Court File No.:

FEDERAL COURT OF APPEAL

B E T W E E N:

DAVID JOSEPH MACKINNON AND ARIS LAVRANOS

Appellants

and

CANADA (ATTORNEY GENERAL)

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellants appears ton the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellants. The appellants request that this appeal be heard at **Toronto**.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or where the appellants are self-represented, on the appellants, **WITHIN 10 DAYS** of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: April 4, 2025

Issued by: _____
(Registry Officer)

Address of local office:

180 Queen Street West, Suite 200
Toronto, Ontario
M5V 3L6

TO: **ATTORNEY GENERAL OF CANADA**

[redacted]

Fax: [redacted]

Per: Elizabeth Richards
Zoe Oxaal
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Alex Dalcourt

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Counsel for the Respondent

APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the order of Chief Justice Paul S. Crampton (the "**Application Judge**"), dated March 6, 2025, by which the Appellants' application for judicial review (the "**Application**") in this proceeding was dismissed on its merits, without costs (the "**JR Decision**"). The Application was commenced by the Appellants in respect of a decision rendered by former Prime Minister of Canada, the Right Honourable Justin Trudeau, P.C. (the "**Prime Minister**"), to advise Her Excellency the Right Honourable Mary Simon, C.C., O.C., O.Q., C.M.M., C.O.M., 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 "**Prorogation Decision**").

THE APPELLANTS ASK that:

(a) this appeal be allowed in its entirety;

(b) the JR Decision on the merits be set aside;

(c) the Application be granted; and

(d) no costs be awarded to or against the Appellants, regardless of the outcome of this appeal.

For purposes of clarity, the Appellants do not challenge the Application Judge's findings on any of the preliminary issues determined on the Application, namely: (a) that the court below had jurisdiction to review the Prorogation Decision; (b) that the issue of whether the Prime Minister exceeded the scope of his authority in making the Prorogation Decision was justiciable; and (c) that the Appellants had standing to challenge the Prorogation Decision. Further, the Appellants do

not challenge the Application Judge's finding that no costs were to be awarded against the Appellants in the circumstances of this case.

THE GROUNDS OF APPEAL are as follows:

1. the Application Judge failed to clearly identify the proper standard of review for him to apply on the Application, which ought to have been "correctness" pursuant to the framework of analysis set out in *Canada (Minister of Immigration and Citizenship) v. Vavilov*, 2019 SCC 65 and its progeny;

2. the Application Judge did not appropriately apply the correctness standard of review in the course of the JR Decision, in light of the Application Judge's flawed reasoning, as follows:

   (a) the Application Judge improperly refused to adopt the test set out at paragraph 50 of *R. (on the application of Miller) v. The Prime Minister*, [2019] UKSC 41 [*Miller II*] (the "**Miller Test**"), on the basis of the following flawed reasoning:

      (i) the Application Judge incorrectly found that the constitutional frameworks of Canada and the United Kingdom differed in "*some important respects*" which made the adoption of the Miller Test inappropriate, when such differences were immaterial to the question of whether the Miller Test ought to be adopted in Canada;

      (ii) the Application Judge improperly relied on what it termed "*very unique legislative and factual circumstances*" in *Miller II*,

which the Application Judge improperly held distinguished *Miller II* from the case at bar; and

(iii) the Application Judge failed to give due and proper (or any) consideration to the Appellants' arguments offered in support of why the Miller Test ought to be adopted;

(b) the Application Judge, having improperly failed to adopt the Miller Test, then failed to analyze and determine the main issues raised by the Appellants on the Application, at all, namely:

(i) the proper scope of a prime minister's power to advise a governor general to prorogue Parliament; and

(ii) whether the Prime Minister's advice to the Governor General in this case fell within that scope;

(c) rather, the Application Judge proceeded to "*focus upon whether the Prime Minister exceeded any constitutional or other legal limits identified by the [Appellants] in exercising his authority*", which was not an issue raised by either the Appellants or the Respondent on the Application. In so doing, the Application Judge undertook a legal and constitutional analysis concerning issues that (i) no party had asked him to undertake, and (ii) the Appellants had not briefed;

(d) at paragraphs 171 to 178 of the JR Decision, the Application Judge mischaracterized the Appellants' argument on the Application with respect to section 3 of the *Charter*. The Application Judge improperly found that "*section 3*

does not impose a constraint on the Prime Minister's exercise of the Crown prerogative to prorogue Parliament", as the Appellants never argued that it was a direct "constraint" in the first place. The Applications Judge failed to appreciate the Appellants' true argument, which is that section 3 of the *Charter* demonstrates that there must be a limit of some kind on a prime minister's prerogative power to prorogue Parliament, not that section 3 necessarily constitutes such a limit *in its own right*;

(e) at paragraphs 179 to 188 of the JR Decision, the Application Judge mischaracterized the Appellants' argument on the Application with respect to section 5 of the *Charter*. The Application Judge improperly held, "*I fail to see anything purposive about an interpretation [of section 5] 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*", as the Appellants never directly advanced that argument in the first place. The Applications Judge failed to appreciate the Appellants' true argument, which is only that section 5 of the *Charter* provides no guidance on when, and under what circumstances, a prorogation can lawfully *begin*, and is therefore of limited assistance in the determination of the proper scope of a prime minister's power to advise a governor general to prorogue Parliament;

(f) at paragraph 201, the Application Judge mischaracterized the Appellants' argument with respect to what he termed the "concept" of responsible government. First, the Application Judge failed to properly identify that "responsible government" qualifies as an unwritten constitutional principle. Second, the

Application Judge improperly held that "*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*", as the Appellants never directly advanced that argument in the first place. The Application Judge failed to appreciate the Appellants' true argument, which is that the principle of responsible government, as in *Miller II*, demonstrates that there must be a limit of some kind on a prime minister's prerogative power to prorogue Parliament, not that such principle constitutes a limit *in its own right*;

(g) at paragraph 212, the Application Judge failed to set out all of the appropriate "*tenets*" that were relevant to the analysis that he was being asked to undertake;

(h) at paragraphs 213-228, the Application Judge:

(i) failed to properly interpret the guidance from the Supreme Court of Canada in *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 with respect to the uses that can be made by unwritten constitutional principles in the course of constitutional adjudication;

(ii) failed to appreciate that the Appellants were not attempting to use unwritten constitutional principles to invalidate legislation, or to directly invalidate executive action, in this case;

(iii) failed to appreciate at paragraph 226 that the Appellants were not attempting to use unwritten constitutional principles to "*independently invalidate the [Prorogation] Decision*" in this case, but rather as interpretive aids demonstrating that there must be a limit of some kind on a prime minister's prerogative power to prorogue Parliament;

(iv) further, or in the alternative, failed to appreciate that the Appellants' intended use of unwritten constitutional principles was in keeping with the Supreme Court of Canada's guidance in *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34;

(i) at paragraphs 228-250, the Application Judge misconstrued the reasons for which the Appellants argued that the Prorogation 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.*" The Appellants never intended to demonstrate directly that such "constitutional functions" demonstrated the violation of any unwritten constitutional principles *in their own right*, but rather that the third step of the Miller Test was met;

(j) at paragraphs 255-260, the Application Judge failed to acknowledge that:

(i) in order to pass the third step of the Miller Test, it is not necessary to demonstrate "specific adverse effects", whether of the same magnitude as those perceived by the Application Judge to have been present in *Miller II*, or at all, but rather only that the effect of prorogation is "*sufficiently serious to justify*" judicial intervention;

(ii) in any event, the Applicants *did* identify specific adverse effects that frustrated or prevented Parliament's ability to perform its legislative functions and to supervise the executive: 1) generally overseeing the government's handling of the ongoing trade dispute with the United States; 2) taking legislative steps (including passing legislation implementing the government's $1.3 billion border security plan), which had already been recognized by the Application Judge in his interlocutory decision as an impediment to Parliament from being able to "*carry out its constitutional functions, including by availing itself of legislative tools at its disposal, for a significant period during which Canada will likely face a grave challenge"*; 3) acting in accordance with s. 53(4) of the *Customs Tariff* and/or ss. 19 and 19.1 of the *Statutory Instruments Act*; 4) tabling a motion of non-confidence; or 5) otherwise dealing with the government's alleged failure to fully comply with a House of Commons

order, dated June 10, 2024, to produce certain documents and particulars related to the now-defunct Sustainable Development Technology Canada, which order was issued following a report released by the Auditor General on June 4, 2024, which, taken as a whole, were sufficiently serious to justify judicial intervention; and

(iii) these facts demonstrated that the first and third steps of the Miller Test were met;

(k) at paragraphs 266-269, the Applications Judge failed to appreciate that the Appellants were not asking him to make a finding that Parliament had been "paralyzed" and hence that this was a justiciable issue. Rather, the Appellants' argument was that this aspect of the Prime Minister's justification for the Prorogation Decision was not reasonable, pursuant to the second step of the Miller Test;

(l) at paragraphs 270-283, the Applications Judge:

(i) improperly found that it was "*not possible to disentangle the impugned partisan considerations from the other considerations that supported the [Prorogation] 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 the [Prorogation] Decision*", when it was manifestly possible to do so;

(ii) failed to appreciate that the partisan justifications he identified ought to have resulted in a finding that the Prime Minister's justification for making the Prorogation Decision was not reasonable, and that they could not be cured or saved by such "*other considerations*";

(iii) improperly identified other "considerations" for making the Prorogation Decision, which were not independent reasons at all, but different iterations of the same two main reasons identified by the Appellants, namely (a) to "reset" Parliament; and (b) to provide the Prime Minister's party an opportunity to avoid a general election while selecting a new leader;

(iv) improperly concluding that the Prime Minister "*was not obliged to give any reasons for proroguing Parliament*" at all;

(m) at paragraph 286, the Application Judge improperly held that "*[i]n the absence of any transgression of 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*";

(n) at paragraph 287, the Application Judge improperly held that the justificatory burden in this matter rested with the Appellants, despite the existence of the Miller Test and that it ought to have been adopted;

(o) at paragraphs 288-289, the Application Judge failed to appreciate that the Appellants were not asking him to make a finding that (i) the Prime Minister's choice to prorogue Parliament rather than dissolve Parliament and call an election; and (ii) the length of the prorogation itself, were justiciable issues. Rather, the Appellants' argument was that these aspects of the Prime Minister's justification for the Prorogation Decision were not reasonable, pursuant to the second step of the Miller Test; and

3. such further and other grounds as counsel may advise and this Court permit.

THE APPELLANTS RELY ON THE FOLLOWING STATUTORY PROVISIONS:

(a) the *Constitution Act, 1867*, 30 & 31 Vict, c. 3 (UK);

(b) the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (UK)*, 1982, c. 11, including the *Canadian Charter of Rights and Freedoms*;

(c) *Federal Courts Act*, R.S.C. 1985, c. F-7;

(d) *Federal Courts Rules*, SOR/8-106; and

(e) such other statutory provisions as counsel may advise.

April 4, 2025

CHARTER ADVOCATES CANADA

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Counsel for the Appellants

DAVID JOSEPH MACKINNON et al. Appellants	-and-	**CANADA (ATTORNEY GENERAL)** Respondent	Court File No.

FEDERAL COURT OF APPEAL

PROCEEDING COMMENCED AT
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