Court File No.: T-60-25

FEDERAL COURT

B E T W E E N:

DAVID JOSEPH MacKINNON and ARIS LAVRANOS

Applicants

and

CANADA (ATTORNEY GENERAL)

Respondent

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

APPLICANTS'
MEMORANDUM OF FACT AND LAW

February 3, 2025

CHARTER ADVOCATES CANADA
[redacted]

James Manson, LSO# 54963K
Andre Memauri, LSS# 5195
Hatim Kheir, LSO# 79576J
Darren Leung, LSO# 87938Q

T: [redacted]

E: [redacted]

Counsel for the Applicants

OVERVIEW

1. This application asks this Court to consider three important realities:

   a) prorogation has the effect of depriving Parliament a "meaningful opportunity"[1] to address Canada's response to new tariffs imposed by the United States;

   b) following *R. (on the application of Miller) v. The Prime Minister*,[2] it is now uncontroversial that the legality, rationality and procedural propriety of exercises of the prorogation prerogative may now be examined by the courts; and

   c) the Prime Minister has not provided a reasonable justification for prorogation of the first session of the 44th Parliament of Canada.

2. Relying on *Miller II*, the applicants, David MacKinnon and Aris Lavranos, ask this Court to declare (a) that the Prime Minister's decision on January 6, 2025 to advise the Governor General to prorogue Parliament was unlawful; (b) that it must be set aside; and (c) that Parliament has therefore not been prorogued.

PART I STATEMENT OF FACT

A. The Decision

3. On January 6, 2025, the Prime Minister held a press conference and announced:

   a) that he had advised the Governor General to prorogue Parliament (the "**Decision**"); and

   b) that the Governor General granted his request to prorogue Parliament until March 24, 2025.

4. He then indicated that he would resign as Prime Minister, following a contested leadership

[1] *MacKinnon et al., v. Canada (Attorney General)*, 2025 FC 105 at para. 60, [*MacKinnon*], **Applicants' Book of Authorities ("ABOA"), Tab 1**.

[2] *R. (on the application of Miller) v. The Prime Minister*, [2019] UKSC 41 at paragraphs 28-52 (UKSC) [*Miller II*], **ABOA, Tab 2**. Paul Daly, "A Critical Analysis of the *Case of Prorogations*" (2021) 7 Can. J Comp Contemporary L, at pp. 285, 289, **ABOA, Tab 80.**

race held by the Liberal Party of Canada ("**LPC**").[3] A new leader will be chosen on March 9, 2025.

5. During the Prime Minister's press conference, he relied on two reasons for the Decision:

   a) to "*reset*" Parliament based on his opinion that Parliament has been "*paralyzed for months*"; and

   b) to permit the LPC time to select a new party leader.[4]

6. No other reasons were given by the Prime Minister for the Decision.[5]

7. The Prime Minister did not explain why an election was not the preferable solution for the problems he described as affecting Parliament.[6]

B. The State of Parliament Leading Up To The Decision

8. During his press conference, the Prime Minister did not describe the cause of the "*paralysis*" in the House of Commons over the last several months, and the fact that it has been due to the government's refusal to disclose documents in connection with a report ("**Report 6**") tabled in Parliament on June 4, 2024 by the Auditor General of Canada (the "**Auditor General**"). Report 6 addresses findings made concerning a federal government agency called Sustainable Development Technology Canada ("**SDTC**").[7] Pages iii and iv of Report 6 set out a synopsis of the Auditor General's findings, which include "*significant lapses in [SDTC's] governance and stewardship of public funds*".[8]

9. In response to Report 6, on June 6, 2024, Mr. Andrew Scheer, House leader of the Official Opposition ("**Mr. Scheer**"), tabled a motion (the **"Motion"**) in the House of Commons. The Motion proposed an order of Parliament requiring the government, SDTC and the Auditor General

[3] MacKinnon Affidavit, paragraph 28 and Exhibits "A" and 'B"; **AR**, **Tab 4**.
[4] MacKinnon Affidavit, paragraphs 37-38, and Exhibits "A" and "B", **AR, Tab 4.**
[5] MacKinnon Affidavit, paragraph 39, **AR, Tab 4**.
[6] MacKinnon Affidavit, paragraph 37 and Exhibits "A" and "B", **AR, Tab 4**.
[7] MacKinnon Affidavit, paragraph 41 and Exhibits "D" and "E", **AR, Tab 4**.
[8] MacKinnon Affidavit, paragraph 42 and Exhibit "E", **AR, Tab 4.**

to produce certain documents and particulars related to Report 6, among other things.[9] On June 10, 2024, the House of Commons adopted the Motion.[10]

10. The government has not fully complied with the House's order. Accordingly, on September 16, 2024, Mr. Scheer raised a question of privilege before the Speaker (**"The Speaker"**).[11]

11. On September 26, 2024, The Speaker ruled that the matter ought to be referred to the Standing Committee on Procedure and House Affairs.[12]

12. Following The Speaker's ruling, Mr. Scheer tabled another motion, "*That the government's failure of fully providing documents, as ordered by the House on June 10, 2024, be hereby referred to the Standing Committee on Procedure and House Affairs* (the **"Privilege Motion**").[13]

13. Debate then commenced on the Privilege Motion, which takes priority over all other House business until it is resolved.[14] The Official Opposition maintains that the government has failed to obey a valid order of the House of Commons. It stated its intention to delay business in the House of Commons until the government produces all unredacted SDTC-related documents.[15]

14. Yet, the government continues to withhold production of the impugned documents. Accordingly, the House of Commons continued to debate the Privilege Motion until it adjourned for its winter recess on December 17, 2024. The Speaker then adjourned the House of Commons until January 27, 2025, when it was to resume consideration of the Privilege Motion.[16]

15. Despite the above, since June 6, 2024, the House of Commons has passed four pieces of legislation: Bill C-20; Bill C-40; Bill C-78; and Bill C-79.[17]

[9] MacKinnon Affidavit, paragraph 44 and Exhibit "F", **AR, Tab 4**.
[10] MacKinnon Affidavit, paragraph 46 and Exhibit "G", **AR, Tab 4**.
[11] MacKinnon Affidavit, paragraph 47 and Exhibit "H", **AR, Tab 4**.
[12] MacKinnon Affidavit, paragraph 49 and Exhibit "I", **AR, Tab 4**.
[13] MacKinnon Affidavit, paragraph 50 and Exhibit "I", **AR, Tab 4**.
[14] MacKinnon Affidavit, paragraph 51, **AR, Tab 4**.
[15] MacKinnon Affidavit, paragraph 52 and Exhibit "J", **AR, Tab 4**.
[16] MacKinnon Affidavit, paragraph 53 and Exhibits "K" and "L", **AR, Tab 4**.
[17] MacKinnon Affidavit, paragraph 54 and Exhibits "M", "N", "O" and "P", **AR, Tab 4**.

C. **House of Commons' Confidence in the Government**

16. The most recent federal election in Canada was held on September 20, 2021. Ultimately, the LPC won 160 seats in the House of Commons and formed a minority government.[18]

17. Prior to the current prorogation, the leaders of all major opposition parties in the House of Commons have repeatedly announced their intention to support a motion of non-confidence in the current government at the earliest opportunity:[19]

- On October 29, 2024 and January 6, 2025, Mr. Yves-François Blanchet, ("**Mr. Blanchet**") leader of the Bloc Québécois ("**BQ**"), announced that his party would vote non-confidence in the government.[20]
- On December 9, 2024, Mr. Pierre Poilievre, ("**Mr. Poilievre**") leader of the CPC, sponsored a motion in the House stating that "*the House proclaims it has lost confidence in the Prime Minister and the government.*" The motion was defeated 180 votes to 152. All members of the CPC and BQ supported the motion.[21]
- On December 20, 2024 and January 6, 2025, Mr. Jagmeet Singh, ("**Mr. Singh**") leader of the NDP, announced that his party would vote non-confidence in the government as soon as possible.[22]

18. Accordingly, on the same day, Mr. Poilievre wrote a letter to the Governor General, restating that the CPC does not have confidence in the Prime Minister and requesting that Parliament be reconvened at the earliest opportunity so that the Prime Minister could "*prove to you [the Governor General] and Canadians that he has the confidence of the House.*"[23]

[18] MacKinnon Affidavit, paragraph 57 and Exhibit "Q", **AR, Tab 4**.
[19] MacKinnon Affidavit, paragraph 59, **AR, Tab 4**.
[20] MacKinnon Affidavit, paragraphs 60 and 67, and Exhibits "S" and "Z", **AR, Tab 4**.
[21] MacKinnon Affidavit, paragraph 61 and Exhibit "T", **AR, Tab 4**.
[22] MacKinnon Affidavit, paragraphs 62 and 65 and Exhibits "U", "X" and "Y", **AR, Tab 4**.
[23] MacKinnon Affidavit, paragraph 63 and Exhibit "V", **AR, Tab 4**.

19. On December 27, 2024, John Williamson, Chairman of the House Public Accounts Committee and member of the CPC announced that he had scheduled committee sittings starting January 7, 2025 to consider and vote on a motion of non-confidence. The results were to be tabled before the House of Commons upon its then-scheduled return on January 27, 2025.[24]

D. US Threats to Canada

20. The present circumstances are exceptional and compelling.

21. On November 5, 2024, Donald J. Trump (the "**President**") won the United States presidential election. He was inaugurated on January 20, 2025.[25]

22. On November 25, 2024, the President announced that, on his first day in office, he would sign "*all necessary documents*" to impose a 25% tariff on all products imported from Canada into the United States.[26] He then suggested on social media that Canada ought to become the 51st state of the United States, referring to the Prime Minister as "*Governor*", along with making further tariff threats against Canada.[27] The President has since declared that he would use "*economic force*" instead of military force to achieve his goals.[28]

23. In his inaugural address, the President announced that he would "*immediately begin the overhaul of our trade system to protect American workers and family. Instead of taxing our citizens to enrich other countries, we will tariff and tax foreign countries to enrich our citizens*."[29]

24. On February 1, 2025, the President signed an executive order declaring that, effective February 4, 2025, all Canadian "*energy or energy resources*" products are subject to an additional

[24] MacKinnon Affidavit, paragraph 64 and Exhibit "W", **AR, Tab 4**.
[25] MacKinnon Affidavit, paragraph 68, **AR, Tab 4**.
[26] MacKinnon Affidavit, paragraph 69 and Exhibit "AA", **AR, Tab 4**.
[27] MacKinnon Affidavit, paragraph 72 and Exhibit "DD", **AR, Tab 4**.
[28] MacKinnon Affidavit, paragraph 74 and Exhibits "FF" and "GG", **AR, Tab 4.**
[29] MacKinnon Affidavit, paragraph 86 and Exhibit "PP", **AR, Tab 4**.

10% tariff, and that all other Canadian products are subject to a 25% tariff.[30]

25. Also on February 1, 2025, the Governor in Council made Order in Council No. 2025-0072 entitled "*United States Surtax Order (2025)*", pursuant to subsection 53(2) and paragraph 79(a) of the *Customs Tariff*.[31]

26. Canada's federal and provincial leaders have taken the situation very seriously. For example, on November 27, 2024, former Finance Minister, The Honourable Chrystia Freeland, stated, "*I don't want to minimize for a moment the gravity of the challenge we now face*" in referring to the incoming United States tariff.[32] Two days later, Prime Minister Trudeau met with President Trump to discuss the tariffs. Earlier that same day, Mr. Trudeau stated:

> One of the things that is really important to understand is that Donald Trump, when he makes statements like that, he plans on carrying them out. There's no question about it.[33]

27. On December 16, 2024, upon resigning from Cabinet, Ms. Freeland stated that "*[o]ur country faces a grave challenge*".[34] Commentators, meanwhile, expressed dismay at the situation, lamenting the lack of a "*functioning government*"[35] and the "*irrelevance*" of the "'*lame duck' Prime Minister*."[36]

E. A Prorogued Parliament Cannot Address Current Threats

28. The lack of a "*functioning government*" is not simply theoretical; Parliament is indeed incapable of taking legislative steps to assist the government to address current threats from the United States.

[30] The Court is entitled to take judicial notice of this fact. See *AstraZeneca Canada Inc. v. Apotex Inc. (F.C.A.)*, 2003 FCA 487, paragraph 11, **ABOA, Tab 3.**
[31] *United States Surtax Order (2025)*, OIC PC-2025-0072; See also *Customs Tariff*, SC 1997, c. 36, section 53(2) and paragraph 79(a).
[32] MacKinnon Affidavit, paragraph 70 and Exhibit "BB", **AR, Tab 4**.
[33] MacKinnon Affidavit, paragraph 71 Exhibit "CC", **AR, Tab 4**.
[34] MacKinnon Affidavit, paragraph 73 and Exhibit "EE", **AR, Tab 4**.
[35] MacKinnon Affidavit, paragraph 81 and Exhibits "NN" and "OO", **AR, Tab 4**.
[36] MacKinnon Affidavit, paragraph 82 and Exhibits "NN" and "OO", **AR, Tab 4**.

29. As found by Chief Justice Crampton, "[t]he fact that the executive branch of government will continue to function during the period that Parliament is prorogued is beside the point. The fact remains that there would be no opportunity for Parliament 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."[37]

30. For example, on December 17, 2024, the federal government announced "*its plan to strengthen border security and our immigration system*" as published on the Government of Canada's website. The plan suggests a $1.3 billion investment in border security; however, the government's plan cannot be considered, adopted or funded by way of legislation since Parliament is not in session. The plan is not subject to Parliamentary oversight and/or approval as a result of the prorogation.[38]

31. Similarly, s. 53(4) of the *Customs Tariff* requires the Minister of Finance to lay a copy of any order made under ss. 53(2) before Parliament, within 15 sitting days. This currently cannot happen.

32. A statutory instrument such as *United States Surtax Order (2025)* may also be revoked by Parliament following the procedures set out at ss. 19 and 19.1 of the *Statutory Instruments Act*.[39] This, too, cannot happen while Parliament remains prorogued.

PART II POINTS IN ISSUE

33. This application raises the following issues:

A. whether the Court has jurisdiction to entertain this proceeding;

B. whether the substantive issues raised in this proceeding are justiciable;

[37] *MacKinnon,* at paragraph 57, **ABOA, Tab 1**.
[38] MacKinnon Affidavit, paragraph 90 and Exhibit "TT", **AR, Tab 4**.
[39] *Statutory Instruments Act*, RSC 1985, c. S-22, at sections 2(1), 19 and 19.1.

C. whether the Applicants have standing to maintain this application;

D. what is the appropriate standard of review applicable in this proceeding;

E. whether a prime minister's power to advise a governor general to prorogue Parliament is unlimited;

F. whether the Prime Minister's Decision to advise the Governor General to exercise her prerogative power to prorogue Parliament until Monday, March 24, 2025 was correct and/or reasonable; and

G. what is the appropriate remedy?

PART III SUBMISSIONS

A. This Court has Jurisdiction to Entertain this Proceeding

34. This case asks this Honourable Court to decide:

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

b) whether the Decision proroguing Parliament until March 29, 2025 falls within that scope.

35. The issues raised herein fall within the Court's jurisdiction. In *Hupacasath*, the Federal Court of Appeal held that "*the Federal Courts can review exercises of jurisdiction or power rooted solely in the federal Crown prerogative*".[40]

B. The Substantive Issues Raised in this Proceeding are Justiciable

General Principles

36. The Applicants rely on the following Canadian authorities concerning the justiciability of the issues:

[40] *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4 at paragraphs 7 and 58 (FCA) [*Hupacasath*], **ABOA, Tab 4**. See also *Stagg v. Canada (Attorney General)*, 2019 FC 630 at paragraphs 41-42 and 48 (FC) [*Stagg*], **ABOA, Tab 5**; *Turp v. Canada (Minister of Justice)*, 2012 FC 893 (FC), **ABOA, Tab 6**.

- ***TeleZone*** – the definition of "federal board, commission or other tribunal" includes a prime minister;[41]
- ***Acadian Society*** – where discretionary decisions of the executive arm of government are taken in a manner or form in violation of the Constitution, courts have an obligation to weigh in; [42]
- ***Black*** – the court has a responsibility to determine whether a prerogative exists and, if so, its scope and whether it has been superseded by statute; [43]
- ***Khadr*** – "courts clearly have the jurisdiction and the duty to determine whether a prerogative power exists and, if so whether its exercise infringes the *Charter* or other constitutional norms." "[I]n a constitutional democracy, all government power must be exercised in accordance with the Constitution. While the government has 'flexibility in deciding how its duties under the prerogative power are to be discharged', 'it is for courts to determine the legal and constitutional limits within which such decisions are to be taken';[44]
- ***Hupacasath*** – on judicial review, courts are in the business of enforcing the rule of law, one aspect of which is 'executive accountability to legal authority' and protecting 'individuals from arbitrary [executive] action. The category of non-justiciable cases is "very small."[45]
- ***Operation Dismantle*** – courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state;[46]
- ***McLeod*** – prerogative powers, while discretionary, must be exercised for the public good; [47]

[41] *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at paragraph 3 (SCC), **ABOA, Tab 7**; See also, e.g., *Hameed v. Prime Minister*, 2024 FC 242 (FC) [*Hameed*], **ABOA, Tab 8**; *Khadr v. Canada (Prime Minister)*, 2010 SCC 3 (SCC) [*Khadr*], **ABOA, Tab 9**; *La Rose v. Canada*, 2023 FCA 241 at paragraphs 23-52 (FCA) [*La Rose*], **ABOA, Tab 10**.
[42] *The Acadian Society of New Brunswick v. The Right Honourable Prime Minister of Canada et al.*, 2022 NBQB 85 at paragraph 1 (QB) [*Acadian Society*], **ABOA, Tab 11**.
[43] *Black v. Canada (Prime Minister)* (2001) CanLII 8547 at paragraph 29 (ONCA), **ABOA, Tab 12**.
[44] *Khadr* at paragraph 36-37, **ABOA, Tab 9**. See also *Stagg* at paragraph 42 , **ABOA, Tab 5.**
[45] *Hupacasath* at paragraphs 66 and 67, **ABOA, Tab 4**.
[46] *Operation Dismantle v. The Queen*, [1985] 1 SCR 441 at paragraphs 61-62, 1985 CarswellNat 151 at paragraphs 62-63 (SCC), [*Operation Dismantle*], **ABOA, Tab 13**.
[47] *R v. McLeod*, 8 S.C.R. 1, 1883 CanLII 49 at page 26, 1883 CarswellNat 9 at paragraph 22 (SCC), **ABOA, Tab 14**.

- **Daly** – "the exercise of the prorogation prerogative is justiciable".[48]
- **Sossin and Kennedy** – "[a]ll executive officials, from a frontline worker in a passport office to the Prime Minister, must act in accordance with the rule of law, including the duty not to exercise their discretion for capricious purposes."[49]

The Exercise of the Prorogation Prerogative is Justiciable

37. In light of the above, the issues raised in this case are justiciable.

38. **First**, following *Telezone*, prime ministers qualify as a "federal board, commission or other tribunal" under section 2(1) of the *Federal Courts Act*. So, the Prime Minister's conduct in this case is reviewable under s. 18.1.[50]

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

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.

[48] Paul Daly, "A Critical Analysis of the *Case of Prorogations*" (2021) 7 Can. J Comp Contemporary L, at pages 285, 289, **ABOA, Tab 80.**
[49] Lorne Sossin and Gerard Kennedy, *Boundaries of Judicial Review,* 3rd ed (Toronto: Thomson Reuters, 2024) §6:7 at page 371, **ABOA, Tab 81.**
[50] *Federal Courts Act,* R.S.C. 1985, c. F-7 at s. 18.1(1) [*FCA*]. See also *Hameed,* paragraphs 79-80*,* **ABOA, Tab 8**.

42. **Third**, the fact that the Decision is based on an exercise of prerogative, not statutory power is immaterial; judicial review remains available.[51] As noted in *Hupacasath*, "*[f]or some time now, it has been accepted that for the purposes of judicial review there is no principled distinction between legislative sources of power and prerogative sources of power*".[52]

43. **Fourth**, as the Court in *Hupacasath* noted, the category of non-justiciable cases is "very small".[53] This Court is not being asked to opine on matters of "high policy", or any policy at all. This is not the "*rare case*", discussed in *Hupacasath*, where exercises of executive power are "*suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis*".[54] While the Decision herein was taken in a political context, that does not bar curial review by this Honourable Court.

44. The Applicants do not challenge the wisdom of the Decision, but whether the Prime Minister was acting within the scope of his power to make it in the first place. Following *La Rose*, review of the Decision is within the ambit of this Court's institutional capacity and legitimacy.[55] Following *Operation Dismantle*, this Court should not relinquish its review function simply because it is asked to exercise it in relation to "*weighty matters of state*".[56]

45. **Fifth**, by its very nature, judicial review is concerned with the rule of law and the objective of ensuring that government officials, from the highest-ranking representatives to those operating at the lower echelons, act within the boundaries of the law.[57] As the Supreme Court of Canada stated in *Kingstreet*, "*the Court's central concern must be to guarantee respect for constitutional*

[51] *Khadr* at paragraph 36, **ABOA, Tab 9**.
[52] *Hupacasath* at paragraphs 63-64, ABOA, **Tab 4**.
[53] *Hupacasath* at paragraph 67, **ABOA, Tab 4**.
[54] *Hupacasath* at paragraph 66, ABOA, **Tab 4**. See also *Jonsson v. Lymer*, 2020 ABCA 167 at paragraph 40 (ABCA), **ABOA, Tab 15**.
[55] *La Rose* at paragraph 24, **ABOA, Tab 10**.
[56] *Operation Dismantle* at paragraph 62-63, **ABOA, Tab 13**.
[57] *Canada (Governor General in Council) v. Mikisew Cree First Nation*, 2016 FCA 311 at paragraph 21 (FCA), **ABOA, Tab 16**.

principles".[58] Following *Hupacasath*, this Court is "*in the business of enforcing the rule of law, one aspect of which is 'executive accountability to legal authority' and protecting 'individuals from arbitrary [executive] action'*". From *McLeod*, prerogative powers must be exercised for the public good; it falls to this Court to determine whether that has happened.

46. **Sixth**, the Applicants rely on the analysis set out by the Supreme Court of the United Kingdom ("**UKSC**") in *Miller II*, at paragraphs 28-52, in support of their contention that the issues raised in this matter are justiciable.[59] The UKSC's justiciability analysis in *Miller II* was discussed with approval by the Ontario Divisional Court in *Canadian Federation of Students*.[60]

C. The Applicants Have Standing to Commence and Maintain this Application

Private Interest Standing

47. As Canadian citizens, the Applicants enjoy the protections of s. 3 of the *Charter*, which provides that "*every citizen has the right to vote in an election of members of the House of Commons…*".[61]

48. The Supreme Court of Canda has held that the purpose of the right to vote in s. 3 is the right to "*effective representation*". The Court held in *Reference re Provincial Electoral Boundaries*:

> Ours is a representative democracy. Each citizen is entitled to be *represented* in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative […][62]

[58] *Kingstreet Investments Ltd., v. New Brunswick (Department of Finance)*, 2007 SCC 1 at paragraph 14 (SCC), **ABOA, Tab 17**.
[59] *Miller II,* at paragraphs 28-52, **ABOA, Tab 2**.
[60] *Canadian Federation of Students v. Ontario*, 2019 ONSC 6658 at paragraphs 82-85 (Div. Ct.), **ABOA, Tab 18**.
[61] *Canadian Charter of Rights and Freedoms*, s. 3. Part 1 of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), c. 11 a [*Charter*].
[62] *Reference re Provincial Electoral Boundaries*, [1991] 2 SCR 158 at paragraphs 26 and 39 (SCC), **ABOA, Tab 19**. See also *Haig v. R.*, [1993] 2 SCR 995, 1993 CarswellNat 2353 at paragraph 61, **ABOA, Tab 20**; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37 at paragraphs 25-30 (SCC) [*Figueroa*], **ABOA, Tab 21**; *Harper v. Canada (Attorney General)*, 2004 SCC 33 at paragraph 68 (SCC) [*Harper*], **ABOA, Tab 22**.

49. In *Figueroa* and *Harper*, the Supreme Court of Canada confirmed that, not only do citizens have a right to effective representation in Parliament, but also to "*participate in the political life of the country*", which is of "*fundamental importance in a free and democratic society*".[63]

50. Pursuant to these principles, as well as s. 18.1 of the *Federal Courts Act*[64] and supporting jurisprudence,[65] the Applicants have private interest standing to commence and maintain this application. They have been "*prejudicially affected*".[66] Their rights to effective representation in Parliament and to participate meaningfully in the political life of the country are undermined by the Decision for two reasons.

51. **First**, their members of Parliament are shut out of Parliament and obviously unable to effectively represent their interests at this critical time in Canadian history. **Second**, the Decision has interfered with the normal workings of Parliament and made it impossible for opposition parties to vote non-confidence in the government, as described above, thereby triggering an election. The Decision has, therefore, effectively disenfranchised the Applicants at a moment where Canada is grappling with how to deal with the current political and economic threats from the United States.

Public Interest Standing

52. The Applicants rely on several similar cases where public interest standing was granted.[67]

[63] *Figueroa* at paragraphs 25-30 (SCC), **ABOA, Tab 21**; *Harper* at paragraphs 68-70 (SCC), **ABOA, Tab 22**.
[64] *Federal Courts Act*, R.S.C. 1985, c. F-7 at s. 18.1(1).
[65] *League for Human Rights of B'nai Brith Canada v. Canada*, 2010 FCA 307 at paragraph 58 (FCA) [*B'nai Brith*], **ABOA, Tab 23**. See also *Mizrachi v. Canada (Attorney General)*, 2024 FC 1424 at paragraph 48 (FC), **ABOA, Tab 24**; *Kurgan v Canada (Attorney General)*, 2021 FC 1084 at paragraph 43 (FC), **ABOA, Tab 25**.
[66] *B'nai Brith* at paragraph 58, **ABOA, Tab 23**.
[67] *Hameed* at paragraphs 176-184, ABOA, **Tab 8**; *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291 at paragraphs 72-77 (FC), **ABOA, Tab 26**; *Democracy Watch v. Canada (Attorney General)*, 2021 FC 613 at paragraphs 48-74 (FC), **ABOA, Tab 27**; *Democracy Watch v. Canada (Attorney General)*, 2022 FCA 208 at paragraphs 5-10 (FCA), **ABOA, Tab 28**; *Democracy Watch v. Canada (Attorney General)*, 2023 FC 31 at paragraphs 65-93 (FC), **ABOA, Tab 29**; *Alford v. Canada (Attorney General)*, 2019 ONCA 657 (ONCA), **ABOA, Tab 30**; *Galati v. Canada (Governor General)*, 2015 FC 91 at paragraphs 20-29 (FC), **ABOA, Tab 31**; *Conacher v. Canada (Prime Minister)*, 2009 FC 920 (FC), **ABOA, Tab 32**.

53. Alternatively, the Applicants submit that they meet the test set out in *Downtown Eastside*, and ought to be granted public interest standing to commence and maintain this application.[68]

54. **First**, this case raises serious justiciable issues. Whether Parliament was unlawfully prorogued is a "*substantial constitutional issue*" that goes to the heart of our democratic system of government,[69] as is the determination of the scope of a prime minister's power to advise a governor general to prorogue Parliament. The court has the "*institutional capacity and legitimacy to adjudicate the matter*."[70]

55. **Second**, the Applicants clearly have a genuine interest in the outcome of this case.[71] The Applicants are both demonstrably "*engaged with the issues they raise*."[72] The court may examine the Applicants' "*reputation, continuing interest, and link with the claim*" to "ensure an economical use of scarce judicial resources."

56. **Third**, this application is a reasonable and effective means to bring the case to court, in light of the criteria in *Downtown Eastside*.[73] The Applicants have the capacity to advance this matter. They are represented, *pro bono*,[74] by a national organization specializing in constitutional litigation.[75] Moreover, the Applicants are able to present a "*concrete and well-developed factual setting*"[76] that will allow the Court to meaningfully consider this matter. Indeed, the important facts presented by the Applicants are matters of public record.

[68] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paragraphs 2 and 37 (SCC) [*Downtown Eastside*], **ABOA, Tab 33**. See also paragraphs 31 and 35-36 for additional guiding principles.
[69] *Downtown Eastside* at paragraph 42, **ABOA, Tab 33**. See also the Affidavit of Aris Lavranos, sworn January 22, 2025 (the "**Lavranos Affidavit**"), at paragraphs 7-10, AR, **Tab 5**; MacKinnon Affidavit at paras. 5-8, **AR, Tab 4**.
[70] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27 (SCC) [*CCD*] at paragraph 50, **ABOA, Tab 34**.
[71] See the MacKinnon Affidavit at paras. 9-21, **AR, Tab 4**; Lavranos Affidavit at paragraphs 11-16, **AR, Tab 5**.
[72] *Downtown Eastside* at paragraph 43, **ABOA, Tab 33**.
[73] *Downtown Eastside* at paragraph 51 **ABOA, Tab 33**; *CCD* at paragraph 33, **ABOA, Tab 34**.
[74] MacKinnon Affidavit, paragraph 23, **AR, Tab 4**. Affidavit of Marty Moore sworn on January 17, 2025 (the "**Moore Affidavit**") at paragraph 4, AR, **Tab 3.**
[75] Lavranos Affidavit at paragraphs 17-18, **AR, Tab 5**; MacKinnon Affidavit at paragraphs 22-24, **AR, Tab 4**; Moore Affidavit at paragraphs 3 and 5-6, **AR, Tab 3**.
[76] *CCD* at paragraph 71, **ABOA, Tab 34**.

57. This application is undeniably a matter of public interest. It transcends the interests of any particular Canadian and truly affects all citizens.[77] This Court has already found that this application raises serious, complex constitutional issues, and that the circumstances described in the application are exceptional and compelling.[78] Further, there are no practical alternatives to this application to ensure that the Decision is subject to judicial review.

58. **Finally**, it cannot be said that this proceeding will prejudice or negatively impact the rights of any other individuals. This is a constitutional matter that applies to all citizens equally.

D. The Appropriate Standard of Review in this Proceeding

59. The applicable standard of review in this case is correctness, for the following reasons.

60. **First**, this Court ought to determine the appropriate standard of review using the *Vavilov* framework.[79] 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 determine what standard is appropriate in a case before it should look to *Vavilov* first, in order to determine how its general framework applies to that case.[80] 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 other*." [Emphasis added.][81]

61. **Second**, while reasonableness is presumed to apply,[82] *Vavilov* sets out some exceptions

[77] *CCD* at paragraph 55, **ABCO, Tab 34**.
[78] *MacKinnon*, paragraphs 63, 65, 73 and 92, **ABOA, Tab 1**.
[79] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (SCC) [*Vavilov*], **ABOA, Tab 35**.
[80] *Vavilov*, paragraphs 10 and 143, **ABOA, Tab 35**. See also *Portnov v. Canada (Attorney General)*, 2021 FCA 171 at paragraphs 25-27 (FCA), **ABOA, Tab 36**; *Innovative Medicines Canada v. Canada (Attorney General)*, 2022 FCA 210 at paragraph 33 (FCA), **ABOA, Tab 37**; See also *Richard v. Canada (Attorney General)*, 2024 FC 657 at paragraphs 19-21 (FC), **ABOA, Tab 38**.
[81] *Auer v. Auer*, 2024 SCC 36 at paragraph 21 (SCC), **ABOA, Tab 39**.
[82] *Vavilov*, paragraph 16, **ABOA, Tab 35**.

where correctness review will be found to apply.[83] One is for constitutional questions concerning "*the relationship between the legislature and the other branches of the state*".[84] Another is for general questions of law that are of central importance to the legal system as a whole.

62. The issues raised in this case qualify for both of these exceptions. 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 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.

63. 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.[85] If this Court concludes that the Prime Minister *did* overstep his authority as alleged, the resulting situation amounts to a constitutional crisis. 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.

E. A Prime Minister's Power to Advise Prorogation is Not Unlimited

64. A prime minister's power to advise a governor general to prorogue Parliament, while broad, is not unlimited.[86] This is so in light of various considerations, both contextual and constitutional, as discussed in this section.

Contextual Considerations

65. Several contextual factors suggest that a prime minister does not have an untrammeled

[83] *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at paragraphs 42-44, **ABOA, Tab 40**
[84] *Vavilov*, paragraphs 55-56, **ABOA, Tab 35**.
[85] *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22, at paragraphs 62-64, **ABOA, Tab 41.**
[86] *Roncarelli v. Duplessis,* [1959] S.C.R. 121 at page 140 (SCC), 1959 CarswellQue 37 at paragraph 41, **ABOA, Tab 42**.

power to advise a governor general to prorogue Parliament.

66. **First**, there can be no doubt that our country is currently facing an unprecedented challenge to its economic security and sovereignty. President Trump has imposed a 25% tariff on all goods (10% on "energy and energy related products") entering the United States from Canada, with potentially ruinous consequences. While the government has responded in kind, this is "beside the point".[87] There is no opportunity for Parliament to meaningfully address the tariffs imposed by the United States until March 29, 2025.

67. **Second**, there are good reasons to believe that the current federal government has lost Parliament's confidence. The opposition parties have repeatedly signaled their intention to vote in favour of a non-confidence motion at the earliest opportunity.

68. **Third**, while the Prime Minister lamented the "*paralysis*" in Parliament on January 6, 2025, he did not acknowledge that it is due to the government's refusal to disclose documents 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*". Parliament is entitled to investigate and hold the government to account; yet, the government has refused to comply, and now avoids accountability through prorogation.

69. Parliament has been prorogued for *eleven weeks*. Members of Parliament have been stymied – unable to fulfill their constitutional functions of overseeing, supervising and otherwise assisting the government with its overall response to tariffs imposed by the United States. Members of Parliament are unable to use the tools at their disposal, which include: 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

[87] *MacKinnon* at paragraph 57, **ABOA, Tab 1**.

crucial issues and asking questions in committee hearings; and holding general or special debates.[88] Parliament is also prevented from considering the *United States Surtax Order (2025)*, as required by s. 53(4) of *Customs Tariff*. Parliament is 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*.[89]

70. 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 is unable to consider, adopt or fund the government's plan since it is not in session.[90]

71. Although the Prime Minister has provided his stated justification, the Applicants ask whether it is 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 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";

c) while the Decision provides the LPC an opportunity to select a new leader, *should* that be accepted as a "reasonable" basis for prorogation? After all, Parliament can still sit and the House of Commons can still debate Canada's response to the tariffs regardless of who leads the LPC, or whether the LPC's internal selection process has been completed.

72. 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

[88] MacKinnon Affidavit, paragraph 19, **AR, Tab 4**; Lavranos Affidavit, paragraph 14, **AR, Tab 5**.
[89] *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.
[90] MacKinnon Affidavit, paragraph 90 and Exhibit "TT", **AR, Tab 4**.

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, quite simply, would be tyranny, which must be firmly rejected by this Court. 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].
>
> 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. [91] [Emph. added.]

73. Thus, in order to ensure that a prime minister's power to advise prorogation can be made subject to such "*meaningful and fully independent review and accountability*", the Applicants submit that the power to advise prorogation is not unlimited.

Constitutional Considerations

74. The Applicants further submit that a number of constitutional considerations lend further support to their position.

Sections 3 and 5 of the Charter

75. Section 5 of the *Charter* provides:

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

76. Some commentators suggest that s. 5 operates as a check on a prime minister's power to

[91] *Canada (Citizenship and Immigration) v. Tennant,* 2018 FCA 132 at paragraphs 23-24 (FCA), **ABOA, Tab 43**.

advise prorogation and that, apart from a prohibition on proroguing Parliament for 365 days or longer, there are no other limits on the power.[92]

77. The Applicants 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 the *longevity* of prorogation (i.e., 365 days).

78. **Second**, s. 5, provides no guidance on when, and under what circumstances, a prorogation can lawfully *begin*. That is an altogether different question.

79. 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.

80. As noted above, the purpose of the right to vote in s. 3 is the right to "*effective representation*". The Applicants 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 undermines their right to effective representation as described in the above cases.

81. The Decision has in fact undermined the Applicants' s. 3 *Charter* rights to effective representation, as discussed above at paragraphs 48 to 51.

Constitutional Principles

82. 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

[92] Leonid Sirota, "Mulling Over Miller" *Double Aspect* (28 October 2019), online:<https://doubleaspect.blog/2019/10/28/mulling-over-miller/>, **ABOA, Tab 82**; Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Scarborough: Thomson Carswell, 2007) at §9:21, **ABOA, Tab 83**.

unwritten postulates which form the very foundation of the Constitution of Canada.[93] Constitutional principles can assist in the interpretation of constitutional provisions and may give rise to substantive legal obligations.[94] 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 68-69.[95] 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.[96]

83. Parliamentary sovereignty,[97] parliamentary accountability (responsible government),[98] the rule of law[99] and the separation of powers[100] are all recognized constitutional principles in Canada.

84. The Applicants rely on the following jurisprudence that discusses these principles in greater detail: *Reference re Pan-Canadian Securities Regulation*;[101] *Alford v. Canada*;[102] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*;[103] *Schmidt v. Canada (Attorney General);*[104] *Reference re Secession of Quebec;*[105] *TransAlta Corporation v. Alberta (Environment and Parks);*[106] *Ontario (Attorney General) v. G;*[107] *the Preamble to the Constitution*

[93] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paragraph 54 (SCC) [*Secession Reference*], **ABCO, Tab 44**. See also *Re Manitoba Language Rights*, [1985] 1 SCR 721 at paragraph 70 (SCC) [*Reference re Manitoba Language Rights*], **ABCO, Tab 45**.
[94] *Democracy Watch v. Canada (Prime Minister)*, 2023 FCA 41 at paragraph 21 (FCA), **ABCO, Tab 46**.
[95] *Reference re Manitoba Language Rights,* at paragraphs 68-69 (SCC), **ABCO, Tab 45**.
[96] *Reference re Manitoba Language Rights,* at paragraph 84 (SCC), **ABOA, Tab 45**. See also *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at paragraphs 55-56 (SCC), **ABOA, Tab 47**; *Canadian Pacific Railway v. Saskatchewan*, 2024 SKKB 157 at paragraphs 91-92 (SKKB), **ABOA, Tab 48**.
[97] *Canada (Attorney General) v. Power*, 2024 SCC 26 at paragraph 48 (SCC) [*Power*], **ABOA, Tab 49**.
[98] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at paragraph 28 (SCC), **ABOA, Tab 50**.
[99] *Reference re Senate Reform*, 2014 SCC 32 at paragraphs 25-26 (SCC), **ABOA, Tab 51.**
[100] *Power* at paragraph 48, **ABOA, Tab 49.**
[101] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paragraphs 54-60 (SCC), **ABOA, Tab 52**.
[102] *Alford v. Canada (Attorney General)*, 2024 ONCA 306 at paragraph 1 (ONCA), **ABOA, Tab 53**.
[103] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at paragraph 28 (SCC), **ABOA, Tab 50**.
[104] *Schmidt v. Canada (Attorney General)*, 2018 FCA 55 at paragraph 85 (FCA), **ABOA, Tab 54**.
[105] *Secession Reference* at paragraph 68, 70 (SCC), **ABOA, Tab 44**.
[106] *TransAlta Corporation v. Alberta (Environment and Parks)*, 2024 ABCA 127 at paragraph 39 (ABCA), **ABOA, Tab 55**.
[107] *Ontario (Attorney General) v. G*, 2020 SCC 38 at paragraph 96 (SCC), **ABOA, Tab 56.**

Act, 1867;[108] *the Preamble to the Charter;* [109] *Roncarelli v. Duplessis*;[110] *Canada (Attorney General) v. Power*;[111] *Reference re: Greenhouse Gas Pollution Pricing Act*;[112] *Khela v. Mission Institution*;[113] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*;[114] and *Ontario v. Criminal Lawyers' Association of Ontario*.[115]

85. 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;

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

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

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

86. The Applicants submit that 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.[116]

[108] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (UK), preamble.
[109] *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c.11, including the *Canadian Charter of Rights and Freedoms*.
[110] *Roncarelli v. Duplessis*, [1959] SCR 121 (SCC), **ABOA, Tab 42**.
[111] *Power* at paragraphs 50, 54, **ABOA, Tab 49**.
[112] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paragraph 277 (per Cote J., in dissent), **ABOA, Tab 57**.
[113] *Mission Institution v. Khela.,* 2014 SCC 24 at paragraph 37 (SCC), **ABOA, Tab 58**.
[114] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at paragraph 3 (SCC), **ABOA, Tab 50**.
[115] *Ontario v. Criminal Lawyer's Association of Ontario,* 2013 SCC 43 at paragraphs 27-31 (SCC), **ABOA, Tab 59**.
[116] *Georgia Strait Alliance v. Canada (Minister of Fisheries & Oceans)*, 2012 FCA 41 at paragraphs 71-72 (FCA), **ABOA, Tab 60**. See also *Ontario Federation of Anglers and Hunters v. Ontario (Minister of Natural Resources and Forestry)*, 2016 ONSC 2806 at paragraph 46 (Div. Ct.), **ABOA, Tab 61**; *Khadr v. Canada (Prime Minister)*, 2010 FC 715 at paragraph 59 (FC), **ABOA, Tab 62**; *Miller II*, paragraph 41, **ABOA, Tab 2**.

87. In *Ross River Dena Council v. Canada*, the BCCA observed that "*prerogative is the residual executive power of the Crown, exercised by convention at the direction of the Prime Minister and the Cabinet*".[117] 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 extremely cautious about finding, creating or expanding prerogative powers, especially in areas of high political and social importance…[118]

88. Therefore, 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.

Miller II should be adopted

89. In *Miller II*, in factual circumstances very 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 as a consequence Parliament had not been prorogued at all.[119]

90. 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*".[120]

91. 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

[117] *Ross River Band v. HMTQ and Yukon*, 1999 BCCA 750 at paragraph 57 (YKCA) [*Ross River Band*], **ABOA, Tab 63**.
[118] *Ross River Band* at paragraph 60 (YKCA), **ABOA, Tab 63**.
[119] *Miller II* at paragraphs 62 and 70, **ABOA, Tab 2**.
[120] *Miller II* at paragraph 30, **ABOA, Tab 2**.

prorogued provide a "reasonable justification"?

c) In any event, are "the consequences [of prorogation]…sufficiently serious to call for the court's intervention"?

92. In summary, a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.[121]

93. For the following reasons, this Court ought to adopt the UKSC's analysis and conclusions in *Miller II*. 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.

94. **First**, Section 1 of the *Constitution Act, 1867*, provides Canada with a "Constitution similar in Principle to that of the United Kingdom".

95. **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.[122] **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.

96. **Fourth**, the Court in *Miller II* based its decision on the constitutional principles of Parliamentary sovereignty and Parliamentary accountability (responsible government), as well as

[121] *Miller II,* at para. 50, **ABOA, Tab 2**.
[122] see *Nielsen v. Kamloops (City),* [1984] 2 S.C.R. 2 at pages 10-11, (SCC) **ABOA, Tab 64,** 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) **ABOA, Tab 65**; *Childs v. Desormeau,* 2006 SCC 18 at paragraphs 11-12, (SCC) **ABOA, Tab 66**. See also, *R v. Clayton,* 2007 SCC 32 at paragraph 22, **ABOA, Tab 67**, 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, **ABOA, Tab 68**.

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.[123]

97. **Fifth**, *Miller II* already has a foothold in Canadian jurisprudence.[124] It has also been cited with approval in New Zealand.[125] **Sixth**, there is no shortage of academic commentary in support of the Court's analysis and decision in *Miller II*.[126]

F. The Prime Minister's Decision in this Case was Incorrect

98. Applying the analytical framework developed in *Miller II*, the Decision in this case is incorrect and must be set aside.

99. 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*

[123] Nicholas A. MacDonald and James W.J. Bowden, "No Discretion: On Prorogation and the Governor General", (2011) 34:1 Cd. Parl. Rev 7, **ABOA, Tab 84** ; 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, **ABOA, Tab 83** ; See also *Black,* paragraph 31, **ABOA, Tab 12**; *Galati v. Canada (Governor)*, 2015 FC 91 at paragraph 46 (FC), **ABOA, Tab 31**; *Onion Lake Cree Nation v. Canada*, 2017 FC 1049 at paragraph 28 (FC), **ABOA, Tab 69**; *Patriation Reference*, [1981] 1 SCR 753 at page 857, 1981 CarswellMan 110 at paragraph 375 (SCC), **ABOA, Tab 70**; *Reference re Bill C-7 concerning the reform of the Senate*, 2013 QCCA 1807 at paragraphs 53-54 (QCCA), **ABOA, Tab 71**.

[124] *Power*, at paragraph 48, **ABOA, Tab 49**; *Democracy Watch v. Prime Minister*, 2023 FCA 41 at paras. 30-34 (FCA), **ABOA, Tab 46**; *Democracy Watch v. British Columbia (Lieutenant Governor)*, 2023 BCCA 404 at paragraphs 82-84 (BCCA), **ABOA, Tab 72**; *Democracy Watch v. Premier of New Brunswick*, 2022 NBCA 21 at paragraph 29 (NBCA), **ABOA, Tab 73**; and *Canadian Federation of Students v. Ontario*, 2019 ONSC 6658 at paragraphs 82-85 and 95 (Div. Ct.), **ABOA, Tab 18**.

[125] See, e.g., *NZ Council of Licensed Firearms Owners Inc v Minister of Police,* [2020] NZHC 1456 at paragraphs 34 and 37 (NZHC), **ABOA, Tab 74**; *Idea Services Ltd v Attorney General,* [2022] NZHC 308 at paragraph 141 (NZHC), **ABOA, Tab 75**; *NZ Loyal v Electoral Commission,* [2023] NZHC 2827 at paragraph 25 (NZHC), **ABOA, Tab 76**; *Timaru District Council v Minister of Local Government,* [2023] NZHC 244 at paragraphs 101-107 (NZHC), **ABOA, Tab 77**.

[126] Paul Craig, "The Supreme Court, Prorogation and Constitutional Principle", Oxford Legal Research Paper No. 57/2019, **ABOA, Tab 85**; 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, **ABOA, Tab 86**; 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/>, **ABOA, Tab 87**; 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/>, **ABOA, Tab 88**; 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/>,**ABOA, Tab 89.**

power to do so, to have regard to all relevant matters, including the interests of Parliament".[127]

100. The Court in *Miller II* also determined that a prime minister must provide "reasonable justification" for prorogation of Parliament.

101. In this case, the Prime Minister failed in that responsibility.

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

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

104. The Applicants ask this Court to consider whether the 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. Has the Prime Minister provided "reasonable justification" to the Governor General, or does his explanation demonstrate that he took other, unrelated interests (e.g., those of the LPC), into account?

105. For example, the Decision has 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.

106. 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*

[127] *Miller II*, at paragraph 30, **ABOA, Tab 2**.

supervision of the executive",[128] at the exact moment of a potentially devastating trade war. Not those of the Canadian public either, who will bear the brunt of the impending tariffs and whose elected representatives sit on the sidelines.

107. The Prime Minister also failed to take the interests of the Crown, represented by the Governor General, into account. It cannot be disputed that the Governor General has a constitutional duty to ensure that the government of the day commands the confidence of the House.[129] By making the Decision, has the Prime Minister ignored the Governor General's duty in favour of his own interests, and those of the LPC?

The Decision prevented Parliament from carrying out its constitutional functions

108. Following *Miller II*, the Decision has "*had the effect of frustrating and preventing Parliament's ability to carry out its constitutional functions*". Parliament is 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 take are speculative and ultimately up to Parliament. The point is that Parliament has been prevented from taking any steps at all, nor can it supervise whatever steps the government is unilaterally taking.

109. **Second**, as discussed above, the Prime Minister failed to provide a "*reasonable justification*" for making the Decision. Following *Miller II*, the Applicants ask whether the Prime Minister, in giving advice to the Governor General, did so in keeping with his constitutional

[128] *Miller II*, at paragraph 50, **ABOA, Tab 2**.
[129] The Governor General of Canada, "Constitutional Duties" (retrieved February 1, 2025), online: < https://www.gg.ca/en/governor-general/role-and-responsibilities/constitutional-duties>, **ABOA, Tab 90.**

responsibility,[130] or whether the Prime Minister's Decision might have been made for other reasons unrelated to those stated. In any event, however, there is no way for this Court to conclude, on the strength of the evidence before it, that there was "*any reason – let alone a good reason*" to advise the Governor General to prorogue.[131]

110. Moreover, the situation in this case is "*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 (and are) of sufficient magnitude as to require judicial intervention.

111. In fact, the situation in this case may well be 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.

Further, or in the alternative, the Decision interfered with the Governor General's role

112. Further, or in the alternative, the Decision was incorrect for another reason. This further argument focuses *not* on the Decision's effect on Parliament, as described above, but rather on its effect on the *Crown*, as represented by the Governor General. It depends on the unique circumstances of this case, where three things have happened in conjunction: (1) the Prime Minister has announced his resignation, which will occur once a new LPC leader has been chosen, meaning that a new prime minister will be installed before Parliament reconvenes for a new session on March 24, 2025; (2) the new prime minister will have an automatic right to prepare and deliver a Throne Speech when Parliament reopens; and (3) the minority status of the current government.

113. As noted above, the Crown, as represented by the Governor General, has a constitutional duty to ensure that the government of the day commands the confidence of the House. And, as

[130] *Miller II*, at paragraph 60, **ABOA, Tab 2**.
[131] *Miller II*, at paragraph 61, **ABOA, Tab 2**.

Hogg notes, when a prime minister resigns, it falls to the governor general to find another member of Parliament who could form a government that would enjoy the confidence of the House.[132]

114. In these unique circumstances, the Decision has not only resulted in an unlawful prorogation of Parliament (which the Governor General was unable to refuse) but will also result in the selection of a new Prime Minister, in a minority government situation, who has not demonstrated that he or she has the confidence of the House. Due to the prorogation, that new Prime Minister will then automatically be accorded the significant advantage of being able to prepare and deliver a Throne Speech when Parliament resumes.

115. Thus, the Prime Minister's advice has resulted in a situation where a new prime minister will be inevitably forced on the Governor General. Her ability to decide which member of the House ought to be given a chance to try and form a new government has thus been interfered with.

116. The Governor General should not have been constrained in this manner. The Prime Minister's actions interfered with her ability to uphold the principle of responsible government. The Decision was therefore also unlawful in this respect.

G. What is the appropriate remedy?

117. This Honourable Court is able to grant declaratory relief even though no consequential relief is sought.[133] In *S.A. v. Metro Vancouver Housing Corp.*, the Supreme Court of Canada confirmed that 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").[134]

[132] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Scarborough: Thomson Carswell, 2007), at Section 9:15, **ABOA, Tab 83.**
[133] *Federal Courts Rules*, SOR 98/106, as amended, Rule 64.
[134] *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at paragraph 60 (SCC), **ABOA, Tab 78**; See also *Daniels*

118. 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.

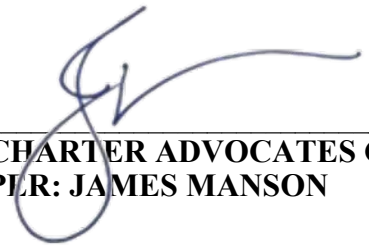
119. The Applicants ask the Court to declare, pursuant to s. 18.1(3)(b) of the *FCA*, that the Decision was unlawful and that Parliament has not been prorogued. This mirrors what was sought and granted in *Miller II*. It mirrors *Khadr*, where the Court granted declaratory relief but did not go further and make positive orders that would interfere with the business of the government,[135] and also *Hameed* where the Court granted declaratory relief but not a writ of *mandamus*.[136]

120. In this case, as in *Miller II*, if the Court grants the relief sought, then Parliament will be free to resume sitting.[137] Parliament can then take whatever steps it considers appropriate in response to the issues discussed above. That is the most appropriate outcome.

PART IV ORDER SOUGHT

121. For the above reasons, the Applicants ask this Court to declare: (a) if necessary, that the Applicants have public interest standing to maintain this proceeding; (b) that the Decision was unlawful; and (c) that the first session of the 44th Parliament of Canada has not been prorogued.

February 3, 2025



James Manson, LSO# 54963K
Andre Memauri, LSS# 5195
Hatim Kheir, LSO# 79576J
Darren Leung, LSO#87938Q

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PLR: JAMES MANSON

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[135] See *Khadr* at paragraph 47, **ABOA, Tab 9.**

[136] *Hameed* at paragraphs 187-189, **ABOA, Tab 8**.

[137] *Miller II*, at paragraph 69, **ABOA, Tab 2**.

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APPENDIX "A"
Applicants' Memorandum of Fact and Law

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