Miller II, Part II?

The Legal Challenge to Trudeau's Prorogation

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Earlier this week, Canadian Prime Minister Justin Trudeau held a press conference to announce 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.

The announcement ended months of speculation about Trudeau's future. Until September 2024, the Liberal Party had been governing in a minority parliament with the support of a supply and confidence agreement with the New Democratic Party (NDP). 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 Conservative efforts to topple the government. Calls from within the Liberal party for Trudeau to resign also reached a fevered pitch in December after Finance Minister Chrystia Freeland resigned. 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). The Liberal Party now faces the uphill battle of choosing a new leader and preparing for an election once Parliament returns.

Following the Prime Minister's announcement, a judicial review application was filed in Federal Court challenging the prorogation. In this blog post, I analyse what we know about the legal challenge so far. First, I emphasize that determining the constitutional validity of a prorogation is a highly fact-driven exercise. This means that the reasons given for a prorogation are very important. Second, I argue that the legal challenge to Trudeau's prorogation is unlikely to succeed, and should not succeed. There is nothing so exceptional about this case as to warrant judicial intervention. At the same time, I do not foreclose the possibility that in exceptional circumstances, a court might in the future conclude that a prorogation is unlawful. And third, I argue that there are multiple bases for distinguishing the present case from the UK Supreme Court's decision in *Miller II*. *Miller II*, as many readers will know, is a remarkable 2019 decision in which the UK Supreme Court annulled a prorogation on the grounds that Boris Johnson's advice to the Queen to prorogue violated the constitutional principles of parliamentary sovereignty and parliamentary accountability without reasonable justification.

Before moving on, it is perhaps worth highlighting that my focus is on the merits of the legal challenge. Nothing I say here should prevent a vigorous political conversation about whether Trudeau's prorogation is legitimate. In fact, such discussions are needed for the political dimensions of our constitutional order to remain robust. I agree with Philippe Lagassé that a Prime Minister should act honourably in deciding whether to request a prorogation. This means that they should not do so to avoid a vote of no confidence. Whether a court would conclude that this is what in fact occurred here, however, is another matter.

The Legal Challenge

The legal challenge filed by David Joseph MacKinnon and Aris Lavranos hews closely to *Miller II* by arguing that Trudeau's prorogation violates the principles of parliamentary sovereignty and parliamentary accountability without reasonable justification. It also reprises some of the arguments made during Canada's 2008 prorogation debate, when then-Prime Minister Stephen Harper was accused of requesting a proroga-

tion to avoid the looming defeat of his government. The parties argue, *inter alia*, that

> *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].*

In my view, these arguments are unlikely to succeed. For one, Canadian courts have mostly rejected these types of cases on the grounds that they deal with politically-enforceable constitutional conventions rather than law. That alone is enough to doubt whether the Federal Court will break new ground in this case. In addition, however, serious questions can also be raised about both the factual and legal bases of these claims.

The Facts of the Prorogation

When Prime Minister Trudeau announced that the Governor General had prorogued Parliament, he offered the following justification for his request:

> *The 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 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 on whether the objective of the prorogation was to avoid a vote of no confidence, Trudeau referenced the 2008 precedent described above:

> *In 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.*

Whether prorogation was strategically the best option for the Liberal Party and the country is of course a matter of debate, but from the standpoint of constitutional convention, this appears to be a legitimate reason for requesting a prorogation. It is difficult to imagine a court second-guessing this justification as part of a legal challenge. Moreover, it was simply not inevitable that a vote of no confidence would have succeeded had Parliament continued sitting. To suggest otherwise would be to oversimplify the fluidity

of the situation the Prime Minister was facing in December and early January.

The Legal Considerations

Over the past few weeks, legal scholars and political scientists have mused about the merits of a possible legal challenge to a Trudeau prorogation. Leonid Sirota argued that the Canadian Charter of Rights and Freedoms establishes a "bright line rule" that Parliament must sit at least once a year, and that this is the extent of the judicially enforceable limits on prorogation. Prior to the Prime Minister's announcement, Paul Daly wrote that a Canadian court might rely upon *Miller II* to invalidate a prorogation that interfered with parliamentary accountability. And Emmett Macfarlane argued that any legal challenge would be unsuccessful, since a prorogation to "reset" the government aligns with precedent. He added that "if the Canadian courts were to ever involve themselves in a prorogation decision along similar grounds [as *Miller II*] they would be dramatically overstepping their role."

I share the view that there are good constitutional reasons for the courts not to intervene here. In Canada, the principles of parliamentary sovereignty and parliamentary accountability are best understood as unwritten constitutional principles. Over the past four decades, the Supreme Court has developed an increasingly deep body of jurisprudence on these principles. Philippe Lagassé and I have argued that they have both legal and political dimensions, meaning that they can be enforced by political actors and by the courts. We say that the Supreme Court's recent decision in the*City of Toronto* case lends support to our view. Legal underenforcement of these principles is relatively common, and can be desirable where enforcement raises separation of powers concerns.

In my view, this is a case where the principles of parliamentary sovereignty and parliamentary accountability are best enforced politically. To conclude otherwise would be to implicate the courts in matters long regarded – rightly – as high politics. This is not to say that courts should never intervene, but only that courts should not be adjudicating the lawfulness of routine prorogations (for a similar argument, see here).

The Persuasiveness of Miller II

This brings us to *Miller II*, and two key factors that distinguish it from the current case. The first factor is that, unlike in *Miller II*, Prime Minister Trudeau *did* offer a justification for the prorogation.[1] The second factor is that *Miller II* concerned a truly singular prorogation, one that would have seen the UK Parliament prorogued for several weeks in the lead up to Brexit. The idea of Parliament being sidelined while this monumental constitutional change took place was, for the Court, simply untenable:

> *Such an interruption in the process of responsible government might not matter in some circumstances. But the circumstances here were, as already explained, quite exceptional. A fundamental change was due to take place in the Constitution of the United Kingdom on 31st October 2019. Whether or not this is a good thing is not for this or any other court to judge. The people have decided that. But 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.*

It is true that the court relied on the principles of parliamentary sovereignty and parliamentary accountability to ground its decision, and that these principles are also arguably engaged by the Trudeau prorogation. But the Court in *Miller II* was not concerned with routine accountability. It was concerned with extraordinary events that merited the extraordinary step of the courts getting involved to preserve constitutional democracy. In *Miller II*, the balance tipped in favour of legal enforcement. This situation is very different than the facts we are presented with here.

For all these reasons, I do not think the present case should attract judicial intervention. Canada's modern system of constitutional government is characterized by a delicate balance of legal and political.

[1] I am grateful to Colm O'Cinneide for this point.

Parliamentary sovereignty and parliamentary accountability are indeed constitutional principles that, in my view, could legitimately be 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.

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