



2200 - 181 University Avenue
Toronto, ON M5H 3M7

May 20, 2025

VIA ONLINE PORTAL

James Manson
Direct Line: 416-888-9254
Email: jmanson@charteradvocates.ca

Judicial Administrator
Federal Court of Appeal, Ottawa Registry
90 Sparks Street, Ground Floor
Ottawa, ON K1A 0H9

Dear Judicial Administrator:

RE: *Mackinnon et al. v. Canada (Attorney General)*(Court File No. A-131-25)

As you know, we are counsel for the appellants (the “**Appellants**”) in the above-captioned matter.

I write further to Justice Stratas’s direction, dated April 22, 2025 (the “**Direction**”). Pursuant to its terms, we offer the following written submissions in reply to the submissions received on April 14, 2025 from the respondent, the Attorney General of Canada (the “**Respondent**”). I would be grateful if you could place these submissions before His Honour for his review and consideration, along with the Appellants’ submissions in chief that were filed on May 2, 2025.

First, at the outset of its submissions, the Respondent takes the position that this appeal is moot and that “*there is no practical utility to the relief sought*”. The Appellants disagree; they maintain that this appeal is *not* moot and that there is definitely practical utility in the relief sought. They repeat and rely on their submissions in chief on these points.

Second, the Respondent has submitted as follows in its letter to the Court:

In response to the Court’s Direction, the Appellants emphasize that they are seeking declaratory relief regarding the scope of the power to prorogue. This is not consistent with the relief sought in the application and appeal as pled.

The Respondent’s submission on this point is incorrect. The Appellants are not seeking “declaratory relief regarding the scope of the power to prorogue”. Rather, as indicated in their submissions in chief, the Appellants are seeking only to quash the underlying decision, and for the declarations described in the Amended Notice of Application.

However, the scope of a prime minister’s power to advise prorogation *is* nonetheless a central issue raised in this matter. As indicated in the Amended Notice of Application, the Appellants maintain that former Prime Minister Trudeau’s decision to advise the Governor General to

prorogue Parliament on January 6, 2025, was *ultra vires* his authority as Prime Minister.¹ Naturally, therefore, in order to properly consider this issue, it was necessary for the court below, and for this Court on appeal, to delineate the scope of a prime minister's power to advise prorogation: when is it within a prime minister's power to validly advise prorogation, and when is it not? The Appellants contend that it is impossible to determine whether former Prime Minister Trudeau exceeded his authority in advising prorogation in this case without knowing what the scope of that authority was to begin with.

This is why, in their Amended Notice of Application, the Appellants pleaded that:

in all of the particular circumstances surrounding it, the Decision 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, particularly insofar as it relates to Parliament's ability to deal quickly and decisively with especially pressing issues, such as the situation caused by President-elect Trump's stated intention to impose a 25% tariff on all goods entering the United States from Canada;²

This was a deliberate effort on the Appellants' part to rely on the test established by the UK Supreme Court in *R. v. Miller*.³ In *Miller*, the UKSC expounded at length at paragraphs 28-35 on the justiciability of the question of the scope of a prerogative power.⁴ At paragraph 35, the Court clearly stated that the question of "*whether a prerogative power exists, and if it does exist, its extent*" "*undoubtedly lies within the jurisdiction of the courts and is justiciable.*"⁵ All of the parties in *Miller* accepted that proposition. The Appellants thus maintain that in this case, as in *Miller*, it was both appropriate and necessary to first determine the extent of a prime minister's power to advise prorogation before proceeding to ascertain whether former Prime Minister Trudeau's decision in this specific case was *ultra vires*.

The Appellants further note that, like in *Miller*, the Supreme Court of Canada and the Ontario Court of Appeal have also observed that the scope of a prerogative power is an important issue to be determined in cases like this.⁶

In addition to having been raised in the Amended Notice of Application, the scope of a prime minister's power to advise prorogation was squarely raised and discussed at paragraphs 39-41 in the Appellants' Memorandum of Fact and Law, filed in the court below:

39. Second, the issues raised in this case are:

¹ See paragraph 30(i) of the Amended Notice of Application.

² See paragraph 30(a) of the Amended Notice of Application.

³ [R. \(on the application of Miller\) v. The Prime Minister, \[2019\] UKSC 41](#) (UKSC).

⁴ *Ibid.*, paragraphs 28-35.

⁵ *Ibid.*, paragraph 35.

⁶ See, e.g., [Black v. Canada \(Prime Minister\) \(2001\), CanLII 8537](#) at [paragraph 29](#) (CA) [*Black*]; [Khadr v. Canada \(Prime Minister\), 2010 SCC 3](#) at [paragraph 37](#) (SCC) [*Khadr*].

- a) the proper scope of a prime minister's power to advise a governor general to prorogue Parliament; and
 - b) whether the Prime Minister's advice to the Governor General in this case fell within that scope.
40. These issues are manifestly justiciable because they are constitutional in nature. Ultimately, the Decision was discretionary; the Court in *Acadian Society* instructs that, where discretionary decisions are made in violation of the Constitution, courts are obliged to intervene.
41. Following *Black*, this Court is called upon to determine the proper scope of the prerogative of prorogation, and whether the Prime Minister's advice fell within that scope. Following *Khadr*, while the government has flexibility in discharging its duties under the prerogative power, it is for courts to determine the legal and constitutional limits within which such decisions may be taken.

In the Appellants' view, the scope of a prime minister's power to advise prorogation was a fundamental question that *was* (and of necessity *had to be*) before the lower court. Thus, any contention by the Respondent that this issue was not properly raised below is incorrect. The issue clearly *was* raised and ought to have been considered by the application judge, but was not.

Moreover, any contention that the Appellants are improperly seeking declaratory relief regarding the scope of the power to prorogue is also incorrect. Simply put, they are not. The Appellants are, to be sure, asking the Court to consider the scope of the power to prorogue, and to either adopt the *Miller* test or some other means of delineating the proper scope of a prime minister's power to advise prorogation; however, that is a fundamentally different proposition than seeking declaratory relief on what amounts to a point of law.

Should this appeal proceed, the Appellants plan to submit, among other things, that the application judge's failure to adopt the "*Miller* test" (or some other means of delineating the proper scope of a prime minister's power to advise prorogation) led the lower court astray.

Third, the Appellants note that the Respondent intends to argue on appeal that this matter is "neither reviewable nor justiciable". The Appellants have already indicated to the Court in their Notice of Appeal that they do not intend to challenge the application judge's findings on any of the preliminary issues determined by the court below, including justiciability. However, in light of the Respondent's advice in its submissions that it intends to re-argue this issue on appeal, the Appellants now seek this Court's permission to file a reply memorandum of fact and law, of no more than 20 pages (double-spaced) in length, in addition to their main memorandum. The reply memorandum will respond to the Respondent's memorandum, both on the issue of justiciability and as otherwise appropriate in reply, depending on the Respondent's submissions.

Fourth, the Appellants disagree with the Respondent's statement, citing *Amgen Canada Inc. v.*

Apotex Inc.,⁷ under the heading “Next Steps” in its letter to the Court, as follows:

If the Court believes there is a significant issue regarding mootness, it will need to decide whether to refer the matter immediately to a panel or leave mootness to the panel which will hear the appeal against the context of all the legal issues at play.

In the Appellants’ view, the procedure described in the above passage is not open to the Court in this case. This is not a motion brought by a party, as was the case in *Amgen*, but rather a review process initiated by the Court. Thus, the correct procedure is that described in *Dugré c. Canada (Procureur general)*,⁸ at paragraphs 19-25. As indicated by Chief Justice Noël at paragraph 25, “when the answer to be given to the question raised might result in the disposition of an appeal... only a panel of three judges may be called upon to decide the question pursuant to section 16 of the Federal Courts Act [citation omitted]”.

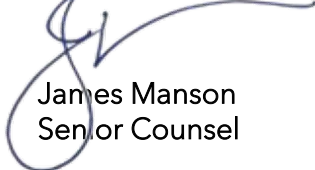
Thus, despite both of the parties’ submissions that this matter should proceed, if this Court continues to have the concerns described in the Direction, then, following *Dugré*, a panel of three judges must be convened to consider the matter further. A single judge cannot decide the matter summarily, as suggested in *Amgen* at paragraph 10.

Finally, the Appellants take no issue with the Respondent’s final submission concerning the extant intervention motion that was filed on April 22, 2025, and await the Court’s further direction in that regard.

All of which is respectfully submitted, with thanks,

CHARTER ADVOCATES CANADA

Per:



James Manson
Senior Counsel

CC: Elizabeth Richards (Elizabeth.Richards@justice.gc.ca)
Sanam Goudarzi (Sanam.Gouzardi@justice.gc.ca)
Alex Dalcourt (Alex.Dalcourt@justice.gc.ca)

⁷ *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196 at [paras. 8, 10](#) (FCA) [*Amgen*].

⁸ *Dugré v. Canada (Procureur general)*, 2021 FCA 8 at [paragraphs 19-25](#) (FCA).