion in *Acadian Society of New Brunswick*, especially in paras. 30-32 based on the United Kingdom Supreme Court's unanimous ruling in *Miller v. Prime Minister* [2019] UKSC 41, that exercises of prerogative power are justiciable and, as expanded on by the Reviewing Court in para. 39 of *Acadian Society*, that it is proper for the courts to consider whether an exercise is unlawful because it violates constitutional principles, including

(as *Miller* emphasizes in paras. 30-31, 38, 41 and 55-56) the key principle of the sovereignty of Parliament.

5. The Appellant respectfully submits that the Reviewing Court erred in paras. 26-27 of *Acadian Society of New Brunswick* when seeming to suggest that the Federal Court of Appeal (FCA) ruled in *Conacher v. Canada (Prime Minister)*, 2010 FCA 131 (CanLII), [2011] 4 FCR 22 that the Appellant did not have standing to apply for judicial review of the Prime Minister's action of advising the Governor General to call a snap election. In fact, the Federal Court ruled on the Appellant's application, and while the FCA queried the Appellant's standing it did not rule that the Appellant did not have standing.

PART 2: Statement of Facts

6. The Acadian Society of New Brunswick filed an application in the Court of Queen's Bench of New Brunswick for an order that Prime Minister Justin Trudeau's advice to the Governor General to appoint Brenda Louise Murphy as the Lieutenant Governor of New Brunswick was unconstitutional because Ms. Murphy is unilingual, and therefore the appointment violated various sections of the *Charter*.

7. Chief Justice DeWare's ruling in *Acadian Society of New Brunswick* on April 14, 2022 held that:
    a) Prime Minister Trudeau's advice to the Governor General is justiciable because it was an exercise of prerogative power that raised constitutional issues (paras. 15-33);
    b) The advice was unconstitutional because Ms. Murphy is unilingual (paras. 34-64); and,
    c) The appropriate remedy is to order that the Lieutenant Governor of New Brunswick must be bilingual in English and French, but that

the Order in Council appointing Ms. Murphy stands, and that this is sufficient to ensure that the Government of Canada will take appropriate and prompt action to ensure that the Lieutenant Governor of New Brunswick is bilingual (paras. 65-73 and 75).

Part 3: Issues

8. The ruling in *Acadian Society of New Brunswick* raises the following issues:
    a. Issue 1: Does the ruling mean that the Lieutenant Governor of New Brunswick could not dissolve Parliament on August 17, 2020 and to hold a snap general election on September 14, 2020?
    b. Issue 2: Was the ruling correct in terms of the justiciability of an exercise of prerogative by the Prime Minister (or a provincial Premier)?
    c. Issue 3: Was the ruling correct on the issue of standing to apply for an order with regard to an exercise of prerogative power by the Prime Minister (or a provincial Premier)?

Part 4: Argument

Issue 1: Lieutenant Governor was in a position to call the 2020 election

1. The Reviewing Court in *Acadian Society of New Brunswick* decided that the Order in Council appointing Ms. Murphy as the Lieutenant Governor of New Brunswick, while unconstitutional, would not be nullified due to the "potential chaos" that would be caused as "countless laws, Orders in Council and appointments" would also be nullified (at paras. 65 and 71-73).

2. Instead, the Reviewing Court issued an order that the Lieutenant Governor must be bilingual, and left it to the Prime Minister and the

executive of the Government of Canada to decide what next steps to take, and the timing of any step, to comply with this order (at paras. 65-73 and 75).

3. The Appellant endorses this future-focused remedy. The Appellant's application for judicial review of the Premier of New Brunswick's advice to the Lieutenant Governor to call the snap 2020 New Brunswick provincial election does not seek to overturn or nullify the results of the election, but instead seeks an order that declares such a snap election call illegal in order to prevent such an election call in the future.

4. Therefore, the Appellant respectfully submits that, despite the ruling in *Acadian Society of New Brunswick*, the Lieutenant Governor was in a position to dissolve the legislature and call the 2020 snap election.

Issue 2: An exercise of prerogative power under a statute is justiciable

5. The Appellant respectfully submits that the Reviewing Court erred in para. 33 of *Acadian Society of New Brunswick* when seeming to suggest that the action of a Prime Minister (or Premier) exercising a prerogative power unlawfully is not justiciable when the action violates a statutory, as opposed to constitutional, provision or principle.

6. In fact, the Federal Court (FC) ruled in *Conacher v. Canada (Prime Minister)*, 2009 FC 920 (CanLII), [2010] 3 FCR 411 that the issue of the lawfulness of the action is justiciable (at paras. 18-29). As the FC stated at para. 29:

> it stands to reason that prerogative powers must be exercised in accordance with the law and this application asks whether section 56.1 [of the *Canada Elections Act*] has been violated.

7. The Federal Court of Appeal in *Conacher v. Canada (Prime Minister)*, 2010 FCA 131 (CanLII), [2011] 4 FCR 22 did not overturn the Federal Court's ruling on the justiciability of an exercise of prerogative power under a statute.

8. This Honourable Court must ensure that the Premier abides by the will of the Legislature as manifested in the *Legislative Assembly Act* (RSNB 2014, c.116, s 3(4) ("*LAA*"). As noted by the Supreme Court of Canada in *Inuit Tapirisat of Canada v Canada (Attorney General)* [1980] 2 SCR 735, p. 752:

> [...] in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorized by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respect to a duty assigned to it by statute.

9. The Crown prerogative can be limited by ordinary statute, as the *LAA* does. As a branch of the common law, the Crown prerogative is subject to limitations established by both statute and by common law (*Ross River Dena Council Band v Can*., 2002 SCC 54, para. 54; *Delivery Drugs Ltd. v British Columbia (Deputy Minister of Health)*, 2007 BCCA 550, para. 53).

10. On the issue of justiciability, the Reviewing Court in *Acadian Society of New Brunswick* (at paras. 30-32) was correct to cite the United Kingdom Supreme Court's unanimous ruling in *Miller v. Prime Minister* [2019] UKSC 41 that the Prime Minister's decision to advise the Queen to prorogue Parliament was justiciable, and was unlawful, in that it has "the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive" (at paras. 50, 61, 70). The court issued a declaration to that effect.

11. This jurisprudence is not relevant simply by analogy. The Crown prerogative as exercised by the Premier in New Brunswick 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 appeal, even if they are not binding on this Court (*Re The Initiative and Referendum Act*, [1919] AC 935 (JCPC), 48 DLR 18 at 24).

12. In addition, the constitutionality of the Premier's action of advising the Lieutenant Governor to call the snap 2020 provincial election is at issue in this application, as it was also at issue in the application in *Conacher* concerning the Prime Minister's 2008 snap federal election call. At issue, as emphasized in *Miller*, is whether the election calls complied with the constitutional principles of the sovereignty of parliament, and the constitutional conventions of responsible government.

13. In *Miller*, without even a statutory provision to refer to, and relying only on the UK's unwritten constitutional principle of the sovereignty of Parliament, and the conventions of responsible government, the UK Supreme Court properly restricted the ability of one MP to decide whether the legislature shall continue to operate. As the Court stated at para. 30 concerning a situation in which the Prime Minister is advising the Crown to do something re: Parliament:

> That situation does, however, place on the Prime Minister a constitutional responsibility, as the only person with power to do so, to have regard to all relevant interests, including the interests of Parliament.

14. The Court also stated at para. 31 (and also provided two examples in para. 32):

> …the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it. As the Divisional Court observed in para 47 of its judgment, almost all

> important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense.

15. The UK Supreme Court also stated, at para. 38, that:

> "every prerogative power has its limits, and it is the function of the court to determine, when necessary, where they lie…. In particular, the boundaries of a prerogative power relating to the operation of Parliament are likely to be illuminated, and indeed determined, by the fundamental principles of our constitutional law."

and at para. 41 (including providing three examples) that:

> Two fundamental principles of our constitutional law are relevant to the present case. The first is the principle of Parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply. However, the effect which the courts have given to Parliamentary sovereignty is not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law. Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty.

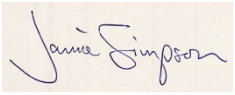
Issue 3: Democracy Watch has standing in this application

16. The Appellant respectfully submits that the Reviewing Court erred in paras. 26-27 of *Acadian Society of New Brunswick* when seeming to suggest that the Federal Court of Appeal (FCA) ruled in *Conacher v. Canada (Prime Minister)*, 2010 FCA 131 (CanLII), [2011] 4 FCR 22 that the Appellant did not have standing to apply for judicial review of the Prime Minister's action of advising the Governor General to call a snap election.

17. In fact, in the same way that the Reviewing Court ruled on the Acadian Society of New Brunswick's application in *Acadian Society of New Brunswick*, the Federal Court ruled on the Appellant's application in Conacher.

18. While the FCA in Conacher queried the Appellant's standing, it did not rule that the Appellant did not have standing.

All of which is respectfully submitted this 12th day of May, 2022.



Jamie Simpson

Counsel for the Appellant

APPENDIX "A": List of Authorities

1. *Acadian Society of New Brunswick v. Right Honourable Prime Minister of Canada*, 2022 NBQB 85, paras. 15-73, 75

2. *Conacher v. Canada (Prime Minister)*, 2009 FC 920 (CanLII), [2010] 3 FCR 411, paras. 18-29

3. *Miller v. Prime Minister* [2019] UKSC 41, para. 30-32, 38, 41, 50, 55-56, 61, 70

4. *Conacher v. Canada (Prime Minister)*, 2010 FCA 131 (CanLII), [2011] 4 FCR 22

5. *Inuit Tapirisat of Canada v Canada (Attorney General)* [1980] 2 SCR 735, p. 752

6. *Ross River Dena Council Band v Can*., 2002 SCC 54, para. 54

7. *Delivery Drugs Ltd. v British Columbia (Deputy Minister of Health)*, 2007 BCCA 550, para. 53

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