Court File No.: T-60-25

FEDERAL COURT

BETWEEN:

DAVID JOSEPH MACKINNON and ARIS LAVRANOS

Applicants

-and-

CANADA (ATTORNEY GENERAL)

Respondent

-and-

DEMOCRACY WATCH, THE CANADIAN CONSTITUTIONAL LAW INITIATIVE OF THE UNIVERSITY OF OTTAWA PUBLIC LAW CENTRE AND THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT

ATTORNEY GENERAL OF CANADA
Department of Justice
Civil Litigation Section

Per: **Elizabeth Richards**
Zoe Oxaal
Sanam Goudarzi
Loujain El Sahli
Alex Dalcourt
Tel:
Email:

Counsel for the Respondent

TABLE OF CONTENTS

OVERVIEW 1
PART I – STATEMENT OF FACTS 2
A. Current prorogation 2
B. Power to summon, prorogue, and dissolve Parliament is an exercise of Royal prerogative 4
C. Prorogation practice in Canada differs from the UK 5
D. Decision to prorogue is effected by Governor General's proclamation 7
E. Executive government continues during prorogation 8
F. Resumption of Parliament after prorogation 9
G. Parliamentary accountability 10
PART II – POINTS IN ISSUE 11
PART III – SUBMISSIONS 12
A. The Prime Minister's advice is not reviewable or justiciable 12
a) The Prime Minister's advice does not affect any legal rights or interests 12
b) The Prime Minister's advice to prorogue Parliament is not justiciable 13
c) Proclamation of Prorogation is not challenged but is likewise not justiciable 15
d) The Applicants have not identified any relevant legal constraints on prorogation 16
B. *Miller II* does not apply 20
a) Canadian courts must apply binding precedents, not decisions of foreign courts 21
b) *Miller II* is legally distinguishable 22
c) *Miller II* is factually distinguishable 24
d) *Miller II* supports judicial restraint in this case 25
C. No legal remedy available 26
D. Other issues 28
a) The Applicants should not be granted standing 28
b) Expert evidence is admissible 29
PART IV – ORDER SOUGHT 30
PART V – LIST OF AUTHORITIES 31

OVERVIEW

1. Prorogation is a "valuable tool" that can "serve an important function in our parliamentary democracy." It is recognized in Canada's Constitution, forms an integral part of our system of responsible and accountable government, and is a power that has been exercised since Confederation. The Prime Minister's advice to the Governor General is given pursuant to a well-established constitutional convention and is not reviewable by this Court. The Governor General's exercise of the royal prerogative is based on a broad range of political and parliamentary factors that are well outside the courts' ken or capability.

2. There have been no successful challenges to prorogation in Canada, the United Kingdom, or the Commonwealth other than the 2019 decision of the United Kingdom Supreme Court in *Miller II*. That decision, which the UK court itself recognized was an exceptional "one-off", was based on a different constitutional and factual context and has no application in Canada. The UK was facing an impending deadline for "Brexit" requiring Parliament to express its collective view on a fundamental change to that country's constitution. The context raised by the Applicants in this case, including threats of tariffs by the United States, does not rise to that level.

3. The government will be accountable to the House of Commons and, ultimately, the electorate for the decision to prorogue. The basis for the prorogation and its duration is entirely consistent with the exercise of the power in Canada and met the only constitutional requirement: that Parliament sit at least once every 12 months. During the brief period of the prorogation, only five scheduled sitting weeks of the House of Commons will have been interrupted and the executive branch of government has and will continue to function effectively. Any intervention by a court would be contrary to binding authority and unwarranted.

PART I – STATEMENT OF FACTS

A. Current prorogation

4. The first session of the 44th Parliament began in November 2021 and ran for the longest recorded time for a minority government in Canada.[1]

5. Prior to prorogation, Parliament was at an impasse: from September 26, 2024 onwards, the House of Commons was seized with two privilege motions that effectively halted most other debates.[2] They could have done so indefinitely since there is no limit to the amount of time that a privilege motion can be debated: subject to special orders or under a specific Standing Order, the motions would have continued to be considered until (1) there were no Members of Parliament who wished to contribute to the debate or (2) a motion was put forward and adopted to conclude the debate.[3]

6. While the privilege motions were under debate, only limited other House business proceeded. Nevertheless, on three occasions, the House of Commons formally expressed its confidence in the government.[4]

7. On December 17, 2024, the Speaker adjourned the House to January 27, 2025, for the winter break. The privilege debate was continuing when the House was adjourned.[5] The House of Commons was scheduled to be adjourned in 2025 from February 14 to February 24, and February 28 to March 17.[6]

8. On January 6, 2025, Prime Minister Trudeau announced that he had advised the Governor General of Canada that a new session of Parliament was required and that Her Excellency had

---

[1] Affidavit of Shane Wittenburg affirmed on January 24, 2025, at para 17 [Wittenburg Affidavit], Respondent's Record [RR] at Tab 1, p 6.
[2] Wittenburg Affidavit at paras 3–4, RR at Tab 1, p 2.
[3] Wittenburg Affidavit at para 11, RR at Tab 1, p 4.
[4] Wittenburg Affidavit at paras 5–9, RR at Tab 1, p 3.
[5] Wittenburg Affidavit at para 10, RR at Tab 1, pp 3–4.
[6] Wittenburg Affidavit at para 16, RR at Tab 1, pp 5–6; House of Commons Sitting Calendar – 2025, Exhibit P to the Wittenburg Affidavit, RR at Tab 1(P), p 164.

granted the request.[7] On the same day, the Governor General prorogued the House of Commons until March 24, 2024.[8] Considering the previously scheduled adjournment, only five sitting weeks were lost.

9. In announcing prorogation, the Prime Minister's public comments referenced multiple considerations, including that: (i) it had been the longest serving minority government in history;[9] (ii) Parliament had been obstructed by filibustering;[10] (iii) there would be a new Prime Minister;[11] (iv) his departure would allow for a "reset" that may allow "the temperature to come down", and should "decrease the level of polarization . . . and allow people to actually focus on serving Canadians in this House";[12] (v) the government had won three non-confidence votes before it adjourned, and public comments concerning confidence do not carry the same weight as an actual confidence vote in the House;[13] (vi) confidence votes in March would allow the House of Commons to express its confidence or non-confidence in the government;[14] and (vii) government will continue to function in the meantime.[15]

10. Following the prorogation, a new session of Parliament is scheduled to begin on March 24, 2025.[16]

[7] Wittenburg Affidavit at para 12, RR at Tab 1, p 4.
[8] Wittenburg Affidavit at para 13, RR at Tab 1, p 4; Proclamation Proroguing Parliament, Exhibit L to the Wittenburg Affidavit, RR at Tab 1(L), pp 132–35.
[9] Certified Transcription of the Press Conference [Transcript], Exhibit B to the Affidavit of David MacKinnon sworn January 22, 2025 [MacKinnon Affidavit], Applicant's Record [AR] at Tab 4, pp 67 (ln 33), 68 (ln 1), 76 (ln 17–18).
[10] Transcript, Exhibit B to the MacKinnon Affidavit, AR at Tab 4, pp 67 (ln 32–33), 76 (ln 13–17).
[11] Transcript, Exhibit B to the MacKinnon Affidavit, AR at Tab 4, p 69 (ln 14–16, 25–26).
[12] Transcript, Exhibit B to the MacKinnon Affidavit, AR at Tab 4, p 76 (ln 18–20, 25–29).
[13] Transcript, Exhibit B to the MacKinnon Affidavit, AR at Tab 4, pp 74 (ln 27–31), 75 (ln 10–12).
[14] Transcript, Exhibit B to the MacKinnon Affidavit, AR at Tab 4, p 75 (ln 13–17).
[15] Transcript, Exhibit B to the MacKinnon Affidavit, AR at Tab 4, pp 77 (ln 31–33), 78 (ln 1–2, 4–8).
[16] Wittenburg Affidavit at para 14, RR at Tab 1, p 5.

B. Power to summon, prorogue, and dissolve Parliament is an exercise of Royal prerogative

11. It is well established in Canada, the United Kingdom (UK), and throughout the Commonwealth that the power to summon, prorogue, and dissolve Parliament is exercised by the King or his representative in the realms.[17] This power is derived from the royal prerogative powers held by the Crown under the Westminster model of parliamentary government.[18] In Canada, the Governor General is authorized to exercise the powers of the Crown to summon, prorogue, or dissolve Parliament as set out in a prerogative instrument issued by King George VI, the *Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada of 1947* (*Letters Patent*):

> Summoning, Proroguing, or Dissolving the Parliament of Canada
>
> And We do further authorise and empower Our Governor General to exercise all powers lawfully belonging to Us in respect of summoning, proroguing or dissolving the Parliament of Canada. [19]

12. The power to prorogue Parliament was implicitly included in Canada's constitutional structure at Confederation which, pursuant to the preamble of the *Constitution Act, 1867*, is "similar in Principle to that of the United Kingdom". Section 9 of that Act declares that executive power continues to be vested in the Queen.[20] In addition, section 38 of the *Constitution Act, 1867* states that "[t]he Governor General shall from Time to Time, in the Queen's Name, …, summon and call together the House of Commons".[21]

---

17 Expert Affidavit of Peter C. Oliver sworn on January 27, 2025, at para 57 [Oliver Expert Affidavit], RR at Tab 3, p 524; Affidavit of Donald Booth affirmed on January 24, 2025, at para 5 [Booth Affidavit], RR at Tab 2, p 317.

18 Booth Affidavit at para 8, RR at Tab 2, p 318; Oliver Expert Affidavit at para 42, RR at Tab 3, p 520; Patrick J. Monahan, Wade K. Wright & Erika Chamberlain, *Hogg's Liability of the Crown* (Toronto: Carswell, 2024), p 22, Respondent's Book of Authorities at Tab 2 [RBOA]; Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, 5th ed suppl. (Toronto: Carswell, 2024), § 9:21, RBOA at Tab 3 [*Hogg & Wright*].

19 *Letters Patent constituting the Office of Governor General of Canada and Commander-in-Chief,* RSC 1985, Appendix II, No 31 [*Letters Patent*], Exhibit K to the Wittenburg Affidavit, RR at Tab 1(K), pp 125–30; Booth Affidavit at para 6, RR at Tab 2, pp 317–18.

20 *Constitution Act, 1867 (UK),* 30 & 31 Vict, c 3, s 9, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*] s 9.

21 Booth Affidavit at para 5, RR at Tab 2, p 317.

13. Section 5 of the *Canadian Charter of Rights and Freedoms* (*Charter*)[22] requires that "[t]here shall be a sitting of Parliament and of each legislature at least once every twelve months".[23] Legally, this means that a prorogation may not last more than 364 days. A constitutionally entrenched time limit on the maximum period for which Parliament will be prorogued is a feature of many Commonwealth countries, albeit not of the UK.[24] The annual sitting rule has been a Canadian constitutional requirement since Confederation.[25]

14. As a matter of well-established constitutional convention, the Governor General exercises the power to prorogue Parliament on the advice of the Prime Minister who enjoys the confidence of the House of Commons.[26] This constitutional convention, existing in Canada since Confederation, is among those that protect the principle of responsible government.[27]

15. A 1935 Privy Council minute P.C. 3374 confirms that it is for the Prime Minister to recommend dissolution and convocation of Parliament. Prorogation is treated in the same manner. In turn, the government is accountable to the House of Commons when it is summoned, and ultimately to the electorate, for the Governor General's decision to prorogue Parliament following the Prime Minister's advice.[28]

C. Prorogation practice in Canada differs from the UK

16. Parliamentary sessions in Canada have no fixed length.[29] Subject to the annual sitting rule, the length of time for which Parliament is prorogued is within the Prime Minister's discretion. Practically, it may be affected by such things as the need to enact legislation, or the need to grant

---

[22] Part I of *The Constitution Act,* 1982, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
[23] Booth Affidavit at para 7, RR at Tab 2, p 318.
[24] Oliver Expert Affidavit at paras 39, 45, RR at Tab 3, pp 518, 520.
[25] Section 5 of the *Charter* replaces section 20 of the *Constitution Act, 1867*.
[26] Booth Affidavit at para 9, RR at Tab 2, p 318; Oliver Expert Affidavit at paras 43–44, RR at Tab 3, p 520.
[27] Booth Affidavit at para 9, RR at Tab 2, pp 318–19; Oliver Expert Affidavit at para 43, RR at Tab 3, p 520.
[28] Booth Affidavit at para 9, RR at Tab 2, pp 318–19; P.C. 3374, Exhibit B to the Booth Affidavit, RR at Tab 2(B), pp 330–31.
[29] Wittenburg Affidavit at para 17, RR at Tab 1, p 6.

supply (the process by which the government asks Parliament to appropriate the funds required to meet financial obligations and to implement programs) during scheduled periods.[30]

17. Prorogation has been exercised periodically in Canada since Confederation with the average Canadian prorogation lasting 151 days.[31] In contemporary times, it has traditionally been around 40 days, but in the past few decades this has varied depending on the circumstances.[32] For example, Prime Minister Mulroney advised the Governor General to prorogue Parliament 3 times for periods between 1 and 33 days; Prime Minister Chrétien – 4 times for periods between 14 and 82 days (for example, for 82 days when Prime Minister Martin replaced Prime Minister Chrétien), and Prime Minister Harper – 4 times for periods ranging between 32 and 63 days. Prime Minister Trudeau has previously advised the Governor General to prorogue Parliament one other time in 2020 for 36 days.[33]

18. These prorogations, some of which may have been the subject of public comment at the time, were, with a single exception, not the subject of any legal challenges, and in the one (unreported) case where a legal challenge was mounted, it was rejected by the Ontario Superior Court.[34]

19. In contrast to the Canadian experience, the UK norm with respect to prorogation periods is now closer to one week. Professor Peter Oliver explains that this may be a function of the significantly longer period during which UK members of Parliament sit during each year as compared to their Canadian counterparts, such that a prorogation period that some might consider "short" in Canada would be considered "long" in the UK.[35]

[30] Boot Affidavi a par 11 R a Tab , p 319. See also *Fina cial Administr tion Act*, RS 19 5, c. -11 ss 26, 30(1.1 .
[3] Li t of all Pro ogati ns since Confe eration, Appen ix 1, Tab 4, p 10.
[32] Boo h ffid vit at pa a 1 , R at Tab 2, p 319.
[3] Wittenb rg Aff dav t at pa a 19, R at Tab 1, pp 6–7 Chart Setting out the Periods of P oroga ion f om Conf d ra ion Until 2020, Exhi it D o the Booth Affidavit, R t Tab 2( ), pp 33 –4 .
[34] *Kuj n v ttor ey General of Canada*, 20 4 ONSC 966, RBOA at Tab 1.
[35] Oliver Exp rt Aff da it at para 11, 32, 47, 6 , RR t T b 3 pp 508, 51 , 21–22, 2 . See also *R (on the a plic tion of iller) v rime Minister*, [2019] UKSC 41 at para 59 [*Miller II*].

D. Decision to prorogue is effected by Governor General's proclamation

20. Once the Governor General approves the Prime Minister's advice, a Proclamation of Prorogation is published in the Canada Gazette.[36] The proclamation includes the date on which Parliament is prorogued and a date requested by the Prime Minister for the return of Parliament. This date can be changed, either forward or backward, by subsequent proclamation.[37] A subsequent proclamation can be issued at any time.[38]

21. The effect of prorogation is to end the current session of Parliament and begin a new one, organizing parliamentary sittings into distinct phases.[39] The reset of the legislative agenda effected by prorogation can achieve a number of outcomes. In the event of a change of Prime Minister and the formation of a new ministry, the reset permits a new Prime Minister to lay out an agenda, including the measures that will be put before Parliament, in a Speech from the Throne. In the event of a deadlocked Parliament, a reset may achieve forward motion.[40]

22. The considerations leading to prorogation are often parliamentary and political and respond to events facing Canada.[41] As Professor Oliver explains, when summarizing a number of academic responses to prorogation:

> On one view a prorogation may frustrate Parliament in the face of pressing political issues and a seemingly inevitable vote of non-confidence; on another view that same prorogation may allow Parliament to deal with those same pressing issues more effectively by allowing cooler heads to prevail thereby avoiding an election and dissolution which also has the effect of shutting down Parliament.[42]

---

[36] Booth Affidavit at para 10, RR at Tab 2, p 319.
[37] Booth Affidavit at para 11, RR at Tab 2, p 319.
[38] Wittenburg Affidavit at para 18, RR at Tab 1, p 6; Chapter 8 of House of Commons Procedure and Practice, The Parliamentary Cycle, on recall during prorogation, Exhibit S to the Wittenburg Affidavit, Tab 1(S), p 180.
[39] Wittenburg Affidavit at para 14, RR at Tab 1, p 5; Chapter 8 of House of Commons Procedure and Practice, The Parliamentary Cycle, on prorogation, Exhibit M to the Wittenburg Affidavit, RR at Tab 1(M), pp 137–39; Booth Affidavit at para 5, RR at Tab 2, p 317.
[40] Booth Affidavit at para 13, RR at Tab 2, p 320.
[41] Booth Affidavit at para 13, RR at Tab 2, p 320.
[42] Oliver Expert Affidavit at para 64, RR at Tab 2, p 527.

23. No Governor General of Canada has ever refused the Prime Minister's advice to prorogue Parliament.[43] However, many commentators take the view that in Canada the Governor General has a discretion to refuse and certainly to "warn and encourage" regarding a Prime Minister's request to prorogue.[44]

E. Executive government continues during prorogation

24. During prorogation, the Government of Canada continues to function effectively through the usual powers, duties, and functions of the executive. Ministers continue to perform the work of government, including in response to President Trump's statement of an intention to impose tariffs on imports from Canada. Since January 6, activities of the executive branch of government with respect to the tariff threat have included: Cabinet committees and retreats; meetings with United States (US) business leaders; regular weekly meetings with Canada's Premiers; and multiple bilateral discussions between the Prime Minister and President Trump directly.[45]

25. Existing legislative authorities are available to respond to the imposition of tariffs. For example, potential responses to the current US threat include measures similar to those taken when the US imposed tariffs on steel and aluminum in 2018.[46] At that time, Canada imposed surtaxes against US goods using existing authorities.[47] In response to the current situation, on February 1, 2025 an Order in Council setting out intended surtaxes on certain US goods was promulgated pursuant to existing provisions of the *Customs Tariff*.[48] It has not gone into effect because the US agreed to delay the imposition of tariffs for at least 30 days.

26. There is no evidence before the Court that new legislative measures are currently required. Nevertheless, the executive branch is responsible for the policy development leading to the drafting of government bills ultimately introduced in Parliament. This work can continue during

---

[43] Booth Affidavit at para 9, RR at Tab 2, p 319–20.
[44] *Hogg & Wright* at §9:21, RBOA at Tab 3; Oliver Expert Affidavit at para 11, RR at Tab 2, p 509.
[45] Wittenburg Affidavit at paras 20–26, RR at Tab 1, pp 7–10. See also Exhibits U to JJ to the Wittenburg Affidavit, Tabs 1(U) – 1(JJ), pp 226–80.
[46] Wittenburg Affidavit at para 27, RR at Tab 1, p 10.
[47] Wittenburg Affidavit at para 27, RR at Tab 1, p 10.
[48] *United States Surtax Order (2025)*, PC 2025-0072.

prorogation in advance of the new parliamentary session. The House of Commons' involvement does not begin until the Government House Leader gives notice of such bills.[49]

27. If future circumstances make it necessary, the Governor General can summon Parliament back at an earlier date than currently fixed, on the advice of the Prime Minister.[50]

F. Resumption of Parliament after prorogation

28. After the prorogation period ends, the Senate and House of Commons will resume sitting on the date fixed by proclamation. The new session begins with the Speech from the Throne which will typically introduce the government's priorities and goals, and outline how it will achieve them, including measures to be put before the Senate and the House of Commons for enactment.[51] Preparation for the Speech from the Throne is supported by the Privy Council Office, and involves considerable interdepartmental consultation to identify initiatives and themes.[52]

29. The last Speech from the Throne was delivered by the Governor General on November 23, 2021. The principal themes of the Speech were protecting Canadians from COVID-19; having a resilient economic agenda for the middle class; protecting the environment; advancing reconciliation with Indigenous peoples; and achieving a safer Canada with social justice, fairness, and equity dimensions.[53]

---

[49] Wittenburg Affidavit at para 28, RR at Tab 1, p 11. See also Chart of the Federal Law-Making Process and Associated Support Activities, Exhibit LL to the Wittenburg Affidavit, RR at Tab 1(LL), p 315.
[50] Wittenburg Affidavit at paras 18–19, RR at Tab 1, p 6. See e.g. Canada Gazette, Proclamations for prorogations referenced in paragraph 19, Exhibit T to the Wittenburg Affidavit, RR at Tab 1(T), at pp. 194–95.
[51] Booth Affidavit at paras 14–15, RR at Tab 2, p 320.
[52] Booth Affidavit at paras 16–17, RR at Tab 2, pp 320–21.
[53] Booth Affidavit at para 19, RR at Tab 2, p 321.

30. It is anticipated that the Speech from the Throne that is currently scheduled to take place on March 24, 2025 will outline the new Prime Minister's priorities and the measures that will be presented to the Senate and the House of Commons for consideration.[54]

G. Parliamentary accountability

31. There are several avenues by which a government will be made accountable for the recommendation to prorogue Parliament, and a government for actions taken during prorogation and for its planned agenda following prorogation.

32. First, since 2017, the Standing Orders of the House of Commons have required that the reasons for recommending prorogation be tabled within 20 sitting days of the new session of Parliament. These reasons will be automatically referred to the Standing Committee on Procedure and House Affairs (Committee) for study. The effect of this study and consideration by parliamentarians, those directly affected by prorogation, is to shed light on the Prime Minister's recommendation.[55] For example, after the August 2020 prorogation of Parliament, the government's reasons for recommending prorogation were tabled in the House of Commons, studied, and the subject of a Report.[56] In that Report, the Committee acknowledged that "prorogation is a valuable tool and can serve an important function in our parliamentary democracy" and recommended:

> That prorogation should not be limited as it can be used in many circumstances, including but not limited to, political, legislative, policy-planning or other reasons.
>
> That it is inadvisable to pursue constitutional amendments touching upon the Governor General's authority to summon, prorogue or dissolve Parliament.[57]

---

[54] Booth Affidavit at para 20, RR at Tab 2, p 321.

[55] Booth Affidavit at para 21, RR at Tab 2, pp 321–22; Standing Order 32(7), Exhibit G to the Booth Affidavit, RR at Tab 2(G), p 361; Wittenburg Affidavit at para 15, RR at Tab 1, p 5.

[56] Booth Affidavit at para 22, RR at Tab 2, p 322; Report on the Government's Report to Parliament: August 2020 Prorogation – COVID-19 Pandemic, Exhibit H to the Booth Affidavit, RR at Tab 2(H), pp 413–15.

[57] Report on the Government's Report to Parliament: August 2020 Prorogation – COVID-19 Pandemic, Exhibit H to the Booth Affidavit, RR at Tab 2(H), p 414.

33. The formal reasons for the current prorogation must be tabled within 20 sitting days of March 24th, when Parliament will resume sitting.

34. Second, the Speech from the Throne commencing the new session of Parliament will be debated by the House of Commons and there could be several opportunities to test the confidence of the House, including through a vote on the Address in Reply to the Speech from the Throne, the process for granting supply, or a legislative initiative of the government considered to be a confidence matter.[58] The government will remain accountable to Parliament for decisions made and actions taken during the period of prorogation once Parliament resumes.

35. Finally, the government remains ultimately accountable to the electorate.[59]

PART II – POINTS IN ISSUE

36. The issues to be considered by the Court are:

A. Whether the Prime Minister's advice to the Governor General is reviewable or justiciable;
B. Whether the decision of the UK Supreme Court in *Miller II* applies in Canada;
C. Whether the remedy sought is available; and
D. Other issues:
   a) Whether the Applicants have standing and, if not, whether they should be granted public interest standing; and
   b) Whether the Respondent's expert affidavit should be admitted.

[58] Booth Affidavit at para 18, RR at Tab 2, p 321.
[59] Booth Affidavit at para 9, RR at Tab 2, pp 318–19.

PART III – SUBMISSIONS

A. The Prime Minister's advice is not reviewable or justiciable

37. The Prime Minister's advice to the Governor General, the "decision" challenged in this application, was made pursuant to a constitutional convention, not in the exercise of a legal power, and is not subject to review by this Court. The legal decision to prorogue Parliament rested with the Governor General under the royal prerogative and is not challenged in this application. The Federal Court has jurisdiction to review exercises of the royal prerogative only where the matter affects an individual's rights and interests and is justiciable through having a sufficient legal component to warrant a court's intervention.[60]

38. Furthermore, neither the Governor General's decision nor the Prime Minister's underlying advice are justiciable because they are suffused with political and parliamentary concerns reserved to other branches of government and not amenable to review by this Court. One of justiciability's guiding principles is that all branches of government must be sensitive to the constitutionally significant separation among them, so as not to intrude inappropriately into spheres reserved to others.[61] In this way, justiciability is intimately connected with the rule of law.[62]

a) The Prime Minister's advice does not affect any legal rights or interests

39. When the Prime Minister advises the Governor General to prorogue, that advice is not pursuant to an exercise of the royal prerogative or a statutory power, but is pursuant to the constitutional convention that supports our system of responsible government.[63] The Federal Court's jurisdiction pursuant to paragraph 18(1)(a) of the *Federal Courts Act* is to provide relief

[60] *Hupacasath First Nation v Canada*, 2015 FCA 4 at paras 34, 58, 63 and 66–70 [*Hupacasath*]; *Black v Canada (Prime Minister)*, (2001) 54 OR (3d) 215 (CA) at para 46.
[61] *Canada (Auditor General) v Canada (Minister of Energy, Mines & Resources*), [1989] 2 SCR 49 at pp 90–91 [*Auditor General*]; *La Rose v Canada*, 2023 FCA 241 at para 26 [*La Rose*].
[62] *Hupacasath* at para 66.
[63] *Conacher v Canada (Prime Minister)*, 2009 FC 920 at para 34 [*Conacher FC*]; aff'd 2010 FCA 131 [*Conacher FCA*]; *Hogg & Wright* §1:9, RBOA at Tab 3; Booth Affidavit at paras 7–9, RR at Tab 2, p 318.

against a "federal board, commission or tribunal"[64], defined as a body "exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown".[65] The Prime Minister is not a federal board, commission, or other tribunal when providing advice to the Governor General.[66]

40. As a matter of law, the legal decision to prorogue is made by the Governor General. The Prime Minister's advice has no independent legal effect.[67] The Prime Minister's advice cannot, therefore, affect legal rights, impose legal obligations, or cause prejudicial effects and so is not amenable to judicial review.[68] For the reasons given below, section 3 of the *Charter* has no applicability in this context.[69]

b) The Prime Minister's advice to prorogue Parliament is not justiciable

41. The Prime Minister's advice is also not justiciable. Justiciability is primarily concerned with the appropriateness of judicial intervention in a subject matter in dispute, and requires the court to consider its institutional capacity and legitimacy to adjudicate the matter.[70] Under our system of democratic government, the constitutional conventions pursuant to which the Prime Minister's advice is provided cannot give rise to enforceable legal rights and are not measurable legal standards that a court can legitimately apply.

42. Conventions are non-legal rules of constitutional behaviour consisting of politically binding practices that are not enforceable by the courts.[71] In the *Patriation Reference*, the Supreme Court of Canada offered two principal rationales for this. First, conventions are not based on judicial precedents but on precedents established by the other institutions of government themselves,

---

64 *Federal Courts Act*, RSC 1985, c F-7, ss 18(1)(a) [*FCA*].
65 *FCA*, s 2(1) ("federal board, commission or other tribunal").
66 *Anisman v Canada (Border Services Agency)*, 2010 FCA 52 at paras 29–31.
67 *Conacher FCA* at para 11.
68 *Democracy Watch v Canada (Attorney General)*, 2021 FCA 133 at para 23; *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 at para 36; *Conacher FC* at paras 29, 35.
69 See para 53 above.
70 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at paras 32–34; *Hupacasath* at para 62; *La Rose* at para 24.
71 *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at p 880 [*Patriation Reference*]; *Democracy Watch v Canada (Prime Minister)*, 2023 FCA 41 at para 19 [*Democracy Watch FCA*]; Oliver Expert Affidavit at para 19, RR at Tab 3, p 511.

namely the relevant political actors.[72] They are not part of the law of the Constitution, and courts cannot give effect to them unless they have been adopted in a statute.[73] Second, they generally comprise behavioural rules that may limit (and in that sense, conflict with) how an otherwise broad or even unconstrained legal power can be exercised.[74] Nevertheless, courts are bound to apply the law, not the convention, and to recognize the validity of the legal instrument: in this case, the lawful Proclamation issued by the Governor General to prorogue Parliament.

43. Binding case law from the Federal Court of Appeal considering the Prime Minister's advice to dissolve Parliament confirms that constitutional conventions are not justiciable legal questions. Dissolution, like prorogation, is governed by convention. In *Conacher FCA*,[75] the Court of Appeal affirmed this Court's decision that Prime Minister Harper's 2008 advice to dissolve Parliament was not justiciable. This Court held that any constitutional conventions bearing on the advice, being non-legal rules flowing from the principle of responsible government, were not legal measures to be adjudicated. The Prime Minister is politically responsible to the legislative branch and, ultimately, to the electorate for his advice.[76]

44. More recently, in *Democracy Watch FCA*, the Federal Court of Appeal likewise held that Prime Minister Trudeau's 2021 advice to the Governor General to dissolve Parliament was not justiciable, substantially for the reasons given in *Conacher FCA*.[77] The Court held it was "trite law" that constitutional conventions are not enforceable by the courts.[78] A breach of such a convention would only give rise to a "deficit in legitimacy" to be sanctioned in the political arena, not in the courts.[79]

45. Prorogation and dissolution of Parliament both involve the exercise of the royal prerogative by the Governor General on the advice of the Prime Minister. The exercise of both powers is

---

[72] *Patriation Reference* at pp 774–75, 878, 880.
[73] *Patriation Reference* at pp 784, 877–78, 882.
[74] *Patriation Reference* at pp 880–81.
[75] *Conacher FCA*.
[76] *Conacher FC* at paras 30–31, 34–35, 69, 75.
[77] *Democracy Watch FCA*.
[78] *Democracy Watch FCA* at paras 19–26.
[79] *Democracy Watch FCA* at para 25.

governed by long-established constitutional conventions that relate to the principle of responsible government. Prorogation, like dissolution, should be treated by this Court as non-justiciable.

c) Proclamation of Prorogation is not challenged but is likewise not justiciable

46. Even if this Court considers that the Proclamation to Prorogue is at issue, there are limits on the Court's ability to review that decision. While it is true that this Court has the jurisdiction to review the exercise of royal prerogative, its ability to do so remains subject to it affecting an individual's rights and interests and therefore being justiciable.[80] The only legal limit governing the power to prorogue Parliament is the annual sitting rule in section 5 of the *Charter*.[81] With the prorogation period at issue in this case being 11 weeks in length, the Governor General acted well within her powers to proclaim it.

47. Subject to the annual sitting rule, the decision to prorogue is not justiciable. In *Conacher FC*, this Court held that while it might review whether the exercise of the dissolution prerogative violated the *Charter* or any statute, its pure exercise was a matter of "high policy" in which the Court should not intervene.[82] This analysis was upheld by the Federal Court of Appeal, confirming that under our constitutional framework and as a matter of law, the Governor General may consider a wide variety of factors in deciding whether to dissolve Parliament and call an election. This might include any matters of constitutional law and any conventions that, in her opinion, may bear upon the matter.[83] The same principles apply in this case.

48. The Federal Court of Appeal's decisions in *Conacher FCA* and *Democracy Watch* have also been applied by the British Columbia Court of Appeal. It rejected a challenge to the Lieutenant Governor's decision to dissolve the legislative assembly at the Premier's request, confirming the Premier's advice on dissolution to be purely political in nature and, therefore, not justiciable. A political question was defined by the court as: one that raises issues that are "multi-faceted,

[80] *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 36–37 [*Khadr*].
[81] *Charter*, s 5.
[82] *Conacher FC* at paras 25, 28–29, 68, 74–75.
[83] *Conacher FCA* at paras 6, 11.

require controversial and open-ended consideration of the public interest, and do not engage the application of legal rules or principles".[84]

49. Like dissolution, prorogation is a fundamentally political decision and may be the product of political calculus.[85] To the extent that the Prime Minister's advice was relevant to the Governor General's decision, the Prime Minister's considerations as communicated in his public announcement are all non-legal matters whose adjudication would confront the Court with a quintessentially non-justiciable question. Those reasons included: the Prime Minister's intention to resign as leader of the Liberal Party of Canada; the need for a reset of a deadlocked and polarized House of Commons; and opportunities for confidence votes on Parliament's return.[86]

50. The Applicants ask the Court to second-guess those considerations, and to achieve a specific outcome: a non-confidence vote in the House of Commons, immediately.[87] Assessing whether the Prime Minister's recommendation was correct, as the Applicants suggest, or even whether he acted reasonably within a range of acceptability and defensibility with respect to those factors is beyond the Court's "ken or capability", and would push the Court beyond its proper role within the separation of powers.[88] The rule of law has always required that each branch of government show proper deference to the legitimate sphere of activity of the others.[89]

d) The Applicants have not identified any relevant legal constraints on prorogation

51. The Applicants have not pointed to any constitutional or statutory provision that prescribes when and under what circumstances a Prime Minister may recommend prorogation. The only

[84] *Democracy Watch v British Columbia (Lieutenant Governor)*, 2023 BCCA 404 at paras 79–81 [*Democracy Watch BCCA*].
[85] Booth Affidavit at para 13, RR at Tab 2, p 320.
[86] See para 9, ln 9–15 above.
[87] See "contextual considerations" argument advanced in the Applicants' Memorandum of Fact and Law at paras 65–71, AR at Tab 7, pp 463–65.
[88] *Hupacasath* at paras 62, 66; *Engel v Alberta (Executive Council)*, 2019 ABQB 490 at para 75, aff'd 2020 ABCA 462 [*Engel ABCA*]; *Democracy Watch BCCA* at para 21.
[89] *New Brunswick Broadcasting* at p 389; *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62 at para 33; *Québec Secession Reference* at paras 98–99.

provision of the *Charter* raised by the Applicants, section 3, is mischaracterized and does not apply in the circumstances.

52. The *Charter* does not guarantee a freestanding right to “effective representation” and to participate “in the political life of the country”. As stated by the Supreme Court of Canada, “representative democracy” is a value used to elucidate specific conditions of the electoral process.[90] Furthermore, ‘effective representation’ is “the desired end product of the electoral process”, and section 3 has to be understood as a right to have a meaningful role in that process.[91] Section 3 cannot be interpreted in a way that overshoots the words of the Constitution itself and must be viewed in light of its historical and jurisprudential context.[92] The Applicants’ right to vote remains and they continue to have access to democratically-elected Members of Parliament to whom they can bring their concerns and who continue to represent them, even when Parliament is not in session.

53. The Constitution contemplates regular periods of time during which Parliament may be prorogued. One part of the Constitution cannot be interpreted to abrogate another[93] and the Federal Court of Appeal has confirmed that the role of a court is to objectively and rigorously enforce the terms of the Constitution itself.[94] Section 5 of the *Charter* requires only that the period of prorogation not exceed 12 months.[95] Additionally, section 4 of the *Charter* sets an outer limit of five years for a House of Commons to continue, after which (barring certain circumstances) an election must be called.[96] Lastly, subsection 47(2) of the *Constitution Act, 1982* expressly contemplates periods during which Parliament is not sitting by confirming that periods of prorogation do not count for certain purposes associated with the constitutional

---

[90] *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at pp 183–85 [*Electoral Boundaries Reference*]. See also *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at 1031.
[91] *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at paras 22–30.
[92] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 14; *Canada v Boloh 1(a),* 2023 FCA 120 at paras 23–26 [*BOLOH*].
[93] *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 30.
[94] *BOLOH* at para 23.
[95] *Charter*, s 5.
[96] *Charter*, s 4.

amendment procedures : "[a]ny period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period…"[emphasis added].[97]

54. For similar reasons, there is also no merit to the Applicants' argument that prorogation, either in this case or in general, offends or otherwise compromises the "constitutional principles" of parliamentary sovereignty or parliamentary accountability. Both terms must be understood within the context of our constitutional text, which is supreme in this country[98], and which does not require that Parliament be continually sitting or in session.

55. Properly understood, parliamentary sovereignty does not curtail the power to prorogue as suggested by the Applicants. As a foundational principle of the Westminster model of government, it recognizes Parliament's legislative powers and exclusive authority to enact, amend, and repeal any law as it sees fit, which in Canada are subject to constitutional limits.[99] In this case, the brief period of prorogation will not impair Parliament's power to enact, amend, or repeal any laws once it resumes sitting. In Canada, parliamentary sovereignty must not be confused with parliamentary supremacy, since it is the Constitution of Canada that is the supreme law and that constrains even Parliament.[100]

56. Parliamentary sovereignty in fact confirms the legality of periods of prorogation, through legislation that contemplates both regular periods of prorogation and circumstances in which Parliament must be recalled.[101] Subsection 53(4) of the *Customs Tariff*[102], which the Applicants misstate, contemplates that Parliament will not always be sitting. Its full text requires that the relevant order "be laid before Parliament on any of the first 15 days after the making of the order that either house of Parliament is sitting" [emphasis added]. Section 58 of the *Emergencies Act* demonstrates that when Parliament intended a circumstance in which a prorogued Parliament ought to be recalled, it has said so expressly. Section 58 provides not only that a motion for confirmation of a declaration of emergency must be laid before each House of Parliament within

---

[97] *Constitution Act, 1982*, s 47(2).
[98] *Constitution Act, 1982*, s 52.
[99] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras 54–58 [*Securities Act Reference*].
[100] *Canada (Attorney General) v Power*, 2024 SCC 26 at paras 49 [*Power*].
[101] *Democracy Watch FCA* at para 37.
[102] *Customs Tariff*, SC 1997, c 36, s 53(4).

seven sitting days after the declaration is issued, but also that if the declaration is issued during a prorogation, that Parliament be "summoned forthwith to sit" for that purpose.[103]

57. The current prorogation in no way impedes the ability of Parliament to exercise its legislative authority on its return, including with respect to the current tariff threats. If legislative measures are considered necessary before March, the executive branch can continue the preparatory work necessary for introducing a bill in Parliament and, if necessary, the Governor General can summon Parliament back at an earlier date on the advice of the Prime Minister.[104] In the meantime, and in our system of government, the executive branch and elected officials are constitutionally responsible for continuing to govern and for the policy development that may ultimately lead to legislative measures.[105]

58. The executive branch continues to do this work.[106] Executive actions at both the federal and provincial levels have included Orders in Council, diplomatic negotiations, bilateral engagement between the Prime Miniter and President and federal-provincial coordination, among others.[107] The record before the Court demonstrates that the government's current considered approach, like its approach to the previous imposition of tariffs by the US, has involved its existing executive and legislative authority. The Court should not speculate that additional legislative responses are necessary or determine for itself what those might be. Such considerations involve wholly political matters outside the institutional and appropriate responsibility of this Court.

59. Parliamentary accountability is not an unwritten constitutional principle. It flows from the same principle of responsible government that underly the Prime Minister's ability to advise that Parliament be prorogued. This Court has explained that parliamentary accountability is related

---

[103] *Emergencies Act*, RSC 1985 (4th Supp), c 22, s 58. For further examples see *Energy Supplies Emergency Act*, RSC 1985, c E-9, s 46; *National Defence Act,* RSC 1985, c N-5, s 32.
[104] Wittenburg Affidavit at paras 19, 28, RR at Tab 1, pp 6, 11; Booth Affidavit at para 11, RR at Tab 2, p 319.
[105] *Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66 at paras 36–41.
[106] Wittenburg Affidavit at paras 20–26, RR at Tab 1, pp 7–10; Exhibits U to JJ to the Wittenburg Affidavit, RR at Tab(U) – (JJ), pp 226–80.
[107] Wittenburg Affidavit at paras 20–26, RR at Tab 1, pp 7–10; Exhibits U to JJ to the Wittenburg Affidavit, RR at Tab(U) – (JJ), pp 226–80. See also *United States Surtax Order (2025)*, PC 2025-0072.

to parliamentary oversight through political discourse.[108] Parliament's own scheduled sittings demonstrate that it does not envisage a need that it be in session every day for this discourse to take place. Indeed, in 2024, the House of Commons sat for 122 of 365 days.[109] As Professor Hogg explained, in its democratic sense, parliamentary accountability contemplates that: "the executive is responsible to the legislative assembly, meaning that the executive must have the confidence of the legislative assembly in order to continue in office."[110]

60. Contrary to the inferences the Applicants make, recent proceedings confirm that the government has the confidence of the House of Commons.[111] In the weeks prior to prorogation the House expressed its confidence in the government three times. In any event, a 'vote of non-confidence' itself does not have a legal definition and often requires the judgment of the Prime Minister.[112] Letters or statements made outside Parliament cannot be accepted by this Court as evidence about confidence.[113] The stated intent of individual members of the House of Commons cannot be conflated with the outcome of an actual vote in the House of Commons as a whole.[114]

B. *Miller II* does not apply

61. The decision of the UK Supreme Court (UKSC) in *Miller II* is not binding in Canada and, in any event, has no application to the facts of this case.

---

[108] *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183 at paras 43–45, aff'd 2009 FCA 297.
[109] House of Commons Sitting Calendar for 2024, Exhibit H to the Wittenburg Affidavit, RR at Tab 1(H), p 113.
[110] *Hogg & Wright*, § 9:1, RBOA at Tab 3.
[111] See Wittenberg Affidavit at paras 8–9, RR at Tab 1, p 3.
[112] *Conacher FC* at para 59. See also Anne Twomey, *The Veiled Sceptre* at p 604, Appendix 4 to the Oliver Expert Affidavit, RR at Tab 3, p 663.
[113] *Democracy Watch FCA*, at paras 36–37. See *Hogg & Wright* at § 9:13, RBOA at Tab 3. See also Anne Twomey, *The Veiled Sceptre* at p 604, Appendix 4 to the Oliver Expert Affidavit, RR at Tab 3, p 663.
[114] *R v Sharma*, 2022 SCC 39 at para 89.

a) Canadian courts must apply binding precedents, not decisions of foreign courts

62. Canadian courts are required to apply the binding decisions of higher courts and should, as a result of judicial comity, follow those of coordinate courts unless there is a legally permissible reason to depart from them.[115] Failure to apply *stare decisis* confounds the rule of law.[116] The decisions of the Federal Court of Appeal and the Supreme Court of Canada discussed above are binding on this Court and cannot be displaced by foreign and international jurisprudence.

63. Both the Supreme Court of Canada and the Federal Court of Appeal have held that decisions of foreign and international courts are not binding in Canada, especially in constitutional litigation that is informed by the Constitution of Canada as interpreted through Canadian jurisprudence. At most, they are non-binding, potentially persuasive guidance for Canadian courts in an appropriate context.[117] Even then, the weight that they receive may be limited, particularly where they are based on different constitutional provisions and principles.[118]

64. For the purposes of this application, *Miller II* should be understood as a highly exceptional case with little, if any, persuasive value. Scholars have noted that across the Commonwealth, through many prorogation scenarios including controversial ones, there is no other case in which the first minister's advice was found to be justiciable much less ruled illegal by a court.[119] Moreover, *Miller II* has been consistently rejected by Canadian courts, including the Federal Court of Appeal, Alberta Court of Appeal and the British Columbia Court of Appeal.[120] It would be unprecedented for this Court to apply it.

65. As further discussed below, the unique constitutional principles in the UK and the "once in a lifetime" facts of *Miller II* render the UKSC's reasoning and legal test inapplicable in this matter.

---

[115] *R v Sullivan*, 2022 SCC 19 at paras 64–65, 73–75.
[116] *R v Kirkpatrick*, 2022 SCC 33 at para 186.
[117] *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32 at paras 43, 46; *La Rose* at para 74.
[118] *R v Bissonnette*, 2022 SCC 23 at para 103; *R v Rahey*, [1987] 1 SCR 588 at para 108.
[119] Oliver Expert affidavit at paras 38-39, RR at Tab 3, p. 518.
[120] *Democracy Watch FCA* at paras 33–34; *Engel ABCA* at para 25; *Democracy Watch BCCA* at para 84.

b) Miller II is legally distinguishable

66. *Miller II's* precedential value is limited. The UKSC's decision that it was unlawful for the Prime Minister to advise the prorogation of Parliament in the weeks before the UK was to leave the European Union on October 31, 2019, was based on a constitutional framework and legislative restraints specific to the UK and different from our own.

67. First, *Miller II* must be understood in light of the UKSC's decision in *Miller I*, which found that Parliament had a necessary constitutional role in the UK's withdrawal from the European Union.[121] This was because withdrawal marked a fundamental change to the UK's constitutional framework, which required legislation.[122] Second, the UKSC recognized prorogation would have significantly impeded that specific constitutional role. Parliament had every intention of exercising its role and had already rejected a withdrawal agreement three times.[123] In that sense, a prorogation that appeared to be geared towards engineering a "no-deal Brexit" was contrary to the demonstrated will of Parliament.

68. This background explains the UKSC's statement that it was focused on the aspects of the case that were "justiciable", those concerning the constitutional limits of the prerogative power of prorogation.[124] For the UKSC, the two principles of constitutional law that were engaged were parliamentary sovereignty and parliamentary accountability, as they are understood within the UK's constitutional arrangements.[125] Its discussion of those principles led it to formulate the following constitutional limit on the power to prorogue the UK Parliament: a decision to prorogue Parliament will be unlawful if it has the effect of (1) **frustrating**; (2) **without reasonable justification**; (3) the ability of Parliament to carry out its **constitutional functions**.[126]

69. The frustration of Parliament, that the UKSC found justiciable, was tied to the UK Parliament's constitutional functions. However, the UK Parliament has a different constitutional

---

[121] *Miller II*, at paras 8–9; *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*, [2017] UKSC 5 [*Miller I*].
[122] *Miller I*, at paras 75–82.
[123] *Miller II*, at paras 8–9, 11–13, 22.
[124] *Miller II* at paras 34–38.
[125] *Miller II* at paras 41–48.
[126] *Miller II* at para 50.

role and the constitutional principles the UKSC cited do not have the same meaning in Canada's constitutional system. The UK has no written, entrenched constitution.[127] In the absence of a written constitution, the UKSC included among its "constitutional principles" statutory rules and other principles developed by the common law.[128] Thus parliamentary sovereignty in the UK means that "laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply".[129] On this basis, the UKSC was able to say that Parliament was frustrated because it was prevented from carrying out a "constitutional role" for five out of a possible eight weeks before a fundamental change to the country's constitutional structure, a matter with which Parliament was seized.[130]

70. When the UKSC then demanded "reasonable justification" for this decision, what it required was a justification referring to that constitutional limit, not reasons for prorogation:

> … [The rationale given] does not discuss what Parliamentary time would be needed to approve any new withdrawal agreement under section 13 of the European Union (Withdrawal) Act 2018 and enact the necessary primary and delegated legislation. It does not discuss the impact of prorogation on the special procedures for scrutinizing the delegated legislation necessary to make UK law ready for exit day and achieve an orderly withdrawal with or without a withdrawal agreement, which are laid down in the European Union (Withdrawal) Act 2018. Scrutiny committees in both the House of Commons and the House of Lords play a vital role in this. … [131]

71. Importantly, the UKSC confirmed that in the absence of a frustration of the UK Parliament in its constitutional functions, the *exercise* of the power – that particular mix of political and other reasons that went into the advice and decision – remained non-justiciable.[132] Indeed, the UKSC expressed a need for deference such that the Prime Minister's "wish to end one session of Parliament and to begin another will normally be enough".[133]

72. The UKSC's analysis reflects a fundamental difference between the constitutional systems of the UK and Canada on this point. With the enactment of the *Constitution Act, 1982* and as a

---

[127] Oliver Expert Affidavit at paras 15, 18, 63, RR at Tab 3, pp 510–11, 526; *Miller II* at para 39.
[128] *Miller II* at para 40.
[129] *Miller II* at para 41.
[130] *Miller II* at paras 51, 56–57; Oliver Expert Affidavit at para 33, RR at Tab 3, pp 515–16.
[131] *Miller II* at para 58.
[132] *Miller II* at para 52; Oliver Expert Affidavit at paras 25–26, 31, RR at Tab 3, pp 513–15.
[133] *Miller II* at para 51.

result of section 52(1), Canada was fully transformed from a system of parliamentary supremacy to one of constitutional supremacy.[134] Moreover, and as explained above, parliamentary sovereignty in Canada does not equate to the parliamentary *supremacy* of the UK.[135] Given these differences, it would be a legal error for a Canadian court to find that prorogation in Canada, when within Canada's constitutional limits, frustrates Parliament in any constitutional sense. For the reasons explained above, Canada's constitutional arrangements do not require that Parliament be continuously sitting or in session.[136]

73. The Federal Court of Appeal recently considered and rejected *Miller II* in the context of the dissolution prerogative and recognized that the UKSC decision was based on the specific legal limits identified by the UKSC based on its distinct constitutional principles. The Federal Court of Appeal found that the legal underpinnings of that case were quite different from those in Canada. The Federal Court of Appeal applied instead – as this Court must – binding principles of Canadian constitutional jurisprudence.[137] Likewise, the British Columbia Court of Appeal rejected the applicability of *Miller II* in the context of its review of the dissolution power, on the basis that *Miller II* concerned a specific constitutional role that Parliament had in the context of Brexit.[138]

c) *Miller II is factually distinguishable*

74. For two other factual reasons, *Miller II* is not persuasive. First, the "exceptional" circumstance that caused the UKSC to identify the decision as a "one off" was the impending change to the UK's constitutional framework. By contrast, in the present case there is no pending fundamental change to Canada's constitution. The threat of US tariffs, while it poses significant and serious issues for the Canadian and US economies and for our ongoing relationship with the US, does not involve a change to Canada's constitution. Further, as recent events have demonstrated, this is a fluid and ongoing issue which may or may not be resolved at the executive

---

[134] *Power* at paras 49, 55; *Québec Secession Reference* at para 72.
[135] *Securities Act Reference* at paras 55–58; *Power* at para 49.
[136] See para 54 above.
[137] *Democracy Watch FCA* at paras 32–34.
[138] *Democracy Watch BCCA* at paras 83–84.

level by both Canada and the US by the time Parliament resumes. Parliament will have the full ability to express itself on these matters when the House of Commons is summoned in March.

75. If a prorogation in Canada could lead to 'frustration' any time a serious difficulty faced the country, every prorogation would be open to legal challenge. Further, on the same logic, dissolutions and other parliamentary matters having some temporary impact on the conduct of Parliament's affairs – such as scheduled recesses of the Senate and the House of Commons – could likewise be characterized as 'frustrations'. This would be inconsistent with our constitutional text and would see the Court routinely adjudicating prorogation and other political matters.

76. Second, the UKSC focused on UK parliamentary norms which are closer to continuous parliamentary sitting, such that prorogations are significantly shorter in UK practice.[139] The period of prorogation in *Miller II* exceeded UK practice "by nearly an order of ten".[140] A five-week prorogation in the UK would be understood much differently than in Canada, where prorogations are routinely 40 days or more and average annual sittings days are fewer.

d) *Miller II supports judicial restraint in this case*

77. However, even if the *Miller II* test were to apply in Canada, which it does not, in the present case the Court could only conclude that the Prime Minister's advice was lawful, since: (1) there has been no frustration of Parliament of the type that arose in *Miller II*; (2) there is reasonable justification; and (3) exceptional intervention by the courts is not warranted.[141]

78. ***(1) No frustration of Parliament***: For the reasons outlined above, a frustration of Parliament in its constitutional role cannot be established. The present circumstances do not involve the frustration of constitutionally required action by Parliament in relation to a pending fundamental constitutional change.

[139] *Miller II* at para 59.
[140] Oliver Expert Affidavit at para 32, RR at Tab 3, p 515.
[141] Oliver Expert Affidavit at paras 25–27, RR at Tab 3, pp 513–14.

79. ***(2) Reasonable justification***: In his public comments, the Prime Minister expressed considerations for prorogation based on multiple factors as noted above.[142] These surpass the level of justification for prorogation envisaged by the UKSC, which recognized the need for deference to political judgment. Furthermore, the prorogation would be justified and lawful under Canadian law.

80. ***(3) Exceptional intervention by the courts is not warranted***: Finally, even if the *Miller II* test were applied, the circumstances in the present case are not sufficient to call for intervention by the courts. Parliamentary accountability will take place when Parliament returns and intervention by the courts would be contrary to the courts' role in our constitutional structure.

C. No legal remedy available

81. The Court cannot order the remedies sought by the Applicants: to set aside the "Decision" (which they characterize as the Prime Minister's advice) and "declare" that the first session of the 44th Parliament has not been prorogued.[143] Any judicial remedy against the Prime Minister's advice would involve the Court in either enforcing or constraining a constitutional convention, contrary to the express holding of the Supreme Court of Canada.[144] Even if this Court were to set the Prime Minister's advice aside, this would have no bearing on the validity of the Proclamation of Prorogation other than to risk effectively dictating to the Governor General how to exercise her own discretion in the future.[145] For the same reason, the Court cannot properly issue a declaration. Declarations should only be granted where they would have some utility in relation to a legal state of affairs.[146] The Court cannot issue a declaration that is inconsistent with a valid legal instrument.

82. Declarations are not opinions, but legal remedies. In *Canada v BOLOH(1)(a)*, the Federal Court of Appeal instructed that courts must determine the real essence of declarations sought, to

---

[142] See para 9 above.
[143] Notice of Application, dated January 7, 2025, para 3(c), AR at Tab 1, p 7.
[144] *Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*, 2001 SCC 15 at para 63. See also *Miller I* at para 146.
[145] *Conacher FC* at para 74.
[146] *BOLOH* at para 60; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 11.

determine their legal prerequisites.[147] As a legal remedy, a declaration assumes that the relevant legal actor will comply with it.[148] In this case, the Applicants are asking this Court to grant a specific outcome: the resumption of Parliament to pave the way for a non-confidence vote in the House of Commons, immediately.[149] This is not a remedy this Court may grant within our constitutional framework.

83. As the Federal Court of Appeal directed very recently, "[c]ourts should always be sensitive to their proper role in a constitutional democracy like ours, where separation of powers goes hand in hand with the rule of law [emphasis added]."[150] It was this same principle that caused this Court, in the first challenge to a Prime Minister's advice to dissolve Parliament, to warn of the "extreme caution" that courts must exercise before even opining on matters involving the operation of conventions, because "the opinions of courts on these matters have historically had enormous repercussions".[151] This is particularly true where the political dynamics remain fluid, and political actors must remain responsive to changing circumstances, without being second-guessed by a court.

84. It is for other branches of government, and through them, Canadians, to facilitate the political accountability that the Applicants seek, at the appropriate time and place, and this Court ought to defer to those bodies. Factually, the first expected event following Parliament's return after the prorogation period ends is the Speech from the Throne, and the House will have an opportunity to express whether it has confidence in the government and its planned agenda.[152] Pursuant to subsection 32(7) of the Standing Orders of the House of Commons, parliamentarians themselves will also study and shed light on the Prime Minister's reasons for advising that Parliament be prorogued, once the prorogation period ends.[153] The 2017 amendment to the Standing Orders was parliamentarians' own chosen means to facilitate accountability. The Supreme Court of Canada has recognized that such political remedies must not be

---

[147] *BOLOH* at para 61.
[148] *Assiniboine v Meeches*, 2013 FCA 114 at para 15.
[149] See "contextual considerations" argument advanced in the Applicants' Memorandum of Fact and Law at paras 65–71, AR at Tab 7, pp 463–65.
[150] *Democracy Watch v Canada (Attorney General)*, 2024 FCA 158 at para 89.
[151] *Conacher FC* at para 72.
[152] Booth Affidavit at paras 15, 18, RR at Tab 2, pp 320–21.
[153] Standing Order 32(7), Exhibit B to the Booth Affidavit, RR at Tab 2, p 361.

underestimated.[154] Ultimate accountability in this context will remain, as it should, with the electorate.[155]

85. As Professor Oliver explains, Canada has a range of options available to it should it wish to regulate prorogations differently.[156] However, it is for the relevant political actors to either recommend or pursue those avenues. To this point, Canada has chosen the annual sitting rule as the only legal constraint. In its first opportunity to study reasons for prorogation after the new tabling procedure was implemented, the Committee recommended against placing legislative limits on prorogation, or pursuing constitutional amendments in that regard, given the variety of circumstances in which it is used in our democratic system of government.[157] In considering the similar context of the dissolution prerogative, the Federal Court of Appeal signaled that it was an open question whether even legislative changes alone could constrain the Prime Minister's advice-giving role.[158] Certainly, for this Court to regulate the conventions governing prorogation and subject them to new constraints would be to exceed its jurisdiction.

D. Other issues

a) The Applicants should not be granted standing

86. The Applicants do not have standing as the matter they challenge – whether it is the Prime Minister's advice or the Governor General's decision to prorogue Parliament – does not adversely affect their legal rights, impose legal obligations on them, or prejudicially affect them directly.[159] Contrary to the Applicants' argument, section 3 of the *Charter* relates to the electoral process only and gives them no freestanding entitlements in any way affected by prorogation.[160]

---

[154] *Auditor General* at p 104.
[155] *Patriation Reference* at pp 881–83.
[156] Oliver Expert Affidavit at paras 14, 53–55, RR at Tab 3, pp 510, 523–24.
[157] Report on the Government's Report to Parliament: August 2020 Prorogation – COVID-19 Pandemic, Exhibit H to the Booth Affidavit, RR at Tab 2(H), p 414.
[158] *Conacher FCA* at para 5. See also Warren J. Newman, "Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions during a Parliamentary Crisis" (2010) 27 NJCL 217 at 224–25.
[159] *Bernard v Close*, 2017 FCA 52 at para 2; *Bernard v Canada (Attorney General)*, 2019 FC 924 at para 14.
[160] See *Harper v Canada (Attorney General)*, 2004 SCC 33 at paras 69–71.

In any event, their Members of Parliament remain available to provide "effective assistance ... in their 'ombudsman' role."[161]

87. Moreover, the Applicants should not be granted public interest standing. Given the non-justiciability of the Prime Minister's advice and the Governor General's decision to prorogue, the Applicants cannot meet the first requirement of the public interest standing test – whether there is a serious *justiciable* issue raised. Concern for the proper role of the courts and their constitutional relationship to the other branches of government is an established reason to limit standing. As the Supreme Court of Canada has held, the existence of a justiciable issue is essential for public interest standing to be granted.[162]

88. Further, the Applicants have not established that they possess a "genuine interest" as explained in *Downtown Eastside* – engagement through "reputation, continuing interest, and link with the claim"[163] – which should also weigh against granting them public interest standing.

b) Expert evidence is admissible

89. Although they served a notice of objection, the Applicants have not advanced any argument objecting to the evidence of Professor Oliver in their Memorandum of Fact and Law and are taken, therefore, to have abandoned this issue.

90. In any event, the expert evidence of Professor Oliver satisfies the requirements for the admissibility of expert evidence: relevance, necessity in assisting the trier of fact, absence of an exclusionary rule, and a properly qualified expert.[164] Courts have relied, in numerous other cases, on expert reports providing a comparative analysis between Canada, the Commonwealth and other international jurisdictions to assist their understanding of Canada's institutions and constitutional systems.[165] Professor Oliver's report, unlike the report in the case cited by the

---

[161] *Electoral Boundaries Reference* at p 188.
[162] *Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras 30, 37, 39–40 [*Downtown Eastside*].
[163] *Downtown Eastside* at paras 29, 43.
[164] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 19 [*White Burgess*].
[165] See e.g. *Schmidt v Canada (Attorney General)*, 2016 FC 269 at paras 215–17; *Motard c Canada (Procureur général)*, 2016 QCCS 588 at paras 95–101.

Applicants, does not express any preference over how the Court should adjudicate this case.[166] On balance, the potential risks of admitting the evidence are outweighed by the benefits and any concerns can be addressed by this Court in determining the weight to be attributed.[167]

PART IV – ORDER SOUGHT

91. The Respondent requests that the application be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa this 7th day of February 2025

Elizabeth Richards
Zoe Oxaal
Sanam Goudarzi
Loujain El Sahli
Alex Dalcourt

Counsel for the Respondent,
the Attorney General of Canada

[166] *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at para 21.
[167] *White Burgess* at para 19, *Feher v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 335 at para 174.

PART V – LIST OF AUTHORITIES

Legislation

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5

Constitution Act, *1982*, *Schedule B to the Canada Act 1982 (UK), 1982, c 11*

Customs Tariff, SC 1997, c 36

Federal Courts Act, RSC 1985, c F-7

Financial Administration Act, RSC 1985, c. F-11

Emergencies Act, RSC 1985 (4th Supp), c 22

Energy Supplies Emergency Act, RSC 1985, c E-9

National Defence Act, RSC 1985, c N-5

Jurisprudence

Anisman v Canada (Border Services Agency), 2010 FCA 52

Assiniboine v Meeches, 2013 FCA 114

Bernard v Canada (Attorney General), 2019 FC 924

Bernard v Close, 2017 FCA 52

Black v Canada (Prime Minister), (2001) 54 OR (3d) 215 (CA)

Canada v BOLOH(1)(a), 2023 FCA 120

Canada (Board of Internal Economy) v Canada (Attorney General), 2017 FCA 43

Canada (Auditor General) v Canada (Minister of Energy, Mines & Resources), [1989] 2 SCR 49

Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45

Canada (Prime Minister) v Khadr, 2010 SCC 3

Canada (Attorney General) v Power, 2024 SCC 26

Canada (House of Commons) v Vaid, 2005 SCC 30

Conacher v Canada (Prime Minister), 2009 FC 920

Conacher v Canada, 2010 FCA 131

Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12

Democracy Watch v Canada (Attorney General), 2021 FCA 133

Democracy Watch v British Columbia (Lieutenant Governor), 2023 BCCA 404

Democracy Watch v Canada (Prime Minister), 2023 FCA 41

Democracy Watch v Canada (Attorney General), 2024 FCA 158

Doucet-Boudreau v Nova Scotia (Department of Education), 2003 SCC 62

Engel v Alberta (Executive Council), 2019 ABQB 490

Engel v Prentice, 2020 ABCA 462

Feher v Canada (Public Safety and Emergency Preparedness), 2019 FC 335

Figueroa v Canada (Attorney General), 2003 SCC 37

Friends of the Earth v Canada (Governor in Council), 2008 FC 1183

Friends of the Earth v Canada (Governor in Council), 2009 FCA 297

Harper v Canada (Attorney General), 2004 SCC 33

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall, 2018 SCC 26

Hupacasath First Nation v Canada, 2015 FCA 4

Kujan v Attorney General of Canada, 2014 ONSC 966

La Rose v Canada, 2023 FCA 241

Le-Vel Brands, LLC v Canada (Attorney General), 2023 FCA 66

Motard c Canada (Procureur général), 2016 QCCS 588

New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly), 1993 CanLII 153 (SCC)

Ontario English Catholic Teachers' Assn v Ontario (Attorney General), 2001 SCC 15

Quebec (Attorney General) v 9147-0732 Québec Inc, 2020 SCC 32

R v Bissonnette, 2022 SCC 23

R v Kirkpatrick, 2022 SCC 33

R (on the application of Miller and another) v Secretary of State for Exiting the European Union, [2017] UKSC 5

R (on the application of Miller) v Prime Minister, [2019] UKSC 41

R v Rahey, [1987] 1 SCR 588

R v Sharma, 2022 SCC 39

R v Sullivan, 2022 SCC 19

Reference re Pan-Canadian Securities Regulation, 2018 SCC 48

Reference re Secession of Quebec, [1998] 2 SCR 217

Re: Resolution to amend the Constitution, [1981] 1 SCR 753

Schmidt v Canada (Attorney General), 2016 FC 269

Taseko Mines Limited v Canada (Environment), 2019 FCA 319

Toronto (City) v Ontario (Attorney General), 2021 SCC 34

White Burgess Langille Inman v Abbott and Haliburton Co, 2015 SCC 23

Secondary Sources

Patrick J. Monahan, Wade K. Wright and Erika Chamberlain, *Hogg's Liability of the Crown* (Toronto, Ont.: Carswell, 2024).

Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, 5th ed suppl. (Toronto, Carswell, 2024).

Warren J. Newman, "Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions during a Parliamentary Crisis" (2010) 27 NJCL 217.