Court File No.: A-131-25

FEDERAL COURT OF APPEAL

B E T W E E N:

DAVID JOSEPH MacKINNON and ARIS LAVRANOS

Appellants

and

CANADA (ATTORNEY GENERAL)

Respondent

(APPLICATION UNDER SECTION 18.1 OF THE
FEDERAL COURTS ACT, R.S.C. 1985, c. F-7)

APPELLANTS'
MEMORANDUM OF FACT AND LAW

October 15, 2025

CHARTER ADVOCATES CANADA
[redacted]

James Manson, LSO# 54963K
Chris Fleury, LSO# 67485L
Hatim Kheir, LSO# 79576J
Darren Leung, LSO# 87938Q

[redacted]

[redacted]

Counsel for the Appellants

1. The appellants, David Joseph MacKinnon and Aris Lavranos (the "**Appellants**"), appeal to this Court from the order of Chief Justice Paul S. Crampton (the "**Application Judge**"), dated March 6, 2025, by which the Appellants' underlying application for judicial review in this proceeding was dismissed on its merits, without costs (the "**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 "**former 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.

2. The Appellants ask this Court to allow this appeal, set aside the Decision and declare that the 44th Parliament was not prorogued. They say the Application Judge neither selected nor applied the appropriate standard of review of correctness in this case. They also point to several instances of flawed reasoning in the Decision, discussed below, which further support their position here.

3. One such instance was the Application Judge's refusal to address a central issue in this case: what is the scope of the prerogative power of prorogation? Put another way, when can a prime minister validly advise a governor general to prorogue, and when can he or she not? These are straightforward, justiciable, legal questions that in the Appellants' submission can be easily answered by recognizing that the common law test (the "***Miller* Test**") established by the UK Supreme Court in *R. (on the application of Miller) v. The Prime Minister*[1] governs in Canada.

4. Yet, the Application Judge declined to recognize the *Miller* Test. This was a mistake. *Miller II* ought to be endorsed by this Court without hesitation; there is no principled basis for refusing

[1] *R. (on the application of Miller) v. The Prime Minister*, [2019] UKSC 41 at paragraphs 28-52 (UKSC) [*Miller II*]. Paul Daly, "A Critical Analysis of the *Case of Prorogations*" (2021) 7 Can. J Comp Contemporary L, at pp. 285, 289.

to do so. On the contrary, for the reasons set out below, it is now uncontroversial that *Miller II* is the law in this country, and that the legality, rationality and procedural propriety of exercises of the prorogation prerogative may now be examined by the courts, using the *Miller* Test.

5. Had the Application Judge correctly recognized that the *Miller* Test governs in Canada, he would have proceeded to apply the test to the circumstances of this case. He did not do so; accordingly, the Appellants ask this Court to consider *de novo* the former Prime Minister's conduct in advising prorogation, and to conclude that the former Prime Minister's decision to advise prorogation did not meet the requirements of the *Miller* Test.

6. Finally, in light of the significant public interest aspect of this case, the order of no costs below should not be disturbed, nor should costs be ordered on this appeal.

PART I STATEMENT OF FACT

7. The Application Judge's findings of fact, located at paragraphs 23-42 of the Decision,[2] are generally sufficient for the purposes of this appeal, and need not be repeated here. The Appellants also invite the Court to review the Statement of Facts set out in their underlying memorandum of fact and law, filed below, should it require additional factual detail.[3]

PART II POINTS IN ISSUE

8. This appeal raises the following issues:

A. the preliminary issue of mootness, insofar as it was raised and framed by Justice Stratas in the course of his review of the Notice of Appeal;

B. the standard of review applicable on this appeal;

C. whether the Application Judge identified the correct standard of review on the underlying judicial review application;

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[2] Reasons of the Application Judge, March 6, 2025 ["Decision"] **Appeal Book ["AB"] Tab 2**, paragraphs 23-42.

[3] Applicant's Memorandum of Fact and Law, February 3, 2025, paragraphs 3-32 **AB, Tab 6D,** pages 581-587**.** See also Decision, paragraphs 23-42, **AB, Tab 2,** pages 8-14.

D. if so, whether the Application Judge applied the correct standard of review on the underlying judicial review application;

E. if not, what is the appropriate remedy?

PART III SUBMISSIONS

A. MOOTNESS

9. Justice Stratas raised mootness as a preliminary issue in April 2025 during this Court's review of the Notice of Appeal. In response to the Court's Direction dated April 22, 2025, the parties all filed written submissions. All of these written submissions are now with the Court. The Appellants repeat, adopt and rely on their written submissions as needed, and stand ready to provide the Court with any additional submissions that it may require.

B. STANDARD OF REVIEW ON THIS APPEAL

10. As noted recently in *Power Workers' Union v. Canada (Attorney General)*, it is settled law that when this Court hears an appeal from a decision of the Federal Court on judicial review, its role is to (a) determine whether the Federal Court selected the appropriate standard of review; and (b), if so, to determine whether that standard was applied properly.[4]

11. It is also settled law that both a reviewing judge's selection *and* application of the standard of review are reviewable for correctness.[5] This approach "*accords no deference to the reviewing judge's application of the standard of review*", therefore requiring the appellate court to "*perform a* de novo *review of the administrative decision*", in effect "stepping into the shoes" of the reviewing judge and focusing on the administrative decision.[6]

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[4] *Power Workers' Union v. Canada (Attorney General)*, 2024 FCA 182 at paragraph 41 (FCA) [*Power Workers' Union*].
[5] *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paragraph 10 (SCC). See also *Gordillo v. Canada (Attorney General)*, 2022 FCA 23 at paragraph 58 (FCA).
[6] *Gordillo v. Canada (Attorney General)*, 2022 FCA 23 at paragraph 58 (FCA). See also *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47 (SCC).

12. In *Power Workers' Union*, this Court also reaffirmed its admonishment to prospective appellants to be prepared, on an appeal of a judicial review proceeding, to demonstrate how the lower court's reasoning was flawed:

> [181] As this Court stated in *Bank of Montreal v. Canada (Attorney General)*, 2021 FCA 189, at paragraph 4, where the Federal Court appears to have given a complete answer to all the arguments advanced by the losing party on a judicial review application, that party "bears a strong tactical burden to show on appeal that the Federal Court's reasoning is flawed".[7]

C. THE APPLICATION JUDGE FAILED TO IDENTIFY THE PROPER STANDARD OF REVIEW BELOW

The Appropriate Standard of Review was Correctness

13. For the following reasons, the Application Judge ought to have determined that the applicable standard of review on the underlying judicial review proceeding was correctness.

14. **First**, the Appellants contend here, as they did below, that the Court ought to determine the appropriate standard of review using the *Vavilov* framework.[8] In *Vavilov*, the Supreme Court of Canada undertook a "*holistic revision of the framework for determining the applicable standard of review*". It directed that courts seeking to select the appropriate standard should look to *Vavilov* first, to determine how its general framework applies to that case.[9] In *Auer*, the Supreme Court of Canada recently confirmed that the *Vavilov* framework is intended to "*accommodate all types of administrative decision making… varying in 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*

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[7] *Power Workers' Union* at paragraph 181 (FCA). See also *Bank of Montreal v. Canada (Attorney General)*, 2021 FCA 189 at paragraph 4 (FCA). See also *Cloth v. Canada (Attorney General)*, 2025 FCA 117 at paragraph 6 (FCA).
[8] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (SCC) [*Vavilov*].
[9] *Vavilov*, paragraphs 10 and 143. See also *Portnov v. Canada (Attorney General)*, 2021 FCA 171 at paragraphs 25-27 (FCA); *Innovative Medicines Canada v. Canada (Attorney General)*, 2022 FCA 210 at paragraph 33 (FCA). See also *Richard v. Canada (Attorney General)*, 2024 FC 657 at paragraphs 19-21 (FC).

other." [Emphasis added.][10]

15. **Second**, while reasonableness is presumed to apply,[11] *Vavilov* sets out some exceptions where correctness review will be found to apply.[12] One is for constitutional questions concerning "*the relationship between the legislature and the other branches of the state*".[13] Another is for general questions of law that are of central importance to the legal system as a whole.[14]

16. The Appellants maintain that the issues raised in this case qualify for both of these exceptions; accordingly, correctness review applies. The determination of (a) the proper scope of a prime minister's power to advise a governor general to prorogue Parliament; and (b) whether the former Prime Minister's advice to the Governor General in this case fell within that scope, are clearly concerned with the relationship between the executive and legislative branches of government. One struggles to conceive of more "*constitutional*" questions than these.

17. Moreover, the issues raised in this case are also general questions of law that are of central importance to the legal system as a whole and which require a final and determinate answer.[15] If this Court concludes that the former Prime Minister *did* overstep his authority as alleged, then the resulting situation was constitutionally unacceptable. An eleven-week shutdown of Parliament by the government, without lawful authority, represents a grave threat to democracy, our Parliamentary system and the rule of law itself, and must not be repeated.

The Application Judge Failed to Identify Correctness as the Appropriate Standard of Review

18. The Appellants submit that the Application Judge failed to clearly identify that correctness

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[10] *Auer v. Auer*, 2024 SCC 36 at paragraph 21 (SCC).
[11] *Vavilov*, paragraph 16.
[12] *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at paragraphs 42-44**.**
[13] *Vavilov*, paragraphs 55-56.
[1414] *Vavilov*, paragraphs 58-62.
[15] *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22, at paragraphs 62-64**.**

was the appropriate standard of review. At first, he appeared to identify that correctness was the appropriate standard at paragraphs 148-150 of the Decision. However, he proceeded to distance himself from *Vavilov* at paragraph 151, where he observed that in *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*,[16] this Court held that there was no need to determine the standard of review because the question before the Court in that case was of a binary nature (i.e. whether Canada owed the appellant First Nation a duty to consult, or not). The Application Judge appears to have concluded that the same reasoning was applicable in this case. He thus failed to clearly identify correctness as the appropriate standard of review.

19. It was inappropriate for the Application Judge to adopt this Court's reasoning in *Hupacasath*, for the following reasons. **First**, this Court's conclusion on standard of review in *Hupacasath* has since been superseded by *Vavilov*, which instructs that reasonableness is presumed to be the standard, unless correctness is "*…required by a clear indication of legislative intent or by the rule of law*." The Application Judge failed to adopt the approach required by *Vavilov*, which is applicable to all administrative decisions, from the routine to life-altering, and includes matters of "high policy" on the one hand and "pure law" on the other.[17]

20. **Second**, even if the *Hupacasath* approach described by this Court at paragraph 74 is still good law (a proposition the Appellants reject), the Application Judge misapplied and misdirected himself with respect to it.

21. In *Hupacasath*, the issue was binary: either a duty to consult existed, and the only reasonable outcome was for the government to comply with its duty, or not. The government's decision rose or fell on that binary point alone. But the duty to consult, as well as what triggers it,

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[16] *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4 at paragraph 73 (FCA) [*Hupacasath*].
[17] *Auer v. Auer*, 2024 SCC 36 at paragraph 21 (SCC).

is well-established in Canadian law, as noted by the *Hupacasath* court. It was a straightforward exercise in Hupacasath for this Court to answer, on the facts of that case, the "binary question" of whether a duty to consult existed or not.

22. In contrast, the prorogation prerogative has never been considered by a Canadian court. Thus, before the Application Judge could have considered the corresponding "binary question" in this case (i.e. whether the former Prime Minister's decision was *ultra vires*), it was necessary to determine several *non-binary* questions such as the scope of the prorogation prerogative; the circumstances under which a prime minister can validly advise prorogation; and the legal test (if any) by which a prime minister's decision to advise prorogation can be assessed. These non-binary issues thus distinguish this case from *Hupacasath*, because in that case the law of consultation was settled; no such similar questions needed answering, and no legal test needed to be devised.

23. The Application Judge thus erred when he adopted *Hupacasath*'s reasoning without considering the non-binary issues before the Court. To the extent the Appellants cited *Hupacasath*, its relevance was predicated on the assumption that the Court would answer the non-binary issues first. Ultimately, the Application Judge refused to define the scope of prorogation, or adopt a test to determine whether the former Prime Minister exceeded his authority. Thus, the Application Judge was wrongly guided by *Hupacasath*.

24. **Third**, the Application Judge erred by importing deference into his standard of review analysis. At paragraphs 154-155 of the Decision, he held 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…*" and that "*…the Court must remain mindful of the tenet that each branch of the government must refrain from exercising 'undue interference' with the other*".

25. The Appellants accept these general principles. But the Application Judge was wrong to consider that they had any place in the choice of standard of review analysis. As discussed above, if the Application Judge had properly determined that *Vavilov* correctness review applied, then no deference would have been owed to any aspect of the decision under review.

26. On the other hand, even if the Application Judge was permitted to resort to the approach followed by this Court in *Hupacasath*, then he still ought to have realized that deference was inappropriate because the Application Judge was first being asked to fulfill its constitutional duty of "*supervising exercises of power by the executive branch within the separation of powers framework, which extends to the Crown's prerogative powers*".[18] He was being asked to delineate the scope of the prorogation prerogative. With respect, deference plays no role in such circumstances, as the Application Judge himself correctly noted at paragraph 100 of the Decision.[19]

27. In *Hupacasath*, this Court showed deference to the lower court's finding on whether a duty to consult existed. Since the legal test was established, this Court found no reason to interfere. However, in the case at bar, the Application Judge had to first determine the scope of the prerogative before proceeding to determine whether the former Prime Minister's decision to advise prorogation fell within that scope. No deference ought to be given in answering this question, as it is a question that had never been asked or answered before.

28. Accordingly, the Application Judge misguided himself when he imported deference in arriving at his decision, as he indicated at paragraph 154-155 of the Decision and the approach taken by this Court in *Hupacasath*. Instead, he should have concluded that no deference ought to

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[18] Decision, paragraph 84.
[19] Decision, paragraph 100.

be given when determining the scope of the prorogation prerogative. His overemphasis on deference improperly coloured his analysis on whether to adopt the *Miller* Test.

D. THE APPLICATION JUDGE FAILED TO APPLY THE PROPER STANDARD OF REVIEW BELOW

29. As argued above, the Application Judge ought to have selected the correctness standard of review below. He did not; thus, he naturally did not apply that standard either. Accordingly, this Court's *de novo* analysis of this matter should proceed on a standard of review of correctness.

30. Alternatively, should this Court be of the view, despite the Appellants' contention to the contrary, that the Application Judge properly adopted the "*Hupacasath* approach", and/or that that approach ought to be confirmed by this Court as the proper standard of review, then this Court must undertake its *de novo* analysis premised, following *Hupacasath*, on the principle that "*the only acceptable and defensible outcome available*" to the Respondent in this case was/is "*compliance with the law*" concerning the decision to advise prorogation.

31. And any analysis whose aim is to determine whether the Respondent complied with the law concerning the decision to advise prorogation is meaningless without first ascertaining what that law actually *is*. One cannot decide whether a prime minister acted *ultra vires* his or her authority to advise prorogation until one first defines the *scope* of that authority. Thus, whether this Court's *de novo* analysis proceeds on the *Vavilov* correctness standard, or under the "*Hupacasath* approach", it must first determine the scope of the prorogation prerogative. Only then can there be a meaningful analysis of whether the former Prime Minister's decision to advise prorogation in this case was *ultra vires*, or not. The Appellants thus disagree with the Application Judge's finding at paragraphs 89-90 of the Decision that it was unnecessary to "*make general pronouncements about the proper scope of 'a' Prime Minister's power to advise 'a' Governor General to prorogue Parliament*". That conclusion demonstrates flawed reasoning on the

Application Judge's part; in reality, such "*general pronouncements*" had to have been made before a coherent review of the former Prime Minister's decision to prorogue could be undertaken.

A Prime Minister's Power to Advise Prorogation is Limited

32. The Appellants submit that a prime minister's power to advise a governor general to prorogue Parliament, while broad, is still limited.[20] This is so in light of various considerations, both contextual and constitutional.

Contextual Considerations

33. Several contextual factors suggest that a prime minister does not have untrammeled power to advise a governor general to prorogue Parliament.

34. **First**, there can be no doubt that at the time of the instant prorogation, Canada was facing an unprecedented challenge to its economic security and sovereignty. President Trump had imposed a 25% tariff on all goods (10% on "energy and energy related products") entering the United States from Canada, with potentially ruinous consequences.[21] While the government responded in kind, this is "beside the point".[22] There was no opportunity for Parliament to meaningfully address the tariffs imposed by the United States until March 29, 2025.

35. **Second**, at the time of the prorogation, there were good reasons to believe that the current federal government had lost Parliament's confidence. The opposition parties had repeatedly signaled their intention to vote in favour of a non-confidence motion at the earliest opportunity.[23]

36. **Third**, while the former Prime Minister lamented the "*paralysis*" in Parliament on January 6, 2025, he did not acknowledge that it was due to the government's refusal to disclose documents

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[20] *Roncarelli v. Duplessis,* [1959] S.C.R. 121 at page 140 (SCC), 1959 CarswellQue 37 at paragraph 41.
[21] MacKinnon Affidavit, paragraph 69, **AB, Tab 6B,** page 192.
[22] See the Application Judge's preliminary ruling granting an expedited hearing: *MacKinnon v. Canada (Attorney General)*, 2025 FC 105 at paragraph 57 (FC).
[23] MacKinnon Affidavit, paragraphs 59-67, **AB, Tab 6B**, pages 189-192.

in connection with the Auditor General's Report 6. As discussed above, Report 6 addresses findings made concerning "*significant lapses in [SDTC's] governance and stewardship of public funds*".[24] Parliament is entitled to investigate and hold the government to account; yet, the government refused to comply, and avoided accountability through prorogation.

37. Parliament was prorogued for *11 weeks*, its Members unable to fulfill their constitutional functions of overseeing, supervising and assisting the government with its response to tariffs imposed by the United States. Members of Parliament were unable to use the tools at their disposal: considering and adopting spending bills, other legislation, motions and petitions; voting, including on confidence motions; participating in oversight and other committees; making inquiries during question periods; raising crucial issues and asking questions in committee; and holding debates.[25] Parliament was prevented from considering the *United States Surtax Order (2025)*, as required by s. 53(4) of *Customs Tariff*. Parliament was also unable to take steps to consider revoking that order pursuant to its power under ss. 19 and 19.1 of the *Statutory Instruments Act*.[26]

38. Although the government proposed a $1.3 billion plan to "*strengthen border security and our immigration system*" in December 2024 in response to the tariffs, Parliament was unable to consider, adopt or fund the government's plan since it was not in session.[27]

39. Although the Prime Minister provided his stated justification for the prorogation,[28] the Appellants ask whether it was credible or appropriate, or whether it might have been made for other reasons unrelated to those stated. Significantly, (a) there was no explanation given for why

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[24]MacKinnon Affidavit, paragraphs 41-53 , **AB, Tab 6B,** pages 184-188.
[25] MacKinnon Affidavit, paragraph 19, **AB, Tab 6B,** page 179; Lavranos Affidavit, paragraph 14, **AB, Tab 6C,** page 578.
[26] *Customs Tariff,* S.C. 1997, c.36, s.53. See also *Statutory Instruments Act*, RSC 1985, c. S-22, ss 2(1), 19 and 19.1.
[27] MacKinnon Affidavit, paragraph 90 and Exhibit "TT", **AB, Tab 6B,** page 199.
[28] MacKinnon Affidavit, paragraphs 37-38 and Exhibits "A" and "B", **AB, Tab 6B**, pages 183-184.

an election could not be called right away so as to provide the stated Parliamentary "reset" in a more democratic and effective way; (b) there was no explanation for why a prorogation of *eleven weeks* (or more) is necessary to achieve such a "reset"; and (c) while the prorogation provided the LPC an opportunity to select a new leader, *should* that be accepted as a "reasonable" basis for prorogation? After all, Parliament could still have sat and the House of Commons could have still debated Canada's response to the tariffs regardless of who led the LPC, or whether the LPC's internal selection process had been completed.

40. Simply put, it is for Parliament to oversee and supervise the government; it is not for the government or the LPC to oversee and supervise Parliament. Any attempt on the government's part to do so would be constitutionally unacceptable. While a prime minister does have the power to advise the Governor General to prorogue Parliament, such power cannot be used in the absence of reasonable justification. It cannot be used to enable the government to "ride herd" over Parliament. That is tyranny, which must be firmly rejected. In *Tennant*, Justice Stratas wrote:

> 23 "L'état, c'est moi" and "trust us, we got it right" have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them — the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on — must obey the law: [citations omitted].
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> 24 Tyranny, despotism and abuse can come in many forms, sizes, and motivations: major and minor, large and small, sometimes clothed in good intentions, sometimes not. Over centuries of experience, we have learned that all are nevertheless the same: all are pernicious. Thus, we insist that all who exercise public power — no matter how lofty, no matter how important — must be subject to meaningful and fully independent review and accountability. [29] [Emph. added.]

Constitutional Considerations

41. The Appellants further submit here, as they did before the Application Judge, that a number of constitutional considerations lend further support to their position.

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[29] *Canada (Citizenship and Immigration) v. Tennant,* 2018 FCA 132 at paragraphs 23-24 (FCA).

Sections 3 and 5 of the Charter

42. Section 5 of the *Charter* provides:

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

43. Some commentators argue that s. 5 operates as the only check on a prime minister's power to advise prorogation and that, apart from a prohibition on proroguing Parliament for 365 days or longer, there are no other limits on the power.[30]

44. The Appellants disagree. **First**, the very fact that s. 5 exists demonstrates that a prime minister's discretion to advise prorogation is not absolute. Prorogation is not universally available at his or her slightest whim. At a minimum, s. 5 provides that there are limits to when a prorogation must *end* (i.e., 365 days). **Second**, s. 5, provides no guidance on when, and under what circumstances, a prorogation can lawfully *begin*. That is an altogether different question.

45. Section 3 provides, provides:

> **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.

46. The purpose of the right to vote in s. 3 is the right to "*effective representation*".[31] The Appellants thus submit that these principles emanating from s. 3 must also inform a prime minister's power to advise prorogation. Given that citizens are entitled to be represented and have a voice in Parliament, and to have a meaningful way to bring their grievances to the government's attention, a prime minister's power to advise prorogation cannot be exercised in a manner that

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[30] Leonid Sirota, "Mulling Over Miller" *Double Aspect* (28 October 2019), online:<https://doubleaspect.blog/2019/10/28/mulling-over-miller/>; Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Scarborough: Thomson Carswell, 2007) at §9:21.

[31] *Reference re Provincial Electoral Boundaries*, [1991] 2 SCR 158 at paragraphs 26 and 39 (SCC). See also *Haig v. R.*, [1993] 2 SCR 995, 1993 CarswellNat 2353 at paragraph 61; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37 at paragraphs 25-30 (SCC) [*Figueroa*]; *Harper v. Canada (Attorney General)*, 2004 SCC 33 at paragraph 68 (SCC) [*Harper*].

undermines their right to effective representation.

Constitutional Principles

47. Unwritten constitutional principles also suggest that a prime minister's power to advise prorogation cannot be unlimited. In the process of constitutional adjudication, courts may have regard to unwritten postulates which form the very foundation of the Constitution of Canada.[32] Constitutional principles can assist in the interpretation of constitutional provisions and may give rise to substantive legal obligations.[33] In the *Manitoba Language Rights Reference*, the Supreme Court of Canada commented on its willingness to use unwritten constitutional principles to interpret the Constitution, at paragraphs 65-66.[34] Indeed, in that case, the Court directly applied the principle of the rule of law to create a rule whereby it suspended its declaration of invalidity in order to give the Manitoba legislature time to translate all of its statutes into French.[35]

48. Parliamentary sovereignty,[36] parliamentary accountability (responsible government),[37] the rule of law[38] and the separation of powers[39] are all recognized constitutional principles in Canada. The common threads running through the authorities on all four of these unwritten constitutional principles are as follows:

a) *Parliament*, not the executive, is supreme. The executive cannot fetter Parliament's law-making power;[40]

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[32] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paragraph 54 (SCC) [*Secession Reference*]. See also *Re Manitoba Language Rights*, [1985] 1 SCR 721 at paragraph 70 (SCC) [*Reference re Manitoba Language Rights*].
[33] *Democracy Watch v. Canada (Prime Minister)*, 2023 FCA 41 at paragraph 21 (FCA).
[34] *Reference re Manitoba Language Rights,* at paragraphs 65-66 (SCC).
[35] *Reference re Manitoba Language Rights,* at paragraph 84 (SCC). See also *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at paragraphs 55-56 (SCC); *Canadian Pacific Railway v. Saskatchewan*, 2024 SKKB 157 at paragraphs 91-92 (SKKB).
[36] *Canada (Attorney General) v. Power*, 2024 SCC 26 at paragraph 48 (SCC) [*Power*].
[37] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at paragraph 28 (SCC).
[38] *Reference re Senate Reform*, 2014 SCC 32 at paragraphs 25-26 (SCC).
[39] *Power* at paragraph 48,.
[40] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paragraphs 54-60 (SCC) [*Pan-Canadian Securities*]; *Power* at paragraphs 48-49.

b) to maintain its authority to govern, the government must remain accountable to, and retain the confidence of, Parliament;[41]

c) the rule of law is intended to shield citizens from arbitrary state action. In order to protect the rule of law, and prevent arbitrary conduct, courts have a constitutional duty to judicially review actions of the executive;[42] and

d) each branch of government must refrain from unduly interfering with the others.[43].

49. These fundamental constitutional principles have emerged over time, following centuries of struggle between the Crown and the people represented in Parliament. Through these historical events, the Crown's powers were made subject to Parliament's laws.[44]

50. In *Ross River Band v. Canada*, the YKCA observed that "*prerogative is the residual executive power of the Crown, exercised by convention at the direction of the Prime Minister and the Cabinet*".[45] The Court further wrote, citing various scholars:

> As these commentators make clear, the prerogative is not only residual, but shrinking: it is the last vestige of government by monarchy, and in the modern days of representative democracy it is on its way out. In my view, courts should be

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[41] *Alford v. Canada (Attorney General)*, 2024 ONCA 306 at paragraph 1 (ONCA); *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at paragraph 28 (SCC); *Schmidt v. Canada (Attorney General)*, 2018 FCA 55 at paragraph 85 (FCA); *Secession Reference* at paragraph 68; *TransAlta Corporation v. Alberta (Environment and Parks)*, 2024 ABCA 127 at paragraph 39 (ABCA).

[42] *Secession Reference* at paragraph 70; *Ontario (Attorney General) v. G*, 2020 SCC 38 at paragraph 96 (SCC); *Roncarelli v. Duplessis*, [1959] SCR 121 (SCC); at pages 140-142; *Power* at paragraph 54; *Reference re Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11 at paragraph 277 (per Cote J., in dissent); *Mission Institution v. Khela.*, 2014 SCC 24 at paragraph 37 (SCC); *Constitution Act, 1982*, being Schedule B to the *Canada Act*, *1982* (UK), 1982, c.11, including the *Canadian Charter of Rights and Freedoms*, preamble.

[43] *Pan-Canadian Securities* at paragraphs 54-60 (SCC); *Power* at paragraphs 50; *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at paragraph 3 (SCC); *Ontario v. Criminal Lawyer's Association of Ontario*, 2013 SCC 43 at paragraphs 27-31 (SCC).

[44] *Georgia Strait Alliance v. Canada (Minister of Fisheries & Oceans)*, 2012 FCA 41 at paragraphs 71-72 (FCA). See also *Ontario Federation of Anglers and Hunters v. Ontario (Minister of Natural Resources and Forestry)*, 2016 ONSC 2806 at paragraph 46 (Div. Ct.); *Khadr v. Canada (Prime Minister)*, 2010 FC 715 at paragraph 59 (FC); *Miller II*, paragraph 41.

[45] *Ross River Band v. HMTQ and Yukon,* 1999 BCCA 750 at paragraph 57 (YKCA) [*Ross River Band*].

> extremely cautious about finding, creating or expanding prerogative powers, especially in areas of high political and social importance…[46]

51. In light of all of the above considerations, a prime minister's power to advise a Governor General to prorogue Parliament cannot be unlimited. Such a notion seriously undermines all of the hard-won principles and protections developed through decades of jurisprudence. To conclude otherwise would be to stand those principles and protections on their heads.

52. Of course, this conclusion naturally gives rise to another question: **what, then, *is* the limit on a prime minister's power to advise a Governor General to prorogue Parliament?** The Appellants submit that *Miller II* provides the answer.

***Miller II* should be recognized in Canada**

53. In *Miller II*, in factual circumstances similar to those in this case, the UKSC declared that Prime Minister Johnson's advice to Her Late Majesty to prorogue Parliament was unlawful, and that Parliament had not been prorogued at all.[47] The same result necessarily follows in this case.

54. In the course of its decision, the UKSC held that when a Prime Minister advises the sovereign to prorogue, he or she has a "*constitutional responsibility, as the only person with power to do so, to have regard to all relevant interests, including the interests of Parliament*".[48]

55. Lady Hale and Lord Reed describe a three-part test at paragraphs 50-51: (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"?

56. In summary, a decision to prorogue Parliament (or to advise the monarch to prorogue

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[46] *Ross River Band* at paragraph 60 (YKCA).
[47] *Miller II* at paragraphs 62 and 70.
[48] *Miller II* at paragraph 30.

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.[49]

57. A Canadian prime minister's power to advise a governor general to prorogue Parliament should be subject to the same modest, desirable and reasonable guardrails as is that of a British prime minister. For the following reasons, the Application Judge ought to have adopted the UKSC's analysis and conclusions in *Miller II*, and this Court ought to do so now.

58. **First**, the preamble to the *Constitution Act, 1867* provides Canada with a "Constitution similar in Principle to that of the United Kingdom".[50] In *Power*, the Supreme Court of Canada expressly stated that by virtue of the existence of the preamble, Crown prerogatives as well as other unwritten rules (constitutional conventions and parliamentary privilege) "*became unwritten components of the Canadian Constitution*".[51] And earlier, in *Re: Resolution to Amend the Constitution*,[52] the SCC also stated at paragraph 110:

> A preamble, needless to say, has no enacting force, but certainly it can be called in aid to illuminate provisions of the statute in which it appears. Federal union "with a Constitution similar in Principle to that of the United Kingdom" may well embrace responsible government and some common law aspects of the United Kingdom's unitary constitutionalism, such as the rule of law and Crown prerogatives and immunities... Legislative changes may alter common law prescriptions, as has happened with respect to Crown prerogatives and immunities.[53]

59. In *Proulx v. Québec (Procureur general)*, at paragraphs 88-89,[54] the Supreme Court of Canada also quoted Professor Archambault with approval, as follows:

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[49] *Miller II*, at para. 50.
[50] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (UK), preamble.
[51] *Power*, paragraphs 269-270. See also *Cirillo v. Ontario*, 2019 ONSC 3066 at paragraph 10 (SCJ).
[52] *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753 (SCC).
[53] *Ibid.*, paragraph 110.
[54] *Proulx v. Québec (Procureur general)*, 2001 SCC 66 at paragraphs 88-89 (SCC).

> 88 According to H. Immarigeon, *La responsabilité extra-contractuelle de la Couronne au Canada* (l965), at p. 51, quoted by Professor Archambault in his article, *supra*, [translation] "whenever a case that involves prerogative must be decided, we must look to the principles of English law, having regard, however, to the Canadian statutory provisions that may have affected them, whether by amending them or by eliminating them".
>
> 89 Professor Archambault goes on to say (at pp. 519-20):
>
> [TRANSLATION]
>
> The English law of prerogative was naturally incorporated in Canadian law at the time of the Conquest in 1760. Her Majesty's rights and privileges could then be exercised in the Colony in the same way as in the mother country, unless they were eliminated or modified by local legislation. A century later, the preamble to the *Constitution Act, 1867* expressed the desire of the participating provinces to be federally united "with a Constitution similar in Principle to that of the United Kingdom". The House of Lords later held that the prerogative applied for the benefit of the provinces as well as the central government. Quebec had expressly recognized this legal heritage in art. 9 *C.C.L.C.*: "No act of the legislature affects the rights or prerogatives of the Crown, unless they are included therein by special enactment." Accordingly, absent legislation to the contrary, Quebec civil law as codified in 1866 did not run counter to the prerogative in public law. Thus in 1857 the Crown in Quebec enjoyed the prerogatives found in English public law, and more specifically immunity from prosecution and from proceedings in tort. The two prerogatives, which are separate but related, have been eroded, little by little, by the legislature and courts of Quebec together, and have finally become completely blunted. This metamorphosis of the law of the Crown in Quebec was accomplished on the foundation of British law.

60. Thus, the prorogation prerogative was received in Canada from the United Kingdom. It is therefore reasonable to look to British jurisprudence for guidance on what the scope of that prerogative *is*. As noted by the Ontario Court of Appeal in *Black*:

> 26 The prerogative is a branch of the common law because decisions of courts determine both its existence and its extent. In short, the prerogative consists of "the powers and privileges accorded by the common law to the Crown." Peter Hogg, *Constitutional Law in Canada* Loose-Leaf Edition (Toronto: Carswell, 1995) at 1.9. See also *Case of Proclamations* (1611), 77 E.R. 1352 (Eng. K.B.) . The Crown prerogative has descended from England to the Commonwealth. As Professor Cox has recently observed, "it is clear that the major prerogatives apply throughout the Commonwealth, and are applied as a pure question of law". N. Cox, *The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity*, 14 Australian Journal of Law and Society (1998-

99) 15 at 19.'[55]

61. **Second**, *Miller II* was a unanimous decision from the UKSC, a highly esteemed court. Canadian courts frequently turn to British jurisprudence for guidance; there is no danger in this case were the Court to do likewise.[56] **Third**, in *Miller II*, the Court was faced with very similar factual circumstances to those in this case. In *Miller II*, Prime Minister Johnson advised Her Late Majesty to prorogue Parliament at a similarly critical juncture in his country's history. **Fourth**, the Court in *Miller II* based its decision on the constitutional principles of Parliamentary sovereignty and Parliamentary accountability (responsible government), as well as the "modern constitutional practice" of the Crown (governor general in Canada) exercising the prorogation power only on the advice of a prime minister. These principles are equally well-known in Canada and equally applicable in this case.[57]

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[55] *Black*, paragraph 26. See also *Delivery Drugs Ltd. v. Ballem*, 2007 BCCA 550 at paragraph 42; *Ross River Dena Council v. Canada*, 2002 SCC 54 at paragraph 54; *Democracy Watch v. British Columbia (Lieutenant Governor)*, 2023 BCCA 404 at paragraph 31 (BCCA). See also *P.S. Knight Co. Ltd. v. Canadian Standards Association*, 2018 FCA 222 at paragraph 121 (FCA); *Agricultural Credit Corp. of Saskatchewan v. Kozak*, 1991 CanLII 7747 at paragraph 4 (KB); *R. v. Bank of Nova Scotia* (1885), 11 SCR 1 at page 10 (SCC) (cited with approval in *Household Realty Corp., v. Canada (AG)*, [1980] 1 SCR 423 at 426 (SCC)).

[56] see *Nielsen v. Kamloops (City),* [1984] 2 S.C.R. 2 at pages 10-11, (SCC), adopts test in *Anns v. Merton London Borough Council,* (1977), [1978] A.C. 728 (UKHL). See also *Odhavi Estate v. Woodhouse,* 2003 SCC 69 at paragraph 46, (SCC); *Childs v. Desormeaux,* 2006 SCC 18 at paragraphs 11-12, (SCC). See also, *R v. Clayton,* 2007 SCC 32 at paragraph 22,, discussion of the adoption of the *R. v. Waterfield,* [1963] 3. All E.R. 659 (Eng. CA) test, first adopted in *R. v. Stenning,* [1970] S.C.R. 631 at page 636 (SCC), 1970 CarswellOnt 196 at paragraph 18.

[57] Nicholas A. MacDonald and James W.J. Bowden, "No Discretion: On Prorogation and the Governor General", (2011) 34:1 Cd. Parl. Rev 7; see also Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Scarborough: Thomson Carswell, 2007) at §9:1. Definition of responsible government, §9:3. Law and Convention, §9:16. The principle; See also *Black v. Canada (Prime Minister)*, 2001 CanLII 8547, 2001 CarswellOnt 1672 (ONCA), paragraph 31,; *Galati v. Canada (Governor General)*, 2015 FC 91 at paragraph 46 (FC); *Onion Lake Cree Nation v. Canada*, 2017 FC 1049 at paragraph 28 (FC); *Patriation Reference*, [1981] 1 SCR 753 at page 857, 1981 CarswellMan 110 at paragraph 375 (SCC); *Reference re Bill C-7 concerning the reform of the Senate*, 2013 QCCA 1807 at paragraphs 53-54 (QCCA).

62. **Fifth**, *Miller II* already has a foothold in Canadian jurisprudence.[58] It has also been cited with approval in New Zealand.[59] **Sixth**, there is considerable academic commentary in support of the Court's analysis and decision in *Miller II*.[60]

The Prime Minister's Decision in this Case was *Ultra Vires*

63. Applying the analytical framework developed in *Miller II*, the Decision in this case must be set aside. In *Miller II*, the Court recognized at paragraph 30 that when a prime minister advises the sovereign to prorogue Parliament, s/he has a constitutional responsibility, "*as the only person with power to do so, to have regard to all relevant matters, including the interests of Parliament*".[61]

64. The Court in *Miller II* also held that a prime minister must provide "reasonable justification" for prorogation of Parliament. In this case, the former Prime Minister failed.

65. Prorogation has important practical consequences. As described by Lady Hale and Lord Reed at para. 2 of *Miller II* "*[w]hile Parliament is prorogued, neither House can meet, debate and pass legislation. Neither House can debate Government policy. Nor may members of either House*

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[58] *Power*, at paragraph 48,; *Democracy Watch v. Prime Minister*, 2023 FCA 41 at paras. 30-34 (FCA); *Democracy Watch v. British Columbia (Lieutenant Governor)*, 2023 BCCA 404 at paragraphs 82-84 (BCCA); *Democracy Watch v. Premier of New Brunswick*, 2022 NBCA 21 at paragraph 29 (NBCA); and *Canadian Federation of Students v. Ontario*, 2019 ONSC 6658 at paragraphs 82-85 and 95 (Div. Ct.).

[59] See, e.g., *NZ Council of Licensed Firearms Owners Inc v Minister of Police,* [2020] NZHC 1456 at paragraphs 34 and 37 (NZHC); *Timaru District Council v Minister of Local Government,* [2023] NZHC 244 at paragraphs 101-107 (NZHC).

[60] Paul Craig, "The Supreme Court, Prorogation and Constitutional Principle", Oxford Legal Research Paper No. 57/2019; Mark Elliot, "Constitutional Adjudication and Constitutional Politics in the United Kingdom: the Miller II Case in Legal and Political Context", (January 2021) University of Cambridge Legal Studies Research Paper Series no. 3/2021; Alison Young, "Deftly guarding the constitution", (September 29, 2019), Policy Exchange: Judicial Power Project, online: <https://judicialpowerproject.org.uk/alison-young-deftly-guarding-the-constitution/>,; Nick Barber, "Constitutional hardball and justified development of the law", (September 29, 2019), online: < https://judicialpowerproject.org.uk/nick-barber-constitutional-hardball-and-justified-development-of-the-law/>; Michael Detmold, "The Monarch in the Room", U.K. Constitutional Law Association, (October 2, 2019) online: < https://ukconstitutionallaw.org/2019/10/02/michael-detmold-the-monarch-in-the-room/>.

[61] *Miller II*, at paragraph 30.

ask written or oral questions of Ministers. They may not meet and take evidence in committees."

66. As in *Miller II*, the House of Commons – which includes all parties and members – has the "right to have a voice" with respect to significant changes in Canada's economic relationship with the United States, as well as any new and significant spending decisions.

67. The Appellants ask whether the former Prime Minister's remarks on January 6, 2025 demonstrate that he took the legitimate interests of Parliament, or other constitutional actors such as the Crown, as represented by the Governor General, into account before making the Decision. Did he provided "reasonable justification" to the Governor General, or did his explanation demonstrate that he took other, unrelated interests (e.g., those of the LPC), into account?

68. For example, the Decision removed the opposition parties' ability to table a non-confidence motion and also Parliament's ability to oversee the government with respect to both the Auditor General's Report 6 and the current trade war with the United States.

69. The Decision reveals no other interests taken into account. Not those of Parliament, which is unable to fulfill its "*constitutional functions as a legislature, and as the body responsible for the supervision of the executive*",[62] at the exact moment of a potentially devastating trade war. Not those of the Canadian public either, who bore the brunt of the tariffs and whose elected representatives were forced to sit on the sidelines.

70. The former Prime Minister also failed to take the Crown's interests, represented by the Governor General, into account. The Governor General has a constitutional duty to ensure that the government of the day commands the confidence of the House.[63] By making the Decision, the former Prime Minister ignored the Governor General's duty in favour of his and his party's

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[62] *Miller II*, at paragraph 50.
[63] The Governor General of Canada, "Constitutional Duties" (retrieved February 1, 2025), online: < https://www.gg.ca/en/governor-general/role-and-responsibilities/constitutional-duties>.

interests.

The Decision did not meet the *Miller* Test

71. Following the *Miller* Test, **first**, the Decision "*had the effect of frustrating and preventing Parliament's ability to carry out its constitutional functions*". Parliament was unable to oversee the government and take whatever legislative action it might consider appropriate, which could include (a) taking action under s. 53(4) of the *Customs Tariff* and/or ss. 19 and 19.1 of the *Statutory Instruments Act*; (b) passing other legislation, including legislation implementing the government's $1.3 billion border security plan, to (c) tabling a motion of non-confidence. What steps Parliament might have taken are speculative and were ultimately up to Parliament. The point is that Parliament was prevented from taking any steps at all, nor could it supervise the government.

72. The Appellants also repeat and rely on the above points raised at paragraphs 33 – 39, in further support of their contention on this point.

73. **Second**, as discussed above, the Prime Minister failed to provide a "*reasonable justification*" for making the Decision. Following *Miller II*, the Appellants ask whether the Prime Minister, in giving advice to the Governor General, did so in keeping with his constitutional responsibility,[64] or whether the Prime Minister's Decision might have been made for other reasons unrelated to those stated. In any event, there was no way for this Court to conclude, on the strength of the evidence, that there was "*any reason – let alone a good reason*" to advise prorogation.[65]

74. **Third**, the situation in this case was "*sufficiently serious*" to justify the Court's intervention in this matter, as did the UKSC in *Miller II*. There is an obvious parallel between the impending "Brexit" crisis in *Miller II* and a trade war with the United States in this case. Both crises were of sufficient magnitude as to require judicial intervention.

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[64] *Miller II*, at paragraph 60.
[65] *Miller II*, at paragraph 61.

75. In fact, the situation in this case may well have been much more acute and compelling than in *Miller II*, if in fact the Decision was made by the Prime Minister, not simply for "no good reason" (as was the case in *Miller II*), but rather for inappropriate reasons.

The Application Judge Improperly Declined to Adopt the *Miller* Test

76. The Application Judge declined to adopt the *Miller* Test, for the reasons outlined at paragraphs 162-169 of the Decision.[66] He held, at paragraph 169, "*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 [*Miller *Test]*."[67]

77. For the following reasons, the Application Judge's basis for refusing to adopt the *Miller* Test was flawed. **First**, the Application Judge was misguided by the idea that *Miller II* "*was based on a constitutional framework that differs in some important respects from our own*".[68] At paragraph 164, the Application Judge writes:

> 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 [citations omitted]. 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.

78. In reality, the fact that Canada has a written constitution, whereas the United Kingdom does not, is immaterial to the issues raised on this application. It is true that the Canadian constitution differs from that of the United Kingdom in two important ways: (a) Canada's federal structure, and (b) the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, both of which place limits on Parliament's ability to make laws.[69] However, nothing in this application

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[66] See the Decision, paragraphs 162-169.
[67] See the Decision, para 169.
[68] Decision, paragraph 163.
[69] *Pan-Canadian Securities*, paragraphs 56-58.

engages either of those limits.

79. Rather, this case deals with the scope and application of the prorogation prerogative, which is not expressly found anywhere in the written Canadian Constitution. Its content, therefore, is the same as it is in the United Kingdom. This must be the case given that the preamble to the *Constitution Act, 1867*, expressly states the "*desire*" of the Provinces of Canada, Nova Scotia and New Brunswick "*to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a* ***Constitution similar in Principle to that of the United Kingdom***" [Emphasis added.].[70] The Appellants also rely on the cases cited above at paragraphs 58-59 (i.e. *Power*, *Proulx*, *Re: Resolution to Amend the Constitution*, etc.).

80. Moreover, the Application Judge's comments at paragraphs 216-227 of the Decision are also flawed. His reference to *Toronto (City) v. Ontario*,[71] and his comments concerning the use that may be made of unwritten constitutional principles in constitutional adjudication,[72] were not germane to the issues raised in the application and to the reasons for which the Appellants were relying on them. For one thing, *Toronto (City)* was about using unwritten constitutional principles to *invalidate legislation*, which has nothing to do with the issues raised in this case.

81. Furthermore, the Appellants never suggested that unwritten constitutional principles can be used, by themselves, to *invalidate executive action*. The Application Judge mused that this might not be permissible either. He never actually decided the point,[73] but in any event, the Appellants were not even trying to use unwritten constitutional principles to "*invalidate executive action*". Rather, they have raised them to underscore the similarities between the principles

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[70] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (UK), preamble.
[71] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (SCC) [*Toronto (City)*].
[72] *Ibid*., paragraphs 49-63.
[73] Decision, paragraph 215.

underlying the constitutional orders in both the United Kingdom and Canada: in reality, the two orders are identical when it comes to the scope of the prorogation prerogative. The Appellants' reference to unwritten principles was intended to demonstrate that the *Miller* Test must be adopted in Canada. Since our two countries share a common constitutional tradition and virtually identical constitutional principles, is no compelling reason in law to exclude the incorporation of the *Miller* Test into Canadian law.

82. **Second**, the Application Judge's reference to and description of "*the unique legislative and factual circumstances of* Miller II" at paragraph 165 of the Decision was also misguided. The factual circumstances at play in *Miller II* were admittedly extraordinary; but that does not mean that the situation in Canada at time of the prorogation was any less worthy of judicial scrutiny.

83. At paragraph 165, the Application Judge also noted the differences in the lengths of average UK prorogations, as compared with Canadian prorogations. This also was not a valid reason for rejecting the *Miller* Test.[74] The *Miller* Court did not consider the *length* of the subject prorogation in that case, but rather its *timing*, as it stymied Parliament's ability to respond to Brexit.[75]

84. In any event, however, the Application Judge erred in law by taking into consideration the "*unique and factual circumstances of* Miller II" at all as germane to the issue of admitting the *Miller* Test into Canadian law. Consideration of the factual circumstances in existence in Canada might (and should) have been considered by the Application Judge in his eventual application of the *Miller* Test to the case at bar; however, it was not proper for him to base his refusal to recognize the *Miller* Test because the factual circumstances here in Canada were different than those in the United Kingdom. That cannot be right; either the prorogation prerogative has limits, or it does not.

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[74] Decision at paragraph 165.
[75] *Miller II* at paragraphs 55-56.

If it does, then those limits, whatever they may be, cannot be arbitrarily determined on a case-by-case basis depending on the underlying facts of a given case. Rather, they must be determined once and for all, as they were in *Miller II*. Naturally, whether a given decision to prorogue falls within any such limits is another question entirely.

85. The Application Judge's flawed reasoning continues at paragraph 169, where he subsequently goes to great lengths to answer a question that the Moving Parties *had never asked* him to answer. He wrote:

> 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...

86. This was in error. A plain reading of the Appellants' underlying memorandum of fact and law[76] demonstrates very clearly that the Appellants ***were not arguing*** that the "*norms, imperatives and dictates of the Constitution, as well as [...] the rule of law*" constituted, in and of themselves, limits that the former Prime Minister's decision needed to "conform" with. As indicated above, the Appellants were arguing that the concepts and principles they identified point to the *need for there to be* a limit (i.e. the *Miller* Test) – not that they *constituted that limit in and of themselves*.

87. Nonetheless, the Application Judge proceeded to examine the unwritten and other constitutional principles raised by the Appellants, in an effort to determine whether they place any limit on a prime minister's power to prorogue Parliament. He often concluded that they did not. For example, at paragraphs 171-178 of the Decision, the Application Judge concluded that "*section 3 [of the* Charter*] does not impose a constraint on the Prime Minister's exercise of the Crown*

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[76] See the Applicants' Memorandum of Fact and Law, paragraphs 74-88, **AB, Tab 6D**, pages 599-603.

prerogative to prorogue Parliament".[77] The Appellants repeat that this was never the reason for which they raised, for example, section 3 of the *Charter*; rather, they did so to demonstrate that s. 3 of the *Charter* contributes to the overall conclusion there must be a limit to a prime minister's power to prorogue, not that section 3 of the *Charter* constituted such a limit in and of itself.[78]

88. Following a significant amount of additional discussion and analysis (which the Appellants submit was undertaken in error, as a result of his misapprehension of their argument), the Application Judge concluded, at paragraph 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. [79]

89. Thus, the Application Judge was clearly of the view that the Appellants were arguing that the unwritten constitutional principles automatically constituted, in and of themselves, fetters to the former Prime Minister's power to prorogue. Simply put, they were not. Rather, they were attempting to demonstrate that the former Prime Minister's decision to prorogue Parliament did not meet the requirements of the *Miller* Test, which they argued must exist in Canada as in the United Kingdom by virtue of the two countries' shared constitutional values and legal traditions.

Further Flawed Reasoning on the Application Judge's Part

90. In addition to the foregoing, the Appellants point to several further examples of flawed reasoning on the Application Judge's part, as follows.

91. **First**, at paragraphs 228-250, the Application Judge misconstrued the reasons for which the Appellants argued that the decision to advise prorogation "*exceeded the Prime Minister's authority because it prevented Parliament's "constitutional functions" to (1) table a motion of*

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[77] See the Decision, paragraph 178.
[78] See also the Decision, paragraphs 179-188, 201 and 216, for other examples of how the Application Judge's similarly mischaracterized the Appellants' position.
[79] See the Decision, paragraph 249. See also paragraph 8.

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 argue that such "constitutional functions" demonstrated a violation of any unwritten constitutional principles *in their own right*, but rather that the first and third steps of the *Miller* Test were met.

92. **Second**, at paragraphs 266-269 and 288-289, the Application Judge framed the Appellants' arguments as stating that (i) the former Prime Minister's choice to prorogue Parliament rather than dissolve Parliament and call an election; (ii) the length of the prorogation itself; and (iii) that Parliament had been "paralyzed", all constituted justiciable issues. None of this was the case; rather, the Appellants' argument was that these aspects of the former Prime Minister's justification for the prorogation were not reasonable, under the second step of the *Miller* Test.

93. **Third,** at paragraphs 255-260, the Application Judge failed to acknowledge that 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 was "*sufficiently serious to justify*" judicial intervention.

94. 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. Taken as a whole, the circumstances were sufficiently serious to justify judicial intervention. Thus, the Application Judge ought to have found that the first and third steps of the *Miller* Test were met.

95. **Fourth**, at paragraphs 270-283, the Applications Judge 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*". The Appellants disagree; it was manifestly possible to do so. Moreover, the Application Judge failed to appreciate that the partisan justifications he identified ought to have resulted in a finding that the former 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*".

96. **Fifth**, the Application Judge's conclusions at paragraphs 281 and 286 that the former Prime Minister was not obligated to provide any justification for proroguing Parliament was incorrect.

E. WHAT IS THE APPROPRIATE REMEDY?

97. In light of the foregoing, the Application Judge neither selected nor applied the appropriate standard of review (of correctness). Applying that standard, he should have recognized that the *Miller* Test forms part of Canadian law, and that the former Prime Minister's decision to advise prorogation did not meet that test. Since he did not do so, the Appellants ask this Court to make those findings now, and to make the declarations requested in the Amended Notice of Application.

98. This Court is able to grant declaratory relief even though no consequential relief is sought.[80] In *S.A. v. Metro Vancouver Housing Corp.*, the Supreme Court of Canada confirmed that

[80] *Federal Courts Rules*, SOR 98/106, as amended, Rule 64.

declaratory relief may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought (in other words, there is "practical utility" that will settle a "live controversy").[81]

99. In this case, all four requirements are met. **First**, as noted above, this Court has jurisdiction to hear this case. **Second**, the dispute in this case is real and not theoretical, as it relates to a decision that was actually made by the Prime Minister. **Third**, both parties clearly have an interest in settling this "live controversy" over the scope of a prime minister's power to advise a governor general to prorogue Parliament. This is undoubtedly a case with enormous practical utility.

100. The Appellants ask the Court to declare, pursuant to s. 52a(b) of the *FCA*, that the Decision was unlawful and that Parliament was never prorogued. This mirrors what was sought and granted in *Miller II*. It mirrors *Khadr*, where the Court granted declaratory relief but did not go further and make positive orders that would interfere with the business of the government.[82]

PART IV ORDER SOUGHT

101. For the above reasons, the Appellants ask this Court to grant the relief set out in the Notice of Appeal.

October 15, 2025

CHARTER ADVOCATES CANADA
[redacted]

James Manson, LSO# 54963K
Chris Fleury, LSO# 67485L
Hatim Kheir, LSO# 79576J
Darren Leung, LSO# 87938Q

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[81] *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at paragraph 60 (SCC). See also *Daniels v. Canada (Minister of Indian Affairs and Northern Development*, 2016 SCC 12 at paragraph 11 (SCC).

[82] See *Khadr v. Canada (Prime Minister),* 2010 SCC 3 at paragraph 47 [*Khadr*].

PART V

STATUTES AND REGULATIONS
Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), 1982, c.11, including the *Canadian Charter of Rights and Freedoms*, preamble, s. 3 and s. 5
Constitution Act, 1867, 30 & 31 Victoria, c. 3 (UK), preamble
Customs Tariff, SC 1997, c. 36, section 53(2) and paragraph 79(a)
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