Federal Court Cour fédérale

Date: 20250306

Docket: T-60-25

Citation: 2025 FC 422

Ottawa, Ontario, March 6, 2025

PRESENT: THE CHIEF JUSTICE

BETWEEN:

DAVID JOSEPH MACKINNON AND ARIS LAVRANOS

Applicants

and

CANADA (ATTORNEY GENERAL)

Respondent

and

DEMOCRACY WATCH, THE CANADIAN CONSTITUTIONAL LAW INITIATIVE OF THE UNIVERSITY OF OTTAWA PUBLIC LAW CENTRE AND THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

JUDGMENT AND REASONS

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I. Introduction

[1] At its core, this proceeding concerns the extent to which our constitutional framework contemplates a potential role for the courts to play when the Prime Minister advises the Governor General to prorogue Parliament.

[2] The Respondent, on behalf of Prime Minister Trudeau, maintains that the courts have no role whatsoever.

[3] I respectfully disagree. The courts have a constitutional role, and it is important that it be exercised to maintain public confidence in our institutions of government.

[4] In this proceeding, the Applicants seek judicial review of the Prime Minister's decision "to advise ... the Governor General of Canada, (the "**Governor General**"), to exercise her

prerogative power to prorogue the first session of the 44th Parliament of Canada until Monday, March 24, 2025 (the "**Decision**")."

[5] Before addressing that issue, the Court must determine whether it has the jurisdiction to review the Decision. If so, the Court must then assess whether the Decision is justiciable, and whether the Applicants have standing to challenge it.

[6] It is only after making affirmative findings on those three initial issues that the Court could then assess the Applicants' allegation that the Prime Minister exceeded his authority in making the Decision. If the Court were to conclude that the Prime Minister exceeded his authority, it would then have to consider whether to grant the Applicants' requests to set aside the Decision and declare that Parliament has not been prorogued.

[7] For the reasons that follow, I find that this Court has the jurisdiction to review the Decision.

[8] I also find that the issue of whether the Prime Minister exceeded the constitutional or other legal limits of his authority in making the Decision is justiciable. However, I conclude that the Applicants failed to demonstrate that any such limits were exceeded. In particular, the Applicants failed to demonstrate that the Prime Minister exceeded any limits established by the written Constitution or by the unwritten principles they identified. The Applicants also failed to demonstrate that the Prime Minister exceeded any other legal limits.

[9] In their Application for Judicial Review (the "**Application**"), the Applicants allege that the Decision was "part of a stratagem designed specifically to interrupt the business of Parliament and stymie the publicly stated intent of a majority of the House of Commons to bring a motion for non-confidence in the government." However, the Applicants were unable to establish those allegations.

[10] Regarding the confidence of the House of Commons (the "**House**"), the Applicants failed to demonstrate when, if at all, a non-confidence vote in the House likely would have occurred in the absence of the Decision. They also conceded during the hearing that "the government *does* enjoy the confidence of the House right now" [emphasis added].

[11] The Applicants also alleged that the Decision was made "in service of the interests of the [Liberal Party of Canada]" (the "**Liberal Party**"). For example, in the Prime Minister's prepared public statement to announce the Decision, he mentioned that he had requested the president of the Liberal Party to begin the process of selecting a new leader for that party. He also stated: "A new PM and Leader of the Liberal party will carry its values and ideals into [the] next election."

[12] Even if those matters were beyond the scope of the authority of the Crown prerogative to prorogue Parliament, there were several other reasons given for the Decision and it is not possible to disentangle the partisan reasons from the other reasons given by the Prime Minister. On their face, those other reasons related either to the business of Parliament or to what appears to be the Prime Minister's view of the public interest. It is not the Court's role to question the merits or wisdom of those reasons.

[13] In reaching my determination on this issue, I have remained mindful of the emphasis that the Supreme Court of Canada (the "**SCC**") has placed on the courts refraining from "undue interference" with the other branches of government: see paragraphs 81–82 below. The Applicants appeared to recognize this when they submitted that "the situation is 'sufficiently serious' to justify the Court's intervention in this matter, as did the [Supreme Court of the United Kingdom in *R (Miller) v The Prime Minister*, [2019] UKSC 41 [***Miller II***]]."

[14] *Miller II* appears to be the only case in the history of the Commonwealth where a court interfered with the exercise of the Crown prerogative to prorogue Parliament. There, the Supreme Court of the United Kingdom (the "**UKSC**") was called upon to consider the advice given by Prime Minister Boris Johnson to Her Late Majesty Queen Elizabeth II that Parliament should be prorogued. That advice was given a few weeks before a major constitutional change was due to take place in connection with the UK's withdrawal from the European Union in October 2019. It was also given after Parliament had made clear its intention to be involved in the process of withdrawal, including by passing legislation contemplating such involvement. In the opening paragraph of its decision, the UKSC explained that the circumstances with which it had been presented "have never arisen before and are unlikely to ever arise again." Later, in articulating the "relevant limit upon the power to prorogue," the Court emphasized that "the court will intervene if the effect is sufficiently serious to justify such an *exceptional* course": *Miller II* at para 50 [emphasis added].

[15] Neither the effect of the Decision that is currently before me nor the overall circumstances related to it are similarly exceptional.

[16] Having regard to all of the foregoing, this Application will be dismissed.

II. The Parties and Interveners

[17] The Applicants are Canadian citizens who reside in Nova Scotia. David Joseph MacKinnon is a non-practising member of the Law Society of British Columbia and a retired member of the Barreau du Québec. Aris Lavranos is an emergency medicine physician and a recent member of the Nova Scotia Barristers' Society. Both are eligible to vote in the next federal election and intend to do so.

[18] The Attorney General of Canada represents the interests of, and responds to the allegations made in this proceeding against, the Prime Minister.

[19] Democracy Watch is a national, non-governmental, non-partisan, non-profit organization that advocates for democratic good government and corporate responsibility reforms in Canada.

[20] The Constitutional Law Initiative ("the **Initiative**") is a project of the uOttawa Public Law Centre, a university research centre located at the University of Ottawa Faculty of Law. Its stated purpose is to integrate the practice of constitutional law into the educational and scholarly environment of the law school. It also endeavours to assist courts to address difficult constitutional issues.

[21] The British Columbia Civil Liberties Association (the "**BCCLA**") is a non-profit and non-partisan advocacy group focused on the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada.

[22] Democracy Watch, the Initiative, and the BCCLA were granted leave to intervene in this Application.

III. Background

[23] Since late September 2024, the House has been seized with a motion relating to privilege. In the intervening period prior to the prorogation, very limited other House business proceeded.

[24] On November 25, 2024, President-elect Trump posted a message on the "Truth Social" social media application ("**Truth Social**") advising that on his first day in office he would "sign all necessary documents to charge Mexico and Canada a 25% Tariff on ALL products coming into the United States" (the "**25% Tariff**"). He explained that this "Tariff will remain in effect until such time as Drugs, in particular Fentanyl, and all Illegal Aliens stop the Invasion of our Country!"

[25] Two days later, the Premiers of Canada's provinces and territories reportedly met virtually with the Prime Minister and certain senior members of the federal Cabinet to discuss the 25% Tariff.

[26] Beginning on December 10, 2024, President-elect Trump made successive posts on Truth Social in which he referred to the Prime Minister and Canada as the “Governor” and the “Great State of Canada,” respectively. The President-elect also issued posts describing various benefits that Canadians could gain by becoming “the 51st State.”

[27] On December 16, 2024, then-Finance Minister Chrystia Freeland resigned from Cabinet by way of an open letter. In her letter, she stated, among other things, that “[o]ur country today faces a grave challenge. The incoming administration in the United States is pursuing a policy of aggressive economic nationalism, including a threat of 25 per cent tariffs.”

[28] The following afternoon, Parliament adjourned for its scheduled holiday recess. At that time, the House was scheduled to resume sittings on January 27, 2025, and to be subsequently adjourned from February 15 to February 23, and from March 1 to March 16, 2025.

[29] On January 6, 2025, the Prime Minister held a press conference at which he announced the Decision and his intention to resign as Prime Minister and as leader of the Liberal Party. He added that he had requested the president of the Liberal Party to begin the process of selecting the party’s next leader.

[30] Later that day, the *Canada Gazette* Part II, Extra vol. 159, No. 1, was published, containing the Governor General’s Proclamation Proroguing Parliament to March 24, 2025 (the “**Prorogation**”).

[31] Prior to the Prorogation, the leaders of all major opposition parties in the House had announced their intention to vote non-confidence in the current government, as soon as there was an opportunity.

[32] Specifically, on October 29, 2024, Mr. Yves-François Blanchet, leader of the Bloc Québécois ("**BQ**"), announced that his party would vote non-confidence in the government. On December 9, 2024, Mr. Pierre Poilievre, leader of the Conservative Party of Canada ("**CPC**"), sponsored a motion in the House stating that "the House proclaims it has lost confidence in the Prime Minister and the government." Despite the support of all members of the BQ and CPC, the motion was defeated 180 votes to 152. On December 20, 2024, Mr. Jagmeet Singh, leader of the New Democratic Party ("**NDP**"), announced in an open letter to Canadians that his party would "put forward a clear motion of non-confidence in the next sitting of the House of Commons." Later that day, Mr. Poilievre wrote a letter to the Governor General stating that the "Prime Minister has lost the confidence of the House of Commons and cannot continue to govern unless he regains it or wins a new election." In support of this statement, Mr. Poilievre noted that "all three recognized opposition parties, whose combined MPs constitute a clear majority of the House of Commons, have now stated unequivocally that they have lost confidence in the Prime Minister." Therefore, he requested the Governor General to:

> … inform the Prime Minister that he must either dissolve Parliament and call an election or reconvene Parliament on the earliest day that is not a statutory holiday before the end of the calendar year to prove to you and to Canadians that he has the confidence of the House to continue as Prime Minister.

[33] After the Decision was announced on January 6, 2025, both Mr. Singh and Mr. Blanchet repeated the intention of their respective parties to vote non-confidence in the government as soon as there is a confidence vote.

[34] During a press conference on January 7, 2025, President-elect Trump was asked whether he was "considering military force to annex and acquire Canada." He replied: "No, economic force because Canada and the United States, that would really be something …" [emphasis added].

[35] On January 8, 2025, the Applicants filed their Application challenging the Decision. The following evening, they filed a Motion requesting that the Application be scheduled to be heard on an expedited basis (the "**Motion to Expedite**").

[36] On January 10, 2025, Associate Judge Trent Horne and I participated in an initial case management conference ("**CMC**") with the parties. During that CMC, counsel to the Respondent indicated that they did not yet have instructions regarding the Motion to Expedite. Counsel agreed to advise the Court of their instructions regarding that request the following Monday, January 13, 2025.

[37] On January 13, 2025, the Respondent advised the Court that it intended to oppose the Motion to Expedite.

[38] On January 18, 2025, I granted the Motion to Expedite and scheduled the hearing of the Application for February 13 and 14, 2025: *MacKinnon v Canada (Attorney General)*, 2025 FC 105 [***MacKinnon***]. Those hearing dates were chosen to provide the parties with a fair opportunity to prepare and serve supporting affidavits and documentary evidence, complete cross-examinations on those materials, and prepare their respective records. It was also necessary to build in time for the Interveners to serve and file their submissions, and for the parties to have an opportunity to address those submissions at the hearing.[1]

[39] President Trump was inaugurated on January 20, 2025. On February 1, 2025, he signed an executive order declaring that, effective February 4, 2025, all Canadian energy or energy resources products would be subject to a 10% tariff, and that all other Canadian products would be subject to a 25% tariff. Also on February 1, 2025, the Governor in Council in Canada made Order in Council No. 2025-0072 pursuant to subsection 53(2) and paragraph 79(a) of the *Customs Tariff*, SC 1997, c 36 [***Customs Tariff***], subjecting certain goods that originate in the United States to a 25% surtax effective February 4, 2024. These measures were subsequently suspended for 30 days after discussions between President Trump and the Prime Minister, as well as between other representatives of Canada and the United States. However, on February 10, 2025, President Trump reportedly signed orders imposing 25% tariffs on all steel and aluminum imports, including from Canada. On March 4, 2025, the tariffs that had been suspended came into effect.

[1] I also provided the parties with the opportunity to provide written submissions in reply to the Interveners' submissions, by the close of business on February 19, 2025.

[40] Seven parties requested leave to intervene in this proceeding. On February 3, 2025, Associate Judge Horne granted the motions of Democracy Watch, the Initiative and the BCCLA (the "**Interveners**"). He dismissed the motions of Steven Spadijer and Michael Moreau, as well as the informal requests by the Haida Matriarch Tribunal and Norman Traversy/Daniel Mesrobian.

IV. The Decision

[41] As noted at paragraph 29 above, the Prime Minister announced the Decision on January 6, 2025. The Applicants maintain that the following transcript of a portion of his press conference that day constitutes the core of the reasons for the Decision, for the purposes of this proceeding:

> … And the fact is, despite best efforts to work through it, Parliament has been paralyzed for months, after what has been the longest session of a minority Parliament in Canadian history.
>
> That's why this morning, I advised the Governor General that we need a new session of Parliament. She has granted this request, and the House will now be prorogued until March 24.
>
> Over the holidays, I've also had a chance to reflect and have had long talks with my family about our future. Throughout the course of my career, any success I have personally achieved has been because of their support, and with their encouragement.
>
> So last night over dinner, I told my kids about the decision that I'm sharing with you today. I intend to resign as party leader, as Prime Minister, after the party selects its next leader through a robust, nationwide, competitive process.
>
> Last night, I asked the president of the Liberal Party to begin that process. This country deserves a real choice in the next election, and it has become clear to me that if I'm having to fight internal battles, I cannot be the best option in that election.

[42] In their Application, the Applicants indicate that the Decision also includes the rest of the Prime Minister's prepared statement, as well as answers that he provided in response to questions from reporters, immediately after giving his prepared statement. The written submissions filed by the Respondent reflect that this is also its understanding of the Decision under review. I will return to the relevant portions of those responses in the reasons below.

V. Preliminary Issue

[43] On January 29, 2025, the Applicants served a Notice of Objection to an expert report prepared by Professor Peter Oliver (the "**Oliver Report**") on behalf of the Respondent. Broadly speaking, the Applicants maintain that the Oliver Report simply provides a "cautionary treatise" in how the Court ought to apply domestic law, and that it thereby usurps the role of the Court.

[44] The admissibility of expert evidence is determined by the application of a two-stage test: At the first stage, the party putting forward the evidence must demonstrate that it satisfies the four "Mohan" requirements, namely 1) logical relevance; 2) necessity in assisting the trier of fact; 3) absence of an exclusionary rule; and 4) made by a properly qualified expert: *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [***White Burgess***] at paras 19 and 23, citing *R v Mohan*, [1994] 2 SCR 9 [***Mohan***] at 20–25.

[45] At the second stage, sometimes referred to as the "gatekeeping" stage, the Court weighs the benefits, or probative value, of admitting evidence that satisfies the four *Mohan* requirements against the "costs" of its admission, including the risk of confusion, time and expense that may thereby result: *White Burgess* at paras 16 and 24. This is a case-specific, discretionary exercise.

If the costs are found to outweigh the benefits, the evidence may be deemed inadmissible despite having met all the *Mohan* factors.

[46] The Applicants submit that the Oliver Report does not meet the threshold of 'necessity' under the *Mohan* framework, as it does not provide necessary facts which are likely to be outside the experience and knowledge of the Court. The Applicants add that the Oliver Report falls within the 'exclusionary rule' of the *Mohan* framework because it often does not address foreign law as a question of fact, but rather as a centrepiece for commentary and opinions about its suggested application in Canada. The Applicants further maintain that the Oliver Report usurps the Court's role as the adjudicator, because it either provides opinions about the applicability of foreign law in Canada or opines on the constitutional conventions and principles which govern the exercise of prerogative powers in Canada.

[47] The Applicants also submit that even if the Court finds that the Oliver Report meets the four *Mohan* requirements, the Court should exercise its discretion to strike the Report. In support of this submission, the Applicants state that the prejudice that would result from admitting the Oliver Report would exceed its probative value, as it would "dress up and expand the scale of" the Respondent's arguments.

[48] The Respondent requests that Professor Oliver be qualified as an expert in comparative constitutional systems, including constitutional conventions and the constitutional framework of the United Kingdom ("**UK**") and the Commonwealth.

[49] The Respondent submits that the Oliver Report satisfies the requirements for the admissibility of expert evidence and that it does not express any preference over how the Court should adjudicate this case. The Respondent maintains that courts have relied, in numerous other cases, on expert reports providing a comparative analysis between Canada, the Commonwealth and other international jurisdictions to assist their understanding of Canada's institutions and constitutional systems: *Schmidt v Canada (Attorney General)*, 2016 FC 269 at paras 215–217; *Motard c Canada (Procureur général)*, 2016 QCCS 588 at paras 95–101.

[50] I largely agree with the Respondent. I accept that Professor Oliver should be recognized as a qualified expert in the constitutional framework of the UK and in comparative constitutional law. For the most part, I reject the various submissions of the Applicants described above. However, I agree with the Applicants that the parts of the Oliver Report which opine on Canadian constitutional law, including the constitutional principles that govern the exercise of prerogative powers in Canada, are inadmissible. These are matters for the Court to determine. The same is true with respect to the applicability of foreign law in Canada.

[51] Consequently, the passages of the Oliver Report identified in Appendix 1 to these reasons are inadmissible and should be considered struck from that document.

VI. Issues

[52] In my view, there are five principal issues in this proceeding. They are as follows:

1. Does the Court have the jurisdiction to review the Decision?

2. If so, is the issue of whether the Prime Minister exceeded the scope of his authority in making the Decision justiciable?

3. If so, do the Applicants have standing to challenge the Decision?

4. If so, did the Prime Minister exceed his authority in making the Decision?

5. If so, what is the appropriate remedy?

[53] Although the parties characterized the fourth issue above in somewhat different terms, the manner in which I have stated it above better aligns with the Applicants' contention, in their Amended Notice of Application, that "the Prime Minister's advice to the Governor General was *ultra vires* his authority as Prime Minister." This statement of the issue will also provide a framework within which to address, to the extent necessary, the matters contemplated by the parties' respective articulations of this issue and their related allegations and submissions.

VII. Assessment

A. *Does the Court have the jurisdiction to review the Decision?*

[54] The Respondent submits that the Decision is not subject to review by this Court for two reasons.

[55] First, the Respondent, supported by the Initiative, asserts that the Decision was made pursuant to a constitutional convention and not pursuant to an exercise of a royal prerogative or statutory power. This convention provides that the Governor General exercises the power to

prorogue Parliament on the advice of the Prime Minister. The Respondent maintains that when the Prime Minister provides such advice, he does not act in the capacity of a "federal board, commission or other tribunal," as contemplated by paragraph 18(1)(a) of the *Federal Courts Act*, RSC 1985, c F-7 [***Federal Courts Act***]. This is because he is not "exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown," as contemplated by the definition in subsection 2(1) of that legislation.

[56] Second, the Respondent asserts that, as a matter of law, the legal decision to prorogue Parliament is made by the Governor General, not by the Prime Minister. Consequently, the Respondent maintained that the Prime Minister's advice has no independent legal effect and thus is not amenable to judicial review in this Court, as it cannot "affect legal rights, impose legal obligations, or cause prejudicial effects": *Democracy Watch v Canada (Attorney General)*, 2021 FCA 133 [***Democracy Watch 2021***] at paras 23 and 29; *Air Passenger Rights v Canada (Attorney General)*, 2024 FCA 128 at paras 6, 18 and 44.

[57] I disagree.

[58] Regarding the Respondent's first contention, the advice given by the Prime Minister with respect to the exercise of other types of prerogative powers has been held to constitute the exercise of Crown prerogative power: *Conacher v Canada (Prime Minister)*, 2009 FC 920 [***Conacher***] at paras 26–27, aff'd 2010 FCA 131 [***Conacher FCA***], leave to appeal to SCC ref'd, 33848 (20 January 2011); *Black v Canada (Prime Minister)*, 2001 CanLII 8537 (ON CA)

[***Black***] at paras 31–41. See also *Democracy Watch v Premier of New Brunswick*, 2022 NBCA 21 [***Democracy Watch NB***] at para 58; and *Engel v Prentice*, 2020 ABCA 462 [***Engel***] at paras 27–28, leave to appeal to SCC ref'd, 39566 (27 May 2021).

[59] It has also been established that the exercise of Crown prerogative powers may be reviewed in certain circumstances, at least by the superior courts in the provinces: *Black* at paras 46–47; *Democracy Watch NB* at paras 8 and 56.

[60] In addition, it is now established that the powers under subsections 2(1), 18(1) 18.1(3) of the *Federal Courts Act* extend to exercises of executive prerogative power rooted solely in the federal Crown prerogative: *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2015 FCA 4 [***Hupacasath***] at paras 7 and 40–58; *Oceanex Inc v Canada (Transport)*, 2019 FCA 250 at para 28; *Stagg v Canada (Attorney General)*, 2019 FC 630 [***Stagg***] at para 41**.** In *Conacher*, this Court reached a similar conclusion with respect to this Court's jurisdiction to review exercises of prerogative powers for compliance with the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [***Charter***] and the Constitution more broadly: *Conacher* at paras 29–30.

[61] For greater certainty, the exercise of prerogative powers by federal officials is within the purview of the definition of "federal board, commission or other tribunal" set forth in subsection 2(1) of the *Federal Courts Act*: *Hupacasath* at paras 41–58.

[62] Moreover, the federal decision makers that are included within the scope of the phrase "federal board, commission or other tribunal" include the Prime Minister: *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [***TeleZone***] at para 3.

[63] Although the jurisprudence cited above concerned exercises of Crown prerogative powers other than the prorogation power, I see no principled basis for why the Prime Minister's discretionary advice with respect to the prorogation of Parliament should be any different.

[64] I will now address the Respondent's second submission, namely, that the Decision is not amenable to judicial review because the final decision to prorogue is made by the Governor General, and therefore the Prime Minister's advice cannot independently "affect legal rights, impose legal obligations, or cause prejudicial effects."

[65] In addressing that submission, the Applicants rely on the UKSC's analysis in *Miller II*. There, a unanimous 11-member panel of the Court granted declarations and orders in relation to the advice given by Prime Minister Boris Johnson to Her Late Majesty Queen Elizabeth II that Parliament should be prorogued. In the course of its analysis, the Court appeared to treat the Prime Minister's advice-giving function and Her Late Majesty's exercise of the prerogative to prorogue to be effectively one and the same: *Miller II* at para 30.

[66] The Respondent maintains that *Miller II* is distinguishable because the UKSC assumed, without deciding, that Her Late Majesty was *obliged* by constitutional convention to accept Prime Minister Johnson's advice: *Miller II* at para 30. By contrast, the Respondent asserts that, in

Canada, “many commentators take the view that … the Governor General has a discretion to refuse and certainly to ‘warn and encourage’ regarding a Prime Minister’s request to prorogue.”

[67] By convention and under the principle of responsible government, the Governor General acts on the advice of a Prime Minister who enjoys the confidence of the House. As the Respondent itself recognizes, there are no known instances where a Governor General of Canada has ever refused advice by the Prime Minister to prorogue the House. Likewise, there is no evidence before the Court that a Governor General of Canada has ever prorogued Parliament without first being advised to do so by the Prime Minister. Moreover, according to an affidavit filed by Donald Booth on behalf of the Respondent, “the practice and procedure relating to prorogation is within the Prime Minister’s prerogative,” and the length of time for which Parliament may be prorogued “is entirely within the discretion of the Prime Minister.”

[68] In these circumstances, the Respondent’s contention that the Prime Minister’s advice cannot affect legal rights, impose legal obligations, or cause prejudicial effects fails to reflect the reality of the situation. The Prime Minister’s advice is in fact a critical lynchpin of the exercise of the Crown’s prerogative to prorogue Parliament. If the Prime Minister exceeded the constitutional or other legal limits of his authority in providing that advice, the elected representatives of the people would unlawfully be prevented from performing their constitutional functions. In my view, this constitutes a sufficient adverse prejudicial effect on those elected representatives and the public at large to give this Court jurisdiction in this matter: see generally *Canada (Citizenship and Immigration) v Tennant*, 2018 FCA 132 at paras 23–24; *Democracy Watch NB* at para 56.

[69] The possibility that the Governor General might one day refuse the Prime Minister's advice to prorogue Parliament is not a sufficient basis upon which to immunize that advice from review by the courts. The same is true with respect to the possibility that the Governor General might impose one or more conditions on the requested prorogation, as the Respondent and the Initiative maintain Governor General Jean did in 2008.

[70] In support of its position that the Prime Minister's advice has no independent legal effect and thus is not amenable to judicial review in this Court, the Respondent relies on *Conacher FCA*. There, the Federal Court of Appeal (the "**FCA**") discussed the appellants' argument that, in advising the Governor General to dissolve Parliament in the fall of 2008, the Prime Minister *caused* the ensuing election to take place before the fixed times set out in subsection 56.1(2) of the *Canada Elections Act*, SC 2000, c 9 [***Elections Act***]. The appellants added that this infringed the rights of Canadian citizens to vote and run for office under section 3 of the *Charter*.

[71] The FCA began its discussion of the alleged breach of section 3 of the *Charter* by stating that it agreed with this Court's finding at first instance that the Prime Minister's act in advising the Governor General to dissolve Parliament and call an election did not infringe the rights of Canadian citizens under section 3 of the *Charter*. However, instead of specifically endorsing or otherwise commenting upon this Court's findings on this issue, the FCA made its own finding. It stated: "To the extent that [the Prime Minister's alleged causation of an early election] 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": *Conacher FCA* at para 11.

[72] The FCA made this statement late in its decision, after assessing and ultimately rejecting the appellants' contention that this Court erred finding that the Prime Minister's advice to the Governor General did not contravene section 56.1 of the *Elections Act*. At first instance, this Court ruled that it had the jurisdiction to consider that issue, as well as constitutional issues, pursuant to paragraph 18.1(4)(f) of the *Federal Courts Act*: *Conacher* at paras 29–30. That provision permits this Court to grant relief if it is satisfied that the "federal board, commission or other tribunal" in question "acted … contrary to law."

[73] In affirming this Court's conclusion on the section 56.1 issue, and by dealing with the issue itself, the FCA appears to have accepted this Court's finding that it had the jurisdiction to determine whether the Prime Minister's advice to the Governor General contravened that provision. This is notwithstanding the fact that the formal decision to dissolve Parliament and call an election was made by the Governor General. The FCA's subsequent statement that, "as a matter of law, it was the Governor General that called the election, not the Prime Minister," appears to have been confined to the issue of whether the Prime Minister's advice had contravened section 3 of the *Charter*.

[74] The statement quoted immediately above also needs to be considered against the backdrop of the FCA's earlier statement in that decision that, "under our constitutional framework and as a matter of law, the Governor General *may consider a wide variety of factors* in deciding whether to dissolve Parliament and call an election": *Conacher FCA* at para 6 [emphasis added]. By comparison, the evidence in this proceeding is that the Governor General acts on the advice of the Prime Minister, subject to a "reserve" power to reject the Prime

Minister's advice to prorogue Parliament. As noted above, the evidence before the Court is that this "reserve" power has never been used. It is reasonable to question whether, if it had been presented with similar evidence, the Court in *Conacher FCA* would have reached the same finding on this issue.

[75] This is particularly so given the subsequent teaching of the SCC that the *Federal Courts Act* should be interpreted in a manner that promotes the objectives of enhancing government accountability and promoting access to justice: *Telezone* at para 32. In *Hupacasath* at para 56, the Court cited this teaching as support for the proposition that technical distinctions that serve "only to trap the unwary and obstruct access to justice" should be avoided. The Court made that observation after noting that an interpretation of the *Federal Courts Act* which would recognize this Court's jurisdiction "to review federal exercises of pure prerogative power is consistent with the Parliament's aim to have the Federal Courts review all federal administrative decisions": *Hupacasath* at para 54.

[76] Interpreting the *Federal Courts Act* in a manner that would enable this Court to review the Prime Minister's advice to the Governor General to prorogue Parliament would also be consistent with the evolving view that "all holders of public power must be accountable for their exercises of power, a principle that rests at the heart of our democratic governance and the rule of law": *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at para 104, rev'd in part on other grounds, 2023 SCC 17; *Canadian National Railway Company v Canada (Transportation Agency)*, 2023 FCA 245 at paras 7–8.

[77] In further support of its submission that the Prime Minister's advice to the Governor General to prorogue Parliament cannot affect legal rights, impose legal obligations, or cause prejudicial effects, the Respondent relies on *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 [***Taseko***] at para 36. There, the FCA noted that it had previously held that reports of the National Energy Board are not reviewable because they are only recommendations to the Governor in Council ("**GIC**") that lack any independent legal or practical effect. However, that case is distinguishable because the Court determined that the challenged report "only serve[d] to assist the Minister (or the GIC) in making their decisions": *Taseko* at para 43. By contrast, in the case of prorogation, the Governor General *acts* on the advice of the Prime Minister, subject to a possible reserve power that appears to have never been exercised.

[78] Having regard to all of the foregoing, I conclude that this Court has the jurisdiction to review the Decision, including for the purpose of determining (a) the justiciability of the issue of whether the Prime Minister exceeded his authority in making the Decision; and if that issue is justiciable, (b) whether the Prime Minister did in fact exceed the his authority, as alleged by the Applicants.

[79] For greater certainty, the advice given by the Prime Minister to the Governor General to prorogue Parliament is a reviewable "matter" in respect of which relief is sought, as contemplated by subsection 18.1(1) of the *Federal Courts Act*. It is also a matter in respect of which a remedy may be available under section 18 of that legislation, if the issue of whether the Prime Minister exceeded his authority in providing that advice is justiciable. To the extent that such advice, on a purposive interpretation of paragraph 18.1(3)(b), may be said to constitute a

"decision" or an "act" that can "affect legal rights, impose legal obligations, or cause prejudicial effects," it is reviewable by this Court: *Air Canada v Toronto Port Authority*, 2011 FCA 347 at paras 24 and 29; *Democracy Watch 2021* at paras 23 and 29.

B. *The justiciability of the issues raised by the Applicants*

(1) Introduction

[80] The term "justiciability" relates to the subject matter of a dispute and requires the Court to consider whether the issue before it "is appropriate for a court to decide": *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 [***Highwood Congregation***] at para 32. In brief, "[t]he court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter": *Highwood Congregation* at para 34; *La Rose v Canada*, 2023 FCA 241 [***La Rose***] at para 24. As explained in *Hupacasath* at para 62: "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."

[81] This demarcation of powers is also known as the separation of powers between the three branches of government, namely, the executive, legislative, and judicial branches. In *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 [***Criminal Lawyers***], the SCC described the functions of the three branches of government as follows:

> [28] … The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts

> laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.
>
> [29] All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others…

[82] In *Canada (AG) v Power*, 2024 SCC 26 [***Power***], the SCC elaborated as follows:

> [50] The separation of powers is part of the foundational architecture of our constitutional order. It is a constitutional principle which recognizes that the three branches of government have different functions, institutional capacities and expertise; and that each must refrain from undue interference with the others ... The separation of powers allows each branch to fulfill its distinct but complementary institutional role without undue interference and to create a system of checks and balances within our constitutional democracy.
>
> [Citations omitted].

[83] Pursuant to the separation of powers, the courts "play a fundamental role in holding the executive and legislative branches of government to account in Canada's constitutional order": *Power* at para 56. While courts are generally expected to "avoid interfering in the management of public administration," they have a duty to "act as vigilant guardians of constitutional rights and the rule of law": *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [***Doucet-Boudreau***] at para 110; *Power* at para 56. See also *Miller II* at para 36.

[84] The courts' role in supervising exercises of power by the executive branch within the separation of powers framework extends to the Crown's prerogative powers: *Hinse v Canada (Attorney General)*, 2015 SCC 35 at para 43; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 [***Khadr***] at para 36; *Hupacasath* at paras 63–64; *Stagg* at paras 41–42; *Conacher* at paras 26–29; *Black* at paras 45–47.

[85] Prerogative powers are "a limited source of non-statutory administrative power accorded by the common law to the Crown": *Khadr* at para 34. They are the Crown's remaining inherent or historical powers, as they have been shaped by the common law: *Hupacasath* at para 32, citing Peter W Hogg et al, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 19–20. Stated differently, they are "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": *Hupacasath* at para 32, citing AV Dicey, *Law of the Constitution*, 10th ed (1959) at 424.

[86] In the present proceeding, the Applicants ask the Court to decide both (a) "the proper scope of a prime minister's power to advise a governor general to prorogue Parliament," and (b) whether the Decision falls within that scope. The Applicants maintain that each of those two issues is justiciable. I will address each of them immediately below.

[87] I pause to observe that the Applicants identified those two issues in their written submissions. Neither of those issues was mentioned in the Notice of Application, although the second issue is another way of stating the allegation in the Application that the Prime Minister's advice to the Governor General was *ultra vires* his authority as Prime Minister. In the reasons

below, I will retain the latter formulation of the issue, or its plain language equivalent: "whether the Prime Minister exceeded his authority in making the Decision."

(2) The scope of a Prime Minister's power to advise a Governor General to prorogue Parliament

[88] The Respondent submits that this issue is essentially a freestanding reference question that is untethered from the relief sought in the Application.

[89] I agree that the question regarding "the proper scope of a prime minister's power to advise a governor general to prorogue Parliament" [emphasis added] is a freestanding reference question that is beyond the scope of this proceeding: see *Committee for Monetary and Economic Reform (*"*COMER*"*) v Canada*, 2016 FC 147 at para 43, aff'd 2016 FCA 312 at paras 9–12, leave to appeal to SCC ref'd, 37431 (4 May 2017). See also *Fort McKay Métis Community Association v Métis Nation of Alberta Association*, 2019 ABQB 892 at para 69.

[90] The specific issue with which the Court is seized in this proceeding is whether the current Prime Minister exceeded his authority in advising the Governor General to prorogue Parliament. To answer this question, it is not necessary or appropriate to make general pronouncements about the proper scope of "a" Prime Minister's power to advise "a" Governor General to prorogue Parliament.

[91] My agreement with the Respondent on this specific issue does not imply that the Court should completely refrain from addressing, at least to the extent necessary, the limits of the

present Prime Minister's power to advise the current General Governor to prorogue Parliament. The justiciability of the issue of whether the Prime Minister exceeded his authority in making the Decision "requires some understanding of the jurisprudence that underlies the claim, which in turn requires a somewhat probing examination of the substantive allegations of the claim": *La Rose* at para 36. Moreover, if the issue with which the Court is seized is justiciable, the Court must have some understanding of the limits of the Prime Minister's authority to be able to determine whether he exceeded them in making the Decision.

(3) The issue of whether the Prime Minister exceeded the scope of his authority in making the Decision

[92] The Applicants, supported by the Interveners Democracy Watch and BCCLA, maintain that the issue of whether the Decision falls within the proper scope of a Prime Minister's authority to advise a Governor General to prorogue Parliament is justiciable.

[93] As I have noted, the Applicants have also characterized this issue in terms of the Decision being *ultra vires* the Prime Minister's authority.

[94] The Respondent submits that neither the Governor General's decision nor the Prime Minister's underlying advice is justiciable because they are matters suffused with political and parliamentary concerns reserved to other branches of government and are not amenable to review by this Court. In this regard, the Respondent and the Initiative maintain that the considerations identified by the Prime Minister when he communicated the Decision to the

public are all non-legal matters whose adjudication would confront the Court with a quintessentially non-justiciable question.

[95] The Respondent and the Initiative add that the constitutional conventions pursuant to which the Prime Minister provides advice to the Governor General cannot give rise to enforceable legal rights and are not measurable legal standards that a court can legitimately apply.

[96] For the reasons set forth below, I disagree with the Respondent's position that the issue of whether the Prime Minister exceeded his authority in making the Decision is not justiciable.

[97] As noted at paragraphs 61–62 above, the exercise of Crown prerogative powers at the federal level includes the advice provided by the Prime Minister to the Governor General regarding the exercise of that power.

[98] In Canada, the courts have a legitimate role in supervising the exercise of some of the Crown's prerogative powers. That role begins with determining whether the question they are called upon to answer is properly a question for the judicial branch of government: *Hupacasath* at para 66; *La Rose* at paras 24–29; *Power* at para 223.

[99] It is common ground between the parties and among the Interveners that exercises of at least some executive powers are "beyond the courts' ken or capability to assess": *Hupacasath* at para 66. This category of executive powers includes exercises that are "suffused with

ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis": *Hupacasath* at para 66. However, the parties disagree as to whether the specific exercise of prerogative power at issue in the present proceeding falls within this category.

[100] It is now settled that courts in Canada are responsible for determining whether the prerogative power in question exists, and if so, whether it has been superseded by statute: *Khadr* at para 36; *Black* at para 29; *Democracy Watch NB* at para 54. The courts' role also includes determining the scope, or legal limits, of Crown prerogative powers, at least to the extent required to review whether specific challenged exercises of those powers have exceeded such limits: *Black* at paras 29, 37 and 45; *Miller II* at paras 35–37. See also *PS Knight Co Ltd v Canadian Standards Association*, 2018 FCA 222 at para 126; *Democracy Watch NB* at para 54.

[101] While judicial oversight of the exercise of prerogative power was historically confined to the limited matters set forth above, this is no longer the case: *Black* at paras 45–47; *Black v Advisory Council for the Order of Canada*, 2012 FC 1234 at paras 47–49, aff'd (albeit explicitly without expressing an opinion on the issues of justiciability and legitimate expectation) 2013 FCA 267; *Stagg* at para 42.

[102] Courts now ask whether the question with which they have been presented "has a sufficient legal component to warrant the intervention of the judicial branch": *Black* at para 50, citing *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 545. See also *Democracy Watch v British Columbia (Lieutenant Governor)*, 2023 BCCA 404 [***Democracy***

Watch BC] at para 74; *Stagg* at para 50; *La Rose* at paras 28 and 36. In making this determination, the Court must consider whether it can adjudicate the question before it against an objective legal standard: *La Rose* at para 36.

[103] In assessing whether a disputed exercise of a prerogative power has "a sufficient legal component to warrant the intervention of the judicial branch," courts have sometimes asked whether the rights or legitimate expectations of an individual or group of persons have been affected by the exercise of executive power at issue: see, e.g., *Black* at paras 48–52; *Democracy Watch NB* at para 55.

[104] In other cases, courts have found that exercises of Crown prerogative powers were, or would be, justiciable insofar as they implicated rights under the *Charter*: *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC) [***Operation Dismantle***] at 447, 471–472; *Blanco v Canada*, 2003 FCT 263 at para 15, *Turp v Chrétien*, 2003 FCT 301 at paras 13–14.

[105] More recently, the SCC has assessed the exercise of Crown prerogatives through a broader constitutional and rule of law lens. Specifically, the SCC held in *Khadr* that, upon determining that a specific Crown prerogative does in fact exist, courts have "the jurisdiction and the duty" to review the exercise of the prerogative power to ensure that it is in accordance with the Constitution: *Khadr* at paras 36–37. The SCC added that "it is for the courts to determine the legal and constitutional limits within which [decisions to exercise Crown prerogative powers] are to be taken": *Khadr* at para 37.

[106] This function of the courts includes determining whether disputed exercises of prerogative powers:

(i) violate rights guaranteed by the *Charter*: *Operation Dismantle* at 459 and 473–474; *Veffer v Canada (Foreign Affairs and International Trade Canada) (FCA)*, 2007 FCA 247 [***Veffer***] at para 23; *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 580 [***Abdelrazik***] at paras 134–135;

(ii) infringe other constitutional norms, imperatives or dictates: *Khadr* at para 36; *Air Canada v British Columbia (Attorney General)*, 1986 CanLII 2 (SCC) at paras 12 and 14; *Democracy Watch BC* at para 82; *Zeng v Canada (Attorney General)*, 2013 FC 104 at paras 32 and 74; Peter W Hogg & Wade K Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thompson Reuters, 2007) (loose-leaf updated 2024, release 1) [**Hogg & Wright**] at §1:9. See also *Ontario (Attorney General) v G*, 2020 SCC 38 [***Ontario (AG)***] at para 98; or

(iii) exceed other legal limits: *Khadr* at para 37; *Stagg* at para 42; Hogg & Wright at §1:9. See also Lorne Sossin and Gerard Kennedy, *Boundaries of Judicial Review – The Law of Justiciability in Canada*, 3rd ed (Toronto: Thompson Reuters, 2024) at 20–21.

[107] The third of the above functions is consistent with the general mandate of the courts to safeguard the rule of law *(Ontario (AG)* at para 96; *Doucet-Boudreau* at para 110), including by ensuring that executive power is not used for a purpose that is beyond its limits, lines or objects: *Roncarelli v Duplessis,* 1959 CanLII 50 (SCC) [***Roncarelli***] at 140–143. It is also consistent with this Court's jurisdiction to grant relief pursuant to subsection 18.1(3) of the *Federal Courts Act*,

if it finds that the "federal board, commission or other tribunal" in question "acted … contrary to law": *Federal Courts Act*, paragraph 18.1(4)(f).

[108] It follows from the foregoing that the courts have a legitimate role to play in ensuring that exercises of executive powers, including Crown prerogative powers, conform with the norms, imperatives and dictates of the Constitution, as well as with the rule of law.

[109] To the extent that the limits of the Prime Minister's authority to exercise prerogative powers are constitutional or otherwise legal in nature, the issue as to whether he exceeded those limits in making the Decision that is currently before the Court is justiciable. This issue has the requisite "sufficient legal component to warrant the intervention of" this Court: see paragraph 102 above.

[110] The constitutional or other legal limits that may circumscribe the prerogative to prorogue Parliament provide the objective legal standards against which to adjudicate the issue described immediately above. Those objective standards also ground a legitimate role for the Court within the separation of powers: *Democracy Watch v Canada (Attorney General)*, 2023 FC 31 para 76, aff'd 2024 FCA 75.

[111] Within the separation of powers, it is the courts' duty to determine the constitutionality and legality of executive action: *Doucet-Boudreau* at para 110; *Power* at para 56. That is the case even when that action is taken under the Crown prerogative: *Khadr* at paras 36–37; *Hupacasath* at para 63. Contrary to the Respondent's submissions, the issue of whether the Prime Minister

exceeded his legal authority in making the Decision is not "beyond the courts' ken or capability to assess": *Hupacasath* at para 66. This issue is justiciable.

[112] In summary, for the reasons set forth above, the issue of whether the Prime Minister exceeded the constitutional or other legal limits of his authority in making the Decision is justiciable. This includes whether the Prime Minister exceeded any written provisions of the Constitution, any of the unwritten constitutional principles identified by the Applicants, or any other legal limits, such as any "lines or objects" that may be contemplated by the prerogative to prorogue: *Roncarelli* at 140. It also includes whether the Prime Minister had an obligation to (i) provide a "reasonable justification" for the Decision, as suggested by the Applicants, or (ii) failed to take account of the "relevant interests" that they identified.

[113] However, certain issues raised by the Applicants in advancing their case are not justiciable. These include their assertions that "an election – and not a prorogation – is the only legitimate and democratic mechanism by which a 'reset' of Parliament can be achieved," and that "a prorogation of almost eleven weeks, until March 24, 2025, amounts to an inherently unreasonable attempt to 'reset' [sic] of Parliament."[2] Another non-justiciable issue is whether Parliament was "paralyzed" in the period leading up to the prorogation, as mentioned in the Decision. These are essentially matters that go to the "wisdom" or "merits" of the Decision, which are not justiciable issues. As the SCC observed in *Khadr*, "[i]t is for the executive and not the courts to decide whether and how to exercise its powers": *Khadr* at para 36.

[2] However, as noted at paragraph 289 below, the duration of a prorogation may be relevant in any assessment of the effect and true purpose of a prorogation.

C. *Standing*

(1) Introduction

[114] The Applicants submit that they meet the test for both private interest standing and public interest standing.

[115] The Respondent disagrees.

[116] For the reasons that follow, I conclude that at least one of the Applicants has public interest standing. Consequently, it is unnecessary to address whether the Applicants also have private interest standing.

[117] Notwithstanding the requirement in subsection 18.1(1) of the *Federal Courts Act* that an application be made by a person "directly affected by the matter in respect of which relief is sought," applicants who meet the test for public interest standing can seek relief before this Court: *Canada (Royal Canadian Mounted Police Public Complaints Commission) v Canada (Attorney General) (FCA)*, 2005 FCA 213 at para 56.

[118] The test for public interest standing is threefold: (1) whether there is a serious justiciable issue raised; (2) whether the applicant has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [***Downtown Eastside***] at para 37.

[119] In exercising its discretion to grant standing, the Court must apply this test flexibly, generously, purposively, and cumulatively, rather than as a checklist of technical requirements to be applied mechanically: *Downtown Eastside* at paras 20, 36–37 and 48. At the same time, the Court must remain mindful of its scarce resources and the various reasons why it is appropriate to screen out "mere busybodies": *Downtown Eastside* at paras 26–28.

[120] The Court must also be mindful of the principle of legality, which "refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action": *Downtown Eastside* at para 31. This latter principle was central to the development of public interest standing in Canada: *Downtown Eastside* at para 31.

(2) Assessment

[121] As noted above, the first prong of the tripartite test for public interest standing is whether the Applicants raise a serious justiciable issue. To constitute a "serious issue," the question raised must be a "substantial constitutional issue" or an "important one": *Downtown Eastside* at para 42.

[122] For the reasons provided in part VII.B. above, this factor is met. The issue as to whether the Prime Minister exceeded his authority in making the Decision is justiciable. This is also a substantial constitutional and important issue.

[123] The second prong of the test is whether the Applicants have a real stake or a genuine interest in this issue. Keeping in mind the need to take a generous, purposive and flexible approach, I find that at least one of the Applicants meets this test.

[124] In his unchallenged affidavit evidence, the Applicant David MacKinnon states that he has a longstanding, deep and abiding interest in democracy, the rule of law, and unwritten constitutional principles. His interest in these matters was cultivated by his father, who was a justice of the British Columbia Supreme Court. At university, he wrote a thesis on Quebec history focused on Church-state relations during the dawn of democratic institutions in Lower Canada, just prior to Confederation and responsible government. Later, at law school, he studied under several of the leading constitutional and administrative law experts in the country.

[125] I recognize that the foregoing history of engagement with issues in this proceeding is not at the same level as that which has typically been demonstrated by those who have been granted public interest standing. However, viewing the three prongs of the test for public interest standing cumulatively, I consider that this shortcoming is overcome by the strength of the Applicants' case with respect to the other two prongs of the test.

[126] Given this finding, it is unnecessary for me to address whether the Applicant Aris Lavranos also meets the second prong of the test. However, I will note for the record that he is also a lawyer who maintains that he has always been passionate about democracy and the rule of law. He is concerned that the prorogation that is at the heart of this proceeding "blocks

Parliamentary accountability … and at this time very much undermines democracy and the rule of law."

[127] The third prong of the test for standing "require[s] consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations … a reasonable and effective means to bring the challenge to court": *Downtown Eastside* at para 44. For the following reasons, I consider that the Applicants also meet this prong of the test.

[128] Courts have addressed this factor "from a practical and pragmatic point of view and in light of the particular nature of the challenge which the plaintiffs proposed to bring": *Downtown Eastside* at para 47. In this regard, courts should consider the practical prospects of the matter in dispute being brought by other potential applicants, either "at all or by equally or more reasonable and effective means": *Downtown Eastside* at para 51. In addition, consideration should be given to the Applicants' capacity to bring forward the issues in dispute, including their resources and whether those issues will be presented in a sufficiently concrete and well-developed factual setting: *Downside Eastside* at para 51.

[129] It is also relevant to "consider whether the case is in the public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action," as well as the "potential impact of the proceedings on the rights of" those other persons: *Downtown Eastside* at para 51.

[130] Moreover, courts need to keep in mind that this third factor is "closely linked to the principle of legality, since courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government actors": *Downtown Eastside* at para 49.

[131] Applying the foregoing to the present context, no one else has challenged the Decision. Furthermore, it is now too late for anyone else to do so in a timeframe in which it will be possible to obtain the principal relief sought in the Application, namely, the return of Parliament before the scheduled end of the current prorogation, on March 24, 2025.

[132] In addition, there is no evidence that anyone whose interests might be more directly affected than the Applicants by the Decision would potentially be negatively impacted by granting standing to the Applicants. There is also no evidence that anyone else has deliberately refrained from challenging the Decision: *Downtown Eastside* at para 51. Although Democracy Watch had publicly announced its intention to file an application challenging the Decision prior to the Applicants' Application, they instead chose to intervene in this proceeding: *MacKinnon* at para 26. I will return to this below.

[133] Furthermore, the issues in this proceeding transcend the interests of those most directly affected by it, as well as the interests of the Applicants. The fact that those issues concern the constitutionality of the Decision and whether it was made in accordance with the rule of law is also a significant consideration: *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 at 366–367.

[134] Indeed, it would appear that if the Applicants are not granted public interest standing, the lawfulness of the Prime Minister's Decision to advise the Governor General to prorogue Parliament will, as a practical matter, be immunized from review. This is at least a "real possibility": *Democracy Watch v Canada (Attorney General)*, 2022 FCA 208 [***Democracy Watch 2022 FCA***] at para 9.

[135] Finally, the Applicants are represented by Charter Advocates Canada ("**CAC**"), a charity that offers legal representation in constitutional litigation. According to a Certificate of Amendment to CAC's articles of incorporation, dated December 15, 2023, its relevant purposes include the following:

> To uphold the enforcement of the Constitution of Canada and other existing laws of Canada and the provinces and territories thereof, as they relate to constitutional freedoms, civil rights, human rights, and other protections under the Constitution of Canada, by facilitating legal advice and representation before government, administrative tribunals, and the courts, where there is need.

[136] An affidavit sworn by Marty Moore on January 17, 2025 states that CAC has "dozens of cases at all levels of court across Canada" and has "prioritized this matter and will continue to allocate all resources necessary to ensure that it is advanced in a fulsome and expeditious matter, including on any appeals."

[137] Having regard to all of the foregoing, I find that the Applicants meet the third prong of the test for public interest standing.

[138] To conclude, for the reasons set forth above, on a holistic review, I find that the Applicants meet the test for public interest standing.

[139] In reaching this conclusion, I have "balance[d] the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action": *Downtown Eastside* at para 23.

[140] In addition, I have kept in mind an exchange that occurred during the initial case management conference in this proceeding that took place on Friday, January 10, 2025. At that time, counsel to the Respondent mentioned the fact that Democracy Watch had announced an intention to bring an application to challenge the Decision. Counsel added that other applications might also be filed, and that this weighed against expediting the hearing of the Application. In response, lead counsel to the Applicants signaled that he might reach out to Democracy Watch. The following Monday, Democracy Watch informed the Court of its intent to file a motion to seek leave to intervene in this proceeding.

[141] Had Democracy Watch proceeded with its own application, it likely would have been granted public interest standing: *Democracy Watch 2022 FCA* at para 6. However, it is reasonable to infer that it chose not to file its own application after being apprised of the above-mentioned exchange that occurred during the case management conference on January 10, 2025. In the exercise of my discretion, I consider that these circumstances also weigh in favour of granting the Applicants standing.

D. *Did the Prime Minister exceed his authority in making the Decision?*

(1) Overview

[142] The Applicants' position that the Prime Minister exceeded his authority in making the Decision is based on what they characterize as "constitutional considerations" and "contextual considerations."

[143] The "constitutional considerations" consist of:

(i) sections 3 and 5 of the *Charter*; and

(ii) the unwritten constitutional principles of parliamentary sovereignty, parliamentary accountability (responsible government), the rule of law and the separation of powers.

[144] The Applicants state that "contextual considerations" are that:

(i) the Decision eliminated Parliament's opportunity to oversee, supervise, and otherwise assist the government with its overall response to the 25% Tariffs;

(ii) the "opposition parties have repeatedly signaled their intention to vote in favour of a non-confidence motion at the earliest opportunity";

(iii) the "paralysis" mentioned in the Prime Minister's prepared statement was the result of the government's own actions; and

(iv) the Decision may have been made for other reasons unrelated to those stated, considering that there was no explanation for: (a) why an election could not be

called right away, so as to provide the stated Parliamentary "reset" in a more democratic and effective way; and (b) why a prorogation of approximately eleven weeks was necessary to achieve a "reset." The Applicants also question the consideration the Prime Minister gave to providing the Liberal Party with an opportunity to select a new leader.

[145] Having regard to the foregoing constitutional and contextual considerations, the Applicants maintain that the Prime Minister exceeded his authority in making the Decision by:

(i) failing to take into account all relevant interests, including Parliament's ability to table a non-confidence motion and oversee the government, and the Governor General's constitutional duty to ensure that the government of the day commands the confidence of the House;

(ii) frustrating and preventing Parliament's ability to carry out its constitutional functions, including by taking whatever legislative action it might consider appropriate to deal with the extraordinary threats announced by President Trump (see paragraphs 24–26 above) and tabling a motion of non-confidence; and

(iii) failing to provide a reasonable justification for making the Decision.

[146] In advancing the foregoing allegations, the Applicants rely on the framework articulated by the UKSC in *Miller II*. They add that, as in *Miller II*, this case is "sufficiently serious" to warrant the Court's intervention in this matter.

[147] I will address below the *Miller II* framework and then each of the foregoing allegations. But first, I will address the standard of review.

(2) Standard of review

[148] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [***Vavilov***], the SCC established that the standard of correctness applies when reviewing questions regarding the relationship between the three branches of government: *Vavilov* at para 55. The Applicants submit that this general principle applies in this case. In making this submission, the Applicants note that the approach established in *Vavilov* was designed to "accommodat[e] all types of administrative decision making" of varying complexity and importance, "ranging from the routine to the life-altering … includ[ing] matters of 'high policy' on the one hand and 'pure law' on the other": *Auer v Auer*, 2024 SCC 36 at para 21, quoting *Vavilov* at paras 11 and 88.

[149] I accept that the foregoing teachings of the SCC appear to suggest that this Court should adopt the correctness standard of review in assessing whether the Prime Minister exceeded his authority in making the Decision.

[150] I am also inclined to consider that there is a second reason why such an approach should be adopted. This is that the constitutional and other legal limits of the Crown's power to prorogue Parliament is a question of central importance to the legal system as a whole: *Vavilov* at para 69; see e.g., *Chagnon v syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 [***Chagnon***] at para 17. As the SCC has observed: "[t]here are few issues as important to our constitutional equilibrium as the relationship between the legislature and the other branches

of the State on which the Constitution has conferred powers, namely the executive and the courts": *Canada (House of Commons) v Vaid*, 2005 SCC 30 (CanLII), [2005] 1 SCR 667 [***Vaid***] at para 4.

[151] Despite the foregoing, the jurisprudence does not appear to provide much guidance regarding the standard of review to apply when reviewing specific exercises of the Crown prerogative powers that have been challenged on the grounds of being *ultra vires* the authority of the relevant executive branch actor. Indeed, several of the cases that found a challenged exercise of Crown prerogative powers to be justiciable did not address the standard of review: see, e.g.; *Veffer*; *Abdelrazik*; *Khadr*; *Operation Dismantle*; *Miller II*. See also *Democracy Watch v Canada (Attorney General)*, 2023 FC 31, aff'd 2024 FCA 75. While the correctness standard was applied in *Turp v Canada (Justice)*, 2012 FC 893 at para 16, the Court simply stated that this was on the basis that the issue before it was whether the government acted in accordance with the law in withdrawing from the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*.

[152] The Respondent submits that this paucity of relevant jurisprudence is explained by the fact that the question of whether a particular exercise of prerogative power exceeded its scope is not one that lends itself well to a *Vavilov*-style analysis.

[153] The Applicants contend that the determination of whether the Prime Minister did or did not act within the scope of his authority is a binary question. In this regard, they note that in *Hupacasath*, Justice Stratas stated that he did not need to consider whether the standard of

review of the decision that was before him was correctness or reasonableness. This was because, if the standard was reasonableness, "the only acceptable and defensible outcome available to the Government of Canada in this case is compliance with the law …": *Hupacasath* at para 73. I am inclined to consider that this reasoning also applies to the Decision under review in this proceeding.

[154] In adopting this approach, I will keep in mind that the separation of powers requires the Court's review of the Decision to reflect the SCC's teaching that each branch of the government must "show proper deference for the legitimate sphere of activity of the other": *Criminal Lawyers* at para 29, quoting *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the house of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 SCR 319 [***New Brunswick Broadcasting***] at 389; *Vaid* at para 20. In addition, the Court must remain mindful of the tenet that each branch of the government must refrain from exercising "'undue' interference" with the other: *Power* at para 82.

[155] These considerations implicitly require a deferential approach to matters within the legitimate sphere of activity of the other branches of government. Much of this deference is expressed through the courts' approach to justiciability. In the present proceeding, this is reflected in my findings that certain arguments made by the Applicants are not justiciable: see paragraph 113 above. It is also reflected in my determination that the role of the Court in reviewing the Decision is limited to assessing whether the Prime Minister exceeded any constitutional or other legal limits that may apply to the Crown prerogative power to prorogue Parliament.

[156] It is incumbent upon me to remain mindful of this in the course of determining whether the Decision exceeded such limits. I will also remain cautious not to engage with the reasons for the Decision beyond what is necessary and appropriate in order to answer the Applicants' allegations in that regard.

[157] I pause to observe in passing that this is consistent with the teaching in *Miller II* that "the Government must be accorded a great deal of latitude in decisions of this nature," namely, a Prime Minister's advice to prorogue Parliament: *Miller II* at para 58. As I have noted, the UKSC also suggested that it would only "intervene if the effect is sufficiently serious to justify such an exceptional course": *Miller II* at para 50.

(3) Analysis

(a) *The* Miller II *framework*

[158] The Applicants' arguments are framed explicitly in the language of *Miller II*. They submit that this Court should adopt the UKSC's analysis and conclusions in *Miller II* and then determine that the Prime Minister's Decision in this case was incorrect, on the basis that it exceeded the scope of his authority.

[159] In *Miller II*, the UKSC applied the following test in assessing whether Prime Minister Boris Johnson's prorogation advice to her Late Majesty Queen Elizabeth II was lawful: see paragraphs 14 and 65 above:

> … the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the

> monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.
>
> *Miller II* at para 50.

[160] The Applicants maintain that this Court should adopt the following three-part test, derived from *Miller II*, to determine whether the Prime Minister acted within the scope of his authority in making the Decision:

> a) Does prorogation frustrate or prevent Parliament's ability to perform its legislative functions and its supervision of the Executive?
>
> b) If so, does the Prime Minister's explanation for advising that Parliament should be prorogued provide a "reasonable justification"?
>
> c) In any event, are "the consequences [of prorogation] … sufficiently serious to call for the court's intervention"?

[161] In support of their contention that this Court should adopt *Miller II*, the Applicants state that: (a) by virtue of the preamble of the *Constitution Act, 1867*, Canada has "a Constitution similar in Principle to that of the United Kingdom"; (b) *Miller II* was a unanimous decision by a highly esteemed court to which Canadian courts frequently turn for guidance; (c) the factual circumstances in *Miller II* are "very similar" to those at hand, because Prime Minister Johnson's advice to her Late Majesty Elizabeth II was provided at "a similarly critical juncture in his country's history"; (d) the Court in *Miller II* based its decision on principles that are "equally well-known in Canada and equally applicable in this case"; (e) *Miller II* already has a "foothold

in Canadian jurisprudence" and has been cited with approval in New Zealand; and (f) the Court's analysis and decision in *Miller II* has received support in academic commentary.

[162] The Respondent submits that *Miller II* is not binding in Canada and, in any event, has no application to the facts of this case. It asserts that *Miller II* has been consistently rejected by Canadian courts, including the Federal Court of Appeal (*Democracy Watch v Canada (Prime Minister)*, 2023 FCA 41 [***Democracy Watch 2023***] at para 34), the Alberta Court of Appeal (*Engel* at para 25) and the British Columbia Court of Appeal (*Democracy Watch BC* at para 84). It adds that it would therefore be unprecedented for this Court to apply and follow *Miller II*. The Respondent and the Initiative further maintain that *Miller II* was based on a constitutional framework and legislative restraints that are specific to the UK and different from our own. This is supported by the Oliver Report.

[163] I agree with the Respondent that *Miller II* is not binding in Canada and that it was based on a constitutional framework that differs in some important respects from our own: *Democracy Watch 2023* at para 35. In addition, the Court there was faced with very unique legislative and factual circumstances. Indeed, the Court observed that the case arose "in circumstances which have never arisen before and are unlikely to ever arise again" and that the case was "a 'one off'": *Miller II* at para 1. It was on this basis that the Canadian courts referred to in the immediately preceding paragraph distinguished *Miller II* from the particular circumstances that were before them.

[164] Regarding the UK's constitutional framework, the principal difference is that the UK does not have a written constitution. As a result, the UK's system is one of Parliamentary supremacy, in contrast to Canada's system of constitutional supremacy: *Power* at para 49; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 [***Securities Reference***] at paras 54–58. This important difference appears to have provided more scope for the UKSC to draw upon unwritten constitutional principles than would be possible under the Canadian jurisprudence discussed at paragraphs 216–227 below.

[165] With respect to the unique legislative and factual circumstances of *Miller II*, "[a] fundamental change was due to take place in the Constitution of the United Kingdom" soon after the prorogation was scheduled to end: *Miller II* at para 57. In addition, the *European Union (Withdrawal) Act 2018* specifically required Parliamentary approval of any withdrawal agreement reached by the government; and the *European Union (Withdrawal) (No 2) Act 2019* required the Prime Minister to seek an extension from the European Council, unless Parliament had either approved a withdrawal agreement or approved leaving without one, by a particular date: *Miller II* at paras 11 and 22. In addition, Parliament had rejected a draft withdrawal agreement on three separate occasions, and the impugned prorogation "prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and exit day on the 31st October": *Miller II* at paras 12 and 56. Finally, the length of the impugned prorogation was "an outlier, in the UK context, by nearly an order of ten": Oliver Report at para 32. In these circumstances, the UKSC found that the unwritten principles of parliamentary sovereignty and parliamentary accountability were engaged and established a constitutional limit on the power to prorogue.

[166] In the circumstances before me, there is no such impending constitutional change and no specifically legislated role for Parliament to respond to the 25% Tariff or the other threats that have been made by the United States.

[167] Moreover, in contrast to the circumstances that were before the UKSC in *Miller II*, there is no looming deadline after which it would be too late for Parliament to address the 25% Tariff and other threats that have been made by the United States government.

[168] Beyond the foregoing, Professor Oliver states in his expert affidavit that *Miller II* "has been the subject of a good deal of negative commentary" from scholars, including in the UK, although other scholars there have been "in favour" of the case: Oliver Report at paras 35 and 36.

[169] Having regard to all of the above, I will approach *Miller II* with caution. Given the differences between the legal frameworks and factual circumstances that were before the UKSC and those that are currently before me, I consider that it would not be appropriate to adopt the test set forth at paragraph 160 above. Instead, I will simply focus upon whether the Prime Minister exceeded any constitutional or other legal limits identified by the Applicants in exercising his authority. In other words, I will assess whether the Decision conforms with the norms, imperatives and dictates of the Constitution, as well as with the rule of law: see also paragraphs 106–108 above. As discussed, given Canada's system of constitutional supremacy, this is a role that has been recognized for the courts: *Khadr* at para 37.

[170] Despite the foregoing, the fact remains that the *Miller II* decision was issued by a unanimous 11-member panel of a highly reputed and influential Court. So, I will not hesitate to cite it where I consider it appropriate to do so.

(b) *Constitutional limits*

(i) Section 3 of the *Charter*

[171] The Applicants submit that the principles emanating from section 3 of the *Charter* must inform a Prime Minister's power to advise the Governor General to prorogue Parliament.

[172] Section 3 of the *Charter* states as follows:

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[173] The Applicants note that the SCC has held that the purpose of the right to vote in section 3 is to confer a right to "effective representation": *Reference re Prov Electoral Boundaries (Sask)*, 1991 CanLII 61 (SCC), [1991] 2 SCR 158 [***Sask Reference***] at 183. The Applicants proceed from there to assert that a Prime Minister's power to advise prorogation cannot be exercised in a manner that undermines that right to effective representation. They state that, by interfering with the normal workings of Parliament at a moment when Canada is facing political and economic threats from the United States, the Prime Minister's Decision "effectively disenfranchised" them.

[174] I disagree with the Applicants position that section 3 imposes a constraint on the Prime Minister's exercise of the Crown's prerogative to prorogue Parliament.

[175] In support of their position that section 3 confers a broad right to "effective representation," the Applicants rely on *Sask Reference* at 183 and *Harper v Canada (Attorney General)*, 2004 SCC 33 [***Harper***] at para 68. The Applicants also reference the SCC's observations that section 3 contemplates the right to "participate in the political life of the country" and is of "fundamental importance in a free and democratic society": *Figueroa v Canada (Attorney General)*, 2003 SCC 37 [***Figueroa***] at para 26.

[176] The Applicants misconstrue the SCC's teachings regarding section 3. In *Figueroa* and *Harper*, the SCC made it clear that the rights to effective representation and to participate in the political life of the country should be interpreted in terms of the electoral *process* of selecting elected representatives, rather than what happens afterwards: *Figueroa* at paras 25–26 and 29; *Harper* at paras 69–71. In *Figueroa*, the SCC reinforced this view when it observed the following:

> 26 Support for the proposition that s. 3 should be understood with reference to the right of each citizen to play a meaningful role in the *electoral process*, rather than the election of a particular form of government, is found in the fact that *the rights of s. 3 are participatory in nature*.
>
> [Emphasis added].

[177] More recently, the SCC has observed that "there is no freestanding right to effective representation outside s. 3 of the Charter": *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 [***Toronto (City)***] at para 5. The Court added that "effective representation connotes voter

parity which, while not exhaustive of the requirements of effective representation, is the overarching concern and the condition of 'prime importance'": *Toronto (City)* at para 46.

[178] Having regard to the foregoing, I conclude that section 3 does not impose a constraint on the Prime Minister's exercise of the Crown prerogative to prorogue Parliament**.**

(ii) Section 5

[179] Section 5 of the *Charter* states:

> 5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

[180] The Applicants assert that section 5 simply places a limit on the *longevity* of prorogation (i.e., 365 days). They add that section 5 provides no guidance on when, and under what circumstances, a prorogation can lawfully begin.

[181] During the hearing of this Application, the Applicants relied on *Roncarelli* to further assert that section 5 cannot be the only legal limit on the Prime Minister's authority to advise the Governor General to prorogue Parliament. In that case, the SCC rejected the notion of "an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant," based on "the rule of law as a fundamental postulate of our constitutional structure": *Roncarelli* at 140 and 143. The Applicants maintained that unwritten constitutional principles could similarly limit the exercise of the Prime Minister's authority, despite the existence of section 5.

[182] The Respondent disputes the potential use of *Roncarelli* or, more broadly, any unwritten constitutional principles, to limit the Crown prerogative to prorogue Parliament. It insists that section 5 and the constitutional conventions pertaining to that prerogative power completely "cover the field" insofar as that power is concerned. The Respondent adds that a constitutional amendment would be required to impose any other limit. It also rejects the notion that any "safety valve" is needed to address any potential exceptional situation, such as occurred in *Miller II*.

[183] I disagree with the Respondent's position that section 5 and the constitutional conventions pertaining to the prerogative power completely "cover the field" with respect to the exercise of the power to prorogue Parliament.

[184] The ordinary meaning of section 5 is that Parliament must sit at least once every 12 months. Reading section 5 in accordance with this ordinary meaning would not suggest that this provision entirely regulates, from legal perspective, the prorogation power. It simply articulates a temporal limit to any adjournment, prorogation or dissolution of Parliament.

[185] I acknowledge that *Charter* rights are to be given a purposive interpretation. However, keeping in mind that *Charter* was enacted to enshrine and protect the rights of Canadians, I fail to see anything purposive about an interpretation that would preclude the application of any unwritten constitutional principles that may otherwise be invoked to protect the Canadian public from an exercise of the prerogative power beyond its limits. I will return to this further below. For the present purposes, I will simply observe that a reading of section 5 which forecloses the

possibility of drawing upon an unwritten constitutional principle to fill a gap in the written constitution emanating from the architecture of the Constitution would produce an incoherency in that architecture.

[186] Moreover, as explained in *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 10:

> ... while Charter rights are to be given a purposive interpretation, such interpretation *must not overshoot* (or, for that matter, undershoot) the actual purpose of the right … Giving primacy to the text — that is, respecting its established significance as the first factor to consider within the purposive approach — prevents such overshooting.
>
> [Citations omitted, emphasis added].

[187] It is also relevant to consider that Parliament has on several occasions legislated limits to the prorogation power when specific circumstances are met: see, for example, *The Emergencies Act*, RCS 1985 (4th Supp), c 22, s 58; *The Energy Supplies Emergency Act*, RCS 1985, c E-9, s 46; and *The National Defence Act*, RCS 1985, c N-5, s 32. These limits provided by statute are not temporal, but circumstantial. It follows that the legal limits to the prerogative power to prorogue Parliament cannot be completely covered by the 12-month temporal limit set forth in section 5 of the *Charter*. Parliament has recognized that this limit is insufficient in some situations.

[188] To the extent that recourse to unwritten constitutional principles may be needed to address other types of exceptional situations that may fall within a gap in the written Constitution, section 5 would not preclude such recourse.

(c) *The relevant unwritten constitutional principles*

[189] The Applicants, supported by the Interveners Democracy Watch and the BCCLA, assert that in assessing whether the Prime Minister exceeded his authority in making the Decision, the Court should consider unwritten constitutional principles. In this regard, the Applicants rely on the "principles" of parliamentary sovereignty, parliamentary accountability (responsible government), the rule of law and the separation of powers. During the hearing of this proceeding, the Applicants also maintained that the principle of democracy infuses the principle of parliamentary sovereignty and the rule of law.

[190] Democracy Watch submitted that several of these principles, including the principle of democracy, restrict the Prime Minister's exercise of the Crown's prerogative to prorogue Parliament.

[191] For its part, the BCCLA relied on the SCC's teaching that, pursuant to the separation of powers, each of the three branches of government should show proper deference for the legitimate sphere of activity of the other, and not unduly interfere with the other. The BCCLA proceeds from there to suggest that the Court adopt an "undue interference" test in assessing the lawfulness of the Decision. However, in contrast to the Applicants and Democracy Watch, the BCCLA expressly refrained from taking a position on the issue of whether the Prime Minister exceeded his authority in making the Decision.

[192] I will summarize the above-mentioned unwritten principles below and then assess the submissions made by the parties and the Interveners.

[193] However, before doing so, I consider it important to note that there are two distinct types of unwritten aspects of the Canadian Constitution. One is legal and the other is political in nature. The political aspects are known as "constitutional conventions": *Re: Resolution to amend the Constitution*, 1981 CanLII 25 (SCC) [***Patriation Reference***] at 882–883. Such conventions are political rules of behaviour arising from the combination of longstanding practice, widespread acceptance and principle. They generally ensure that the executive power established by the written Constitution is democratically accountable: see Hogg & Wright at §§ 1:10 and 9:3.

[194] Unlike the legal aspects of the Constitution, constitutional conventions are not enforceable by the courts: *Patriation Reference* at 880; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) [***Secession Reference***] at paras 98 and 102; *Democracy Watch 2023* at para 21; Hogg & Wright at §1:11. While a breach of a constitutional convention may in some sense be seen as "unconstitutional," no breach of the law has occurred and therefore no legal remedy is available: Hogg & Wright at §1:10; *Patriation Reference* at 855–856.

[195] The line between the enforceable legal principles and unenforceable political conventions of the Constitution may in some cases be difficult to discern, but it is nonetheless crucial that it be maintained by the Court. This case demonstrates why this is so.

(i) Parliamentary sovereignty

[196] The principle of parliamentary sovereignty has been recognized as "a foundational principle of the Westminster model of government," aspects of which have been enshrined in statute: see *Interpretation Act*, RSC 1985, c I-21, s 42(1). This principle is understood to mean that "the legislature has the *exclusive* authority to enact, amend, and repeal any law as it sees fit, and that there is no matter in respect of which it may not make laws": *Securities Reference* at para 54. A corollary to this principle is "the rule that the executive cannot unilaterally fetter the legislature's law-making power": *Securities Reference* at para 59.

(ii) Parliamentary accountability (responsible government)

[197] "Parliamentary accountability" does not appear to have been recognized as a principle of the Canadian Constitution. However, the Applicants raise "responsible government" as the Canadian equivalent of this concept.

[198] Responsible government consists of two basic elements: (1) the responsibility of individual ministers and their respective departments for their activities; and (2) the collective responsibility and accountability of the Executive to the legislative assembly, which includes the Prime Minister maintaining the confidence of the House of Commons: Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis, 2017) [**Régimbald & Newman**] at §3.20.

[199] Responsible government has been recognized as a principle of Canada's *system of government*, and the "most important non-federal characteristic of the Canadian Constitution": *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 [***Ontario Privacy Commissioner***] at para 28, citing Hogg & Wright at §9:3.

[200] The jurisprudence relied upon by the Applicants to evidence that responsible government is an *unwritten constitutional principle* does not appear to support that assertion. In those cases, the role of the legislature in debating laws and holding the executive to account was discussed as *context* for (1) the importance of parliamentary privilege and Cabinet confidentiality (see *Ontario Privacy Commissioner* at para 28; *Alford v Canada (Attorney General)*, 2024 ONCA 306 at para 1; *TransAlta Corporation v Alberta (Environment and Parks)*, 2024 ABCA 127 at para 39; *Power* at para 51; *Chagnon* at paras 1 and 20–21; *New Brunswick Broadcasting* at 354; *Vaid* at para 41); and (2) the separation of powers as a consideration in legislative interpretation (*Schmidt v Canada (Attorney General)*, 2018 FCA 55 at para 85).

[201] While the SCC has recognized responsible government as a principle of Canada's *system of government* (see paragraph 199 above), it has also characterized it as a *non-legal* principle of convention: *Ontario (Attorney General) v OPSEU*, 1987 CanLII 71 (SCC) [***OPSEU***] at para 85. Consequently, there appears to be little scope for the concept of responsible government itself to set legally enforceable limits on the Prime Minister's authority to advise the Governor General to prorogue Parliament. However, responsible government is contemplated by the democratic principle.

(iii) The democratic principle

[202] The democratic principle "has always informed the design of our constitutional structure, and continues to act as an essential interpretative consideration to this day": *Secession Reference* at para 62. It "can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated": *Secession Reference* at para 62. See generally Régimbald & Newman at §3.87.

[203] The democratic principle "has both an institutional and an individual aspect": *Secession Reference* at para 61. In institutional terms, it contemplates the process of representative and responsible government and the right of citizens to participate in the political process: *Secession Reference* at para 65; *Toronto (City)* at paras 76–77. In brief, "[t]he Constitution mandates government by democratic legislatures, *and an executive accountable to them*, 'resting ultimately on public opinion reached by discussion and the interplay of ideas'": *Secession Reference* at para 68, citing *Saumur v City of Quebec*, 1953 CanLII 3 (SCC) at 330 [emphasis added]. It is this institutional aspect that is most germane for the present purposes.

[204] For completeness, it may be noted that the individual aspect of the democracy refers to the right of every citizen of Canada to vote in elections to the House and the provincial legislatures: *Secession Reference* at para 65.

(iv) The rule of law

[205] The rule of law is explicitly recognized in the preamble to the *Charter*, which states that "Canada is founded upon principles that recognize … the rule of law": *Ontario (AG)* at para 96.

[206] The rule of law is intimately connected with the democracy principle. This is because "democracy in any real sense of the word cannot exist without the rule of law": *Secession Reference* at para 67.

[207] The rule of law has been recognized as "a fundamental postulate of our constitutional structure" that is "clearly implicit in the very nature of a Constitution": *Power* at para 54, citing *Roncarelli* at 142; *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 SCR 721 [***Manitoba Language Rights***] at 750.

[208] The rule of law protects "individuals from arbitrary state action" by ensuring "that the law is supreme over the acts of both government and private persons": *Power* at para 54, citing *Secession Reference* at paras 70–71. Another way of stating this is that "[t]he rule of law also protects against arbitrary decisions or abuses of power by governments," usually on the part of the executive branch: Régimbald & Newman at §§ 3.74 and 3.76.

[209] The rule of law is also intimately connected to the principle of constitutionalism. Whereas the latter principle "requires that all government action comply with the Constitution," the rule of law principle "requires that all government action must comply with the law, including the Constitution": *Secession Reference* at para 72; *Power* at para 55. Indeed, the executive branch's "sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source": *Secession Reference* at para 72.

(v) The separation of powers

[210] The separation of powers is briefly discussed at paragraphs 81–83 and 111 above. For the present purposes, it will suffice to reiterate that the separation of powers contemplates that each branch of government must refrain from unduly interfering with the others: *Power* at para 50. Importantly, the separation of powers requires an "appreciation by the judiciary of its own position in the constitutional scheme": *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 (CanLII) at para 104, citing *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, 1989 CanLII 73 (SCC), [1989] 2 SCR 49 at 91. In this regard, the SCC observed in *Criminal Lawyers*:

> [31] … [E]ven where courts have the jurisdiction to address matters that fall within the constitutional role of the other branches of government, they must give sufficient weight to the constitutional responsibilities of the legislative and executive branches, as in certain cases the other branch will be "better placed to make such decisions within a range of constitutional options" (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 37).

(d) *Assessment of the relevant unwritten constitutional principles*

[211] At the outset, it is relevant to note that Constitution "embraces the entire global system of rules and principles which govern the exercise of constitutional authority," and that when determining its dictates, it is "necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution": *Secession Reference* at para 148.

[212] From the brief summary above of the unwritten constitutional principles relied upon by the Applicants, I consider that three tenets are most relevant for the analysis below. These are (i)

that the three branches of government should refrain from "undue interference" with the distinct core competencies and institutional capacities of the others (see paragraphs 81–82 above); (ii) "the Constitution mandates government by democratic legislatures, *and an executive accountable to them*" (see paragraph 203 above [emphasis added] – see also *Power* at para 56); and (iii) the rule of law protects "individuals from arbitrary state action" by ensuring "that the law is supreme over the acts of both government and private persons" (see paragraph 208 above).

(i) The Applicants' proposed use of unwritten constitutional principles

[213] The Applicants argue that the "common threads" running through the jurisprudence relating to the constitutional principles summarized above are that: (a) Parliament, not the executive, is supreme, and the executive cannot fetter Parliament's law-making power; (b) to maintain its authority to govern, the government must remain accountable to, and retain the confidence of, Parliament; (c) the rule of law is intended to shield citizens from arbitrary state action, and to protect the rule of law and prevent arbitrary conduct, courts have a constitutional duty to judicially review actions of the executive; and (d) each branch of government must refrain from unduly interfering with the others.

[214] The Applicants submit that these "common threads" support their assertion that the Prime Minister's authority to advise the Governor General is not unlimited. They further maintain that, by "preventing Parliament's ability to carry out its constitutional functions," the Prime Minister exceeded the limits of his authority in making the Decision. This quoted language is directly taken from *Miller II*.

[215] In very general terms, the "common threads" identified by the Applicants provide a helpful *point of departure* for the analysis below. However, they do no more than that. It remains necessary to address the SCC's teachings regarding the limited ways in which unwritten constitutional principles can be used in adjudicating legal questions.

[216] The Applicants assert that unwritten constitutional principles "have full legal force" and "can guide and constrain the decision-making of the executive and legislative branches": *Toronto (City)* at para 49, citing *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 [***Imperial Tobacco***] at para 52. Put differently, the Applicants maintain that unwritten principles "are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments": *Secession Reference* at para 54. The Applicants proceed from there to suggest that the unwritten constitutional principles discussed above and their common threads, create binding limits on the prerogative power to prorogue.

[217] Despite the statements quoted in the immediately preceding paragraph, the SCC has circumscribed the potential role of unwritten constitutional principles in constitutional adjudication.

[218] Specifically, in *Toronto (City)*, the SCC clarified that the "full legal force" of unwritten constitutional principles "lies in their representation of general principles within which our constitutional order operates and, therefore, by which the Constitution's written terms — its provisions — are to be given effect": *Toronto (City)* at para 54. The Court proceeded from there to observe that "[i]n practical terms, this means that unwritten constitutional principles may

assist courts ‘in *only* two distinct but related ways’”: (1) in the interpretation of constitutional provisions; (2) as structural doctrines to fill gaps or answer questions on which the written Constitution is silent: *Toronto (City)* at paras 55–56 [emphasis added].

[219] This restriction of the role for unwritten constitutional principles was articulated in the course of the Court’s assessment of whether *legislation* could be found unconstitutional for violating the unwritten principle of democracy. The legislation in question reduced the size of the Toronto City Council through a reduction in the number of municipal wards. In addressing this issue, the SCC concluded that neither of the two above-mentioned restricted roles for unwritten constitutional principles support the proposition “that the force of unwritten principles extends to invalidating legislation”: *Toronto (City)* at para 57.

[220] The context in which the SCC addressed these two restricted roles suggests that they may have been intended to be confined to the use of unwritten principles *to invalidate legislation*. Indeed, the Court appears to have been careful throughout this part of its decision to confine what it stated to the use of unwritten constitutional principles to invalidate legislation.

[221] However, the unqualified statement that unwritten constitutional principles may assist courts “in *only* two distinct but related ways” could also be interpreted as meaning that the SCC intended its statement to apply to *all* potential uses of such principles: *Toronto (City)* at para 54 [emphasis added]. This would include to invalidate *executive* action.

[222] In any event, the SCC proceeded from the statements discussed above to make various statements that appear to generally restrict the potential role for unwritten constitutional principles, even assuming that passages discussed above were intended to be limited to the use of such principles *to invalidate legislation*.

[223] In particular, after characterizing unwritten constitutional principles as "highly abstract" and "nebulous," the Court observed that "the statement in *Babcock* that unwritten constitutional principles are 'capable of limiting government actions' is to be understood in a narrow and particular sense": *Toronto (City)* at paras 59 and 72, quoting *Babcock v Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3 [***Babcock***] at para 54. The Court added: "*Imperial Tobacco* thus unequivocally affirmed both a narrow interpretive role for unwritten principles, and the primacy of the text in constitutional adjudication," and that "where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text": *Toronto (City)* at paras 73 and 75. The Court then reiterated that unwritten constitutional principles have a "limited scope of application": *Toronto City* at para 75.

[224] It would appear from the foregoing that, if the use of unwritten constitutional principles to invalidate *executive* action may extend beyond the two limited roles identified in *Toronto (City)*, the margin for their independent force would nonetheless be narrow. In order to protect legal certainty and predictability in the exercise of judicial review, the independent force of unwritten constitutional principles would at least be restricted to what *arises by necessary implication from* the Constitution's text and architecture: *Toronto (City)* at paras 58–59 and 75.

[225] It is unnecessary to definitively resolve this question here because, regardless of whether the two roles for unwritten constitutional principles identified in *Toronto (City)* and at paragraph 218 above, apply also to the review of executive action, the Applicants have failed to meet their burden either way.

[226] In brief, the teachings from paragraphs 54–56 of *Toronto (City)* (discussed at paragraphs 218–221) above do apply in this case, the Applicants have failed to demonstrate that their proposed use of unwritten constitutional principles to independently invalidate the Decision falls within either of the two limited roles articulated therein.

[227] The same applies if those teachings do not apply the review of executive action. Once again, the Applicants have failed to argue or demonstrate that the Constitution's text and architecture *necessarily imply* that those unwritten constitutional principles set limits on the Prime Minister's authority to advise the prorogation of Parliament in the ways they allege.

[228] In this regard, the Applicants assert that the Decision exceeded the Prime Minister's authority because it prevented Parliament's "constitutional functions" to (1) table a motion of non-confidence; and (2) oversee the government and take whatever legislative action it might consider appropriate in relation to the threatened 25% Tariff. I will address these assertions in the next two sections below.

(ii) Parliament's ability to table a non-confidence motion

[229] In support of their position that the Decision prevented Parliament from tabling a motion of non-confidence, the Applicants rely on the publicly announced intentions of the leaders of the three main opposition parties to support a motion of non-confidence in the current government, as soon as there was a confidence vote: see paragraphs 31–33 above.

[230] Before addressing this assertion, I consider it important to briefly return to the brief discussion of constitutional conventions at paragraphs 193–195 above.

[231] It has been recognized that the rules governing responsible government are almost entirely conventional in nature: Hogg & Wright at §§ 1:10 and 9:3; *Ontario (Attorney General) v OPSEU*, 1987 CanLII 71 (SCC) at para 85. This includes the requirement that the government maintain the confidence of the House: *Patriation Reference* at 857–859.

[232] Moreover, letters or statements made outside Parliament cannot be accepted by this Court as evidence about confidence, and the stated intent of individual members of the House cannot be conflated with the "will of Parliament," as expressed in its actual actions: *Democracy Watch 2023* at paras 36–37; *R v Sharma*, 2022 SCC 39 at para 89. This includes the outcome of an actual vote in the House.

[233] As this Court recognized in *Conacher*, "[a] government losing the confidence of the House of Commons is an event that does not have a strict definition and often requires the judgment of the Prime Minister": *Conacher* at para 59. Moreover, "votes of non-confidence are political in nature and lack legal aspects," and therefore, "[t]he determination of when a

government has lost the confidence of the House should be left to the Prime Minister and not be turned into a legal issue for the courts to decide": *Conacher* at para 59.

[234] Insofar as the matter at hand is concerned, the Respondent's uncontested evidence is that the House expressed its confidence in the government on three occasions soon before the House adjourned on December 17, 2024 for its winter recess. Specifically, on November 28, 2024, the House passed Bill C-78, *An Act respecting temporary cost of living relief (affordability)*. On December 9, 2024, the House defeated an opposition day motion that the House had lost confidence in the government. The following day, the House passed Bill C-79, *An Act for granting to His Majesty certain sums of money for the federal public administration for the fiscal year ending March 31, 2025*, which is generally considered a confidence matter.

[235] I can understand the Applicants' view that the situation changed on December 20, 2024, when Mr. Jagmeet Singh, the leader of the NDP, announced in an open letter to Canadians that his party would "put forward a clear motion of non-confidence in the next sitting of the House of Commons." However, as stated above, that is not reliable evidence of the House's confidence. Furthermore, it is far from clear when any motion of non-confidence likely would have been placed before the House for a vote, had the House not been prorogued.

[236] When pressed on this during the hearing, the Applicants referred to a letter dated December 27, 2024 from John Williamson, Chairman of the House Public Accounts Committee, which had been posted on "X." In that letter, Mr. Williamson advised that he had scheduled committee meetings beginning on January 7, 2025, to consider and vote on a motion of non-

confidence in the government. He ended the letter by describing a course of action that would "ensure the committee's non-confidence matter can be debated and voted on by the House of Commons as early as Thursday January 30."

[237] In response, the Respondent maintained that this January 30th date was "entirely aspirational" and that several steps would need to have been taken before any report by the House Public Accounts Committee might have ultimately led to a motion of non-confidence in the House.

[238] In the absence of any persuasive evidence as to when any motion of non-confidence likely would have been placed before the House *as a whole* for a vote, it is not possible to gauge the extent to which the actual effect of the Decision was to prevent a vote on a non-confidence motion that would likely have occurred significantly prior to March 24, 2025, if at all.

[239] Beyond asserting that, as a practical matter, the Decision prevented Parliament from tabling a motion of non-confidence, the Applicants assert that it was one of the *intended effects* of the Decision to "stymie the publicly stated intent of a majority of the House of Commons to bring a motion for non-confidence in the government."

[240] The Applicants have not demonstrated on a balance of probabilities that the intended effect of the Prime Minister's Decision was to avoid a motion for non-confidence in the House. The overall circumstances discussed above and below do not permit the Court to draw any inference in this regard.

[241] I pause to observe that the Court must always remain mindful of the SCC's teaching that the courts should refrain from unduly interfering with the other branches of government. I consider it to be implicit in this teaching that the Court should avoid drawing any inference regarding a Prime Minister's unstated intentions in relation to prorogation, in the absence of exceptional circumstances.

[242] Given all of the foregoing, the issue of whether it would be *beyond the Prime Minister's authority* to exercise the prorogation power for the purpose of avoiding a certain confidence vote is best left for another day.

[243] Considering the nature of this issue, I consider it appropriate to note for the record that, during the hearing of this Application, the Applicants expressly conceded that "it can fairly be said that the government does enjoy the confidence of the House right now. There hasn't been a non-confidence motion at all": February 13, 2025 Hearing Transcript at page 68, lines 10–12. The Applicants added: "I want to be very clear on this. The Governor General does not have any power to discern anything about confidence until there's been a motion passed in the House": February 13, 2025 Hearing Transcript at page 69, lines 5–8. The Respondent agreed.

[244] Beyond their assertions regarding the Prime Minister's *intention* to avoid a non-confidence motion, as briefly noted at paragraph 239 above, the Applicants advance the somewhat contradictory assertion that the Prime Minister *failed to take account of* "Parliament's ability to table a non-confidence motion." However, the Applicants did not demonstrate the existence of any obligation on the part of the Prime Minister to take into account the potential

and uncertain non-confidence motion announced by the leaders of the three main opposition parties.

[245] The Applicants also assert that the Prime Minister failed to take into account the Governor General's constitutional "duty" to ensure that the government of the day commands the confidence of the House. The Applicants explain that because the process to select a new leader of the Liberal Party will result in a new Prime Minister, the Governor General will have no ability to satisfy herself that this person has the confidence of the House. Once again, the Applicants failed to demonstrate the existence of any legal obligation on the Prime Minister to consider this "duty" of the Governor General, which is based on a constitutional convention: Hogg & Wright at §9:3.

(iii) Parliament's ability to legislate and hold the executive to account

[246] The Applicants further assert that the Decision prevented Parliament from overseeing the government and taking whatever legislative action it might consider to be appropriate in relation to Canada's response to the 25% Tariff.

[247] As recognized in the democratic principle, the architecture of the written Constitution appears to contemplate the basic structure of responsible government. However, as I have noted, the particular mechanisms by which the legislature holds the executive to account are, to a significant degree, rooted in convention: Hogg & Wright at §§ 1:10 and 9:3. Nevertheless, to the extent that it might be possible to demonstrate that the executive branch's accountability to

Parliament arises *by necessary implication* from the architecture of the Constitution, there *may* be potential scope for one or more unwritten constitutional principles to play a role in this regard.

[248] For example, this could arguably be the case where a prorogation fundamentally alters or substantially interferes with the relationships among the institutions of the state within our constitutional order. In such a case, unwritten constitutional principles may take on a "structural" character: see The Honourable Justice Malcolm Rowe & Manish Oza, "Structural Analysis and the Canadian Constitution" (2023) 101:1 Can Bar Rev 205 at 219.

[249] However, it bears underscoring that the Applicants have not explained how the unwritten constitutional principles they advance dovetail with and fit within the limited permissible role for such principles described in the jurisprudence.

[250] Consequently, the Applicants' effort to advance unwritten constitutional principles in support of their Application falls short.

[251] Notwithstanding my conclusion on this issue, I will proceed to address the Applicants' submission that the Prime Minister exceeded the scope of his authority by frustrating or preventing Parliament from legislating and holding the executive branch of government to account.

[252] In brief, the Applicants simply addressed, in a very cursory fashion, the three parts of the test set forth at paragraph 160 above, and derived from *Miller II*. Even on that test, the Applicants fall short.

[253] For convenience, I will reproduce that test below:

> a) Does prorogation frustrate or prevent Parliament's ability to perform its legislative functions and its supervision of the Executive?
>
> b) If so, does the Prime Minister's explanation for advising that Parliament should be prorogued provide a "reasonable justification"?
>
> c) In any event, are "the consequences [of prorogation] … sufficiently serious to call for the court's intervention"?

[254] For the present purposes, it will suffice to address the Applicants' submissions with respect to the first element of the test. I will address further below the Applicants' position that the Prime Minister was obliged to provide a reasonable justification for his Decision. It is unnecessary to address the third part of the test, beyond observing that the consequences of the Decision are nowhere near as exceptional as they were in *Miller II*.

[255] Regarding the first element of the test, the Applicants assert that the Decision prevented Parliament from carrying out its constitutional functions because it is unable to oversee the government and take whatever legislative action it *might* consider appropriate with respect to two things: (i) what they call "the current trade war with the United States," and (ii) the tabling of a non-confidence motion, which I have already addressed in the immediately preceding section of these reasons above.

[256] The Applicants expressly recognize that the "steps Parliament might take are speculative" in nature.

[257] Consequently, the Applicants' position appears to simply be that the Prime Minister's Decision prevented Parliament from having the *opportunity* to hold the government to account and take whatever legislative action it might consider appropriate to respond to the "trade war."

[258] An obvious shortcoming with this position is that the opportunity to hold the government to account and take whatever action it might consider to be appropriate will always be adversely impacted by a prorogation, at least to some degree.

[259] In *Miller II*, the UKSC addressed this issue by focusing on the extraordinary effects of the impugned prorogation: *Miller II* at paras 50, 54 and 56–57.

[260] In the present proceeding, the Applicants have not identified any specific adverse effects of the Prime Minister's Decision on Parliament's ability to fulfill its constitutional functions, let alone the effects of the magnitude that were identified in *Miller II*.

[261] In the absence of any other identified criteria for distinguishing between lawful and unlawful advice given to the Governor General to prorogue Parliament, the Applicants have failed to demonstrate that the Decision under review falls into the unlawful category.

[262] In reaching my decision on this issue, I am mindful of the requirement that the courts should refrain from "unduly interfering" with the functions of the other branches of government: see paragraphs 81–82 above.

[263] In summary, for all of the reasons set forth above, the Applicants have not established that the Prime Minister exceeded the scope of his constitutional or other legal authority in making the Decision, on the ground that he prevented Parliament from exercising its constitutional functions.

(iv) The reasons for the prorogation

[264] Beyond arguing that the Decision prevented Parliament from exercising its constitutional functions, the Applicants further impugn the credibility and appropriateness of the Prime Minister's *reasons* for prorogation.

[265] The Applicants assert that there were two reasons given for the Decision, namely (i) to "reset" Parliament, based on the fact that it had been "paralyzed" for months; and (ii) to permit the Liberal Party to select a new party leader, who can then lead the Liberal Party into the next election. The Applicants appear to suggest that these reasons were beyond the "lines and objects" of the Prime Minister's authority to advise the Governor General to prorogue Parliament, and therefore were contrary to the rule of law: *Roncarelli* at 140.

Parliament's "paralysis"

[266] The Applicants state that this justification is specious, arbitrary, irrational, and without a legal or constitutional basis. The Applicants assert that the reason for the "paralysis" in Parliament was the government's refusal to disclose documents in connection with a report by the Auditor General that made findings concerning "significant lapses in [Sustainable Development Technology Canada's] governance and stewardship of public funds." The Applicants maintain that Parliament is entitled to investigate and hold the government to account, and that the Prime Minister inappropriately attempted to avoid accountability by refusing to disclose the documents in question and then advising the Governor General to prorogue Parliament.

[267] To begin, I will observe that Parliament's "paralysis" was not complete. Parliament managed to pass Bills C-78 and C-79, apparently with the agreement of the House to deal with these bills, notwithstanding the privilege motion with which the House had been seized since late September 2024.

[268] I will also note that the dispute in Parliament concerned the government's alleged failure to fully comply with a House order, dated June 10, 2024, to produce certain documents and particulars related to the now defunct federal agency Sustainable Development Technology Canada ("**SDTC**"). That order was issued following a report by the Auditor General concerning the SDTC. According to a news release issued by the Auditor General on June 4, 2024 and attached at Exhibit D to David MacKinnon's affidavit, the Auditor General "conclude[d] that there were significant lapses in [SDTC] governance and stewardship of public funds."

[269] In my view, the merits or wisdom of the Prime Minister's view that Parliament was "paralyzed" at the time of the Decision is not a justiciable issue. In any event, the Applicants have not demonstrated that it was beyond the constitutional and other legal limits of the Prime Minister's authority to take that consideration into account.

Furthering the interests of the Liberal Party

[270] In the prepared statement made by the Prime Minister to announce the Decision, he stated: "This country deserves a real choice in the next election, and it has become clear to me that if I'm having to fight internal battles, I cannot be the best option in that election."

[271] Elsewhere in that prepared statement, the Prime Minister stated: "A new PM and Leader of the Liberal Party will carry its values and ideals into that next election."

[272] The Applicants maintain that, by invoking the desirability of having a new leader to carry the Liberal Party's "values and ideals" into the next election, the Prime Minister conflated his role as leader of the government with his role as leader of the governing party.

[273] I recognize that, in exercising the prerogative power to prorogue Parliament, it is within the Prime Minister's "area of responsibility" to consider at least some "matters of political judgment": *Miller II* at para 51.

[274] However, it is not immediately obvious that the partisan considerations identified above are within the scope of the legitimate spheres of activities of the legislative or executive branches

of government. In *Criminal Lawyers*, the SCC explained the functions of those branches as follows:

> [28] … The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service.

[275] It is unnecessary to make any determination on the issue of whether partisan considerations are within the scope of the Prime Minister's authority to advise the Governor General to prorogue Parliament, because nothing turns on it. This is because it is not possible to disentangle the impugned partisan considerations from the other considerations that supported the Decision, for the purposes of making an overall finding on the issue of whether the Prime Minister exceeded the scope of his authority in making his Decision.

[276] In their written submissions, the Applicants maintain that the Decision under review includes the prepared statement made by the Prime Minister in announcing the Decision, together with the subsequent exchanges that he had with the media that day. Taken together, they indicate that the considerations he relied upon included the following:

(i) Parliament had been "paralyzed" for months;

(ii) the prorogued session of Parliament had been the longest session of a minority Parliament in Canadian history;

(iii) it was "time for the temperature to come down" in Parliament;

(iv) it was time for a “reset”;

(v) removing the Prime Minister “from the equation as the leader who will fight the next election for the Liberal Party should also decrease the level of polarization” that was being experienced in the House and in Canadian politics, and allow people to focus on serving Canadians in the House and on the rest of their work;

(vi) “this country deserves a real choice in the next election” and if the Prime Minister was having to fight internal battles, he could not be the best person to lead the Liberal Party in the next election; and

(vii) a “new PM and Leader of the Liberal Party will carry its values and ideals into the next election”.

[277] The first three considerations from the list above pertain to the affairs of Parliament. The Applicants have not demonstrated that any of these considerations exceed the constitutional and legal limits of the Prime Minister’s authority to prorogue Parliament.

[278] Regarding the fourth consideration, a member of the media asked the Prime Minister what he meant by his reference to the need for a “reset.” The Prime Minister simply reiterated that the government had been the longest-serving minority government in history. Viewed in isolation, the Prime Minister’s wish to end a long session of Parliament for the purposes of achieving a “reset” is a matter within the legitimate scope of his role. Without more, it would exceed the proper functions of the courts to intervene in this type of decision.

[279] The remaining three considerations largely pertain to the interests of the Liberal Party, discussed above. However, in consideration (v) in the list above, the Prime Minister also referred to his desire to "decrease the level of polarization that was being experienced in the House." Once again, this is not a justiciable issue. In any event, the Applicants have not demonstrated that it was beyond the constitutional and legal bounds of the Prime Minister's authority to base his Decision on that consideration.

[280] In summary, the considerations that supported the making of the Decision by the Prime Minister included a mix of some matters that pertain to the affairs of Parliament and some partisan considerations that pertain to the Liberal Party. The Prime Minister also appears to have considered that it would be in the public interest for Canadians to have "a real choice in the next election," presumably as opposed to having an outgoing or interim leader representing the governing party.

[281] The Prime Minister was not obliged to give any reasons for proroguing Parliament. However, having done so, it was open to the Applicants to challenge them.

[282] While the overall circumstances are troubling, it is not possible to disentangle the various considerations identified by the Prime Minister, for the purpose of determining whether, on balance, he exceeded the scope of his constitutional and legal authority in making the Decision.

[283] The Applicants bore the burden of demonstrating on a balance of probabilities that the Prime Minister exceeded the scope of his authority in making the Decision. They failed to meet that burden.

(v) The absence of a reasonable justification

[284] Drawing on *Miller II*, the Applicants assert that the Prime Minister's authority to advise the Governor General to prorogue Parliament cannot be exercised in the absence of a reasonable justification.

[285] In this regard, the Applicants suggest that it was incumbent upon the Prime Minister to explain why (i) an election could not be called right away, so as to provide the stated Parliamentary "reset" in a more democratic and effective way; and (ii) why a prorogation of eleven weeks (or more) is necessary to achieve such a "reset."

[286] I disagree. In the absence of any transgression on any *Charter* rights, it was not incumbent upon the Prime Minister to provide any justification or other reasons for advising the Governor General to prorogue Parliament.

[287] As in any challenge of the exercise of executive powers, the burden is upon the applicant: see *Democracy Watch NB* at paras 69–70. Of course, if the Prime Minister fails to provide any justification and his decision is subsequently challenged, this may make it easier for the person making the challenge to satisfy their burden.

[288] Moreover, the Prime Minister's choice to prorogue Parliament rather than dissolve Parliament and call an election is not justiciable. Among other things, this is a highly political choice and there does not appear to be any objective or other legal standards against which to review that choice.

[289] The same is true for the number of weeks for which Parliament may be prorogued. Of course, the duration of a prorogation may be relevant in any assessment of the effect and true purpose of a prorogation. However, it would be beyond the Court's institutional capacity to assess the reasonableness of a justification for a particular length of a prorogation.

[290] In the present proceeding, the uncontested affidavit evidence of Donald Booth is that, in contemporary times, the average prorogation period has been approximately 40 days. That said, in the last 60 years, there has only been one prorogation that was longer than the current prorogation of 77 days. That was when Parliament was prorogued for 82 days between November 12, 2003 and February 2, 2004, when Prime Minister Martin replaced Prime Minister Chrétien.

[291] In the absence of any objective standard for reviewing the 77-day duration of the present prorogation, this issue is not justiciable and it is not appropriate for the Court to express any thoughts about this matter. However, I will observe that Parliament was previously scheduled to be in recess from December 17, 2024 until January 27, 2025, from February 15, 2025 until February 24, 2025, and then again from March 1, 2025 to March 16, 2025. This left a total of

five previously scheduled sitting weeks that were affected by the prorogation, plus any committee business that may have otherwise proceeded in the absence of the prorogation.

(e) *Conclusion*

[292] For the reasons set forth in the preceding sections of this part VII.D.(3), the Applicants failed to demonstrate that the Prime Minister exceeded any of the limits established by the written Constitution or by the unwritten principles they identified. The Applicants also failed to demonstrate that the Prime Minister exceeded any other legal limits.

VIII. Conclusion

[293] This Court has the jurisdiction to review this Application. Among other things, when the Prime Minister advises the Governor General to prorogue Parliament, the Prime Minister exercises the Crown prerogative to prorogue. It is now established that the powers under subsections 2(1), 18(1) 18.1(3) of the *Federal Courts Act* extend to exercises of executive prerogative power rooted solely in the federal Crown prerogative. In addition, the federal decision makers that are included within the scope of the phrase “federal board, commission or other tribunal” include the Prime Minister.

[294] The Respondent’s contention that the Prime Minister’s advice cannot affect legal rights, impose legal obligations, or cause prejudicial effects fails to reflect the reality of the situation. The Prime Minister’s advice is in fact a critical lynchpin of the exercise of the Crown’s prerogative to prorogue Parliament.

[295] The possibility that the Governor General might one day refuse the Prime Minister's advice to prorogue Parliament is not a sufficient basis upon which to immunize that advice from review by the courts. The same is true with respect to the possibility that the Governor General might impose one or more conditions on the requested prorogation, as the Respondent and the Initiative maintain Governor General Jean did in 2008.

[296] The issue of whether the Prime Minister exceeded the scope of his authority in making the Decision is justiciable. Justiciability requires objective legal standards against which to adjudicate the issue. The constitutional or other legal limits that may circumscribe the prerogative to prorogue the House provide the requisite objective legal standards. Those objective standards ground a legitimate role for the Court within the separation of powers.

[297] However, certain issues raised by the Applicants in advancing their case are not justiciable. These include their assertions that "an election – and not a prorogation – is the only legitimate and democratic mechanism by which a 'reset' of Parliament can be achieved," and that "a prorogation of almost eleven weeks, until March 24, 2025, amounts to an inherently unreasonable attempt to 'reset' [sic] of Parliament." Another non-justiciable issue is whether Parliament was "paralyzed" in the period leading up to the prorogation, as mentioned in the Decision. These are essentially matters that go to the "wisdom" or "merits" of the Decision, which are not justiciable issues.

[298] The Applicants failed to demonstrate that the Prime Minister exceeded any limits established by the written Constitution, including sections 3 and 5 of the *Charter*, or by the

unwritten principles they identified. The Applicants also failed to demonstrate that the Prime Minister exceeded any other legal limits.

[299] In addition, the Applicants did not establish that the Decision was "part of a stratagem designed specifically to interrupt the business of Parliament and stymie the publicly stated intent of a majority of the House of Commons to bring a motion for non-confidence in the government." In this regard, the Applicants were unable to establish when, if at all, a non-confidence vote likely would have occurred in the absence of the Decision. They also conceded during the hearing that "the government does enjoy the confidence of the House right now."

[300] Even if the considerations related to the Liberal Party that were identified by the Prime Minister were beyond the scope of his authority, he identified several other considerations for the Decision. It is not possible to disentangle the partisan reasons from those other considerations, for the purpose of determining whether the overall Decision was beyond the Prime Minister's authority. On their face, those other reasons related either to the business of Parliament or to what appears to be the Prime Minister's view of the public interest. It is not the Court's role to question the merits or wisdom of those reasons.

[301] I understand why the Applicants might find the circumstances surrounding the Decision to be troubling. This is particularly so in a broader context in which the executive branch has been increasingly drawing functions away from the legislative branch by "the concentration of power to the Cabinet and the Prime Minister's office": See Régimbald & Newman at §3.68.

[302] However, the Applicants bore the burden to demonstrate that the Decision, viewed in its entirety, exceeded the scope of the Prime Minister's authority. They failed to meet that burden.

[303] In reaching my determination on this issue, I have remained mindful of the emphasis that the SCC has placed on the courts refraining from "undue interference" with the other branches of government: see paragraphs 81–82 above.

IX. Costs

[304] In their Application, the Applicants stated that they "do not seek costs, and ask that no costs be awarded against them, regardless of the outcome of the application."

[305] The Respondent requests costs in the amount of $10,395.

[306] Rule 400(1) of the *Federal Courts Rules*, SOR/98-106 [***Federal Courts Rules***] gives the Court full discretionary power over the amount and allocation of costs. However, that discretion must be exercised in accordance with established principles pertaining to costs, unless the circumstances justify a different approach: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [***Okanagan Indian Band***] at para 22; *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 19.

[307] The factors the Court may consider in exercising its discretion include the result of the proceeding, the importance and complexity of the issues, and the public interest in having the proceeding litigated: *Federal Courts Rules*, Rule 400(3).

[308] The general rule is that the successful party is entitled to have its costs, even if it was not successful in respect of each and every argument it pursued: *Okanagan Indian Band* at paras 20–21; *Raydan Manufacturing Ltd v Emmanuel Simard & Fils (1983) Inc*, 2006 FCA 293 at paras 2–5. However, the Court may depart from this approach in cases of truly "divided success" or "mixed results": *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842 at paras 23 and 56, aff'd 2013 FCA 220 at paras 10 and 15; *Apotex v Sanofi-Aventis*, 2012 FC 318 at para 11; *Bristol-Myers Squibb Canada Co v Teva Canada Limited*, 2016 FC 991 at paras 9–14.

[309] In the present proceeding, the Respondent prevailed in the ultimate result. However, the Applicants prevailed on the issues of jurisdiction, justiciability (to a significant extent) and the Respondent's position that section 5 of the *Charter* and constitutional conventions "occupy the field."

[310] Public interest litigants may be relieved from paying costs where they meet the test set out in *Mcewing v Canada (Attorney General)*, 2013 FC 953 at paras 13-14 and *Calwell Fishing Ltd v Canada*, 2016 FC 1140 at para 11: *Doherty v Canada (Attorney General)*, 2021 FC 695 [***Doherty***] at para 8.

[311] This test requires (1) that the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved; (2) the party requesting relief has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if they have an interest, it clearly does not justify the proceeding economically; (3) the issues have not been previously determined by a court in a proceeding against the other party in the litigation; (4) the

other party has a clearly superior capacity to bear the costs of the proceeding; and (5) the party seeking relief has not engaged in vexatious, frivolous, or abusive conduct.

[312] I find that the Applicants meet this test. They have expressed that their concerns about democracy and the rule of law motivated them to commence this Application "on behalf of all Canadians, no matter their political affiliations." Their personal interest is limited to having their Member of Parliament represent them in the House. Taken in isolation, it is doubtful that this interest would justify the costs associated with bringing this Application. Indeed, the Applicants sought and obtained representation on a *pro bono* basis from CAC, which has a public interest mandate. Moreover, the issues raised were novel. In my view, the Attorney General, who did not retain outside counsel, is clearly able to bear its own costs of the proceeding: *Doherty* at para 19; *Carter v Canada (Attorney General)*, 2012 BCSC 1587 at para 79, aff'd 2015 SCC 5. Finally, the Applicants have not engaged in vexatious, frivolous, or abusive conduct in these proceedings.

[313] Considering that the Applicants are public interest litigants, I exercise my discretion to decline to order costs against them, despite the fact that the Respondent prevailed on the ultimate issue in dispute. By bringing their Application, the Applicants provided the Court with an opportunity to address several issues that may well have future importance.

JUDGMENT in T-60-25

THIS COURT'S JUDGMENT is that:

1. This Application is dismissed.

2. No costs are ordered.

"Paul S. Crampton"
Chief Justice

APPENDIX 1 – Passages to be struck from the Oliver Report

	Passage to be struck
1.	The third sentence in paragraph 1
2.	The first sentence in each of the first two bullet points in paragraph 11, as well as the last two sentences in the fourth bullet point in that paragraph
3.	The second sentence in paragraph 14
4.	Paragraphs 40 to 44
5.	The third and fourth sentences in paragraphs 45 and 46, including the quotation under paragraph 46
6.	Paragraphs 47 to 55
7.	The first bullet point under paragraph 63, as well as the first and last sentences of the third bullet point under that paragraph

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-60-25
STYLE OF CAUSE:	DAVID JOSEPH MACKINNON AND ARIS LAVRANOS v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 13, 14, 2025
JUDGMENT AND REASONS:	CRAMPTON C.J.
DATED:	MARCH 6, 2025

APPEARANCES:

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