

FEDERAL COURT OF APPEAL

B E T W E E N:

DAVID JOSEPH MacKINNON and ARIS LAVRANOS

Appellants

and

CANADA (ATTORNEY GENERAL)

Respondent

and

DEMOCRACY WATCH and the UNIVERSITY OF OTTAWA PUBLIC LAW CENTRE'S
CONSTITUTIONAL LAW INITIATIVE

Interveners

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

**APPELLANTS'
REPLY MEMORANDUM OF FACT AND LAW**

May 15, 2026

CHARTER ADVOCATES CANADA

**James Manson, LSO# 54963K
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Counsel for the Appellants

Issue Addressed in Reply

1. The Appellants' reply submissions focus on the issue of justiciability, as set out in the Respondent's Memorandum of Fact and Law ("RMFL") at paragraphs 32-49.

Argument

A. A prime minister's advice to prorogue Parliament is reviewable

2. Fundamentally, the Appellants submit that the Respondent's arguments at paragraphs 32-49 of the RMFL are unpersuasive and must fail. The Application Judge committed no reviewable errors in concluding, at paragraphs 54-87 and 92-113 of the Decision, that the former Prime Minister's advice to the Governor General was justiciable.

(i) A prime minister *does* exercise the prerogative power to prorogue

3. The Respondent argues at paragraphs 35-44 of the RMFL that the Prime Minister's decision to advise the Governor General to prorogue Parliament is not reviewable because the decision was actually made by the Governor General. To support this contention, the Respondent makes three points: 1) the "uncontested evidence" before the Court is that a prime minister does not exercise a prerogative power in advising prorogation;¹ 2) the Appellants in this case are attempting to enforce a constitutional convention;² and 3) at law, the prorogation prerogative is exercised by the Governor General, who was not made a party to the Application.³ The Appellants disagree. Each of the Respondent's arguments is addressed in turn below.

4. **First**, contrary to the Respondent's assertion, the Respondent's own evidence supports the finding that prime ministers (and not governors general) exercise the prerogative of prorogation. The following additional information was omitted from the Respondent's survey of its witness Mr.

¹ RMFL at paragraph 38.

² RMFL at paragraphs 40-41.

³ RMFL at paragraphs 34, 42.

Booth's evidence⁴ in the RMFL. This additional information directly undermines the Respondent's argument, at paragraphs 32-44 of the RMFL, that a prime minister's advice to prorogue Parliament is not reviewable.

5. At paragraph 8 of his affidavit, Mr. Booth's uncontested evidence, which the Respondent tendered itself, is that:

the practice and procedure relating to prorogation is within the Prime Minister's prerogative and governed by well-established constitutional conventions...In a Privy Council minute, P.C. 3374 dated October 25, 1935, recommendations to the Crown concerning dissolution and convocation of Parliament were confirmed as special prerogatives of the Prime Minister. Prorogation is treated in the same manner. [Emphasis added.]⁵

6. At paragraph 9, Mr. Booth's uncontested evidence is that:

... the Governor General acts on the Prime Minister's advice to prorogue. In Canada, a Prime Minister's request to prorogue Parliament has never been denied in its history. [Emphasis added.]⁶

7. At paragraph 11, Mr. Booth's uncontested evidence is that:

[o]ther than the 12-month constraint established by section 5 of the *Charter*, the length of time for which Parliament is prorogued is entirely within the discretion of the Prime Minister... when the proclamation is issued to prorogue, it includes a date established by the Prime Minister for the return of Parliament. [Emphasis added.]⁷

8. At paragraph 13, Mr. Booth's uncontested evidence is that:

The Prime Minister takes the initiative to advise that Parliament be prorogued. [Emphasis added.]⁸

⁴ Affidavit of Donald Booth, affirmed January 24, 2025 ("**Booth Affidavit**"), Appeal Book, Tab 7B, page 931.

⁵ Booth Affidavit, paragraph 8.

⁶ Booth Affidavit, paragraph 9.

⁷ Booth Affidavit, paragraph 11.

⁸ Booth Affidavit, paragraph 13.

9. Relying on Mr. Booth's evidence,⁹ the Application Judge held that the "*Prime Minister's advice is in fact a critical lynchpin of the exercise of the Crown's prerogative to prorogue Parliament*".¹⁰ The Application Judge rejected the Respondent's submission that the Prime Minister's advice cannot affect legal rights as failing "*to reflect the reality of the situation*."¹¹

10. The Respondent now appears to suggest that the Application Judge erred in his treatment of Booth's evidence – in other words, the Respondent is seeking to overturn the Application Judge's finding on a matter of mixed fact and law, which is of course reviewable only on a standard of palpable overriding and overriding error.¹² Yet, the Respondent has not demonstrated how the Applications Judge committed a palpable and overriding error by recognizing and following the Respondent's own evidence. Absent any such demonstration, the Application Judge's factual findings are entitled to deference on appeal.

11. **Second**, contrary to the Respondent's contention, the Appellants' position is based on constitutional *law*, not convention. The Respondent misconceives the Appellants' position as an attempt to enforce a constitutional convention. That is not the Appellants' position. The relevant convention is that the Governor General prorogues Parliament only on the advice of the Prime Minister. Indeed, that is what occurred in this case. But the Appellants are not attempting to challenge or enforce that convention.

12. Rather, the Appellants' position is that the former Prime Minister's advice (which the Governor General followed) was *ultra vires* and contrary to constitutional law.

⁹ Decision at paragraph [67](#).

¹⁰ Decision at paragraph [68](#).

¹¹ *Ibid.*

¹² [Housen v. Nikolaisen, 2002 SCC 33](#) at paragraph [10](#).

13. Put another way, the *form* of the operation of the convention is mistakenly taken by the Respondent to be the focus of the inquiry. Again, that is not the focus of the Appellants' inquiry. Rather, the *substance* of the decision (by the Prime Minister) to prorogue is the focus of the inquiry.

14. The Respondent relies on this Court's decision in *Hameed* for the proposition that constitutional conventions are not enforceable by the courts. The Appellants agree with that proposition but dispute its relevance to this case. In *Hameed*, this Court overturned the Federal Court's decision because the lower court judge incorrectly declared a new constitutional convention without regard to the governing test and erroneously characterized conventions as judge-made rules.¹³

15. Here, however, the Appellants' argument is different. It is that the Prime Minister exceeded the scope of the prorogation prerogative. *Hameed* is thus of little assistance on this point because it says nothing about defining the scope of a prerogative power. The scope of a prerogative power is a *legal* question, not a matter of convention.¹⁴

16. Ultimately, the Application Judge considered the Respondent's argument that the Prime Minister's Decision to prorogue parliament was made pursuant to constitutional convention and wisely rejected it, finding that the Prime Minister's advice was an exercise of prerogative power.¹⁵

17. **Third**, it is the Prime Minister who exercises the prorogation prerogative in advising the Governor General to prorogue Parliament. Failing theoretical circumstances that are not relevant

¹³ *Canada (Prime Minister) v. Hameed*, 2025 FCA 118 at paragraphs 58-59.

¹⁴ *Black v. Canada (Prime Minister)*, 2001 CanLII 8537 (ON CA) at paragraph 26 [Black]. See also *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at paragraphs 36-37; *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at paragraphs 66-67 [Hupacasath]; *R (On the application of Miller) v. The Prime Minister*, [2019] UKSC 41 at paragraphs 28-52 [Miller]; *Canada (Governor General in Council) v. Mikisew Cree First Nation*, 2016 FCA 311 at paragraph 21; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1 at paragraph 14.

¹⁵ Decision at paragraphs 55-63.

in this case, the Governor General does not have (and has never had) an independent role to play in the exercise of the prorogation prerogative.¹⁶

18. The Respondent's reliance on the *Conacher* decision is misplaced. The Federal Court's analysis in *Conacher* in fact supports the Appellants' position that it is the Prime Minister who exercises the prerogative power when s/he advises the Governor General to prorogue. In *Conacher*, the Federal Court held at paragraph 26:

At first blush, it appears that the Prime Minister's decision to advise the Governor General is not reviewable because the power to dissolve Parliament is the Governor General's prerogative, not the Prime Minister's; however, the Prime Minister's power can be seen as a prerogative because it is discretionary, it is not based on a statutory grant of power and has its roots in the historical power of the Monarch. Although actual discretion therein lies with the Governor General, the case of *Black v. Canada (Prime Minister)* held that the Prime Minister also has the capacity to exercise prerogative powers (at paragraph 33).¹⁷

19. The Federal Court in *Conacher* described *Black* as showing “*that even advisory decisions can be reviewed as exercises of prerogative*”.¹⁸ The Federal Court went on in *Conacher* to state that the issue was whether the exercise of prerogative power by the Prime Minister was justiciable, which turned on whether it affected the rights or legitimate expectations of an individual. Whether the exercise in that case infringed s. 3 of the *Charter* was an example of a justiciable issue.¹⁹ The Federal Court's decision was affirmed by this Court on appeal.

20. Nonetheless, the Respondent relies on an isolated statement in this Court's decision in *Conacher*, that “*as a matter of law it was the Governor General that called the election, not the Prime Minister.*”²⁰ However, that statement must be placed into context. The Court's decision to affirm the lower court's decision was premised on its findings on issues of statutory interpretation

¹⁶ Booth Affidavit at paragraph 9.

¹⁷ *Conacher v. Canada (Prime Minister)*, 2009 FC 920 at paragraph 26 [*Conacher FC*].

¹⁸ *Ibid.* at paragraph 27.

¹⁹ *Ibid.* paragraphs 67-68.

²⁰ *Conacher v. Canada (Prime Minister)*, 2010 FCA 131 at paragraph 11 [*Conacher FCA*].

and the scope of s. 3 of the *Charter*. Thus, the statement about the Governor General was *obiter*. Further, the statement was made without any supporting analysis. Given that this Court was affirming the lower Court's decision, that one sentence cannot, by itself, be taken to be a repudiation of the lower court's analysis on the issue, which was well-reasoned and supported by case law.

21. This statement was also carefully considered by the Application Judge who reviewed this Court's decision in *Conacher* and concluded that, because this Court affirmed the Federal Court's analysis on the statutory interpretation issue and dealt with the issue itself, this Court must have agreed that it had jurisdiction to review the Prime Minister's advice to the Governor General in the first place.²¹ The Application Judge also noted that the evidence in this case (from Mr. Booth) is that the Governor General acts on the Prime Minister's advice and has never refused it. This Court does not appear to have had the benefit of that evidence in the *Conacher* decision.²²

22. *Black* has since been considered by this Court in *Hupacasath*, where this Court confirmed that exercises of Crown prerogative are reviewable and that the Federal Court has jurisdiction in relation to the federal Crown prerogative.²³

23. Ultimately, the Application Judge thoroughly and correctly analyzed the issue of reviewability. He made two conclusions supported by case law: 1) the Prime Minister's advice is itself an exercise of prerogative power;²⁴ and 2) the *Federal Courts Act* grants jurisdiction to review exercises of executive prerogative power rooted solely in the federal Crown prerogative.²⁵

²¹ Decision at paragraph 73.

²² Decision at paragraph 74.

²³ *Hupacasath* at paragraphs 34-35, 43-58.

²⁴ Decision at paragraph 58, cit'g *Conacher FC* at paras 26-27; *Black* at paras 31-41; *Democracy Watch v. Premier of New Brunswick*, 2022 NBCA 21 at para 58 [*Democracy Watch NB*]; and *Engel v. Prentice*, 2020 ABCA 462 at paras 27-28 [*Engel*], leave to appeal to SCC ref'd, 39566 (27 May 2021).

²⁵ Decision at paragraph 60, cit'g *Hupacasath* paras 7 and 40-58; *Oceanex Inc v Canada*

24. The Respondent’s attempt to distinguish *Democracy Watch NB* and *Engel* also fails. The Respondent rightly notes that neither *Democracy Watch NB* nor *Engel* engage with the issue of Federal Court jurisdiction.²⁶ However, both cases support the Application Judge’s conclusion that first ministers exercise a prerogative power when giving advice to their respective vice-regal representatives (i.e. the Governor General or a Lieutenant General). For example, in *Democracy Watch NB*, the New Brunswick Court of Appeal explicitly confirmed “...the **Premier’s prerogative** to provide dissolution and election advice to the Lieutenant-Governor”.²⁷

25. The Application Judge’s finding that the Federal Court has jurisdiction was also supported by *Hupacasath*, *Oceanex*, and *Stagg*.²⁸

(ii) A prime minister’s advice to prorogue **is** a justiciable issue

26. The Respondent also argues at paragraphs 45-49 of the RMFL that, where a decision is “politically-infused”, courts must refrain from “undue interference” with the institutional competence of the executive branch. It argues that the Decision is not justiciable on that basis.²⁹

27. The Appellants disagree. Virtually all decisions of the executive branch are “politically-infused” in some sense. This does not and ought not shield the executive from judicial scrutiny in appropriate cases. It has long been settled that a court will have institutional capacity to decide a matter that has a “*sufficient legal component*”, even where that matter also involves political considerations.³⁰ Canadian courts have frequently engaged in matters of political controversy,

(Transport), [2019 FCA 250](#) at para [28](#) [*Oceanex*]; *Stagg v Canada (Attorney General)*, [2019 FC 630](#) at para [41](#) [*Stagg*].

²⁶ RMFL at paragraph 43.

²⁷ *Democracy Watch NB* at para [58](#).

²⁸ *Hupacasath*, paragraphs [7](#) and [40-58](#); *Oceanex* at paragraph [28](#); *Stagg* at paragraph [41](#).

²⁹ Memorandum of Fact and Law of the Respondent at paras 45-49.

³⁰ *Reference re Canada Assistance Plan*, [1991] 2 SCR 525 at 545–546 (SCC).

provided the fundamental question before the Court is one of legality.³¹ This standard was correctly articulated and applied by the Application Judge at paragraphs 102-113 of the Decision.

28. In support of its position, the Respondent cites a series of cases involving the *dissolution* of provincial and federal legislatures.³² Overall, however, these cases are unhelpful for the Respondent. Dissolution is fundamentally different and distinguishable from prorogation.³³ To the extent that the cases are applicable at all, they are consistent with Canadian jurisprudence governing cases of executive action involving political considerations.³⁴ Where there is a “*sufficient legal component*”, the Court’s supervisory role is engaged.

29. For example, the Respondent cites the Federal Court in *Conacher* for the proposition that the exercise of the power to dissolve parliament was a matter of “high policy” in which the Court should not intervene.³⁵ But the Respondent’s materials omit reference to the second half of the same sentence relied on by the Respondent, which clarifies: “*however, it stands to reason that prerogative powers must be exercised in accordance with the law and this application asks whether section 56.1 has been violated. It appears that the Federal Court has jurisdiction over this limited issue...*” [Emphasis added].³⁶ Thus, while the decision to dissolve Parliament was sufficiently political as to preclude the Court from intervention, when the allegation is that a legal limit (in that case s. 56.1 of the *Canada Elections Act*) has been violated, courts still have an appropriate role to play.

³¹ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para 183-185. See also: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras 26-31, *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at para 63 (Wilson J., with the majority agreeing on justiciability at paragraph 38); *Hupacasath*, paragraphs 66-67.

³² *Conacher v. Canada (Prime Minister)*, 2009 FC 920; *Democracy Watch v British Columbia (Lieutenant Governor)*, 2023 BCCA 404; *Democracy Watch v. Canada (Prime Minister)*, 2023 FCA 41.

³³ See: *Miller* at paras 4-6.

³⁴ See the cases cited at footnotes 30 and 31, above.

³⁵ RMFL at paras 46.

³⁶ *Conacher v. Canada (Prime Minister)*, 2009 FC 920 at para 29.

30. The Supreme Court of the United Kingdom drew a similar distinction in *Miller* between proceedings “concerning the lawfulness of the exercise of a prerogative power within its lawful limits” and proceedings “concerning the lawful limits of the power and whether they have been exceeded”; the latter category of cases being justiciable.³⁷ As in *Miller*, the Appellants allege that the Prime Minister exceeded the lawful limits of the prorogation prerogative. This case is squarely in the second category of cases described in *Miller*.

31. The Respondent also cites the case of *Democracy Watch v British Columbia (Lieutenant Governor)*.³⁸ In that case, the British Columbia Court of Appeal rejected a judicial review of the decision to dissolve the provincial legislature, holding that the Premier’s advice on dissolution was purely political in nature and, therefore, not justiciable. The BCCA explicitly considered *Miller* in its analysis of justiciability, finding that it did not “assist in the analysis required in the circumstances of this case.” Further, “³⁹.” Here, the case at bar raises issues virtually identical to those in *Miller*, namely an alleged abuse of the prerogative power; thus, the BCCA’s decision in *Democracy Watch* is distinguishable and of no assistance.

32. The Respondent also cites *Democracy Watch v. Canada (Prime Minister)*,⁴⁰ a similar case before the Federal Court. The Court in that case applied *Conacher* and summarily dismissed a judicial review challenging the decision of the Prime Minister, advising the Governor General to dissolve Parliament and call a general election. While the outcome of the decision was governed by *Conacher*, the applicants in that case argued that *Miller* had changed the legal landscape. The Court ultimately agreed with the respondent Attorney General that the issues raised in *Miller*,

³⁷ *Miller* at paras 36 and 52.

³⁸ [2023 BCCA 404 \(CA\)](#).

³⁹ *Ibid.*, at para 84.

⁴⁰ [Democracy Watch v. Canada \(Prime Minister\)](#), 2023 FCA 41 at paras 30-34.

which are again substantively similar to those raised in this appeal, were both factually and legally different than those before it. This case is similarly inapplicable to the case at bar.

May 15, 2026

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PART V

TABLE OF AUTHORITIES
<i>Black v. Canada (Prime Minister)</i>, 2001 CanLII 8537 (ON CA)
<i>Canada (Governor General in Council) v. Mikisew Cree First Nation</i>, 2016 FCA 311
<i>Canada (Prime Minister) v. Hameed</i>, 2025 FCA 118
<i>Canada (Prime Minister) v. Khadr</i>, 2010 SCC 3
<i>Chaoulli v. Quebec (Attorney General)</i>, 2005 SCC 35
<i>Conacher v. Canada (Prime Minister)</i>, 2009 FC 920
<i>Conacher v. Canada (Prime Minister)</i>, 2010 FCA 131
<i>Democracy Watch v British Columbia (Lieutenant Governor)</i>, 2023 BCCA 404
<i>Democracy Watch v. Canada (Prime Minister)</i>, 2023 FCA 41
<i>Democracy Watch v. Premier of New Brunswick</i>, 2022 NBCA 21
<i>Engel v. Prentice</i>, 2020 ABCA 462
<i>Housen v. Nikolaisen</i>, 2002 SCC 33
<i>Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)</i>, 2015 FCA 4
<i>Kingstreet Investments Ltd. v. New Brunswick (Finance)</i>, 2007 SCC 1
<i>Oceanex Inc v Canada (Transport)</i>, 2019 FCA 250
<i>Operation Dismantle Inc. v. The Queen</i>, [1985] 1 S.C.R. 441, 1985 CanLII 74 (SCC)

<u><i>R (On the application of Miller) v. The Prime Minister</i>, [2019] UKSC 41</u>
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<u><i>Reference re Canada Assistance Plan</i>, [1991] 2 SCR 525, 1991 CanLII 74 (SCC)</u>

<u><i>Reference re Secession of Quebec</i>, [1998] 2 S.C.R. 217, 1998 CanLII 793</u>
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<u><i>Stagg v Canada (Attorney General)</i>, 2019 FC 630</u>
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