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

and

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

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OVERVIEW

1. Democracy Watch's intervention is focused on the following issue of the several serious legal issues raised by this Application: Given the fundamental constitutional principles of responsible government, the sovereignty of Parliament, and democracy, are there restrictions on the Prime Minister's prerogative power, as the head of the executive branch of government, to shut down the legislative branch of government?

2. Democracy Watch argues that these fundamental constitutional principles restrict the Prime Minister's prerogative power of advising the prorogation of Parliament, and proposes that this Honourable Court evolve Canada's constitutional framework utilizing a three-part test as the basis for its ruling on this proceeding, which will establish the test as the legal framework that restricts future prime ministers' advice to prorogue.

3. Democracy Watch espouses and entirely concurs with the Applicants' submissions that the Prime Minister's exercise of the prerogative power of advising the prorogation of Parliament is justiciable.

PART I: SUMMARY OF FACTS

4. This judicial review application involves a challenge by the Applicants of the constitutionality of Prime Minister Trudeau's advice to the Governor General on January 6, 2025, to prorogue Parliament and the Governor General granting that request.

5. Democracy Watch is a national, non-governmental, non-partisan, non-profit organization established in 1993 that advocates for democratic good government and corporate responsibility reforms in Canada. Democracy Watch's work (which includes research, public education,

litigation, and advocacy) aims to make Canada the world's leading democratic good-government and corporate-responsibility jurisdiction. It has more than 40,000 supporters from across Canada and has had more than 225,000 Canadians sign its online petitions for changes to federal and provincial laws.

6. Democracy Watch's mandate is to advocate for, among other things, restricting unjustifiable exercises of prerogative powers and ensuring such exercises comply with Canada's parliamentary system of responsible government; making more democratic and egalitarian the rules concerning elections, political finance, government ethics, government transparency, lobbying, policy-making, and spending; and increasing government accountability through strengthening enforcement measures and practices.

7. Democracy Watch pursues its mandate through public education initiatives, participation in public policy-making and legislative processes, and public interest litigation.

PART II: QUESTIONS IN ISSUE

8. Democracy Watch fully concurs with the Applicants' position and submissions on justiciability, as set out in their Application and Memorandum of Fact and Law.

9. Accordingly, Democracy Watch's submissions are focused only on the following issue raised by this Application:

i. Given the fundamental constitutional principles of responsible government, the sovereignty of Parliament, and democracy, are there restrictions on the Prime Minister's prerogative power, as the head of the executive branch of government, to shut down the legislative branch of government?

PART III: STATEMENT OF ARGUMENT

A. Constitutional principles restrict the Prime Minister's exercise of prerogative power of advising the Governor General to prorogue Parliament

10. In its unanimous 2019 ruling in *R. (Miller) v. The Prime Minister* concerning a decision by the Prime Minister to advise the Monarch to prorogue Parliament, the United Kingdom Supreme Court ("UKSC") stated that the prime minister's advice to prorogue

> 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.[1]

11. Relying only on the United Kingdom's unwritten constitutional principle of the sovereignty of Parliament and the conventions of responsible government, the UKSC restricted the ability of one Member of Parliament ("MP") – that being the Prime Minister – to decide whether the legislature shall continue to operate. As the UKSC stated, concerning a situation in which the Prime Minister is advising the Crown to do something about Parliament:

> That situation does, however, place on the Prime Minister a constitutional responsibility, as the only person with power to do so, to have regard to all relevant interests, including the interests of Parliament.[2]

12. Democracy Watch submits that a prorogation always frustrates the legislative function of Parliament to some extent, no matter the circumstances, given that it ends the business of the House of Commons and Senate and results in unfinished business dying on the order paper.[3] While it is true that private member bills are reinstated automatically at the beginning of the stage they were at when the prorogation occurred and government bills can be similarly reinstated in the House of Commons by unanimous consent or by the adoption of a motion after notice and

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[1] *R. (Miller) v. The Prime Minister*, [2019] UKSC 41, para. 50 (hereinafter "*Miller II*").
[2] Ibid, para. 30.
[3] Affidavit of Shane Wittenberg, Affirmed January 24, 2025, Respondent's Record (**RR**), Tab 1, p. 5, para. 14 (hereinafter "Wittenberg Affidavit").

debate,[4] these steps unquestionably delay Parliament's consideration of bills and, therefore, its legislative function.

13. When a prorogation occurs during a scheduled adjournment of Parliament and lasts no longer than the adjournment of Parliament, the legislative function is the only function of Parliament that is frustrated.

14. However, when a prorogation occurs during a scheduled adjournment of Parliament and is scheduled to last beyond the adjournment period,[5] the prorogation does more than frustrate: it clearly prevents the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.

15. The UKSC established that only in "unusual circumstances" would a prime minister be required to provide further justification than simply that the prime minister wished to end one session of Parliament and begin another session; and that even if such unusual circumstances existed, the court would still have to take into account that matters of political judgment may be involved and to cautiously consider whether the consequences of the prorogation are "sufficiently serious to call for the court's intervention."[6]

16. With respect, the UKSC's test does not align with the framework that the Supreme Court of Canada ("SCC") has established. As most recently summarized in *Canada (Attorney General) v. Power,* when a conflict between constitutional principles arises, the proper approach is to reconcile the conflict in the pursuit of good governance and fundamental rights; in carrying out

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[4] Ibid.
[5] Ibid, paras. 14 and 16.
[6] *Miller II*, para. 51.

this exercise, the SCC noted, balancing "the need for both government autonomy and accountability" is "especially important in an era of increased transparency and accountability."[7]

17. In this proceeding, the Prime Minister's exercise of the prerogative power to advise the Governor General to prorogue Parliament conflicts with the fundamental constitutional principles that the SCC has upheld of responsible government[8] and the sovereignty of Parliament,[9] both of which are rooted in the underlying core constitutional principle of democracy.[10]

18. It is clear under s. 38 of the *Constitution Act, 1867* that the Prime Minister has the prerogative power to advise the Governor General when to open Parliament,[11] subject to the requirement in s. 5 of the *Charter* that there must be at least one sitting of Parliament every 12 months. In addition, after an election, the Prime Minister's prerogative is also fettered by the constitutional principles of responsible government and the sovereignty of Parliament, which require the government to demonstrate that it has the confidence of the House by introducing and having a majority of Parliament vote in favour of its Speech from the Throne.

19. Once Parliament is opened, its operations also require a balancing between the Prime Minister's prerogative powers – including the power at issue in this proceeding of advising the

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[7] *Canada (Attorney General) v. Power*, 2024 SCC 26 (CanLII), paras. 78-79 (hereinafter "*Power*"), citing *Harvey v. New Brunswick (Attorney General)*, 1996 CanLII 163 (SCC), [1996] 2 S.C.R. 876, para. 69 (p. 917).
[8] *Re: Resolution to amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 SCR 753, pp. 878-879 (hereinafter "*Re: Resolution to amend the Constitution*").
[9] *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, 1989 CanLII 73 (SCC), [1989] 2 SCR 49, p. 103 (hereinafter "*Canada (Auditor General), 1989*"). *Reference Re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 SCR 525, pp. 548 and 565. *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 (CanLII), [2018] 3 SCR 189, paras. 54-58.
[10] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217, paras. 32, 49 and 61-69 (hereinafter "*Reference re Secession of Quebec*").
[11] *Constitution Act, 1867*, s. 38.

prorogation of Parliament – and the principles of responsible government, the sovereignty of Parliament, and democracy.

20. The SCC has held that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of the system when politicians' own self-interested policymaking choices threaten to undermine the foundations of participatory democracy guaranteed by the *Charter*.[12]

21. Democracy Watch urges this Honourable Court to apply this principle in the different context of this proceeding, keeping in mind that when politicians from all political parties (especially the parties most likely to form government) fail to enact measures to restrict the prerogative powers of the Prime Minister because of their self-interest in allowing a prime minister from their party to exercise those powers without restraint, courts must be vigilant in fulfilling their constitutional duty to protect the integrity of our democratic system.

22. While conventions are not enforceable by the courts, courts can declare the existence of a convention and thereby delimit the scope of the convention where it is "open to debate as to [its] scope".[13]

23. This proceeding also involves legal rules, the constitutional principles of responsible government, the sovereignty of Parliament, and democracy; in this context, it is entirely appropriate for this Honourable Court, guided by these principles, to define and restrict the Prime Minister's prerogative power of advising the prorogation of Parliament.

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[12] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 (CanLII), [2002] 3 SCR 519, paras. 9-18, esp. para. 15.
[13] *Conacher v. Canada (Prime Minister)*, 2010 FCA 131 (CanLII), [2011] 4 FCR 22, paras. 5 and 12 (hereinafter "*Conacher*").

24. As the SCC has held, these and other principles underlying our Constitution "dictate major elements of the architecture of the Constitution itself and are as such its lifeblood":

> The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree"[…][14]
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> […]
>
> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations […] which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.[15]

25. In addition, while the preamble of Canada's Constitution states that it is "similar to that of the United Kingdom", the SCC has held that the preamble is an "aid to illuminate the provisions" of the Constitution but has no enacting force.[16] As a result, Canadian courts have discretion to evolve our Constitution, as a living tree, by defining the scope of our constitutional principles and how those principles restrict convention- and prerogative-based powers.

26. Further, unlike the power to open Parliament and the s. 50 power to dissolve Parliament,[17] there is no written provision in the Constitution establishing the power of the Governor General to prorogue Parliament, acting on the Prime Minister's unwritten prerogative power to advise a prorogation.

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[14] *Reference re Secession of Quebec*, paras. 51-52.
[15] *Reference re Secession of Quebec*, para. 54.
[16] *Re: Resolution to amend the Constitution*, p. 805.
[17] *Constitution Act, 1867*, s. 50.

27. The lack of a clear, written constitutional power to prorogue bolsters the role of Canadian courts in delimiting this power.

28. The SCC has also established that courts can issue a "purely prospective declaration of unconstitutionality" and that constitutional principles may require such a declaration;[18] and that courts have some flexibility in striking an appropriate balance between conflicting constitutional principles as long as the court's discretion is exercised in a principled and justified manner, and "a manner that best aligns with our broader constitutional order."[19]

29. Given these factors and constitutional framework, Democracy Watch urges this Honourable Court to establish a test that appropriately balances the unwritten power to prorogue and the unwritten constitutional principles of responsible government, the sovereignty of Parliament, and democracy. Such a test will apply to this proceeding and also prospectively, given the role of prorogation in our democratic system.

30. What should form the basis and elements of such a test? First, as mentioned above, the principle of responsible government requires the executive branch (i.e., the government) to demonstrate that it has the confidence of the House of Commons – which, in effect, means demonstrating that the government's legislative proposals are supported by a majority of MPs in the House.[20]

31. The principle of the sovereignty of Parliament is also based on the premise that "any position taken by the majority must be taken to reflect the sovereign will of Parliament"[21] and the

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[18] *R. v. Sullivan*, 2022 SCC 19 (CanLII), [2022] 1 SCR 460, para. 60.
[19] *Ontario (Attorney General) v. G*, 2020 SCC 38 (CanLII), [2020] 3 SCR 629, paras. 89-99.
[20] *Re: Resolution to amend the Constitution*, pp. 857-858.
[21] *Canada (Auditor General), 1989*, p. 103.

"majority rule" basis of both principles is rooted in the fundamental constitutional principle of democracy.[22]

32. True, the constitutional principle of the rule of the majority is restricted both by the principles of constitutionalism and the rule of law (given the protection of minority rights in the *Charter*), as well as federalism (in terms of the power of the majority in any province to exercise a constitutional power that is granted to the federal government and/or the provinces collectively).[23] But neither of these competing principles are at issue in this proceeding.

33. At issue in this proceeding is a situation in which one MP – that being the Prime Minister – has advised that Parliament remain shut down beyond the end of its scheduled adjournment, thereby preventing sitting MPs from taking positions on legislation and all other issues, and also preventing Parliament as a whole from carrying out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.

34. Further, in this case, the Prime Minister's advice was given at a time when the leaders of the other recognized parties in the House of Commons (such parties comprising a majority of MPs) had all clearly and publicly expressed by December 20, 2024, that the parties intended to vote non-confidence in the Prime Minister's minority government.[24] At this time, Parliament had a regularly scheduled adjournment beginning December 17, 2024, and ending January 27, 2025.[25]

35. In addition, the Prime Minister did not offer reasonable justifications for the prorogation. Parliament was not "paralyzed for months", as the Prime Minister claimed in his public statement

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[22] *Reference re Secession of Quebec*, para. 63.
[23] *Reference re Secession of Quebec*, paras. 66-78.
[24] Affidavit of David MacKinnon, AR, Tab 4, pp. 50-51, paras. 59-64, and Exhibits S to W (hereinafter "MacKinnon Affidavit").
[25] MacKinnon Affidavit, AR, Tab 4, p. 49, para. 53 and Exhibits K and L.

concerning the prorogation on January 6, 2025.[26] In fact, four bills were passed by Parliament during the time period in question.[27]

36. True, the session of Parliament was long compared to the average length, but Parliament was still actively reviewing and acting upon the government's planned legislative agenda. There is also no evidence to support the Prime Minister's claims that, compared to any other time period since Parliament's session began in November 2021, "the temperature" of Parliament was higher than usual; a "fresh start" was needed for MPs; the time period was more "complex domestically and internationally"; or that MPs were not as focused on serving Canadians.[28]

37. In the statement on January 6th, the Prime Minister also announced his intention to resign as Leader of the Liberal Party of Canada (the "Party") after the Party selects its next leader, and that he had asked the President of the Party to initiate the leadership selection process.[29] While the Prime Minister did not explicitly state that reason for the prorogation of Parliament was to give the Party time to select a new leader before a vote of non-confidence occurred (which would trigger an election), the prorogation clearly has that implication and effect.

38. The leadership selection process for a political party is not part of the processes of Parliament, and so it cannot be claimed that the process is undertaken under the principles of responsible government, the sovereignty of Parliament, or democracy.

39. In addition, the Prime Minister had the option of initiating the leadership process on December 21, 2024, after learning that all recognized opposition parties intended to vote non-

[26] MacKinnon Affidavit, AR, Tab 4, p. 42, paras. 29-30 and Exhibit B.
[27] MacKinnon Affidavit, AR, Tab 4, p. 49, para. 54 and Exhibits M to P.
[28] MacKinnon Affidavit, AR, Tab 4, p. 44, para. 37 and Exhibit B.
[29] MacKinnon Affidavit, AR, Tab 4, Exhibit B, p. 68.

confidence in the government, or even earlier, which would have allowed the Party to complete its leadership contest before the scheduled re-opening of Parliament on January 27, 2025, or soon afterwards. The internal machinations of one political party, even the ruling party, are not a justification for overriding the sovereignty of Parliament to keep it shut down for almost two months longer than its scheduled adjournment – especially during a period of minority government.

40. In other words, political parties and party leaders have a responsibility to take heed of the fundamental constitutional rights and functions of Parliament when planning and making decisions concerning their party's internal operations.

41. The Federal Court of Appeal ("FCA") has, to date, declined to utilize constitutional principles to restrict the exercise of the Prime Minister's prerogative powers concerning Parliament, or to apply the UKSC's unanimous ruling in *Miller II* to the situation of the Canadian Prime Minister advising the Governor General to dissolve Parliament and call an election earlier than the date fixed by statute, based on the reason that dissolution is distinct from prorogation.[30]

42. However, the FCA did not preclude applying the *Miller II* principles to a prorogation situation. This may be because dissolution provides the political remedy for the other parties represented in Parliament, and voters, of winning the election. Indeed, the UKSC in *Miller II* specifically differentiated between dissolution and prorogation.

43. In contrast, there is no political remedy for the other parties in a prorogation situation. Parliament is shut down and so the other parties cannot initiate any legislative action or

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[30] *Conacher v. Canada (Prime Minister)*, 2010 FCA 131 (CanLII), [2011] 4 FCR 22. *Democracy Watch v. Canada (Prime Minister)*, 2023 FCA 41 (CanLII), paras. 30-33.

resolution to counter the prorogation, and they cannot vote non-confidence in the government. Only the Governor General can re-open Parliament and, by convention, can only do so on the advice of the Prime Minister who shut down Parliament in the first place. Thus, Parliament will remain shuttered until the Prime Minister wishes to re-open it (or until a vote on a supply measure is needed to finance the government's operations).

44. To conclude (as the Respondent, and the Respondent's expert affiant and other commentators do) that the Prime Minister's discretion to prorogue Parliament has never been restricted in any way and, therefore, should never be restricted[31] deracinates Canada's "living tree" doctrine. Such a conclusion also runs contrary to the SCC's binding requirement that conflicting constitutional principles be reconciled by upholding good governance and fundamental rights and balancing government autonomy and accountability.[32]

45. Commentators who argue that the Prime Minister's discretion is unfettered as long as the government has the confidence of Parliament are essentially arguing that there are no restrictions because, if the government lost the confidence of Parliament, by convention the Prime Minister's only options are to resign or advise the dissolution of Parliament and the calling of an election. This position would allow a Prime Minister to advise the prorogation of Parliament moments before a vote of non-confidence occurs.

46. If the Prime Minister's discretion to advise prorogation is unfettered, then the government has autonomy but no accountability, and the fundamental rights of Parliament to legislate and hold the government to account – including by voting non-confidence in the government – are

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[31] Memorandum of Fact and Law of the Respondent, RR, Tab 4, pp. 675-715, esp. pp. 694-696, paras. 54-59. Affidavit of Peter Oliver, RR, Tab 3, pp. 505-530.
[32] *Power*, paras. 78-79.

clearly violated. This does not comply with the SCC's requirement to balance government autonomy and accountability, nor does it align with Canada's broader constitutional order.

47. Democracy Watch recognizes the difficulty of ensuring the courts are not adjudicating matters of political judgment; that this is a novel proceeding; and that the unusual circumstance exists of the Prime Minister intending to resign and the ruling party currently holding a leadership contest. However, given that the hearing of this proceeding is occurring on February 13–14, and that the leadership contest concludes on March 9, and that Parliament is scheduled to re-open on March 24, Democracy Watch submits that this Honourable Court can both accommodate the unprecedented nature of the situation at issue in this proceeding and also focus on looking forward and establishing a precedent that will ensure government autonomy and accountability are balanced in the future.

48. What position would balance government autonomy with accountability, and the Prime Minister's prerogative power with the principles of responsible government, the sovereignty of Parliament, and democracy, in a way that best aligns with Canada's unique, broader constitutional order, and in a way that will maintain the separation of powers and not involve the courts in parsing political judgments?

49. Democracy Watch proposes that this Honourable Court utilize the following three-part test as the basis for its ruling on this proceeding, which will establish the test as the legal framework that restricts future prime ministers' advice to prorogue:

i. Has notice of a motion of non-confidence in the government been given in Parliament, or has a vote on a matter of confidence (e.g. a supply measure) been

scheduled in Parliament? If yes, then the Prime Minister is prohibited from advising a prorogation until the motion or vote is decided.

ii. If the answer to (a) is no, have the leaders of opposition parties who represent a majority of MPs in the House of Commons clearly and publicly indicated that their parties' MPs intend to vote non-confidence in the government? If yes, then the Prime Minister is prohibited from advising a prorogation outside of, and longer than, a scheduled adjournment period of Parliament.

iii. If the answer to (b) is no, have a majority of MPs voted in favour of a prorogation at a time that is outside of and/or longer than a scheduled adjournment period of Parliament? If yes, then the Prime Minister is permitted to advise a prorogation at a time that is outside of and/or longer than the scheduled adjournment period.

50. The third part of this test allows for flexibility in the timing and length of a prorogation if it is supported by a majority of MPs, in compliance and alignment with the principles of responsible government and the sovereignty of Parliament. In a majority government situation, the government will very likely always have the majority support needed for a prorogation at a time outside of, or longer than, a scheduled adjournment. In a minority government situation, the ruling party could negotiate with one or more parties to support a longer prorogation because of an unusual situation, such as the leader of the ruling party intending to resign.

51. One could add a fourth part to this test, namely: Has the Prime Minister offered clear evidence of an unusual circumstance that falls within the scope of the operations of responsible government and the sovereignty of Parliament that necessitates a prorogation period to take place outside a scheduled adjournment period of Parliament and/or to be longer than the adjournment

period? However, Democracy Watch's view is that the third part of the test already accommodates such an unusual circumstance if it ever arises, and adding this fourth part would lead to the courts being involved in adjudicating political judgments.

52. The three-part test set out above balances constitutional principles in a way that best aligns with Canada's broader constitutional order and is also workable in every future situation.

53. This Honourable Court evolving Canada's living tree constitutional framework by establishing such a test is not only a proper exercise of its judicial function, but also will clearly indicate that, if it is the will of a majority of MPs, Parliament can establish different or more specific rules for prorogations that would, for example, allow for a prorogation during situations such as the ruling party holding a leadership contest during a minority government situation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of February 2025.

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PART IV: TABLE OF AUTHORITIES

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APPENDIX A – PROVISIONS OF STATUTES CITED

Constitution Act, 1867

Summoning of House of Commons

38 The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.

Duration of House of Commons

50 Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.

Canadian Charter of Rights and Freedoms

Annual sitting of legislative bodies

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