IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

FM-64-2019

The Acadian Society of New Brunswick v. The Right Honourable Prime Minister of Canada et al.
2022 NBQB 085

BETWEEN:

THE ACADIAN SOCIETY OF NEW BRUNSWICK,

Applicant,

- and –

THE RIGHT HONOURABLE PRIME MINISTER OF CANADA and THE GOVERNOR GENERAL OF CANADA HER EXCELLENCY THE RIGHT HONOURABLE,

Respondents.

DECISION

BEFORE:	Chief Justice Tracey K. DeWare
AT:	Fredericton, New Brunswick
DATE OF HEARING:	December 13, 14 and 15, 2021
DATE OF DECISION:	April 14, 2022
APPEARANCES:	Jennifer Klinck, Juliette Vani and Giacomo Zucchi, on behalf of Applicant, The Acadian Society of New Brunswick
	Nadine Dupuis and Catherine McIntyre, on behalf of the Respondents, The Right Honourable Prime Minister of Canada and the Governor General of Canada Her Excellency The Right Honourable

DeWare, C.J.,

INTRODUCTION

[1] This decision is an example of an unavoidable intersection between the executive, legislative, and judicial branches of government. In Canada, a foundational principle of our democracy is the independence of the three pillars of government and the fundamental importance that each refrain from infringing on the jurisdiction of the other. Canadian courts do not have the right, either by common law or statute, to intervene in discretionary decisions of the executive arm of government unless such decisions are taken in a manner or form that are in violation of the constitution. In such circumstances, Canadian courts, despite understandable reticence, have an obligation to weigh in. The facts of this case and the issues before the Court trigger this uncomfortable exercise.

[2] The Applicant, the Acadian Society of New Brunswick, brings the current application seeking an order of the court declaring that Prime Minister Trudeau's recommendation to the Governor General in Council appointing Brenda Louise Murphy as the Lieutenant-Governor of New Brunswick was unconstitutional in that it violated sections 16(2), 16.1(2), 18(2), and 20(2), of the ***Canadian Charter of Rights and Freedoms*** (hereinafter referred to as the ***Charter***) and that this recommendation was not just and reasonable in conformity with section 1 of the ***Charter***.

FACTS

[3] On August 2, 2019, the Honourable Jocelyne Roy-Vienneau, Lieutenant-Governor of the Province of New Brunswick, tragically passed away prematurely while still in office. Immediately following l'Honourable Madame Roy-Vienneau's passing, efforts were underway to appoint a new Lieutenant-Governor.

[4] On September 4, 2019, on the advice of Prime Minister Trudeau, the office of the Privy Council recommended that the Governor General issue an Order in Council appointing Brenda Louise Murphy as the 32nd Lieutenant-Governor of New Brunswick pursuant to section 58 of the ***Constitution Act, 1867***.

[5] At the time of her appointment in September 2019 as well as at the time of the hearing of this application in December 2021, the Honourable Lieutenant-Governor Murphy was not bilingual. This fact was conceded by the Respondents at the hearing. While Lieutenant-Governor Murphy is actively engaged in improving her French language skills, as she committed to do at the time of her appointment, she is not bilingual.

[6] It is important at the outset of this decision to acknowledge the important contributions of Lieutenant-Governor Murphy to the citizens of the Province of New Brunswick. The Applicant candidly underscored the important work undertaken by Lieutenant-Governor Murphy in the advancement of equality between the sexes, issues of social justice,

advocacy against discrimination based on sexual orientation, as well as poverty initiatives. The present application in no way seeks to challenge Lieutenant-Governor Murphy's credentials nor the appropriateness of her nomination other than the issue of her linguistic capabilities. The Province of New Brunswick and its citizens have been the beneficiaries of Lieutenant-Governor Murphy's good works both prior and since her appointment as Lieutenant-Governor. When this application was filed, Lieutenant-Governor Murphy happened to be the unilingual appointee to the post of Lieutenant-Governor and therefore her tenancy of the position is now under review. However, it is important to highlight that this application may have been filed during the tenure of any of her unilingual predecessors or successors.

[7] The Canadian democracy has evolved in line with the British tradition of government. Canada remains a constitutional monarchy where the head of state is the British Monarch, currently Queen Elizabeth II, as represented in Canada by a Governor General in Ottawa and Lieutenant-Governors in the provinces. While in practical terms largely ceremonial, the Governor General and Lieutenant-Governors play an important role in the legislative process of the country.

[8] The most recent description of the role of the Lieutenant-Governor, as set out on the Province of New Brunswick's website, includes the following:

> The Lieutenant-Governor serves in a dual capacity: first as representative of the Queen for all purposes of the provincial

> government; and secondly, as a federal officer in discharging certain functions on behalf of the federal government.
>
> The Lieutenant-Governor opens, prorogues and dissolves the Legislative Assembly. The Lieutenant-Governor is responsible for swearing-in the Premier and Cabinet Ministers and must ensure that a government is in office at all times. The Chief Justice of New Brunswick, as Administrator, acts for the Lieutenant-Governor during his/her absence, illness or other inability. One or the other must be in the province at all times.
>
> **The Lieutenant-Governor gives Royal Assent to all Bills passed by the Legislature before they become law, and, as well, signs them and other official documents** such as proclamations, and appointments of persons to government posts including deputy ministers, provincial judges, members of boards, agencies and commissions, crown attorneys, and justices of the peace. The Lieutenant-Governor also signs a number of other official government documents, including land patents, leases, and appointments of notaries public and commissioners for taking affidavits.
>
> **A major responsibility of the Lieutenant-Governor is to deliver the Speech from the Throne at the formal Opening of a new Session of the Legislative Assembly.** This speech outlines proposed legislation, programs, and possible initiatives of the government for that Session.
>
> **In addition to those formal duties, the Lieutenant-Governor also engages in a large number of discretionary but traditional activities, such as lending patronage to not-for-profit organizations which are dedicated to improving the quality of life in the community.** The Lieutenant-Governor sponsors awards, presents citations, and participates in investitures, dedications and other major events celebrating the achievements of the people of New Brunswick; writes messages of greeting, congratulations and condolence; hosts receptions, luncheons and dinners for guests of various organizations and professions; receives members of the Royal Family, heads of state, ambassadors, and other representatives of foreign countries, as well as people from all walks of life. During the course of the year, the Lieutenant-Governor attends hundreds of public events in support of community initiatives across the province.
>
> [Emphasis mine]

[9] The appointment of an individual to the position of Lieutenant-Governor is a discretionary decision that lies, essentially, with the Prime Minister. Understandably, such appointments frequently involve political considerations. Individuals selected for the role of Lieutenant-Governor typically come to the position with an established track record of public

service along with the personal characteristics necessary to discharge the numerous social and community engagements required of the role.

[10] The Prime Minister will provide advice or a recommendation to the Governor General setting out a candidate to be appointed to the position of Lieutenant-Governor. There are no mandatory criteria or pre-requisites necessary set out in the ***Constitution Act, 1867*** which the Prime Minister must consider in selecting an individual for the role of Lieutenant-Governor. The Prime Minister's discretion in recommending an individual to a position of Lieutenant-Governor is fettered only by the political and social considerations of the day. There are no statutory conditions imposed on a Prime Minister in the advice to be given to a Governor General on the selection of a Lieutenant-Governor.

[11] Once a Prime Minister has shared his advice or recommendation to the Governor General, the constitutional convention in Canada mandates that the Governor General will execute the Order in Council officially appointing the individual to the post. While it is the action of the Governor General in executing the Order in Council that officially appoints the Lieutenant-Governor, this act is always premised upon the advice received from the Prime Minister.

[12] The appointment of a provincial Lieutenant-Governor in Canada is governed by section 13 and 58 of the ***Constitution Act, 1867***. These sections state as follows:

Application of Provisions referring to Governor General in Council

13 The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada.

Appointment of Lieutenant Governors of Provinces

58 For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada.

ISSUES

[13] The issues the Court must address in this matter are the following:

(1) Is Prime Minister Trudeau's advice to the Governor General in Council recommending a candidate for appointment as the Lieutenant-Governor of New Brunswick reviewable by this Court?

(2) Is the appointment of a unilingual Lieutenant-Governor in the Province of New Brunswick prohibited pursuant to sections 16(2), 18(2), 20(2), and 16.1(1) of the ***Charter***?

(3) If the appointment of a unilingual individual to the office of Lieutenant-Governor in New Brunswick is found to be unconstitutional, what is the appropriate remedy?

LAW AND ANALYSIS

[14] The necessary constitutional provisions to be considered by the Court in this matter are as follows:

Constitution Act, 1982 – Canadian Charter of Rights and freedoms

Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Official languages of New Brunswick

16(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use **in all institutions of the legislature and government of New Brunswick**.

English and French linguistic communities in New Brunswick

16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, **including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities**.

Proceedings of New Brunswick legislature

16.1(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

New Brunswick statutes and records

18(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

Communications by public with New Brunswick institutions

20(2) **Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French**.

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Constitution Act, 1982 – Procedure for Amending Constitution of Canada

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 the legislative assembly of each province:

> (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province
>
> **Primacy of Constitution of Canada**
>
> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> [Emphasis Mine]

Is there a justiciable question?

[15] The first question this Court must consider is whether or not either the recommendation of Prime Minister Trudeau to the Governor General in Council on the appointment of Ms. Murphy, or the Order in Council signed by the Governor General appointing Ms. Murphy, are in fact reviewable by this Court. Are these justiciable questions upon which this Court may weigh in? The Applicant suggests given the constitutional nature of the issues raised, it is clear the questions are justiciable. The Respondents counter that assertion with the submission that the advice of a Prime Minister to a Governor General is an action which belongs solely to the executive branch of the government and is not reviewable by the courts.

[16] The Respondents refer the Court to Justice Côté's discussion on justiciability and the separation of powers set out in her dissenting opinion in ***Nevsun Resources Ltd. v. Araya***, 2020 SCC 5 (CanLII) where she notes at paragraph 294 the following:

> [294] Justiciability is rooted in a commitment to the constitutional separation of powers: L. M. Sossin, Boundaries of Judicial Review: The Law of Justiciability in Canada (2nd ed. 2012), at p. 289. The separation of powers under the Constitution prescribes different roles for the executive, legislative and judicial orders: Fraser v. Public Service Staff Relations Board, 1985 CanLII 14 (SCC), [1985] 2 S.C.R. 455, at pp. 469-

> 70. In exercising its jurisdiction, a court must conform to the separation of powers by showing deference for the roles of the executive and the legislature in their respective spheres so as to refrain from unduly interfering with the legitimate institutional roles of those orders: Ontario v. Criminal Lawyers' Association of Ontario, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 29-30. **It is "fundamental" that each order not "overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other":** New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319, at p. 389, per McLachlin J. The doctrine of justiciability reflects these institutional limitations.
>
> [Emphasis mine]

[17] This Court is mindful of Justice Côté's directive, the judicial branch must refrain from straying into territory outside "its bounds". The Applicant presents to the Court the development of jurisprudence in Canada since the enactment of the ***Charter*** which has arguably expanded the scope of oversight properly exercised by the judicial branch of government over the executive arm. While acknowledging the development of the scope of proper deference post ***Charter***, the Respondents maintain executive action in the context of constitutional conventions remain immune from judicial oversight.

[18] The Respondents refer the Court to constitutional scholarship explaining the nature and importance of constitutional conventions as well as their lack of justiciability. Professor Hogg's discussion of convention at 1.10 in **Constitutional Law of Canada**, 5th edition, where he comments:

> **An extraordinary feature of the system of responsible government is that its rules are not legal rules in the sense of being enforceable in the courts. They are conventions only.** The exercise of the Crown's prerogative powers is thus regulated by conventions, not laws. Conventions are the topic of the next section of this chapter.
>
> 1.10 – Conventions
>
> (a) – Definition of conventions

> Conventions are rules of the constitution that are not enforced by the law courts. Because they are not enforced by the law courts, they are best regarded as non-legal rules, but because they do in fact regulate the working of the constitution, they are an important concern of the constitutional lawyer. What conventions do is to prescribe the way in which legal powers shall be exercised. Some conventions have the effect of transferring effective power from the legal holder to another official or institution.
>
> Consider the following examples. (1) The Constitution Act, 1867, and many Canadian statutes, confer extensive powers on the Governor General or on the Governor General in Council, but a convention stipulates that the Governor General will exercise those powers only in accordance with the advice of the cabinet or in some cases the Prime Minister. (2) The Constitution Act, 1867 makes the Queen, or the Governor General, an essential party to all federal legislation (s. 17), and it expressly confers upon the Queen and the Governor General the power to withhold the royal assent from a bill that has been enacted by the two Houses of Parliament (s. 55), but a convention stipulates that the royal assent shall never be withheld.
>
> If a convention is disobeyed by an official, then it is common, especially in the United Kingdom, to describe the official's act or omission as "unconstitutional". But this use of the term unconstitutional must be carefully distinguished from the case where a legal rule of the constitution has been disobeyed. **Where unconstitutionality springs from a breach of law, the purported act is normally a nullity and there is a remedy available in the courts. But where "unconstitutionality" springs merely from a breach of convention, no breach of the law has occurred and no legal remedy will be available.**
>
> [Emphasis mine]

[19] The Respondents assert that the Prime Minister's advice to the Governor General and the resulting Order-in-Council appointing a Lieutenant-Governor as a result of that recommendation is the operation of a constitutional convention and is not reviewable by the courts. The Respondents suggest that constitutional conventions are political rules of procedure, not judicial ones. Constitutional conventions which engage solely political questions should be free from judicial oversight. The Respondents refer the Court to the Supreme Court of Canada's

pronouncement on this issue in ***Re: Resolution to amend the Constitution***, [1981] 1 S.C.R. 753 at paragraph 272:

> The main purpose of constitutional conventions is to ensure that the legal framework of the consti-tution will be operated in accordance with the prevailing constitutional values or principles of the period. For example, the constitutional value which is the pivot of the conventions stated above and relating to responsible government is the democratic principle: the powers of the state must be exercised in accordance with the wishes of the electorate; and the constitutional value or principle which anchors the conventions regulating the rela-tionship between the members of the Commonwealth is the independence of the former British colonies.
>
> Being based on custom and precedent, consti-tutional conventions are usually unwritten rules. Some of them, however, may be reduced to writing and expressed in the proceedings and documents of imperial conferences, or in the preamble of stat-utes such as the Statute of Westminster, 1931, or in the proceedings and documents of federal-pro-vincial conferences. They are often referred to and recognized in statements made by members of governments.
>
> **The conventional rules of the constitution present one striking peculiarity. In contradistinc-tion to the laws of the constitution, they are not enforced by the courts. One reason for this situa-tion is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves.** Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce. Furthermore, to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach.
>
> Perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules. The conflict is not of a type which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all.
>
> [Emphasis mine]

[20] The Respondents rely upon the conclusion of Justice McGillis of the Federal Court in ***Samson v. Canada (Attorney General)***, 1998 CanLII 8543 (FC), in support of their position on the question of justiciability. In ***Samson***, an interim injunction was sought to restrain the Governor

General of Canada from appointing to the Senate an individual who had not been elected pursuant to the provisions of the Alberta legislation, ***Senatorial Selection Act***, RSA c S-11.5. In dismissing the application, Justice McGillis explained the discretionary nature of such appointments at paragraphs [5] and [6] as follows:

> [5] **Under the express and unequivocal terms of sections 24 and 32 of the Constitution Act, 1867, the Governor General"s power to appoint qualified persons to the Senate is purely discretionary. In other words, there are no procedural or other limitations restricting the exercise of the Governor General"s discretionary constitutional power of appointment under sections 24 and 32**. A limitation could only be imposed on that power by means of a constitutional amendment to sections 24 and 32, effected in accordance with the procedure prescribed in Part V of the Constitution Act, 1982. In the circumstances, **the Court cannot impose procedural or other limitations on the Governor General"s express power of appointment to the Senate, or otherwise fetter the exercise of his discretion**. [See also Singh v. Canada ; Leblanc v. Canada (1991), 30. R. (3d) 429 (Ont. C.A.); Reference re Appointment of Senators Pursuant to the Constitution Act, 1867 (1991), 1991 CanLII 405 (BC CA), 78 D.L.R. (4th) 245 (B.C.C.A.); Brown v. The Queen in Right of Alberta, July 28, 1998 (Alta., Q.B.)]
>
> [6] **The Governor General"s constitutional power to appoint qualified persons to the Senate is also purely political in nature. In practice, the Governor General exercises his power of appointment on the advice and recommendation of the Governor-in-Council**. In the event that the Governor-in-Council makes a recommendation which ignores the pending election to be held in Alberta under the provisions of the provincial Senatorial Selection Act , it proceeds at its own political peril. However, **that is a purely political decision to be made by politicians, without the interference or intervention of the Court**.
>
> [Emphasis mine]

[21] The Applicant argues strenuously that in the circumstances of this case, the advice or the recommendation of the Prime Minister to the Governor General in Council is reviewable by this Court if that advice or recommendation is deemed to be unconstitutional. In that sense, the Applicant distinguishes the question currently before the Court from that

considered in ***Samson***. In ***Samson***, the question arose out of an allegation of non-compliance with a provincial statute of Alberta. In this case, the argument is that the advice and subsequent appointment of Lieutenant-Governor Murphy were not compliant with the constitutional requirements set out in the ***Charter***.

[22] In ***Black v. Chretien et al.***, 2001 CanLII 8537 (ON CA), the Ontario Court of Appeal considered the question of the justiciability of the review of the actions of a Prime Minister. Conrad Black had been recommended for admittance into the British House of Lords. Prime Minister Chrétien intervened with the Queen in order to block the appointment on the grounds that it would result in a violation of Canadian law as Mr. Black remained a Canadian citizen. The Court of Appeal agreed with the lower court that in communicating with the Queen in such circumstances, Prime Minister Chrétien was exercising a prerogative power, not reviewable by the Court. However, the Court of Appeal, in ***Black***, explained that there are circumstances where the exercise of a prerogative power will be reviewable by the courts, significantly, when ***Charter*** violations are alleged.

[23] The applicability of the ***Charter*** was discussed in ***Black*** although ***Charter*** remedies were not sought. In discussing the impact of the adoption of the ***Charter***, Justice Laskin stated at paragraphs [46] and [47] as follows:

> [46] **Even this narrow view of the court's role in reviewing the prerogative power now has to be modified in Canada because of the Canadian Charter of Rights and Freedoms**. By s. 32(1)(a), the Charter

> applies to Parliament and the Government of Canada in respect of all matters within the authority of Parliament. The Crown prerogative lies within the authority of Parliament. **Therefore, if an individual claims that the exercise of a prerogative power violates that individual's Charter rights, the court has a duty to decide the claim**. See Operation Dismantle, supra. However, Mr. Black does not assert any Charter claim.
>
> [47] **Apart from the Charter, the expanding scope of judicial review and of Crown liability make it no longer tenable to hold that the exercise of a prerogative power is insulated from judicial review merely because it is a prerogative and not a statutory power**. The preferable approach is that adopted by the House of Lords in the Civil Service Unions case, supra. There, the House of Lords emphasized that the controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter, not its source. If, in the words of Lord Roskill, the subject matter of the prerogative power is "amenable to the judicial process", it is reviewable; if not, it is not reviewable. Lord Roskill provided content to this subject matter test of reviewability by explaining that the exercise of the prerogative will be amenable to the judicial process if it affects the rights of individuals. Again, in his words at p. 417 A.C.:
>
> > If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so as to affect the rights of the citizen, **I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive**.
>
> [Emphasis mine]

[24] In ***Operation Dismantle v. The Queen***, 1985 CanLII 74 (SCC), [1985] 1 SCR 441, the Supreme Court of Canada considered whether or not a challenge pursuant to section 7 of the ***Charter*** of a federal cabinet decision granting the United States permission to test cruise missiles on Canadian territory was justiciable. While the Supreme Court of Canada dismissed the appeal and upheld the lower courts rulings that the

statement of claim must be struck, they confirmed the duty vested in the courts to review the actions of the executive branch of government if such actions are alleged to have violated the constitutional rights of Canadian citizens. In confirming this general principle, Justice Dickson, as he then was, stated at page 447 as follows:

> The Supreme Court of Canada confirmed early on in the life of the Canadian ***Charter of Rights and Freedoms*** that the actions of the executive branch of government were reviewable by the judicial branch when such actions were alleged to be unconstitutional.
>
> I have concluded that the casual link between the actions of the Canadian government, and the alleged violation of appellants' rights under the *Charter* is simply too uncertain, speculative and hypothetical to sustain a cause of action. **Thus, although decisions of the federal cabinet are reviewable by the courts under the *Charter***, and the government bears a general duty to act in accordance with the *Charter's* dictates, no duty is imposed on the Canadian government by s. 7 of the *Charter* to refrain from permitting the testing the cruise missile.
>
> [Emphasis mine]

[25] Justice Wilson also discussed the Court's role in reviewing executive decisions including royal prerogatives in ***Operation Dismantle*** at pages 463 to 464 and 471 to 472 as follows:

> The respondents submit that at common law the authority to make international agreements (such as the one made with the United States to permit the testing) is a matter which falls within the prerogative power of the Crown and that both at common law and by s. 15 of the *Constitution Act, 1867* the same is true of decisions relating to national defence. They further submit that since by s. 32(1)(a) the *Charter* applies "to the Parliament and government of Canada in respect of all matters within authority of Parliament", the *Charter's* application must, so far as the government is concerned, be restricted to the exercise of powers which derive directly from statute. It cannot, therefore, apply to an exercise of the royal prerogative which is a source of power existing independently of Parliament; otherwise, it is argued the limiting phrase "within the authority of Parliament" would be deprived of any effect. The answer to this argument seems to me to be that those words of limitation, like the corresponding words "within the authority of the legislature of each province" in s. 32(1)(b), are merely a reference to the division of powers in ss. 91 and 92 of the *Constitution Act, 1867*. They describe the subject-matters in relation to which the Parliament of Canada may legislate or the government of Canada may take executive

> action. As Le Dain J. points out, the royal prerogative is "within the authority of Parliament" in the sense that Parliament is competent to legislate with respect to matters falling within its scope. **Since there is no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the *Charter*, I conclude that the latter do so also.**
>
> It might be timely at this point to remind ourselves of the question the Court is being asked to decide. It is, of course, true that the federal legislature has exclusive legislative jurisdiction in relation to defence under s. 91(7) of the *Constitution Act, 1867* and that the federal executive has the powers conferred upon it in ss. 9-15 of that Act. Accordingly, if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the effect of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. **The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. Indeed, s. 24(1) of the *Charter*, also part of the Constitution, makes it clear that the adjudication of that question is the responsibility of "a court of competent jurisdiction". While the court is entitled to grant such remedy as it "considers appropriate and just in the circumstances", I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question": see Martin H. Redish, "Abstention,** Separation of Powers, and the Limits of the Judicial Function," 94 Yale L.J. 71 (1984).
>
> I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, **if what we are being asked to do is to decide whether any particular act of the executive violates the right of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.**
>
> [Emphasis mine]

[26] Canadian courts have previously considered the question of whether the Prime Minister's advice to the Governor General is justiciable when there is an allegation that the advice itself was contrary to the ***Charter***. In ***Conacher v. Canada (Prime Minister)***, 2010 FCA 131 (CanLII), 4 FCR

22, Justice Stratas, as he then was, upheld the federal court's dismissal of an application for judicial review. The Appellants argued that then Prime Minister Harper's advice to the Governor General in the summer of 2008 to prorogue Parliament and set an election date in October of 2008 was in violation of the fixed dated provisions concerning federal elections as set out in section 56.1 of the ***Canada Elections Act***, SC, c 9.

[27] Justice Stratas determined that there was nothing in the ***Canada Elections Act*** which prohibited the Governor General's discretionary power to prorogue Parliament as set out in section 50 of the ***Constitution Act, 1867***. Justice Stratas further concluded that the Prime Minister's advice to the Governor General in these circumstances did not result in a violation of section 3 of the ***Charter***. In explaining this ruling, Justice Stratas stated at paragraph [11] as follows:

> [11] Likewise, we agree with the court below that the Prime Minister's act in advising the Governor General did not infringe the rights of Canadian citizens to vote and to run for office under section 3 of the Charter. In this regard, the appellants submitted that the Prime Minister caused the election to take place before the times set out in subsection 56.1(2) and this may have caught certain political parties unprepared. To the extent that this may have caused any infringement of section 3 of the Charter, as a matter of law it was the Governor General that called the election, not the Prime Minister. **Further, on this issue, the political parties allegedly affected by this are not before this Court. We query the appellants' standing to litigate those parties' section 3 rights; those parties were well-placed to bring such a claim themselves**: Canadian Council of Churches v. Canada (Minister of Employment and Immigration), 1992 CanLII 116 (SCC), [1992] 1 S.C.R. 236 at 254-256.
>
> [Emphasis mine]

[28] Justice Stratas again had the opportunity to consider the scope of justiciable issues in the context of federal crown prerogatives in

Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada), 2015 FCA 4 (CanLII), stating at paragraphs 60 to 63 as follows:

> [60] In support of this, Canada submits that exercises of pure federal Crown prerogative are reviewable only where Charter rights are in issue. They cite Canada (Prime Minister) v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44 at paragraphs 36-37 and Operation Dismantle Inc. v. Canada, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481.
>
> [61] **It is true that these cases do stand for the narrow proposition that Charter cases are justiciable regardless of the nature of the government action, be it an exercise of the Crown prerogative or otherwise.** But these cases do not stand for the broad proposition that all other exercises of the Crown prerogative are not justiciable. In fact, as I shall demonstrate, some are.
>
> [62] Justiciability, sometimes called the "political questions objection," concerns the appropriateness and ability of a court to deal with an issue before it. Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government.
>
> [63] **Whether the question before the Court is justiciable bears no relation to the source of the government power**: R. v. Ministry of Defence, ex parte Smith, [1995] 4 All E.R. 427, aff'd [1996] Q.B. 517, [1996] 1 All E.R. 257 (C.A.). **For some time now, it has been accepted that for the purposes of judicial review there is no principled distinction between legislative sources of power and prerogative sources of power:** Council of Civil Service Unions, supra. I agree with the following passage from Lord Roskill's speech in that case (at page 417 A.C.):
>
> > If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may be challenged on one or more...grounds.... If the executive instead of acting under a statutory power acts under a prerogative power...I am unable to see...that there is any logical reason why the fact that the source of the power is the prerogative and not statute should deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.
>
> [Emphasis mine]

[29] In reviewing the development of Canadian jurisprudence since ***Operation Dismantle***, it now appears settled law that all government action, including the exercise of prerogative powers, are reviewable by the courts when ***Charter*** rights are appropriately invoked. In ***Conacher***, Justice Stratas determined that the individuals whose section 3 ***Charter*** rights were allegedly infringed were not parties before the Court. Similarly, in ***Black***, the Court confirmed the actions of a Prime Minister which infringed an individual's ***Charter*** rights would be reviewable by the Court; however, no ***Charter*** remedy was sought in ***Black***.

[30] The ability of a Court to review the "advice" of a Prime Minister was recently considered in the United Kingdom as a result of Prime Minister Johnson's request of Queen Elizabeth II to prorogue Parliament in 2019 during the "Brexit" crisis. In ***Miller v. Prime Minister*** [2019] UKSC 41, the United Kingdom Supreme Court determined Prime Minister Johnson's "advice" to the Queen was a justiciable issue and ultimately held it to be unconstitutional. In explaining this reasoning, the Court noted at paragraph [69] the following:

> [69] This court is not, therefore, precluded by art 9 or by any wider Parliamentary privilege from considering the validity of the prorogation itself. **The logical approach to that question is to start at the beginning, with the advice that led to it. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect:** see, if authority were needed, *R (UNISON) v. Lord Chancellor* [2017] UKSC 51, para 119. **It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed.** This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect.
>
> [Emphasis Mine]

[31] Following the process adopted by the Court in ***Miller***, the Applicant maintains the question of Prime Minister Trudeau's advice or recommendation to the Governor General in Council in these circumstances is likewise justiciable. Further, the Applicant asserts that if the Court accepts that Prime Minister Trudeau's advice was indeed unconstitutional, then such a determination renders the Order in Council which flowed from the advice unconstitutional.

[32] The Respondents caution the Court on the applicability of ***Miller*** to the present matter pointing to the Court's recognition in ***Miller*** that it was a "*one off*". The approach taken by the United Kingdom's Supreme Court in ***Miller*** at first blush appears to be persuasive authority in support of the Applicant's position that if a Prime Minister exercises a prerogative power or provides advice in the execution of an executive decision that is in and of itself unconstitutional, any action or appointment that flows from such advice is likewise unconstitutional. However, the factual situation in ***Miller*** was quite unique and differs significantly from the factual backdrop framing the issues before this Court. In my view, the appropriate jurisprudence which clearly points to the Court's ability to consider questions stemming from the alleged infringement of ***Charter*** rights by a government action or decision, regardless of the nature of that action or decision, is found in the line of cases commencing with ***Operation Dismantle***.

[33] In all of the circumstances of this case and, in particular, the fact the questions raised before the Court do require an analysis of whether or not the executive action of appointing a unilingual anglophone lieutenant-governor violates the constitutionally recognized rights of French speaking New Brunswickers, I am of the view these questions are justiciable. This is not the case as in ***Samson*** where there was an allegation of a violation of a provincial statute, nor a case such as ***Conacher*** where the ***Elections Act*** was considered. In this case, the issues raised involve the consideration of ***Charter*** rights and therefore the Court not only may consider the questions, it has a duty to do so. The first issue to resolve in this matter is answered in the affirmative. The questions raised before the Court in this application are justiciable.

Is the appointment of a unilingual Lieutenant-Governor in the Province of New Brunswick unconstitutional?

[34] In analysing the scope of language rights conferred upon the citizens of New Brunswick under the ***Charter*** along with the federal and provincial ***Official Languages Acts***, considerable guidance can be gleaned from the comprehensive discussion of the historical background of these constitutional protections set out by Chief Justice Daigle, as he then was, in ***Charlebois v. Mowat***, 2001 NBCA 117 (CanLII) at paragraphs 7 to 11:

> [7] **New Brunswick is officially bilingual. In fact, it is the only officially bilingual province in Canada.** Other provinces recognize some language rights and are subject to various obligations arising from legislative or constitutional provisions, but no other province has proclaimed itself bilingual. **Legally speaking, the Province of New Brunswick is bilingual because in its legislation and in the Constitution it confers the status of official language on two**

languages, English and French. It also entrenches therein the principle of equality of the two official languages.

[8] Indeed, the recent history of the last thirty years shows that successive New Brunswick governments have, on four separate occasions during that period, enacted language rights legislation or have entrenched language rights in the Canadian Constitution which collectively provide the province with a constitutional language regime quite peculiar to New Brunswick and unique in the country. **Obviously, these legislative and constitutional provisions impose obligations on the province which are also peculiar to New Brunswick.**

[9] In short, the province pioneered by enacting in 1969 the Official Languages of New Brunswick Act, R.S.N.B. 1973, c. O-1, which recognizes that the English and French languages possess and enjoy equality of status and equal rights and privileges in all matters within the jurisdiction of the province and provides for the exercise of specific language rights. In 1981, the provincial government enacted An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick, S.N.B. 1981, c. O-1.1. This Act officially recognizes the existence and equality of the two official linguistic communities. **The following year, 1982, when the federal government was proceeding to patriate the Canadian Constitution and enact the Canadian Charter of Rights and Freedoms, the New Brunswick government had certain language rights entrenched in the Charter; these rights apply specifically to the institutions of the legislature and government of New Brunswick. These language rights are contained in subsections 16(2) to 20(2) of the Charter. Finally, in 1993, by way of constitutional amendment under section 43 of the Constitution Act, 1982, the provincial government constitutionalized the principles of An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick that the Legislative Assembly passed in 1981. This became section 16.1 of the Charter; it contains a declaration that the English linguistic community and the French linguistic community are equal, defines the role of preserving and promoting the equality of status of the official linguistic communities and specifically confers this role on the legislature and government of New Brunswick.**

[10] The bilingualism regime established by law in New Brunswick is not personal bilingualism as its purpose is not to ensure that individuals will be proficient in both official languages. **Rather, it establishes institutional bilingualism aiming for the use of both languages by the province and some of its institutions in the provision of public services.** Under such a regime, individuals have the choice to use either English or French in their dealings with government institutions. On the other hand, certain state activities must necessarily be performed in both languages, legislative bilingualism being a case in point.

[11] Given the significant role played in the history of this province by the law and the Constitution in matters of language rights as I have just described, I think it is quite appropriate to recall, as recognized by Canadian language rights case law, that the recognition of the status of official languages is both a legal and a political act. Politically, the recognition of the constitutional principle of the equality of official languages in New Brunswick is the manifestation of a fundamental

> political choice based on a compromise between the two recognized official linguistic communities of our province. **Legally, it is incumbent upon the courts to delineate the scope of Charter-guaranteed language rights by reference to the history and sources of these rights to determine their purpose and scope as well as to the constitutional documents themselves. A review of the historical evolution of minority rights in New Brunswick is one of the requirements that follow from the use of the broad and liberal method of interpretation that should be used in this matter.**
>
> [Emphasis Mine]

[35] The question of whether the Canadian Constitution requires the Lieutenant-Governor of New Brunswick to be bilingual is not easily answered. There are many components to this question which must be carefully weighed and considered. It is helpful to begin with a consideration of the role of Lieutenant-Governor within the Canadian democratic process.

[36] The Respondents refer the Court to the insightful explanation of responsible government including the roles of Lieutenant-Governors in the Canadian context set out by Professor Hogg in his text **Constitutional Law of Canada**, 5th edition, at 9.1:

> "Responsible government" (or cabinet or parliamentary government) is the term that is used to describe the system of government that evolved in the United Kingdom and was exported to the British colonies, including those of British North America. **In a system of responsible government, there is a "dual executive", consisting of a formal head of state and a political head of state. The *formal* head of state for Canada is the Queen, but she is represented in Canada by the Governor General of Canada and the Lieutenant Governors of the provinces.** In Canada, the Queen rarely exercises any power, except for the occasional act on a royal visit. Most of the time, the role of formal head of state is performed nationally by the Governor General and provincially by the Lieutenant Governors. The *political* head of state for Canada is the Prime Minister, who is the leader of the party that commands a majority in the elected House of Commons. In each province, the equivalent of the Prime Minister is the Premier, who is the

> leader of the party that commands a majority in the elected Legislative Assembly.
>
> **The formal head of state retains many functions, of which the most important is the giving of the royal assent to bills that have been enacted by the Houses of Parliament or the provincial Legislatures. But in a system of responsible government the formal head of state must nearly always act under the "advice" (meaning direction) of the political head of state**. In this way, the forms of monarchical government are retained, but real power is exercised by the elected politicians who give the advice to the Queen and her representatives. In a democracy, it would of course be unacceptable for real powers of government to be possessed by an unelected official, whether a King, a Queen, a Governor General or a Lieutenant Governor Responsible government transfers the real power to the elected Prime Minister. The Queen, the Governor General and the Lieutenant Governors, who are not elected officials, do not exercise any personal initiative or discretion in the exercise of the normal powers of government. (There are certain "reserve powers", or "personal prerogatives" which are exercise by the Governor General or Lieutenant Governors under their own personal discretion, but these apply only in exceptional circumstances when the Prime Minister or Premier no longer commands a majority in the House of Commons or Legislative Assembly.)
>
> [Emphasis Mine]

[37] The enactment of the ***Canadian Charter of Rights and Freedoms*** in 1982 confirmed within the Constitution of Canada the equality of status, rights and privileges of both official languages as well as both linguistic communities in New Brunswick. There is no question but that the Constitution of Canada takes precedence over any other provincial or federal legislative enactment. It is perhaps helpful to restate the law as set out in section 16(2), 16.1(1), and 20(2) of the ***Charter***:

> **Official languages of New Brunswick**
>
> 16(2) **English and French** are the official languages of New Brunswick and **have equality of status and equal rights and privileges** as to their use in all institutions of the legislature and government of New Brunswick.
>
> **English and French linguistic communities in New Brunswick**
>
> 16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights

> and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.
>
> **Communications by public with New Brunswick institutions**
>
> 20(2) Any member of the public in New Brunswick **has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick** in English or French.
>
> [Emphasis mine]

[38] The Applicant contends that the nomination of a unilingual Lieutenant-Governor in the Province of New Brunswick offends the ***Charter*** for the following reasons:

(1) Section 16(2) of the ***Charter*** confirms that French and English are the official languages of New Brunswick with equal rights, status and privileges in the legislature and government;

(2) Sections 16.1(1) and (2) of the ***Charter*** are intended to protect and promote the equality of the two languages and the two linguistic communities in New Brunswick; and

(3) Section 20(2) of the ***Charter*** confirms that any member of the public in New Brunswick has the right to communicate with any institution of the government or the legislature in the language of their choice.

[39] The Supreme Court of Canada eloquently set out the approach to be taken in the analysis of constitutional principles in ***Reference re***

Succession of Quebec, 1998 CanLII 793 (SCC), [1998] 2 SCR 217, stating at paragraphs 49 to 53 as follows:

> 49 What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. **The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.**
>
> 50 Our Constitution has an internal architecture, or what the majority of this Court in OPSEU v. Ontario (Attorney General), 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at p. 57, called a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the Provincial Judges Reference, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the Manitoba Language Rights Reference, supra, at p. 750, we held that "the principle is clearly implicit in the very nature of a Constitution". The same may be said of the other three constitutional principles we underscore today.
>
> 51 Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the Constitution Act, 1867, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.
>
> 52 The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. **Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree"**, to invoke the famous description in Edwards v. Attorney-General for Canada, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.
>
> 53 Given the existence of these underlying constitutional principles, what use may the Court make of them? In the Provincial Judges Reference, supra, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as

> "organizing principles" and described one of them, judicial independence, as an "unwritten norm") could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed in the Provincial Judges Reference that the effect of the preamble to the Constitution Act, 1867 was to incorporate certain constitutional principles by reference, a point made earlier in Fraser v. Public Service Staff Relations Board, 1985 CanLII 14 (SCC), [1985] 2 S.C.R. 455, at pp. 462-63. **In the Provincial Judges Reference, at para. 104, we determined that the preamble "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text"**.
>
> [Emphasis Mine]

[40] In ***R. v. Beaulac***, 1999 CanLII 681 (SCC), [1999] 1 SCR 768, Justice Bastarache set out the purposeful approach to the interpretation of language rights stating at paragraph 24 the following:

> 24 Though constitutional language rights result from a political compromise, this is not a characteristic that uniquely applies to such rights. A. Riddell, in "À la recherche du temps perdu: la Cour suprême et l'interprétation des droits linguistiques constitutionnels dans les années 80" (1988), 29 C. de D. 829, at p. 846, underlines that a political compromise also led to the adoption of ss. 7 and 15 of the Charter and argues, at p. 848, that there is no basis in the constitutional history of Canada for holding that any such political compromises require a restrictive interpretation of constitutional guarantees. I agree that the existence of a political compromise is without consequence with regard to the scope of language rights. The idea that s. 16(3) of the Charter, which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the Jones case, supra, limits the scope of s. 16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time. Section 2 of the Official Languages Act has the same effect with regard to rights recognized under that Act. **This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State**; see McKinney v. University of Guelph, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229, at p. 412; Haig v. Canada, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at p. 1038; Reference re Public Service Employee Relations Act (Alta.), 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313; Eldridge v. British Columbia (Attorney General), 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, at para. 73; Mahe, supra, at p. 365. **It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation**. This being said, I note that this case is not

> concerned with the possibility that constitutionally based language rights may conflict with some specific statutory rights.
>
> [Emphasis Mine]

[41] Courts have consistently confirmed since the arrival of the ***Charter*** on the constitutional landscape that the concept of language rights and equality between the two official linguistic communities goes well beyond simply the spoken or written word. The Supreme Court of Canada eloquently set out this principle in ***Ford v. Quebec (PG)***, [1988] 2 SCR 712 at paragraphs 39 and 40:

> 39. In so far as this issue is concerned, the words "freedom of expression" in s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter should be given the same meaning. As indicated above, both the Superior Court and the Court of Appeal held that freedom of expression includes the freedom to express oneself in the language of one's choice. After indicating the essential relationship between expression and language by reference to dictionary definitions of both, Boudreault J. in the Superior Court said that in the ordinary or general form of expression there cannot be expression without language. Bisson J.A. in the Court of Appeal said that he agreed with the reasons of Boudreault J. on this issue and expressed his own view in the form of the following question: "Is there a purer form of freedom of expression than the spoken language and written language?" He supported his conclusion by quotation of the following statement of this Court in Reference re Manitoba Language Rights, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at p. 744: **"The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society."**
>
> 40. The conclusion of the Superior Court and the Court of Appeal on this issue is correct. Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. **Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity**. It is also the means by which the individual expresses his or her personal identity and sense of individuality. That the concept of "expression" in s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter goes beyond mere

> content is indicated by the specific protection accorded to "freedom of thought, belief [and] opinion" in s. 2 and to "freedom of conscience" and "freedom of opinion" in s. 3. That suggests that "freedom of expression" is intended to extend to more than the content of expression in its narrow sense.
>
> [Emphasis mine]

[42] This Court must resolve the question of whether the institutionally based language rights enshrined in the ***Charter*** have been violated as a result of the appointment of a unilingual Lieutenant-Governor in New Brunswick. In order to answer this question, it is essential to determine if the role of a Lieutenant-Governor engenders a requirement of bilingualism for the office holder herself and not simply for the office she occupies. This question has always been answered narrowly by Canadian courts. Canadian jurisprudence clearly establishes the requirement for equality of the two official languages enshrined in the ***Charter*** creates obligations for the "*institutions*" of government as well as the legislature but does not extend to the individuals working therein.

[43] A helpful definition set out in the ***Official Languages Act of New Brunswick*** is that of "*institution*" which is defined in the ***Act*** as follows:

> "institution" means an institution of the Legislative Assembly or the Government of New Brunswick, the courts, any board, commission or council, or other body or office, established to perform a governmental function by **or pursuant to an Act of the Legislature or by or under the authority of the Lieutenant-Governor in Council**, a department of the Government of New Brunswick, a Crown corporation established by or pursuant to an Act of the Legislature or any other body that is specified by an Act of the Legislature to be an agent of Her Majesty in right of the Province or **to be subject to the direction of the Lieutenant-Governor in Council or a minister of the Crown; (institution)**
>
> [Emphasis mine]

[44] The Respondents direct the Court to a discussion concerning the wording of Bill c-72, an ***Act Respecting the Status and use of the Official Languages of Canada***, and in particular the comments of the then Minister of Justice Raymond Hnatyshyn, P.C., M.P., before a Parliamentary Committee on March 22, 1988 where he stated as follows:

> While the bill restates constitutionally-based language rights in the opening provisions of the first five parts, it otherwise retains the structure of the 1969 act, which is framed in terms of obligations on federal institutions. **These institutional duties ensure that the Act's focus continues to remain on institutional bilingualism in fulfilling the requirements which flow from, or correspond to, the constitutional rights. The duties are not borne directly by individual officers and employees, but rather by the institution itself.** It is therefore incumbent upon the institution to organize and administer its affairs and its personnel resources in such a way as to meet those requirements.
>
> [Emphasis mine]

[45] Can the Lieutenant-Governor be properly considered "*a body or office established to perform a governmental function*"? The Respondents answer this question with an empathetic "NO". The Respondents point out that the office of the Lieutenant-Governor is bilingual and the Lieutenant-Governor herself, a person, is not subject to linguistic obligations set out in the ***Charter***. The Respondents highlight Parliament's choice during the drafting and enactment of the ***Charter*** to adopt an "*institutional*" approach to bilingualism. This approach was likewise followed by the Province of New Brunswick in the enactment of the ***Official Languages Act***. A similar approach was adopted by the federal government when they adopted the federal ***Official Languages Act*** in 1985. The Respondents point out that

all these statutory provisions in addition to the constitutional language of the ***Charter*** speak to "*institutional*" bilingualism and solely "*institutional*" bilingualism.

[46] In ***Société des Acadiens et Acadiennes du Nouveau-Brunswick v. Canada***, 2008 SCC 15 (CanLII), [2008] 1 SCR 383, Justice Bastarache confirms the scope of the section 20(2) of the ***Charter*** stating at paragraph [1] the following:

> [1] Bastarache J. — Section 20(2) of the *Canadian Charter of Rights and Freedoms* provides that **any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French, and, unlike in the case of services provided by federal institutions under s. 20(1) of the *Charter*, this right does not depend on the territorial concentration of the language group or the nature of the office in question. This is complete institutional bilingualism, as citizens have the right to use the language of their choice at all times** when requesting a service from or communicating with the provincial government.
>
> [Emphasis mine]

[47] The Applicant sets out the important distinction between the role of the Lieutenant-Governor who is the formal head state and the Premier who is the political head of government. Unlike the Premier and his or her Ministers, the Lieutenant-Governor is not elected. The citizens of New Brunswick play no role in the selection of the Lieutenant-Governor. Unlike the Ministers and members of the legislature, the unelected Lieutenant-Governor is unique as head of state. There is only one Lieutenant-Governor. The Applicant points to Justice Bastarache's clear direction in ***Société des Acadiens et Acadiennes du Nouveau-Brunswick*** that the ***Charter*** has confirmed in New Brunswick complete institutional

bilingualism and the right of citizens to use the language of their choice at "*all times*".

[48] New Brunswick is the only province in Canada where the equality of the two linguistic communities has been recognized in the federal constitution. The arguments advanced in this case as to the necessity that the Lieutenant-Governor, as head of state of the Province of New Brunswick be bilingual, are unique to the New Brunswick experience. The inclusion of these constitutional protections serves to insulate the francophone minority from the natural human tendency to default to the language favoured by the majority, which in the case of New Brunswick is English.

[49] The Supreme Court of Canada recognized the importance of language rights in protecting the linguistic and cultural identity of minorities in ***Mahe v. Alberta***, 1990 CanLII 133 (SCC), [1990] 1 SCR 342, stating:

> Furthermore, as the historical context in which s. 23 was enacted suggests, **minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional**: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority. In commenting on various setbacks experienced by the Francophone minority in Ontario, the Court of Appeal of that province noted that "[l]ack of meaningful participation in management and control of local school boards by the Francophone minority made these events possible" (*Reference Re Education Act of Ontario, supra*, at p. 531). A similar observation was made by the Prince Edward Island Court of Appeal in *Reference Re Minority Language Educational Rights* (P.E.I.), *supra*, at p. 259:
>
> [Emphasis mine]

[50] The Respondents suggest that the Applicant's depiction of the Lieutenant-Governor herself as an institution is illogical, not in conformity with either a

plain reading or a jurisprudential interpretation of this term. The Respondents maintain that if the Applicant's interpretation of the Lieutenant-Governor as an "*institution*" is found to be appropriate similar conclusions could then be drawn for Prime Ministers, Premiers, Ministers of the Crown or Senior Government Officials. The Respondents direct the Court to the considerable body of common law which has developed since the inception of the ***Charter*** confirming the institutional nature of the obligations created by the language protections set out therein.

[51] Chief Justice Daigle had the opportunity to discuss the approach a Court should take when considering issues of ***Charter*** language guarantees in ***Charlebois v. Mowat***. Chief Justice Daigle commented at paragraphs 51 to 53 as follows:

> [51] In view of the significance of language and culture for the official language minority, the majority of the Court in Beaulac clearly articulated the objectives of language rights by recalling "the importance of language rights as supporting official language communities and their culture" and by emphasizing "the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply". (Beaulac, paragraphs 17 and 25.)
>
> [52] Another objective of language rights that has often been underlined by the Supreme Court is the remedial nature of these rights. Already, in Société des Acadiens, at page 567, Dickson, C.J. had stated that frustrating "the broad remedial purposes of the language protections provided in the Charter [...] [would] be inconsistent with a liberal construction of language rights". **Subsequently, the Supreme Court referred to the same objective in the interpretation of Charter language guarantees in several cases by confirming the cultural objective of language rights and by reiterating that a purposive interpretation of a Charter language provision requires that the content of the right "should ideally be guided by that which will most effectively encourage the flourishing and preservation of the French-language minority in the province"**. The Court also emphasized the remedial nature of language rights holding that the "right should be construed remedially, in recognition of previous injustices that have gone unredressed and which have required the entrenchment of protection for minority language rights". (See Reference re Public

> Schools Act (Man.) at pages 850-51.) Finally, in Arsenault-Cameron, at paragraph 27, Major and Bastarache, JJ., on behalf of a unanimous Court, re-affirmed the larger objects of language rights that I have just described:
>
> > ... A purposive interpretation of s. 23 rights is based on the true purpose of redressing past injustices and providing the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced.
>
> [53] **In short, Charter language guarantees must be construed with an emphasis on the protection and flourishing of official language communities; they should also be construed remedially for the purpose of redressing past inequalities.**
>
> [Emphasis mine]

[52] The Supreme Court of Canada discussed the manner language rights should be interpreted in ***Reference re Manitoba Language Rights***, 1992 CanLII 115 (SCC), [1992] 1 SCR 212 stating:

> "There can be no doubt, as stated in *Reference re Manitoba Language Rights*, *supra*, at p. 739, that the purpose of s. 23 is:
>
> ...to ensure full and equal access to the legislature, the laws and the courts for francophones and anglophones alike.
>
> The Court is bound to ensure that this purpose is not undermined. Consistently with this approach, this Court has acknowledged the necessity of moving beyond an unduly strict interpretation of the phrase "Acts of the Legislature". However, as noted above, **the Court has also stressed that the words of the section cannot be stretched beyond what is necessary to meet its purpose. Therefore, while meeting the purpose of this section requires moving beyond the strict meaning of the phrase "Acts of the Legislature", these cannot be extended to instruments which are not of a legislative nature. The Court must, therefore, approach the issues here in a manner that attempts to give a generous meaning to "Acts of the Legislature", while not applying it to the plethora of other instruments issued by contemporary governments.**
>
> In so determining the scope of s. 23, it is important to place the section within the proper historical context. It, like ss. 93 and 133 of the *Constitution Act, 1867*, is an embodiment of a political compromise. It is not a sweeping guarantee designed to achieve complete linguistic equality, but rather a compromise designed to achieve a level of harmony in the demographic reality of Manitoban society. The following statement of Beetz, J. in *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, at p. 496, regarding s. 133 is applicable here:

> This incomplete but precise scheme is a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union. The scheme is couched in a language which is capable of containing necessary implications, as was held in *Blaikie No. 1 and Blaikie No. 2* with respect to certain forms of delegated legislation. It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation, as was held in the *Jones* case. And it is a scheme which can of course be modified by way of constitutional amendment. **But it is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise.**"
>
> [Emphasis mine]

[53] The provisions enshrined in the Constitution confirming the equality of status of the French and English languages are clearly designed to protect and promote the viability of both linguistic communities within the Province of New Brunswick. The Supreme Court of Canada has confirmed these legislative goals in decisions such as ***Ford***, ***Beaulac***, ***Mahe*** and ***Societe des Acadiens et Acadiennes du Nouveau Brunswick.*** It is difficult to comprehend how the appointment of a unilingual Lieutenant-Governor can be found to align with a purposive interpretation of the ***Charter*** sections in question nor the spirit of these constitutional provisions. Unlike the elected Members of the Legislature who collectively form the government and opposition, there is only one Lieutenant-Governor who is the sole head of state of the province. If francophone citizens are unable to interact with the head of state in the same manner as anglophone citizens it is reasonable to question whether such a situation is compliant with sections 16.1(2), 16(2), and 20(2) of the ***Charter***.

[54] In my view, it is overly simplistic to interpret the relevant ***Charter*** provisions as inapplicable to the role of Lieutenant-Governor as the position is occupied by an individual and therefore falls outside the scope of the *"institutional"* language obligations. The institutional nature of constitutional bilingualism protections is in place to ensure citizens may interact with the government of Canada and the government of New Brunswick in the language of their choice. In the context of the "legislature" or "government", this requirement can be met regardless of the linguistic capacity of any of the individual actors. However, the role of the Lieutenant-Governor in New Brunswick is unique, and the inability of a Lieutenant-Governor to speak one of the official languages cannot so easily be mitigated as it can in the context of other leading figures in the various branches of government.

[55] It is perhaps helpful to return for a moment to the description of "*institution*" as set out in the ***Official Languages Act of New Brunswick***. In reviewing that definition, it is noteworthy that the "*Lieutenant-Governor*" is referenced twice. Other than Her Majesty the Queen, there is no other individual person or role referenced in the definition of "*institution*" but the Lieutenant-Governor. This underscores the unique role of the Lieutenant-Governor in the Province of New Brunswick.

[56] The current application before the Court involves a unilingual anglophone Lieutenant-Governor. It is perhaps important to acknowledge that there has never been a unilingual francophone Lieutenant-Governor in the

Province of New Brunswick. The legal arguments before the Court would be the same if the Lieutenant-Governor was a unilingual francophone; however, such a situation has never arisen in the Province of New Brunswick. A frank acknowledgment of this reality is helpful to the present analysis.

[57] The equality of both official languages in New Brunswick was specifically woven into the fabric of the Canadian constitution in order to protect and promote the existence of both languages and both linguistic communities. Why was this done? In order to provide constitutional protections for both languages and both linguistic communities, such protection understandably of greatest concern to the linguistic minority, French speaking New Brunswickers.

[58] There are two significant components to the role of the Lieutenant-Governor. There is the important role as head of state which calls upon the Lieutenant-Governor to sign all laws, deliver the government's speech from the Throne, and perform other essential functions at the direction of the executive arm of government. In addition to these responsibilities of the Lieutenant-Governor set out in the ***Constitution Act, 1867***, there is the important social and community functions undertaken by a Lieutenant-Governor. It is during the discharge of these tasks that a Lieutenant-Governor is most frequently interacting with the citizens of the province. It will be understandably difficult, if not impossible, for a unilingual anglophone Lieutenant-Governor to converse and interact with

francophone citizens. In such situations, should the French speaking New Brunswicker wish to speak directly to the head of state, she will need to speak in English, if she is able, otherwise, the French speaking citizen will need to speak to the Lieutenant-Governor with the assistance of an interpreter or a bilingual staff member. A unilingual Lieutenant-Governor will experience significant difficulties in delivering a speech from the Throne with equal attention given to both official languages. Can such a situation really be deemed to represent equality of the linguistic communities pursuant to the ***Charter***? In my view, it cannot.

[59] I accept, without reservation, that the bilingual obligations enshrined in the Constitution are institutional, not personal obligations. Compliance with the ***Charter*** does not require any government employee, Minister, Judge, Premier or Prime Minister to be bilingual. However, these individuals can all be replaced by someone else in the execution of their functions, a Lieutenant-Governor cannot. There is only one head of state. The Chief Justice of the Province may step in to perform the essential duties of the Lieutenant-Governor, when she is out of the province or ill. However, the Chief Justice cannot step in to perform the duties of the Lieutenant-Governor if there is no one occupying the office. When the office is vacant, the Chief Justice is not authorized to act. Again, this speaks to the highly peculiar and unique role of a Lieutenant-Governor. To simply argue that the requirements of bilingualism do not extend to a Lieutenant-Governor because she, an individual, cannot be considered an "*institution*" is a

gross oversimplification of a complex question and fails to account for the extremely unique character and constitutional quality of the role itself.

[60] Returning for a moment to the guidance provided in ***Reference re Manitoba Language Rights***, it is necessary that this Court consider the question of "*institution*" in a generous manner while not allowing an interpretation which strays beyond its plain meaning. How then can a conclusion be drawn that, given the unique role of the Lieutenant-Governor of New Brunswick, the individual herself can be deemed to fall within the ambit of "*institution*"? This conclusion can be drawn, in my view, from the manner language rights have been interpreted in Canada since the ***Charter***. In particular, the Court is mindful of the following guiding principles:

(i) the principle of substantive equality of linguistic communities has meaning (***R. v. Beaulac***);

(ii) language rights are not to be considered in the nature of a request for accommodation (***R. v. Beaulac***);

(iii) language is a means by which a people express its cultural identity (***Ford v. Quebec***);

(iv) language rights interpretation must be construed with an emphasis on the protection and flourishing of official language communities (***Charlebois v. Mowat***);

(v) the importance of language rights is grounded in the essential role that language plays in human existence, development and dignity (***Reference re Manitoba Language Rights***); and

(vi) the language rights set out in the ***Charter*** ensure complete institutional bilingualism which confirms that citizens of New Brunswick have the right to use the language of their choice at all times in their interactions with the government and the legislature (***Société des Acadiens et Acadiennes du Nouveau-Brunswick v. Canada***).

[61] In the event the Prime Minister of the day advised the Governor General in Council to name a unilingual francophone to the position of Lieutenant-Governor in New Brunswick, there would possibly be consternation expressed by members of the anglophone majority. English speaking New Brunswickers may have difficulty accepting that a Lieutenant-Governor was delivering a Throne speech uniquely in French or with limited passages in English. There may be disappointment if a unilingual francophone Lieutenant-Governor struggled to chat with English citizens at community events or during ceremonies conferring awards such as the Order of New Brunswick. Yet, these same realities are imposed upon francophone New Brunswickers who are asked to accept the situation because the "Lieutenant-Governor" is not an "*institution*" and therefore need not be bilingual. Such a response seems to overlook the importance of the role of the Lieutenant-Governor and fly in the face of the

constitutional protections providing New Brunswick citizens the right to interact with their government in the language of their choice.

[62] In circumstances where members of one of the two constitutionally recognized linguistic communities are unable to interact directly, in their language, with the head of state – how can that be considered equality of both linguistic communities? In my view, it cannot. Yes, the language rights enshrined in the ***Charter*** are institutional in nature, however, the Lieutenant-Governor is the head of state – the head of the institution. In order to ensure true equality as required by the ***Charter***, the Lieutenant-Governor of New Brunswick must be bilingual, otherwise the protections provided by sections 16(2), 16.1(1), and 20(2) of the ***Charter*** are rendered meaningless. In my view section 18(2) of the ***Charter*** is not violated by the appointment of a unilingual Lieutenant-Governor as the Lieutenant-Governor is not called upon to prepare nor interpret statutes, records of journals of the Legislature in either official language. The constitutional protections afforded by section 18(2) of the ***Charter*** are not applicable to the role of a Lieutenant-Governor.

[63] In concluding that the appointment of a unilingual Lieutenant-Governor in New Brunswick violates sections 16(2),16.1(1) and 20(2) of the ***Charter***, the Court must consider if such violations are nonetheless saved by application of section 1 of the ***Charter***. The Supreme Court of Canada in ***R. v. Oakes***, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 explained the approach Courts are to take when pondering whether the violation of a

Charter right is justified by virtue of operation of section 1. Chief Justice Dickson, as he then was, explained the process at paragraphs 65 and 66 as follows:

> 65. **The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*.** These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.
>
> 66. The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. **The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstra-bly" which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter v. Southam Inc., supra.***
>
> [Emphasis mine]

[64] It must be acknowledged that the Respondents have not taken the position that if a ***Charter*** violation is found by the Court in the context of this matter that it would be justified pursuant to section 1 of the ***Charter***. There is no evidence before the Court to establish that the infringement on the constitutional rights of New Brunswickers by the appointment of a unilingual Lieutenant-Governor is demonstrably justified. In my view, section 1 of the ***Charter*** is not relevant in the circumstances of this case nor was it argued to be by the responding parties.

What is the appropriate remedy?

[65] As the Court has concluded that the appointment of a unilingual Lieutenant-Governor in New Brunswick violates the language rights of New Brunswick citizens enshrined in the ***Charter***, the question becomes what is the appropriate remedy? The Applicant requests a declaration confirming the Order in Council appointing Lieutenant-Governor Murphy as unconstitutional and of no force and effect. Lieutenant-Governor Murphy has been the head of stated in New Brunswick since September 2019 and would have signed countless laws, Orders in Council, and appointments in the execution of her legislative functions. This Court is very mindful of the potential chaos which could ensue following an order declaring Lieutenant-Governor Murphy's appointment as unconstitutional and therefor null and void.

[66] In ***Canada (Prime Minister) v. Khadr***, 2010 SCC3 (CanLII), [2010] 1 SCR 44, Khadr sought a remedy pursuant to section 24(1) of the ***Charter*** as a result of violations of his rights under section 7 of the ***Charter***. The situation leading up to the breach of Khadr's section 7 rights arose in the context of the executive arm of government's decision in matters of foreign affairs. In explaining their approach to the appropriate remedy, the Supreme Court of Canada stated at paragraphs 36, 37, 46, and 47 as follows:

> [36] In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny: Operation Dismantle v. The Queen, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441. **It is for the executive and not the courts to decide whether and how to**

> **exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the Charter** (Operation Dismantle) or other constitutional norms (Air Canada v. British Columbia (Attorney General), 1986 CanLII 2 (SCC), [1986] 2 S.C.R. 539).
>
> [37] The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged: see, e.g., Reference re Secession of Quebec, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at paras. 101-2. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution: United States v. Burns, 2001 SCC 7, [2001] 1 S.C.R. 283.
>
> [46] In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: Operation Dismantle, at p. 481, citing Solosky v. The Queen, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821. It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": R. v. Gamble, 1988 CanLII 15 (SCC), [1988] 2 S.C.R. 595, at p. 649. **A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it.** Such is the case here.
>
> [47] The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration **advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the Charter.**
>
> [Emphasis mine]

[67] This is not a situation where a law has been found to be unconstitutional and the Court is then left to consider if the implementation of that

determination should be delayed preventing the creation of a legal vacuum. In this case, it is the executive action of appointing a unilingual Lieutenant-Governor in New Brunswick that has been found constitutionally wanting. The appropriate remedies available to the court under section 24(1) of the ***Charter*** must be considered with this reality in mind.

[68] In ***Doucet-Boudreau v. Nova Scotia (Minister of Education)***, 2003 SCC 62 (CanLII), [2003] 3 SCR 3, the Supreme Court of Canada discussed appropriate remedies pursuant to section 24(1) of the ***Charter*** in the context of a violation of francophone parents rights under section 23 of the ***Charter*** for the provision of French language instruction for students from the Province of Nova Scotia. In confirming that courts must take a generous and expansive approach to ***Charter*** remedies, Justice Iacobucci and Arbour stated at paragraphs [24] and [25] as follows:

> 24 The requirement of a generous and expansive interpretive approach holds equally true for Charter remedies as for Charter rights (R. v. Gamble, 1988 CanLII 15 (SCC), [1988] 2 S.C.R. 595; R. v. Sarson, 1996 CanLII 200 (SCC), [1996] 2 S.C.R. 223; R. v. 974649 Ontario Inc., [2001] 3 S.C.R. 575, 2001 SCC 81 ("Dunedin")). In Dunedin, McLachlin C.J., writing for the Court, explained why this is so. She stated, at para. 18:
>
> > [Section] 24(1), like all Charter provisions, commands a broad and purposive interpretation. This section forms a vital part of the Charter, and must be construed generously, in a manner that best ensures the attainment of its objects . . . . Moreover, it is remedial, and hence benefits from the general rule of statutory interpretation that accords remedial statutes a "large and liberal" interpretation . . . . Finally, and most importantly, the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of Charter rights. In Mills, McIntyre J. observed at p. 965 that "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion". This broad remedial mandate for s. 24(1) should not be frustrated by a "(n)arrow and technical" reading of the provision . . . . [Reference omitted.]

> 25 **Purposive interpretation means that remedies provisions must be interpreted in a way that provides "a full, effective and meaningful remedy for Charter violations" since "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach"** (Dunedin, supra, at paras. 19-20). A purposive approach to remedies in a Charter context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.
>
> [Emphasis mine]

[69] Justice Iacobucci and Arbour went on to discuss the role of Canadian courts in addressing remedies when constitutional rights are violated while remaining mindful of the importance of the separation of powers between the three branches of government. The Justices discuss these issues at paragraphs 32 to 34 of ***Doucet-Boudreau v. Nova Scotia*** as follows:

> 32 **Fortunately, Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government.** That history of compliance has become a fundamentally cherished value of our constitutional democracy; we must never take it for granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root.
>
> 33 **This tradition of compliance takes on a particular significance in the constitutional law context, where courts must ensure that government behaviour conforms with constitutional norms but in doing so must also be sensitive to the separation of function among the legislative, judicial and executive branches.** While our Constitution does not expressly provide for the separation of powers (see Re Residential Tenancies Act, 1979, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714, at p. 728; Douglas/Kwantlen Faculty Assn. v. Douglas College, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570, at p. 601; Reference re Secession of Quebec, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 15), the functional separation among the executive, legislative and judicial branches of governance has frequently been noted. (See, for example, Fraser v. Public Service Staff Relations Board, 1985 CanLII 14 (SCC), [1985] 2 S.C.R. 455, at pp. 469-70.) In New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319, McLachlin J. (as she then was) stated, at p. 389:

> Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.
>
> **34 In other words, in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited.** Concern for the limits of the judicial role is interwoven throughout the law. The development of the doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts overstepping the bounds of the judicial function and their role vis-à-vis other branches of government.
>
> [Emphasis mine]

[70] Justice Iacobucci and Arbour went on to provide the following framework to be considered by a court in fashioning a remedy under section 24(1), at paragraphs 55 to 58 as follows:

> 55 **First, an appropriate and just remedy in the circumstances of a Charter claim is one that meaningfully vindicates the rights and freedoms of the claimants.** Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore not appropriate and just (see Dunedin, supra, at para. 20, McLachlin C.J. citing Mills, supra, at p. 882, per Lamer J. (as he then was)).
>
> 56 Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering **a Charter remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary.** This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.

> 57 **Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court.** It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.
>
> 58 Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. **The remedy should not impose substantial hardships that are unrelated to securing the right.**
>
> [Emphasis mine]

[71] A declaration that the Order-in-Council appointing Brenda-Louise Murphy was unconstitutional and of no force and effect would render every law, decree, or appointment executed by Lieutenant-Governor Murphy likewise of no force and effect. Such a result could be very problematic for the Province of New Brunswick and its citizens.

[72] The Applicant has been successful in asking this Court to conclude that the unique constitutional protections afforded to the citizens of New Brunswick require that the position of a Lieutenant-Governor, and solely the position of a Lieutenant-Governor, be held by a bilingual individual. As the Court has now provided the requested "*opinion*" on the issue, it is appropriate to leave a determination on necessary next steps in the hands of the federal government for it to "*consider what actions to take*" (***Canada v. Khadr***). The conclusion of this Court vindicates the language rights and freedoms invoked by the Applicant and will undoubtedly have an impact on the nomination of all future Lieutenant-Governors in the Province of New Brunswick. However, this Court must continue to respect its role

within the separation of powers of the three branches of government. In fashioning an appropriate remedy, it is important that this Court not stray into discussions over the implementation of the decision which best rests with the executive arm of government. Finally, the remedy suggested by this Court must avoid imposing substantial hardships which are unrelated to confirming the language rights at the heart of the application.

[73] An immediate declaration that the Order in Council appointing Lieutenant-Governor Murphy is unconstitutional, and therefore null and void, could create substantial hardships for the Province of New Brunswick and its citizens. This Court cannot issue a declaration which could undermine countless lawfully enacted pieces of legislations, appointments, and decrees. Such a situation would create a legislative and constitutional crisis within the Province of New Brunswick which is not necessary to adequately vindicate the infringed language rights in question.

COSTS

[74] The Applicant has been successful in this matter and is entitled to costs. This was a complex matter which required three days to argue and countless hours by all parties to prepare. In all the circumstances, the Applicant is entitled to costs which I fix at $15,000.00 along with taxable disbursements.

CONCLUSION

[75] In my view, this Court can determine that a Lieutenant-Governor in New Brunswick must be capable of executing all aspects of the role in both official languages without declaring the Order in Council appointing Lieutenant-Governor Murphy a nullity. The Court returns to the Supreme Court's observation as set out in ***Doucet-Boudreau v. Nova Scotia*** that Canada is a country which enjoys a "*remarkable history of compliance*" with court decisions. This Court's determination that the appointment of a unilingual individual to the position of Lieutenant-Governor in the Province of New Brunswick violates sections 16(2), 16.1(2), and 20(2) of the ***Charter*** is sufficient to ensure appropriate and prompt action on behalf of the government to rectify the situation. The timing and the extent of that action I leave to the executive arm of government to determine.

DISPOSITION

[76] For all these reasons, the court orders as follows:

(i) Pursuant to sections 16 (2), 16.1 (2) and 20 (2) of the ***Canadian Charter of Rights and Freedoms*** a Lieutenant-Governor in the Province of New Brunswick must be bilingual and capable of executing all tasks required of the Role of Lieutenant-Governor in both the English and the French Languages; and

(ii) The Applicant is entitled to costs of $15,000.00 plus all taxable disbursements.

DATED at Fredericton, N.B., this 14th day of April 2022.

Tracey K. DeWare
Chief Justice of the Court of Queen's Bench
of New Brunswick