

EVALUATING THE LEGAL CHALLENGE TO TRUDEAU'S PROROGATION

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Prorogation is a routine occurrence in the parliamentary calendar. In recent years, however, this seemingly mundane event has become a matter of some controversy. In early January 2025, Prime Minister Justin Trudeau announced that he would resign as prime minister once a new Liberal leader was selected. He also revealed that he had advised the Governor General to prorogue Parliament and that she had granted the request, with Parliament set to return in late March. The announcement ended months of speculation about Trudeau's future. But it also raised questions about whether Parliament had been prorogued to avoid a vote of no confidence and to allow for the selection of a new leader.

These events and the litigation they prompted raise questions about (1) the constitutional limits, if any, on the prime minister's advice-giving function, (2) when, if ever, the governor general is entitled to refuse a request to prorogue parliament, and (3) whether prorogation is amenable to judicial review. In this article, I discuss the legal and the political issues raised by prorogation, both in the context of the current litigation and more broadly. I conclude that judicial intervention in the current prorogation case is not constitutionally justified. By staking out a judicial role in prorogation, I

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argue, courts risk disrupting the delicate balance of legal and political that defines our modern constitutional order.

La prorogation est un événement courant du calendrier parlementaire. Toutefois, depuis quelques années, cette procédure en apparence banale fait l'objet d'une certaine controverse. Au début de janvier 2025, le premier ministre Justin Trudeau a annoncé qu'il démissionnerait de son poste dès qu'un nouveau chef du Parti libéral aurait été choisi. Il a également révélé qu'il avait demandé à la gouverneure générale de proroger le Parlement et qu'elle avait accédé à sa demande, la reprise des travaux parlementaires étant prévue pour la fin mars. L'annonce a mis fin à des mois de spéculations sur l'avenir de Justin Trudeau. Elle a également soulevé des questions quant à savoir si le Parlement avait été prorogé pour éviter un vote de défiance et permettre l'élection d'un nouveau chef.

Ces événements soulèvent des questions concernant : 1) les limites constitutionnelles, le cas échéant, de la fonction consultative du premier ministre, 2) les circonstances, le cas échéant, dans lesquelles le gouverneur général est habilité à refuser une demande de prorogation du Parlement, et 3) la question de savoir si la prorogation peut faire l'objet d'un contrôle judiciaire. Dans cet article, l'auteure aborde les questions juridiques et politiques soulevées par la prorogation, dans le contexte du contentieux actuel et de manière plus générale. Elle conclut que l'intervention judiciaire dans la présente affaire n'est pas justifiée sur le plan constitutionnel. L'auteure soutiens qu'en s'attribuant un rôle judiciaire dans le cadre de la prorogation, les tribunaux risquent de perturber le fragile équilibre entre les dimensions juridique et le politique qui définit notre ordre constitutionnel moderne.

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I. Introduction

Prorogation is a routine occurrence in the parliamentary calendar. It concludes one session of parliament and makes way for another.² Bills that are before parliament when a prorogation occurs die on the order paper. Following a prorogation, a new session of parliament is opened and the Speech from the Throne is read, identifying the government’s legislative priorities for the session.

Prorogation is different than a dissolution of parliament, which precedes a general election, and different than an adjournment, which is a temporary break in proceedings that has no impact on bills before parliament.³ Like dissolution, however, prorogation involves the exercise of the formal legal powers of the governor general. By constitutional convention, these powers are exercised on the advice of the prime minister.⁴

In recent years, prorogation has become a matter of some controversy, both in Canada and the United Kingdom (UK). In 2008, Prime Minister Stephen Harper requested a prorogation mere weeks after a general election in the face of a looming vote of no confidence (one which ultimately failed to materialize).⁵ In 2010, parliament was again prorogued in what some viewed as an attempt to avoid accountability for the Afghan detainee scandal.⁶ There were questionable instances of prorogation under Prime

² Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge: Cambridge University Press, 2018) at ch 1 [Twomey].

³ *R (On the Application of Miller) v Prime Minister; Cherry and Others v Advocate General*, 2019 UKSC 41 at para 6 [*Miller II*]; Robert Marleau & Camille Montpetit eds, “[Prorogation and Dissolution](#)” (Ottawa ON: House of Commons, 2000) online: <tinyurl.com/ke8avrb5> [perma.cc/N2KG-HYJ6].

⁴ *Miller II*, *supra* note 3.

⁵ Michael Valpy, “The ‘Crisis’: A Narrative” in Peter Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 1. See also Andrew Heard, “[The Governor General’s Decision to Prorogue Parliament: Parliamentary Democracy Defended or Endangered?](#)” (January 2009), online (PDF): <tinyurl.com/msr9drn6> [perma.cc/FSB9-SBUC] [Heard, “Defended or Endangered”].

⁶ The claim here was that the Canadian military had transferred prisoners to the Afghan military, who had committed acts of torture against them. See CBC News, “[Harper](#)

Minister Paul Martin, and there have been comparable episodes at the provincial level.⁷ These events raise questions about (1) the constitutional limits, if any, on the prime minister's advice-giving function, (2) when, if ever, the governor general is entitled to refuse a prorogation request, and (3) whether prorogation is amenable to judicial review.⁸

Similar questions have also surfaced in the UK. In 2019, Prime Minister Boris Johnson advised the Queen to prorogue Parliament for a period of five weeks leading up to Britain's exit from the European Union. Legal challenges were initiated to contest the prorogation. To the surprise of many, the UK Supreme Court ruled in *R (on the application of Miller) v The Prime Minister (Miller II)* that the Prime Minister's advice to the Queen was unlawful and that parliament had therefore not been validly prorogued.⁹

It is perhaps predictable, then, that Canadian courts are now being asked to supervise the lawfulness of prorogation, despite there being no Canadian precedent for doing so. The Federal Court was invited to do just that in January 2025 after Prime Minister Justin Trudeau announced that he would resign as prime minister once a new Liberal leader was selected. He also revealed that he had advised the Governor General to prorogue Parliament and that she had granted the request, with Parliament set to return on March 24, 2025.

The announcement ended months of speculation about Trudeau's future. Until September 2024, the Liberals had been governing in a minority parliament with the support of a supply and confidence agreement with the New Democratic Party (NDP).¹⁰ The NDP withdrew their support for the agreement in September, and in late December, NDP leader Jagmeet Singh wrote in an open letter that the party intended to initiate a vote of no confidence against the government, joining ongoing Conservative

[Grilled Over Prorogation, Detainees](#)" (4 March 2010), online: <tinyurl.com/yf54cnxx> [perma.cc/DKZ8-5HXH].

⁷ Gary Levy, "A Crisis Not Made in a Day" in Peter Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 19. See also Duff Conacher, "[Proroguing Parliament without cause? Canadians want it Banned](#)" (23 August 2013), online: <tinyurl.com/5fzf9ay7> [perma.cc/DF9P-VE5J].

⁸ Mark D Walters, "The Law Behind the Conventions of the Constitution: Reassessing the Prorogation Debate" (2011) 5 JPPL 128 at 150 [Walters, "The Law Behind"].

⁹ *Miller II*, *supra* note 3.

¹⁰ NDP, "[Singh Ends Supply and Confidence Agreement with Governing Liberals](#)" (4 September 2024), online: <tinyurl.com/3s2msaen> [perma.cc/ZZ5Q-L7Z6].

efforts to the same effect.¹¹ Calls from within the Liberal party for Trudeau to resign also reached a fever pitch in December after Finance Minister Chrystia Freeland resigned.¹² She had been told she was being shuffled to make way for former Bank of Canada and Bank of England Governor Mark Carney to join the government (he did not ultimately do so). Carney was subsequently selected as Liberal leader and is now Prime Minister of Canada.

The judicial review proceedings initiated by David Joseph MacKinnon and Aris Lavranos relied on the legal test for prorogation articulated in *Miller II*. They argued that the Prime Minister's advice was "incorrect, unreasonable or both" on the grounds that it "ha[d] 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."¹³ They claimed that the prorogation was problematic "particularly insofar as it relates to Parliament's ability to deal quickly and decisively with especially pressing issues, such as the situation caused by President-Elect Trump's stated intention to impose a 25% tariff on all goods entering the United States from Canada."¹⁴ They also argued that the Prime Minister's decision was incorrect or unreasonable because it had the effect of avoiding a vote of no confidence.¹⁵

After hearing the judicial review application on an expedited timeline, Chief Justice Crampton dismissed the matter. In doing so, however, he opened the door to judicial review of prorogation by concluding that the lawfulness of prorogation is justiciable.

In this article, I discuss the legal and the political issues raised by prorogation, both in the context of *MacKinnon v Canada (Attorney General)* and more broadly. I conclude that Chief Justice Crampton was correct to dismiss the case, and that judicial modesty will continue to be required to avoid disrupting the delicate balance of legal and political that

¹¹ NDP, "[Jagmeet Singh's Letter to Canadians](https://www.tinyurl.com/4ybmV8ky)" (20 December 2024), online: <tinyurl.com/4ybmV8ky> [perma.cc/2FB4-23J9]; David Baxter, "[Liberal Government Survives Third Conservative Non-Confidence Vote](https://www.tinyurl.com/wt6aru7v)" (9 December 2024), online: <tinyurl.com/wt6aru7v> [perma.cc/W5G6-LMJJE].

¹² Rob Gillies, "[Canada's Finance Minister Resigns as Unpopular Trudeau Faces Biggest Test of his Political Career](https://www.tinyurl.com/53dtnwxt)" (17 December 2024), online: <tinyurl.com/53dtnwxt> [perma.cc/HL3R-UZWW].

¹³ *MacKinnon v Canada (Attorney General)*, (2025), Federal, T-60-25 (Notice of Application, Applicant) at para 27 online (PDF): <tinyurl.com/2p22zr26> [perma.cc/R93Y-4UNC] [*MacKinnon* NOA].

¹⁴ *Ibid.*

¹⁵ *Ibid.*

defines our modern constitutional order.¹⁶ At the same time, nothing I say here should prevent vigorous *political* conversations about whether Trudeau's prorogation—or any other prorogation—is legitimate. Such discussions are necessary for our constitutional order to remain robust. A prime minister should not advise the governor general to prorogue parliament to avoid a vote of no confidence. The governor general would be entitled to refuse such a request if there was concrete evidence a prorogation would have this effect. But these are separate issues from the role of courts in reviewing prorogation, a matter I say must be approached with caution.

In Part II, I describe the prime minister and the governor general's roles in relation to prorogation. In Part III, I contextualize the UK Supreme Court's decision in *Miller II*. Part IV describes the *MacKinnon* case, while Part V argues that Chief Justice Crampton was correct to dismiss the application. I conclude in Part VI.

II. The Role of the Prime Minister and the Governor General

To analyse the legal issues raised in *MacKinnon*, it is important to have a clear sense of the prime minister and the governor general's duties in relation to prorogation, as well as the constitutional rules that operate in this context.¹⁷

A) The Relevant Constitutional Rules

The *Constitution Act, 1867* is the starting point for any discussion of the powers of the Crown in Canada. The preamble of the 1867 Act states that Canada is to have a constitution “similar in principle to that of the United Kingdom.” These words have been interpreted as establishing “a constitutional monarchy and a system of parliamentary and responsible government” in Canada.¹⁸ Over time, the preamble has also come to be

¹⁶ See generally Emmett Macfarlane, “The Place of Constitutional Conventions in the Constitutional Architecture, and in the Courts” (2022) 55:2 Can J Political Science 322 [Macfarlane]. See also *Canada (Prime Minister) v Hameed* 2025 FCA 118 (Factum, Intervener), online (PDF): <tinyurl.com/3pw9h938>.

¹⁷ For a good review of these principles, see Eric Adams, “The Constitutionality of Prorogation” (2009) 18:1 Const Forum Const 17 [Adams]; See also Peter W Hogg, *Constitutional Law in Canada*, 5th ed (Scarborough: Thomson Carswell, 2024), at chs 9–10 [Hogg].

¹⁸ Warren Newman, “Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis” (2009) 27 NJCL 217 at 217 [Newman]; Peter C Oliver, “A Constitution Similar in Principle to That of the United Kingdom: The Preamble, Constitutional Principles, and a Sustainable Jurisprudence” (2019) 65:2 McGill LJ 207 [Oliver, “A Constitution Similar”].

treated as a source of unwritten constitutional principles.¹⁹ The Supreme Court of Canada has referred to these legal principles—parliamentary sovereignty, democracy, constitutionalism and the rule of law, the separation of powers and the protection of minorities, among others—as fundamental principles of our constitutional order.²⁰ I say more about them in Part III.

Section 9 of the *Constitution Act, 1867* provides that “[t]he Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen” (or the King).²¹ By virtue of sections 10 through 12 of the *Constitution Act, 1867*, the king’s powers are exercised by the governor general acting on the advice of ministers.²² The 1947 letters patent formally authorize the governor general to exercise all the powers of the king in Canada.²³ This includes the power to prorogue parliament.²⁴

The governor general’s power to prorogue parliament is a prerogative power, recognized by the common law. That power is “exercised in accordance with a web of constitutional conventions associated with the principle of responsible government.”²⁵ These conventions ensure that the formal legal powers of the governor general are exercised on the advice of democratically accountable actors.²⁶ Constitutional conventions, as is well known, are the political rules of our constitutional order. Anne Twomey describes them as rules that “operate in the gap between law and principle ... They guide the practical operation of the Constitution so that it accords with constitutional principles ... They are accepted rules of behaviour, which Dicey saw as a form of constitutional ethics or morality.”²⁷ Like legal rules, conventions have a binding quality to them. Unlike legal rules,

¹⁹ Oliver, “A Constitution Similar” *supra* note 18.

²⁰ *Ibid.*; *Reference Re Secession of Quebec*, 1998 CanLII 793 (SCC) [*Reference re Secession of Quebec*]; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, 1993 CarswellNS 417F, 1993 CanLII 153 (SCC).

²¹ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 9, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

²² Newman, *supra* note 18 at 219. See also Adams, *supra* note 17; Brian Slattery, “Why the Governor General Matters” in Peter Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 77 at 79.

²³ Newman, *supra* note 18 at 219; Patrick Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law, 2017) at 55 [Monahan, Shaw & Ryan].

²⁴ Newman, *supra* note 18 at 219.

²⁵ *Ibid.* See also Heard, “Defended or Endangered” *supra* note 5 at 6.

²⁶ Hogg, *supra* note 17; Twomey, *supra* note 2.

²⁷ Twomey, *supra* note 2 at 23.

however, they are enforced through the political process rather than in the courts.²⁸

The major constitutional conventions that govern prorogation are the confidence convention, which requires ministers to retain the confidence of the house of commons to remain in power, and the convention that the governor general acts on the advice of ministers.²⁹ As we will see, these conventions come into tension when it is perceived that the prime minister has advised the governor general to prorogue parliament to avoid a vote of no confidence.³⁰

The leading decision on the judicial treatment of conventions in Canada is the *Patriation Reference*.³¹ There, a majority of the Supreme Court concluded that courts have a role to play in recognizing conventions but not in enforcing them.³² The Court adopted the Jennings test for identifying conventions, which proceeds by asking three questions:

first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.³³

The majority in the *Patriation Reference* explained that some constitutional matters are for political actors to resolve, and gave concrete examples of how this would operate in practice. One example concerned the appropriate judicial response to an incumbent's failure to relinquish the office of prime minister or premier following defeat in an election.³⁴ Such an action would represent "a fundamental breach of convention, one so serious indeed that it could be regarded as tantamount to a *coup d'état*."³⁵ However, it would not be for courts to resolve this issue, the judges explained. Rather, "[t]he remedy in th[at] case would lie with the Governor

²⁸ *Ibid.* For a summary of the academic treatment of conventions, see Macfarlane, *supra* note 16 at 324–325.

²⁹ Twomey, *supra* note 2; Newman, *supra* note 18; Heard, "Defended or Endangered" *supra* note 5 at 6.

³⁰ Twomey, *supra* note 2 at 11.

³¹ *Re: Resolution to amend the Constitution*, 1981 CanLII 25 (SCC) [*Patriation Reference*].

³² *Ibid.*; Mark D Walters, "Judicial Review of Ministerial Advice to the Crown" (2016) 25:3 Const Forum Const 33 at 33.

³³ *Patriation Reference*, *supra* note 31 at 888, citing Sir W Ivor Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press, 1959) at 136.

³⁴ *Patriation Reference*, *supra* note 31 at 882.

³⁵ *Ibid.*

General or the Lieutenant Governor as the case might be who would be justified in dismissing the ministry and in calling on the opposition to form the government.”³⁶ Even if “the Crown [were] slow in taking this course, there is nothing the courts could do about it except at the risk of creating a state of legal discontinuity, that is, a form of revolution.”³⁷

B) The Prime Minister's Advice-Giving Function

In deciding whether to prorogue parliament, the governor general acts on the *advice* of the prime minister. In *MacKinnon*, the applicants challenged the Prime Minister's advice and not the Governor General's exercise of the prerogative. It is therefore important to determine the nature and status of such advice. Does it involve the exercise of a legal power, or is it something else?

In *Miller II*, the UK Supreme Court treated the prime minister's advice-giving function and the queen's exercise of the power to prorogue as being one and the same. It then relied on the case law on judicial review of the prerogative to justify its intervention in the case. Some commentators have suggested that the Court may have chosen to focus on the advice rather than on the exercise of the formal legal power to avoid embarrassing the Queen. The result, however, is a problematic lack of precision in the judgment.

Canadian courts have also struggled to properly characterize prime ministerial advice.³⁸ In *Conacher v Canada*, the Federal Court conceded that “[a]t first blush, it appears that the Prime Minister's decision to advise the Governor General [to dissolve Parliament] is not reviewable because the power to dissolve Parliament is the Governor General's prerogative, not the Prime Minister's.” However, it ultimately held that “the Prime Minister's power can be seen as a prerogative because it is discretionary, it is not based on a statutory grant of power and has its roots in the historical power of the Monarch.”³⁹

In reaching this conclusion, the Court relied partly on the Court of Appeal for Ontario's decision in *Black v Canada (Prime Minister)*.⁴⁰ Conrad Black challenged Prime Minister Jean Chrétien's decision to advise the Queen against granting Black a peerage. Before the Court of Appeal, one of the issues was whether the Prime Minister's advice involved an exercise

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Paul Daly, “[Prorogation, Constitutional Principles and Judicial Review](#)” (19 August 2020), online (blog): <tinyurl.com/2s4akexw> [perma.cc/UWH6-4ZTG].

³⁹ *Ibid.*; *Conacher v Canada*, 2009 FC 920 at para 26 [*Conacher*].

⁴⁰ *Black v Canada (Prime Minister)*, 2001 CanLII 8537 (ONCA) [*Black*].

of the prerogative. The Court of Appeal concluded that “whether one characterizes the Prime Minister’s actions as communicating Canada’s policy on honours to the Queen, giving her advice on Mr. Black’s peerage, or opposing Mr. Black’s appointment, he was exercising the prerogative power of the Crown relating to honours.”⁴¹

Mark Walters argues that *Conacher* incorrectly treated *Black* as authority for the proposition that prime ministerial advice to the governor general involves an exercise of the prerogative. He explains that the Court of Appeal did not in fact treat Chrétien’s statements that way, but instead characterized them as involving a direct exercise of the prerogative to advise foreign governments. “In other words, Prime Minister Chrétien, in advising the Queen not to give Black a peerage, was not advising her on how to exercise a prerogative power relating to Canada, and she did not receive his advice in her capacity as Queen of Canada.”⁴² *Black* is therefore not authority for the proposition that advice to the governor general to prorogue parliament involves an exercise of the prerogative.

If advice does not involve an exercise of the prerogative, then what is it? The most likely source of the advice-giving function is sections 11–13 of the *Constitution Act, 1867*, which refers to advice being given by the King’s Privy Council for Canada.⁴³ The 1947 Letters Patent, which authorize the Governor General to exercise all the powers of the King in

⁴¹ *Ibid* at para 35. See also *Alani v Canada (Prime Minister)*, 2015 FC 649.

⁴² Walters, “The Law Behind”, *supra* note 8 at 147.

⁴³ 11. There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen’s Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.

12. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exercisable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen’s Privy Council for Canada, or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.

Canada, also refers to the Governor General acting on the advice of the Privy Council.⁴⁴

Walters argues that when these provisions are considered in a wider historical context, one is led to conclude that the prime minister is performing a “constitutional duty” when he gives advice.⁴⁵ Because “It is a duty to advise on matters of state,” Walters explains, “the bounds for constitutionally appropriate advice are extremely broad.”⁴⁶ But the legal source of these duties also means that “advice and decisions involving the royal prerogative, while obviously political, cannot be absolutely or purely political. They are decisions made in the course of performing constitutional duties and exercising constitutional powers that are embedded in a structure or fabric of law.”⁴⁷

With this understanding of advice in hand, we are now in a better position to discuss the relationship between the prime minister’s advice and the governor general’s exercise of the prerogative power.

C) The Governor General's Power to Prorogue

In *Miller II*, the UK Supreme Court assumed, without deciding, that the Queen had no discretion to refuse a prorogation request.⁴⁸ However, the issue remains unsettled, both in the UK and Canada. The dominant view in Canada is that the governor general does possess such a power where

13. The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada.

See *Ibid* at 144; *Constitution Act, 1867*, *supra* note 21, ss 11–12 [emphasis added].

⁴⁴ II. And We do hereby authorize and empower Our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada, and for greater certainty but not so as to restrict the generality of the foregoing to do and execute, in the manner aforesaid, all things that may belong to his office and to the trust We have reposed in him according to the several powers and authorities granted or appointed him by virtue of the Constitution Acts, 1867 to 1940 and the powers and authorities hereinafter conferred in these Letters Patent and in such Commission as may be issued to him under Our Great Seal of Canada and under such laws as are or may hereinafter be in force in Canada.

Letters Patent Constituting the Office of the Governor General of Canada (UK), 1947, reprinted in RSC 1985, Appendix II, No 31, art II [emphasis added]; Walters, “The Law Behind”, *supra* note 8 at 144.

⁴⁵ Sections 11 and 12 of the *Constitution Act, 1867* refer to the Privy Council’s advice-giving function.

⁴⁶ Walters, “The Law Behind”, *supra* note 8 at 149.

⁴⁷ *Ibid*. See also Adams, *supra* note 17.

⁴⁸ *Miller II*, *supra* note 3.

the prorogation would allow the prime minister to avoid a vote of no confidence, and possibly in other circumstances as well. Twomey, writing against the backdrop of a number of precedents, including Canadian ones, has concluded that the governor general possesses a reserve power to refuse a prorogation in exceptional cases.⁴⁹ Andrew Heard and Peter Hogg & Wade Wright have reached the same conclusion,⁵⁰ while others, such as Henri Brun, take the opposite view.⁵¹

Twomey's position is that the governor general must follow the prime minister's advice where the prorogation is a routine one.⁵² Where a request raises concerns from the standpoint of constitutional principle, however, the governor general's reserve powers may be triggered. In those circumstances, the governor general has some discretion to refuse a prorogation request. The weight of Canadian authority following the 2008 prorogation supports the view that advice by a prime minister to prorogue for the purpose of avoiding a vote of confidence would violate the constitutional principles of responsible and representative government, and that the governor general would be justified in such circumstances in refusing a prorogation.⁵³

Now, refusing a prorogation is a serious matter. For this reason, a governor general seeking to uphold the principle of responsible government but also avoid becoming drawn into a political maelstrom might avail themselves of other options, such as warning the prime minister that if a prorogation were to be requested, it would be difficult to accede to it, or stretching out the discussion regarding the requested prorogation to demonstrate that it will not be automatically granted.⁵⁴

Governor General Michaëlle Jean appears to have utilized some of these techniques when confronted with Prime Minister Harper's request to prorogue in 2008. A contemporaneous newspaper article, relying on sources close to the discussions, described the events as follows:

In her historic meeting with Prime Minister Stephen Harper, Governor-General Michaëlle Jean discussed Canada's economic situation, the viability of an alternative coalition government and the mood of Parliament.

⁴⁹ Twomey, *supra* note 2.

⁵⁰ Hogg, *supra* note 17; Heard, "Defended or Endangered", *supra* note 5.

⁵¹ Henri Brun, "[La Monarchie Réelle est Morte Depuis Longtemps au Canada](http://www.la-monarchie-reelle.com/2008/12/04/la-monarchie-reelle-est-morte-depuis-longtemps-au-canada/)" (4 December 2008), online: <tinyurl.com/38ew2epn> [perma.cc/LU73-GEGL].

⁵² Twomey, *supra* note 2 at 6.

⁵³ *Ibid* at 11.

⁵⁴ I am grateful to Andrew Bernstein and Eric Adams for a discussion on this point. See also *Ibid* at 92–93.

Ms. Jean made clear to the Prime Minister that she was not a rubber stamp for his request to shut down Parliament until late January; that it was within her constitutional discretionary power to turn him down.

Halfway through the meeting, Mr. Harper and Mr. Lynch, Ottawa's top civil servant, were left alone in the room while the Governor-General and Ms. Cook went to confer with special adviser Peter Hogg, former Osgoode Hall law dean and author of the definitive scholarly work on constitutional law in Canada.

When Ms. Jean returned, there was more discussion, and then she granted the Prime Minister's request to prorogue, or suspend, Parliament, thus allowing him to escape Monday's scheduled vote of no-confidence that almost certainly would have torpedoed his minority Conservative government.⁵⁵

Michael Valpy reported that "what experts decode from the length of the meeting, about 21/2 hours, along with other subterranean information seeping out of the Governor-General's residence, is that Ms. Jean took full advantage of her constitutional right to be consulted, to advise, and to warn the Prime Minister,"⁵⁶ while stopping short of placing "conditions" on the prorogation order.⁵⁷

Somewhat more controversially, Twomey suggests that there is also Canadian precedent (an 1873 prorogation by Lord Dufferin) for a governor general acceding to a request to prorogue Parliament on the condition that the prorogation be shorter than initially proposed, in circumstances where "confidence was at issue."⁵⁸ She also argues that there may be circumstances in which a governor general should simply give effect to the advice to prorogue, even if doing so would be in tension with responsible and representative government.⁵⁹ For instance, refusing a request to prorogue may be unwise where an election has just occurred, where no other leader could command the confidence of the house, or where there is no vote of no confidence yet on the motion paper.⁶⁰

⁵⁵ Michael Valpy, "GG Made Harper Work for Prorogue" (5 December 2008), online: <tinyurl.com/yc3ber4e> [perma.cc/R8B8-CDYM].

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Twomey, *supra* note 2 at 591. Detailed research on this prorogation has been done by University of Ottawa doctoral student, Sarah Gagnon: see Sarah Gagnon, "The 1873 Macdonald-Dufferin Prorogation: A Historical Study of Prorogation and Parliamentary Sovereignty in Early Canada" (2023) (unpublished, copy on file with author).

⁵⁹ *Ibid* at ch 10.

⁶⁰ *Ibid* at ch 10.

Many Canadian scholars' views align with Twomey's.⁶¹ Hogg & Wright suggest that the principle of responsible government guides the governor general's decision whether to prorogue.⁶² This means that "so long as the cabinet enjoys the confidence of a majority in the House of Commons, the governor general is always obliged to follow lawful and constitutional advice which is tendered by the cabinet."⁶³ Where a question arises about whether the prime minister enjoys the confidence of the commons, however, the governor general has the discretion to act contrary to advice.⁶⁴ Building on these themes, Andrew Heard explains that a reserve power exists, but that in responding to a request to prorogue, the governor general must attempt to "intervene in the political process as little as possible."⁶⁵

Nicholas A MacDonald & James WJ Bowden also acknowledge the existence of a theoretical power to reject advice to prorogue, but in narrower circumstances.⁶⁶ For them, to suggest that the governor general acts as a bulwark against executive abuses is to get things exactly backwards: "the constitutional conventions that govern our Westminster system of responsible government have, via the United Kingdom, developed over the course of nearly 800 years by wresting power from the monarch and vesting it in cabinet and parliament."⁶⁷ This means that the governor general is constitutionally obligated to accede to advice to prorogue absent "the most exceptional circumstances in order to protect parliamentary democracy from imminent collapse."⁶⁸

To conclude, there are a range of views about whether a governor general may decline a request from the prime minister to prorogue parliament. However, the weight of authority supports the view that the governor general retains a reserve power to refuse a prorogation in exceptional circumstances. There is also disagreement about what these circumstances might be.⁶⁹ Twomey, for example, explains that the governor general is entitled to refuse advice that is illegal or unconstitutional.⁷⁰ She

⁶¹ Hogg, *supra* note 17; Monahan, Shaw & Ryan, *supra* note 23; Andrew Heard, "The Governor General's Decision to Prorogue Parliament: A Chronology & Assessment" (2009) 18:1 Const Forum Const 1 [Heard, "Chronology & Assessment"].

⁶² Hogg, *supra* note 17 at § 9.16.

⁶³ *Ibid.*

⁶⁴ For a similar conclusion see Monahan, Shaw & Ryan, *supra* note 23.

⁶⁵ Heard, "Chronology & Assessment" *supra* note 61 at 5. See also *Ibid* at 14–15.

⁶⁶ Nicholas A MacDonald & James WJ Bowden, "No Discretion: On Prorogation and the Governor General" (2011) 34:1 Can Parliamentary Rev 7 [MacDonald & Bowden].

⁶⁷ *Ibid* at 7.

⁶⁸ *Ibid* at 15.

⁶⁹ Heard, "Defended or Endangered", *supra* note 5 at 13.

⁷⁰ Twomey, *supra* note 2 at ch 10.

argues that “[t]he proposition that the head of state must obey the law and is entitled to reject advice that would involve a breach of the law has a long and strong provenance.”⁷¹ However, she also explains that it can be difficult for the governor general to know whether a request meets those criteria.⁷² MacDonald & Bowden, by contrast, argue for a much narrower scope for intervention.

III. *Miller II* and its Applicability in Canada

As noted above, the legal challenge in *MacKinnon* relied heavily on the UK Supreme Court’s reasoning in *Miller II*. This section describes *Miller II* in some detail. It also summarizes the academic commentary that followed the decision.

In 2019, with a no-deal Brexit looming, Prime Minister Boris Johnson advised the Queen to prorogue Parliament for a period of five weeks.⁷³ The Queen granted the request. Two cases challenging the prorogation were appealed to the UK Supreme Court. In a unanimous judgment, the Court concluded that the Prime Minister’s advice to prorogue Parliament was unlawful, and that Parliament had therefore not been validly prorogued.

The case proceeded against the backdrop of earlier litigation about Parliament’s role in the Brexit process.⁷⁴ In *R (on the application of Miller) v Secretary of State for Exiting the European Union*,⁷⁵ decided two years earlier, a majority of the UK Supreme Court had concluded that the Prime Minister lacked power under the royal prerogative to invoke the process for exiting the EU unilaterally. Rather, Article 50 of the *European Communities Act, 1972* could only be triggered by an Act of Parliament. The Court’s ruling secured a critical role for Parliament in setting the terms of the UK’s departure from the EU.

Between *Miller I* and *Miller II*, Parliament enacted four pieces of Brexit-related legislation.⁷⁶ “Crucially,” the Supreme Court noted in *Miller II*, one of the acts “require[d] Parliamentary approval of any withdrawal agreement reached by the Government.”⁷⁷ Parliament rejected three such

⁷¹ *Ibid* at 696.

⁷² *Ibid* at 698–99.

⁷³ *Miller II*, *supra* note 3 at para 15.

⁷⁴ Gavin Phillipson, “Judicial Review of Royal Prerogative and the Case of Prorogation: Process not Substance; Exception, not Rule” *Intl J Constitutional L* [forthcoming in 2025] [Phillipson].

⁷⁵ *R (on the application of Miller) v Secretary of State for Exiting the European Union*, 2017 UKSC 5.

⁷⁶ *Miller II*, *supra* note 3 at paras 9–14, 23.

⁷⁷ *Ibid* at para 11.

agreements in 2019, prompting Theresa May to resign and Boris Johnson to be selected as Prime Minister.⁷⁸

When Johnson became Prime Minister, he signalled his intent to proceed with Brexit with or without a deal. At the same time, “it was also clear,” the Supreme Court observed in *Miller II*, “that a majority of the House of Commons would not support withdrawal without an agreement.”⁷⁹ Indeed, the *European Union (Withdrawal) (No 2) Act 2019*, which received royal assent on the day of the prorogation, required the Prime Minister to request a further three month extension of the deadline for exiting the union.⁸⁰ It was in the context of this broader showdown between the Prime Minister and Parliament that Johnson asked the Queen to prorogue Parliament in August 2019.

The Court began its reasoning by observing that prorogation is a prerogative power exercised by the queen on the advice of the prime minister, and that it had not been “suggested ... that Her Majesty was other than obliged by constitutional convention to accept that advice.” While “express[ing] no view on that matter,” the Court concluded that “[t]hat situation... place[s] 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.”⁸¹

On the question of justiciability, the Court noted that the existence and extent of a prerogative power was a legal issue that courts were competent to decide.⁸² Whether that power had been exercised unlawfully in a given context was more controversial, the Court conceded, and “depend[ed] on the nature and subject matter of the particular prerogative power being exercised.”⁸³ In *Council of Civil Service Unions v Minister for the Civil Service*, for example, the House of Lords had taken the view that a dissolution of parliament was not amenable to judicial review.⁸⁴ However, the Court concluded that in the case before it, the nature and extent of the relevant power was at stake, and that this was a matter that fell squarely within the judges’ purview.⁸⁵

The Court then explained that the limits of the power to prorogue should be discerned having regard to “fundamental principles of our

⁷⁸ *Ibid* at para 12.

⁷⁹ *Ibid* at para 14.

⁸⁰ *Ibid* at para 22.

⁸¹ *Ibid* at para 30.

⁸² *Ibid* at para 35.

⁸³ *Ibid*.

⁸⁴ *Council of Civil Service Unions v Minister for the Civil Service*, [1984] UKHL 9.

⁸⁵ *Miller II*, *supra* note 3 at para 36.

constitutional law,” including those recognized at common law.⁸⁶ Two principles were relevant in determining the contours of the power: parliamentary sovereignty and parliamentary accountability.⁸⁷ Regarding parliamentary sovereignty, the Court explained that it was “not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law.”⁸⁸ Parliamentary sovereignty also placed “legal limits” on prorogation: “[t]he sovereignty of parliament would ... be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent parliament from exercising its legislative authority for as long as it pleased.”⁸⁹ Regarding parliamentary accountability, the Court explained that through question period and the work of committees, *inter alia*, “the policies of the executive are subject to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power.”⁹⁰

How did these principles condition the scope of the power to prorogue? The Court emphasized that prorogation was a legitimate practice, and that its lawfulness as such was not in question.⁹¹ However, it also noted that prorogations were not intended to go on at length: “the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model.”⁹²

The Court therefore concluded (and this was the legal standard urged on the Court in *MacKinnon*) that

a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.⁹³

⁸⁶ *Ibid* at para 40.

⁸⁷ *Ibid* at para 41.

⁸⁸ *Ibid* at para 41.

⁸⁹ *Ibid* at para 42.

⁹⁰ *Ibid* at para 46.

⁹¹ *Ibid* at paras 45, 48.

⁹² *Ibid* at para 48.

⁹³ *Ibid* at para 50.

The question of frustration or prevention was a question of fact.⁹⁴ From there, it was for the Court to consider the justification offered for the prorogation.⁹⁵ In the ordinary course, where the prorogation was a short one, “[t]he Prime Minister’s wish to end one session of Parliament and to begin another will normally be enough.” Additional reasons would only become necessary in “unusual circumstances.”⁹⁶ In any event, any assessment of the justification offered would have to consider the fact that political concerns may well form a part of the reasons for proroguing, and that the Prime Minister’s decision-making should therefore be evaluated “with ... caution.”⁹⁷

At this point, the Court noted that it had also been asked to find that Johnson had acted with improper motives in requesting the prorogation. The Court opted to first examine whether the legal standard just identified had been met. The answer to that question was yes.⁹⁸ The Supreme Court concluded that “this was not a normal prorogation”; rather, it had the effect of sidelining parliament for five of the eight weeks leading up to the deadline for exiting the EU.⁹⁹ While a prorogation of this length might not always be an issue, “the circumstances here were... quite exceptional”:

[a] fundamental change was due to take place in the Constitution of the United Kingdom ... that Parliament, and in particular the House of Commons as the democratically elected representatives of the people, has a right to have a voice in how that change comes about is indisputable.”¹⁰⁰

The fact that Parliament passed legislation mandating the Prime Minister to seek a further extension of time immediately prior to prorogation was evidence that the House of Commons did not support a no-deal Brexit.¹⁰¹

Was there a reasonable justification for the Prime Minister’s actions? While noting that “the Government must be accorded a great deal of latitude in making decisions of this nature,” the Supreme Court concluded that the Prime Minister had offered no reason for a prorogation of this

⁹⁴ *Ibid* at para 51.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid* at para 56.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid* at para 57.

¹⁰¹ *Ibid.*

length.¹⁰² Accordingly, the advice was unlawful,¹⁰³ and Parliament had not been validly prorogued.¹⁰⁴

A) The Response to the *Miller* Case

The response to *Miller II* was deeply divided, both within the legal academy and beyond it. Much of the academic commentary can be categorized as either strongly in favour or strongly opposed. As Gavin Phillipson puts it, the first group “defended the judgment pretty much to the hilt and accept[ed] none of the criticisms of it,” while the second “attacked virtually every aspect of the judgment and appear[ed] to see no merit in it at all.”¹⁰⁵ Phillipson takes issue with both groups, arguing that the best way of characterizing the judgment is as “an improvised judicial response to a significant abuse of power by the Executive.” He “thus accepts that the reasoning was doctrinally innovative, light on authority and in places a little sketchy.”¹⁰⁶ Ultimately, however, he does conclude that the decision involved “a defence of British parliamentary democracy that ... was necessary and justified.”¹⁰⁷

The academic commentary centred around five key themes: (1) justiciability; (2) whether prorogation is akin to other exercises of the prerogative; (3) the role of constitutional principles; (4) whether the decision resulted in the juridification of convention; and (5) whether *Miller II* represented continuity, rupture, or both. Below, I elaborate briefly on the concerns regarding justiciability and the role of principles and convention.

1) Justiciability

Mark Elliott, Paul Craig, Hayley Hooper, and Theodore Konstadinides, Noreen O'Meara and Riccardo Sallustio reacted favourably to the Court's ruling on justiciability.¹⁰⁸ Elliott and Konstadinides, O'Meara

¹⁰² *Ibid* at para 58.

¹⁰³ *Ibid* at para 61.

¹⁰⁴ *Ibid* at para 70.

¹⁰⁵ Phillipson, *supra* note 74 at 4. Phillipson does note that some critics were more measured.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*.

¹⁰⁸ Paul Craig, “The Supreme Court, Prorogation and Constitutional Principle” (2020) Public Law 248; Mark Elliott, “Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context” (2020) 16:4 European Constitutional L Rev 625 [Elliott, “Constitutional Adjudication”]; Theodore Konstadinides, Noreen O'Meara & Riccardo Sallustio, “[The UK Supreme Court's Judgment in Miller/Cherry: Reflections on Its Context and Implications](#)” (2 October 2019), online

and Sallustio, concluded that the Supreme Court's approach was to be preferred to the "High Court's overly broad vision of what is non-justiciable."¹⁰⁹ Writing prior to the release of the decision, Elliott argued that the power to prorogue parliament is a legal power, and like other legal powers, is amenable to judicial review in the ordinary way: "[a]ll legal powers held by the Government are legally finite, and their boundaries are determined, among other things, by reference to the purposes for which they may and may not legitimately be used. There is no good reason," he says, "why this should not apply in the case of the prorogation power and the Government's ancillary authority to advise the Queen as to its exercise."¹¹⁰

Here, it should be noted, Elliott collapses the question of whether prorogation is legally limited with the question of whether courts should enforce those limits. A related point was made by Timothy Endicott: "[y]ou may say that the special role of Parliament in our constitution implies that its sessions must be protected. But why should the court do the protecting?"¹¹¹ Others also opposed the decision to treat the exercise of the highly discretionary prerogative to prorogue Parliament as justiciable. Stephen Tierney summarized his position in the following way:

[f]or the Supreme Court to have entertained these arguments in this case is certainly understandable; the Prime Minister's move to seek prorogation was constitutionally questionable. However, the matter was not one that lent itself to legal resolution. The prerogative power of prorogation is central to the fundamental relationship of supremacy that binds the Crown to Parliament; as such Parliament is the only forum within which this power can properly be constitutionally regulated. Any other conclusion is to misread the nature of the Crown in Parliament and to assume for the courts a level of constitutional power that is both unprecedented and inappropriate.¹¹²

(blog): <tinyurl.com/54wsrh5j> [perma.cc/66HB-XZVG] [Konstadinides, O'Meara & Sallustio].

¹⁰⁹ Konstadinides, O'Meara & Sallustio, *supra* note 108.

¹¹⁰ Mark Elliott, "[Prorogation and justiciability: Some thoughts ahead of the Miller II case in the Supreme Court](#)" (12 September 2019), online (blog): <tinyurl.com/563ufkxd> [perma.cc/J3F3-HYJZ].

¹¹¹ Timothy Endicott, "Making Constitutional Principles Into Laws" (2020) 136: Law Q Rev 175.

¹¹² Stephen Tierney, "R. (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland" (2019) 40 Scots Law Times 170 at 171–72. See also Robert Craig, "[Judicial Review of Advice to Prorogue Parliament](#)" (12 July 2019), online (blog): <tinyurl.com/vpd86958> [perma.cc/X597-QL4R]: "It is ... extremely challenging to see how such advice could be justiciable on any orthodox reading of long established case law. This rule arguably rests, in large part, on a point blank refusal to be drawn into controversial political matters. This deeply wise judicial instinct is strongly to be commended."

Writing in a similar vein, Richard Ekins concluded that there was simply no legal basis for invalidating the prorogation.¹¹³ While he concluded that it would be unconstitutional for the prime minister to advise the queen to prorogue parliament to avoid a vote of no confidence, he argued that it would be for the queen to use her reserve powers to deny the request.¹¹⁴ Martin Loughlin stated that on a straightforward application of the relevant legal authorities, the case before the Court failed to meet the criteria for justiciability, owing to the fact that prorogation involves matters of high policy.¹¹⁵ Paul Craig responded to this charge by arguing that prorogation was emphatically not a matter of high policy. “In the very great majority of instances,” he explained, “prorogation entails nothing akin to high policy, in the manner that this phrase normally connotes. It is merely a mechanism for ending one session of Parliament.”¹¹⁶

2) Principles and Convention

Another major line of critique concerned the role of constitutional principle in the decision, and the relationship between principles and convention. It should be noted that constitutional principles have featured less prominently in the UK's constitutional jurisprudence than they have in Canada.

Some scholars concluded that the Court's reference to principles, and its use of those principles to articulate a legal standard for prorogation, was unobjectionable. Elliott acknowledged the critiques against the use of principles—that the principle of parliamentary sovereignty had been stretched beyond its original meaning, and that parliamentary accountability was not a legal principle at all.¹¹⁷ However, he ultimately concluded that parliamentary sovereignty and parliamentary accountability were essential parts of the UK constitutional order. For Elliott, “the additional penumbral implication ascribed by the Court in *Miller II* to parliamentary sovereignty was wholly defensible, albeit ... a step beyond the implications that court had previously attached to the doctrine.”¹¹⁸ The same could be said of parliamentary accountability. While acknowledging that this principle had generally been enforced politically, he denied that the court

¹¹³ Richard Ekins, “[Parliamentary Sovereignty and the Politics of Prorogation](#)” (2019), online (PDF): <tinyurl.com/2wsapk59> [perma.cc/5EZR-3G8B].

¹¹⁴ *Ibid* at 9.

¹¹⁵ Martin Loughlin, “[The Case of Prorogation: The UK Constitutional Council's Ruling on Appeal From the Judgment of the Supreme Court](#)” (2019), online (PDF): <tinyurl.com/3ttxrsu2> [perma.cc/38AB-4XPU] at 14 [Loughlin].

¹¹⁶ Paul Craig, “[Prorogation: Three Assumptions](#)” (10 September 2019), online (blog): <tinyurl.com/4tcbw9d6> [perma.cc/FM7K-SJV4].

¹¹⁷ Elliott, “Constitutional Adjudication”, *supra* note 108 at 629–633.

¹¹⁸ *Ibid* at 631–32.

had enforced a convention, and explained that it had instead reached beneath the convention to enforce “the underlying constitutional reason or principle that underpins and animates the convention.”¹¹⁹ “There is no reason,” he concluded, “why this constitutional principle cannot both underpin a constitutional convention – and thus institutionalise a required mode of political behaviour – while also serving, where relevant, as a constitutional standard to be applied when assessing the lawfulness of executive action.”¹²⁰

TRS Allan reached the same conclusion regarding the legitimacy of the Court’s decision, but seemed to acknowledge that political aspects of the constitution had to some extent been juridified. He wrote that “[i]n giving explicit legal recognition to the convention of ministerial responsibility to Parliament, ... the Supreme Court affirms the fundamental unity of the legal and political constitutions, reflecting the interdependence of legal and political principle.”¹²¹ He concluded that “[t]he prerogative power to prorogue (or advise the monarch to prorogue) Parliament is normally exempt from judicial review, in keeping with legal tradition. If the law is ultimately a reflection of the rule of law, however, the power must have limits that can be enforced judicially in exceptional cases.”¹²²

Others reacted strongly to this integration. John Finnis decried the decision, which in his view transformed political aspects of the constitution into law.¹²³ Finnis noted that the principle of parliamentary accountability had been secured through political rather than judicial action for hundreds of years, and that the “[t]he Judgment offers no constitutionally plausible reason for transforming the conventions about prorogation into rules of law which, being legal, are ... justiciable issues for courts to investigate and oversee.”¹²⁴

3) Final Considerations

One question that arises in considering *Miller II* and the associated commentary is whether it is helpful to understand the decision in jurisprudential terms at all. Loughlin concludes that *Miller II* was ultimately a political decision rather than a sincere exercise in legal analysis.¹²⁵

¹¹⁹ *Ibid* at 633.

¹²⁰ *Ibid* at 632–33.

¹²¹ TRS Allan, “Constitutionalism at Common Law: The Rule of Law and Judicial Review” (2023) 82:2 Cambridge LJ 236 at 253.

¹²² *Ibid* at 241–42.

¹²³ John Finnis, “[The Unconstitutionality of the Supreme Court’s Prorogation Judgment](https://www.tinyurl.com/erpdf9av)” (2019), online: <tinyurl.com/erpdf9av> [perma.cc/UP5K-8788].

¹²⁴ *Ibid* at para 14.

¹²⁵ Loughlin, *supra* note 115.

Indeed, one way of understanding the case is as a strategic decision that is not intended to have wide precedential value. This is the position David Schneiderman has urged in his assessment of the unwritten constitutional principles jurisprudence in Canada.¹²⁶ In essence, Schneiderman argues that it is pointless to try to understand these decisions in strictly legal terms, because they are not “genuine” attempts at legal reasoning.¹²⁷ Rather, principles are used to help the Court get to its preferred outcome.

I have argued against this interpretation of the unwritten principles jurisprudence.¹²⁸ However, when it comes to individual precedents, Schneiderman's argument may have some explanatory value. In my view, there is reason to question whether a close parsing of the Court's language and reasoning in *Miller II* will produce satisfactory answers for either proponents or critics of the decision. This is an additional point to consider in evaluating how helpful this exceptional judgment is to a Canadian court trying to determine the court's role, if any, in adjudicating the lawfulness of a prorogation. Indeed, the UK Supreme Court itself referred to the case as “[arising] in circumstances which have never arisen before and are unlikely ever to arise again.”¹²⁹

IV. *MacKinnon*

This brings us to a discussion of the Federal Court's decision in *MacKinnon*. When Prime Minister Trudeau announced that the Governor General had prorogued Parliament, he offered the following explanation for his request:

[t]he Parliamentary Press Gallery and anyone who's been watching politics closely over the past months will know that Parliament has been entirely seized by obstruction and filibustering and a total lack of productivity over the past few months. We are right now the longest serving minority government in history, and it's time for a reset. It's time for the temperature to come down, for the people to have a fresh start in Parliament, to be able to navigate through these complex times, both domestically and internationally.

And the reset that we have ... is actually two parts. One is the prorogation, but the other part is recognizing that removing me from the equation as the leader who will fight the next election for the Liberal Party should also decrease the level of

¹²⁶ David Schneiderman, “Unwritten Constitutional Principles in Canada: Genuine or Strategic?” in Rosalind Dixon & Adrienne Stone, eds, *Invisible Constitution in Comparative Perspective* (Cambridge: Cambridge University Press, 2018) 517.

¹²⁷ *Ibid.*

¹²⁸ Vanessa A MacDonnell, “Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making” (2019) 65:2 McGill LJ 175.

¹²⁹ *Miller II*, *supra* note 3 at para 1.

polarization that we're seeing right now in the House and in Canadian politics, and allow people to actually focus on serving Canadians in this House and work the way Canadians deserve.

When pressed by the media on whether the prorogation was intended to avoid a vote of no confidence, Trudeau referred to the 2008 prorogation precedent:

[i]n 2008, the Governor General correctly concluded that because the very last times [sic] in the previous weeks that the confidence of the House had been tested, it had passed that confidence test. Stephen Harper continued to have the confidence of the House, and it actually would bear out because as soon as they came back from the prorogation, Stephen Harper won a confidence vote once again. So a political document or political speeches doesn't [sic] carry the kind of weight that winning a confidence vote means. But this prorogation will take us only into March, and there will be confidence votes in March, in the passing of supply that will allow Parliament to weigh in on confidence in a way that is entirely in keeping with all the principles of democracy and the workings of our strong institutions.¹³⁰

In their Notice of Application, MacKinnon and Lavranos argued, *inter alia*, that “[t]he Decision is incorrect or unreasonable, or both, on the following grounds:”

the Decision has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive, particularly insofar as it relates to Parliament's ability to deal quickly and decisively with especially pressing issues, such as the situation caused by President-Elect Trump's stated intention to impose a 25% tariff on all goods entering the United States from Canada,

[and that]

the cumulative and intended effect of the Decision is part of a stratagem designed specifically to interrupt the business of Parliament and stymie the publicly stated intent of a majority of the House of Commons to bring a motion for non-confidence in the government. The Decision was not made in furtherance of Parliamentary business or the business of government, but in service of the interests of the [Liberal Party of Canada].¹³¹

¹³⁰ MacKinnon NOA, *supra* note 13 at para 22.

¹³¹ *Ibid* at para 27.

The application added that “the purported justification of the Decision on the basis that prorogation will achieve a “reset” of Parliament is specious, arbitrary, irrational and without a legal or constitutional basis,” that “alternatively, a prorogation of almost eleven weeks, until March 24, 2025, amounts to an inherently unreasonable attempt to “reset” of Parliament,” and that “the [Liberal Party of Canada] is not entitled to a prorogation of Parliament until March 24, 2025 in order to conduct an internal leadership race.”¹³²

After hearing two days of legal arguments, Chief Justice Crampton dismissed the application. He concluded that the applicants had “failed to demonstrate that the Prime Minister exceeded any limits established by the written Constitution or by the unwritten principles they identified.”¹³³ In response to the claim that the prorogation was “part of a stratagem designed specifically to interrupt the business of Parliament and stymie the publicly stated intent of a majority of the House of Commons to bring a motion for non-confidence,”¹³⁴ he noted that immediately prior to the prorogation, the Liberal Government did in fact enjoy the confidence of the House of Commons. In terms of whether the prorogation was intended to benefit the Liberal Party as it sought to select a new leader, he stated as follows:

[e]ven if those matters were beyond the scope of the authority of the Crown prerogative to prorogue Parliament, there were several other reasons given for the Decision and it is not possible to disentangle the partisan reasons from the other reasons given by the Prime Minister. On their face, those other reasons related either to the business of Parliament or to what appears to be the Prime Minister’s view of the public interest. It is not the Court’s role to question the merits or wisdom of those reasons.¹³⁵

From the standpoint of this prorogation, then, *MacKinnon* appears at first glance to be a rather open and shut case. However, it is important to emphasize that Chief Justice Crampton made a number of consequential findings in the case, including (1) that the Federal Court had jurisdiction to review the Prime Minister’s decision to request a prorogation (a matter which was not obvious),¹³⁶ (2) that the matter was justiciable, albeit in a limited way, (3) that the standard of review “in assessing whether the Prime Minister exceeded his authority” is correctness, and (4) that the

¹³² *Ibid.*

¹³³ *MacKinnon v Canada (Attorney General)*, 2025 FC 422 at para 8 [*MacKinnon*].

¹³⁴ *Ibid* at para 9.

¹³⁵ *Ibid* at para 12.

¹³⁶ Note that this decision seems to be in tension with the Federal Court of Appeal’s decision in the *Hameed* case, which was rendered subsequent to the release of *MacKinnon* and which raises similar issues. See *Canada (Prime Minister) v Hameed*, 2025 FCA 118.

fact that the advice to prorogue Parliament is given in a context largely governed by convention did not preclude judicial review of that advice.¹³⁷ I say more about the second and fourth conclusions now.

1) Justiciability

After finding that the Federal Court had jurisdiction to hear the application, Chief Justice Crampton went on to conclude that the matter was justiciable. He grounded his conclusion primarily in rule of law considerations, citing, among other cases, the Supreme Court's decision in *Roncarelli v Duplessis*.¹³⁸ The Chief Justice explained that "the courts have a legitimate role to play in ensuring that exercises of executive powers, including Crown prerogative powers, conform with the norms, imperatives and dictates of the Constitution, as well as with the rule of law."¹³⁹ This conclusion did not pose a problem for the separation of powers because "[t]he constitutional or other legal limits that may circumscribe the prerogative to prorogue Parliament provide the objective legal standards against which to adjudicate the issue."¹⁴⁰

At the same time, certain aspects of the prorogation, such as whether "an election – and not a prorogation – is the only legitimate and democratic mechanism by which a 'reset' of Parliament can be achieved," whether "a prorogation of almost eleven weeks, until March 24, 2025, amounts to an inherently unreasonable attempt to 'reset' ... of Parliament," and "whether Parliament was "paralyzed" in the period leading up to the prorogation," were not justiciable. These issues, the Chief Justice held, "are essentially matters that go to the "wisdom" or "merits" of the Decision."¹⁴¹

2) Unwritten Principles

The Chief Justice then examined the constitutional constraints on the Prime Minister's advice to prorogue. He began by considering section 5 of the *Charter*, which states that "[t]here shall be a sitting of Parliament and of each legislature at least once every twelve months."¹⁴² The Attorney General of Canada had argued that section 5 was the only legal limit on the prorogation power. The Chief Justice dismissed this submission and explained that section 5 did not foreclose resort to unwritten constitutional principles where required.¹⁴³

¹³⁷ *MacKinnon*, *supra* note 133 at para 149.

¹³⁸ *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC).

¹³⁹ *MacKinnon*, *supra* note 133 at para 108.

¹⁴⁰ *Ibid* at para 110.

¹⁴¹ *Ibid* at para 113.

¹⁴² *Ibid* at para 179.

¹⁴³ *Ibid* at para 185.

He then reviewed the unwritten constitutional principles raised by the parties and interveners: parliamentary sovereignty, democracy, the rule of law and the separation of powers. Regarding parliamentary accountability, the other principle the applicants had pleaded based on *Miller II*, he concluded that it was not a recognized unwritten principle in Canada, and that responsible government, its closest analog, was “a non-legal principle of convention.”¹⁴⁴

The Court was quick to limit expectations about when and how these principles might be invoked to invalidate a prorogation, given the Supreme Court's decision in *Toronto (City) v Ontario (Attorney General)*.¹⁴⁵ In that case, a slim majority concluded that unwritten constitutional principles could not be relied upon to invalidate legislation.¹⁴⁶ In reaching that conclusion, Chief Justice Wagner and Justice Brown explained that “[the] legal force [of unwritten principles] lies in their representation of general principles within which our constitutional order operates and, therefore, by which the Constitution's written terms—its provisions—are to be given effect.”¹⁴⁷ This “mean[t] that unwritten constitutional principles may assist courts in only two distinct but related ways.”¹⁴⁸ The first is to inform the interpretation of the written constitution, and the second is “to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. In this way,” the majority held, “structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent.”¹⁴⁹

Chief Justice Crampton reviewed the two permissible uses of unwritten principles.¹⁵⁰ He also acknowledged that their full range of uses in constraining executive action remained unclear, since *City of Toronto* dealt with a challenge to legislation. However, he posited that

if the use of unwritten constitutional principles to invalidate executive action may extend beyond the two limited roles identified in *Toronto (City)*, the margin for their independent force would nonetheless be narrow. In order to protect legal certainty and predictability in the exercise of judicial review, the independent force of unwritten constitutional principles would at least be restricted to what *arises by necessary implication* from the Constitution's text and architecture.¹⁵¹

¹⁴⁴ *Ibid* at para 201.

¹⁴⁵ *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 [*City of Toronto*].

¹⁴⁶ *Ibid* at para 50.

¹⁴⁷ *Ibid* at para 54.

¹⁴⁸ *Ibid* at para 54.

¹⁴⁹ *Ibid* at paras 55–56.

¹⁵⁰ *MacKinnon*, *supra* note 133 at para 218.

¹⁵¹ *Ibid* at para 224 [emphasis in original].

The applicants in *MacKinnon* had “failed to demonstrate that their proposed use of unwritten constitutional principles ... falls within either of the two limited roles articulated” in *City of Toronto*. He went on to explain that “[t]he same” was true “if those teachings do not apply [to] the review of executive action. Once again, the Applicants ... failed to argue or demonstrate that the Constitution’s text and architecture necessarily imply that those unwritten constitutional principles set limits on the Prime Minister’s authority to advise the prorogation of Parliament in the ways they allege.”¹⁵²

V. Analysis

In this section, I focus on three aspects of the ruling in *MacKinnon*. I begin by discussing justiciability. I then describe the influence of *Miller II* on the decision, before concluding with some analysis of the role of unwritten principles and convention in the case.

1. Justiciability

Justiciability is a preliminary hurdle that must be overcome for any case to be heard on its merits. As Justice Stratas wrote in *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, “[j]usticiability, sometimes called the “political questions objection,” concerns the appropriateness and ability of a court to deal with an issue before it.”¹⁵³ For example, “Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government.”¹⁵⁴

Justiciability has proven to be a hurdle in previous attempts to challenge ministerial advice. In *Conacher*, Justice Shore concluded that “the Prime Minister’s advisory power [to request a dissolution of parliament] is not, in and of itself, reviewable, because it does not affect the rights or legitimate expectations of an individual and is a matter of high policy that is only reviewable on *Charter* grounds.”¹⁵⁵ That decision was upheld by the Federal Court of Appeal.¹⁵⁶ In *Hupacasath*, decided

¹⁵² *Ibid* at paras 226–27.

¹⁵³ *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para 62 [*Hupacasath*]. See also *Black*, *supra* note 40 at para 50.

¹⁵⁴ *Hupacasath*, *supra* note 153 at para 62. See generally *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC); *Reference Re Canada Assistance Plan (BC)*, 1991 CanLII 74 (SCC).

¹⁵⁵ *Conacher*, *supra* note 39 at para 29.

¹⁵⁶ *Conacher v Canada (Prime Minister)*, 2010 FCA 131. As Paul Daly notes, however, not on this point: see Paul Daly, “[Could a Trudeau Prorogation be Challenged](#)

several years later, however, the Federal Court of Appeal seemed to take a broader view of justiciability, finding that a court could legitimately decide cases involving pure exercises of the prerogative (here, in the context of foreign affairs) because “[I]n judicial review, courts are in the business of enforcing the rule of law, one aspect of which is executive accountability to legal authority and protecting individuals from arbitrary [executive] action.”¹⁵⁷

Chief Justice Crampton’s decision on justiciability largely adopted the reasoning in *Hupacasath* and other, similar cases. In my view, the key question for the Court in *MacKinnon* was whether, notwithstanding the highly political nature of prorogation, there was a sufficient legal basis to the issues to ground an argument for justiciability.¹⁵⁸ Chief Justice Crampton was persuaded that the fact that all government action must comply with law rendered the matter justiciable.¹⁵⁹ However, the fact that a court may hear such a case in appropriate circumstances does not mean that it should entertain such disputes in the same way as it would a standard judicial review application. As I will explain, this is a case in which politics and convention predominate, and law plays a more minor role.¹⁶⁰

2. Role of *Miller II*

One issue that was being closely watched was the role that *Miller II* would play in the case. Chief Justice Crampton wisely resisted the wholesale adoption of the *Miller II* standard and instead sought to carve out an approach that drew on Canadian law and Canadian realities. At the same time, the decision bears the imprints of *Miller II* in several respects. The fact that the UK Supreme Court treated prorogation as justiciable in *Miller II* almost certainly influenced the Chief Justice’s conclusion that Canadian courts have a role to play in supervising the lawfulness of prorogation.

[in Court?](#)” (2025), online (blog): <tinyurl.com/yduzppzp> [perma.cc/7YW4-JZKK] [Daly, “Could a Trudeau Prorogation”]. See also *Black*, *supra* note 40, decided before both *Conacher* and *Hupacasath*, in which the Court of Appeal concluded that an exercise of the Prime Minister’s advice regarding honours would only be justiciable “where the rights or legitimate expectations of an individual are affected.”

¹⁵⁷ *Hupacasath*, *supra* note 153 at para 66 [internal quotation marks omitted]. See also Daly, “Could a Trudeau Prorogation”, *supra* note 156.

¹⁵⁸ See generally Paul Daly, “A Critical Analysis of the Case of Prorogations” (2021) 7 Can J Comp & Contemporary L 256.

¹⁵⁹ Lorne Sossin, “The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion and the Limits of the Rule of Law” (2010) 55:3 McGill LJ 661.

¹⁶⁰ See generally Peter Oliver, “[Constitutional Conventions in the Canadian Courts](#)” (4 November 2011), online (blog): <tinyurl.com/yc4v652h> [perma.cc/6ZWQ-5MTE] [Oliver, “Constitutional Conventions”].

After all, prior to *Miller II*, it was widely believed that prorogation was not amenable to judicial review.

Chief Justice Crampton's analysis of the facts was also influenced by *Miller II*. He noted repeatedly that the situation before him differed from that in *Miller II*. That case concerned a truly singular prorogation, one that would have seen the UK Parliament prorogued for several weeks in the lead up to a no-deal Brexit. The idea of Parliament being sidelined while this monumental constitutional change took place was, for the UK Supreme Court, simply untenable.¹⁶¹

These dynamics were simply absent in *MacKinnon*. Moreover, the Court in *Miller II* had to contend with the fact that Parliament had expressed its intention to help set the conditions of Britain's departure from the EU. In that context, the prorogation clearly had the effect of marginalizing Parliament.¹⁶²

Finally, Chief Justice Crampton's general approach to the question of substantive review largely tracked the Court's reasoning in *Miller II*. While he did not adopt the precise legal standard articulated by the UK Supreme Court, he did follow the UK Supreme Court's approach by finding that courts have a duty to articulate the legal limits of the Prime Minister's advice-giving function. The similarities between the two decisions are therefore more significant than they may first appear.

3. Role of Principles and Convention

For constitutional scholars, one of the more interesting aspects of the *City of Toronto* decision is the majority's reflections on the nature of unwritten constitutional principles. As I have noted, the majority acknowledged that these principles are legal, and thus form part of the legal constitution. However, it also explained that unwritten principles function as a sort of constitutional morality, and that, "like all principles of political morality, they can guide and constrain the decision-making of the executive and legislative branches."¹⁶³

Dicey, it will be recalled, used the language of constitutional morality to describe the political or conventional aspects of the constitution.¹⁶⁴ One

¹⁶¹ *Miller II*, *supra* note 3 at para 57.

¹⁶² *MacKinnon*, *supra* note 133 at para 15.

¹⁶³ *City of Toronto*, *supra* note 145 at para 49 [internal brackets and quotation marks removed].

¹⁶⁴ Vanessa MacDonnell & Philippe Lagassé, "Investigating the Legal and Political Contours of Unwritten Constitutional Principles after *City of Toronto*" (2023) 110 SCLR 2d 51 [MacDonnell & Lagassé].

can therefore read the majority's statements as suggesting that unwritten principles have both legal and political dimensions, and that they underpin both the legal and the political constitutions. This interpretation of unwritten principles is widely shared within the academy, but is only rarely discussed in the case law, either as a conceptual matter or as a reason for preferring political enforcement of these principles.¹⁶⁵

Philippe Lagassé & I have argued that this is a desirable way of understanding unwritten constitutional principles.¹⁶⁶ Pragmatically speaking, it also allows for more nuanced consideration of whether a court should enforce the legal dimensions of unwritten principles in a case dominated by convention. This is a point Chief Justice Crampton could have spent more time considering in his opinion.¹⁶⁷

In cases in which conventions dominate, unwritten principles are usually best enforced politically. The reason for this approach, as Chief Justice Crampton himself explained, is that unwritten principles are "nebulous" and "highly abstract,"¹⁶⁸ and a more concrete set of rules is available to resolve the issues: constitutional conventions. As Peter Oliver puts it,

the main reason why the courts should not use the principles underlying conventions to convert conventions into law is that there is no gap to fill. That which appears to be a hard case is only so if one focuses exclusively on the law of the constitution. If one considers together the conventions and the law of the constitution, the political and the legal constitution, then it is clear that judges should respect political means of enforcement rather than use the principles underlying conventions as a means of converting rules of political enforcement into rules of judicial enforcement.¹⁶⁹

¹⁶⁵ See e.g. Noura Karazivan, "De La Structure Constitutionnelle Dans Le Renvoi Relatif Au Senat: Vers Une Gestalt Constitutionnelle?" (2015) 60:4 McGill LJ 793; James W J Bowden & Nicholas A MacDonald, "Cabinet Manuals and the Crown" in D Michael Jackson & Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Montreal & Kingston: McGill-Queen's University Press, 2013) 179; Newman, *supra* note 18; Jean Leclair & Jean-François Gaudreault-Desbiens, "Of Representation, Democracy and Legal Principles: Thinking about the *Impensé*" in Peter Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 105.

¹⁶⁶ MacDonnell & Lagassé, *supra* note 164.

¹⁶⁷ *Ibid.* I am grateful to Philippe Lagassé for making this point in a seminar on MacKinnon with the UK Commons Library in which we both participated.

¹⁶⁸ MacKinnon, *supra* note 133 para 223, citing *City of Toronto*, *supra* note 145 at para 59.

¹⁶⁹ Oliver, "Constitutional Conventions", *supra* note 160.

This approach is also consistent with the majority's statements in *City of Toronto* about the importance of relying on the written constitution's more concrete dictates, as opposed to amorphous, unwritten principles. It also helps explain why legal underenforcement of unwritten principles is relatively common.¹⁷⁰ In the *Secession Reference*, for example, the Supreme Court relied on unwritten principles to articulate a legal framework for session, but left the enforcement of that framework to political actors.¹⁷¹ In the *Patriation Reference*, the Court drew on unwritten principles to articulate a convention of substantial provincial consent to amend the constitution, but refused to enforce the convention.¹⁷²

The upshot is that, while legal challenges to prorogation may satisfy the justiciability threshold, the question of their compliance with constitutional convention and constitutional principle should generally be left to the prime minister and the governor general. The full legal force of these principles is necessarily held in reserve for exceptional circumstances. Those circumstances were simply not present in *MacKinnon*.

4. Final Thoughts on the Facts

In my view, Chief Justice Crampton was correct to emphasize that on January 6, when the prorogation was announced, the Liberal government did, in fact, have the confidence of the House of Commons. It was far from certain that a vote of no confidence would have succeeded imminently had Parliament continued sitting. As both the Prime Minister and MacDonald & Bowden suggested, there is an important difference between an "imminent" loss of confidence and a "formal" loss of confidence.¹⁷³ To suggest that the Prime Minister was facing either an imminent *or* a formal loss of confidence was to oversimplify the fluidity of the situation the Prime Minister was facing in December and early January.¹⁷⁴

The length of the prorogation, which is long by "modern" standards, might raise some questions.¹⁷⁵ However, the constitutional minimalism that defines the role of Governor General suggests that this prorogation would likely have been treated by Her Excellency as a standard prorogation;

¹⁷⁰ Lawrence Gene Sager, "Fair Measure: The Legal Status of Underinformed Constitutional Norms" (1978) 91:6 Harv L Rev 1212.

¹⁷¹ *Reference re Secession of Quebec*, *supra* note 20.

¹⁷² *Patriation Reference*, *supra* note 31.

¹⁷³ MacDonald & Bowden, *supra* note 66 at 8.

¹⁷⁴ CBC Radio, "[The Sunday Magazine for December 22, 2024](https://www.cbc.ca/news/politics/sunday-magazine-for-december-22-2024)" (22 December 2024), online (audio): <tinyurl.com/3katp4hf> [perma.cc/U8DU-QHFS].

¹⁷⁵ Charlie Feldman, "[Seeing many hot takes on prorogation that might benefit from some stats](https://www.cbc.ca/news/politics/seeing-many-hot-takes-on-prorogation-that-might-benefit-from-some-stats)," (20 December 2024), online: <tinyurl.com/374dpejw> [perma.cc/EW74-AMCY].

that is, one which should have been granted automatically by the Governor General. In the circumstances, it would have exceeded the judicial role to second-guess this assessment.

Finally, regarding the adequacy of the justification for prorogation offered by the Prime Minister, Chief Justice Crampton was also correct, in my view, to conclude that a court cannot possibly make legal findings of fact about whether parliament had been operating dysfunctionally without raising significant parliamentary privilege and other concerns. Nor could it inquire into the veracity of whether a prorogation would succeed in resetting parliament or not. To do so would exceed the judicial role and the separation of powers. Such an approach would disrupt the well-established balance between the legal and political in our constitutional order.

To be clear, there is every reason for citizens and politicians to engage in robust debate about whether this prorogation request was made responsibly and in good faith, whether it was strategically wise, and the like. But these are very different questions than whether the Governor General should have exercised her reserve powers to refuse the prorogation request, or whether, as a legal matter, the courts should have invalidated it.

VI. Conclusion

The issues raised by this case were complex.¹⁷⁶ In saying this, I do not mean to suggest that it is difficult to know how the matter should have been resolved. To the contrary, the case for judicial intervention was weak. At the same time, it would be misleading to suggest that the multiple legal and constitutional issues presented by the case produce a straightforward answer. Courts and academic commentators remain divided on many of the issues raised by prorogation. Scholars disagree about the nature of prime ministerial advice. They disagree about whether the governor general has a reserve power to refuse a prorogation.¹⁷⁷ There are disagreements about whether the prime minister's advice-giving function is governed by constitutional convention only, or also by law. There is disagreement about whether courts have a role in supervising prorogation. And there are bound to be disagreements about how helpful the UK's *Miller II* decision is in sorting these issues out in the Canadian context.

¹⁷⁶ In this regard, Martin Loughlin's preliminary comments in his analysis of the *Miller II* case to a similar effect are welcome: see Loughlin, *supra* note 115.

¹⁷⁷ MacDonald & Bowden, *supra* note 66; Twomey, *supra* note 2.

Martin Loughlin explains that cases like this one reveal philosophical differences about how courts should approach constitutional issues.¹⁷⁸ He describes three different ways that judges have handled interpretive issues in the UK over time. One, he says, draws from the “artificial reason [of the common law] “acquired through deep immersion in source-based legal materials.”¹⁷⁹ A second flows from the interpretation of statutes. There, “law is an expression of will of the sovereign authority and the Act of Parliament is the highest expression of law. In this respect, judges are the precision instruments of legislative intention.”¹⁸⁰ The third, he says, is more recent in UK courts, and it involves “principled reasoning.” “[L]aw-as-principle is the elaboration of a type of scholastic reason that limits the range of legitimate expressions of will by governing majorities.”¹⁸¹ It is not difficult to see how these different approaches could produce different outcomes in a case like *MacKinnon*.

In seeking to highlight the different constitutional dimensions of the legal challenge to prorogation, I have made every effort not to flatten out what are deeply complex and contestable questions.¹⁸² However, the courts do not have the option of demurring on at least some of these questions: they must decide. For that reason, it is important to make some effort to interrogate the merits of these contested questions.

I believe the Federal Court was correct to treat this case as warranting only modest judicial intervention, and in concluding that the application should be dismissed. Canada’s modern system of constitutional government is characterized by a delicate balance of legal and political. Parliamentary sovereignty and democracy are principles that may, in my view, be legitimately enforced by courts in exceptional circumstances. But to the extent that they are engaged by the Trudeau prorogation, they should be enforced politically, with the attendant political consequences.

Questions remain, however, about what this means for the role of the governor general. *MacKinnon* may change the strategic considerations facing a governor general when she is deciding whether to grant a prorogation. Until *MacKinnon* was decided, it was widely believed that the buck stopped at the governor general when it came to resisting unconstitutional requests to prorogue Parliament. With *MacKinnon*, those dynamics have now shifted. Will a governor general, faced with a questionable request for prorogation, now be more inclined to simply

¹⁷⁸ Loughlin, *supra* note 115 at 6.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² On flattening, see Patricia Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1992).

grant it, knowing that the courts, rather than the governor general, will serve as the ultimate backstop? It is possible. But it is also possible that we now have two, rather than one, brakes on the most egregious and opportunistic exercises of the power to advise on prorogation. It is obviously too soon to tell.