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REVUE DE DROIT D'OTTAWA
OTTAWA LAW REVIEW

Episode 13: Going (Pro)rogue?

Date: March 31, 2025
Guest Speakers: Vanessa MacDonnell & Mallory Dunlop
Interviewers: Devon Lamont, Stephanie Katajamaki & Zach Auger

TRANSCRIPT

Stephanie Katajamaki: Hi everyone, and welcome to this episode of the *OLR* Podcast. Today, three of our associate editors—Devon Lamont, Stephanie Katajamaki, and Zach Auger—sit down with Professor Vanessa MacDonnell and uOttawa law student Mallory Dunlop to talk about the recent challenge to the prorogation of Parliament at the Federal Court.

Devon Lamont: In January 2025, former Prime Minister Justin Trudeau advised the Governor General to prorogue Parliament. This decision was challenged at the Federal Court, where various intervenors gave submissions on the constitutionality of the prorogation. One of those intervenors was the Constitutional Law Initiative, a project of the uOttawa Public Law Centre.

Stephanie Katajamaki: Professor MacDonnell is co-director of the uOttawa Public Law Centre, as well as an Associate Professor in the uOttawa Faculty of Law. She is an expert in Canadian constitutional law, constitutional theory, comparative constitutional law, and criminal law.

Devon Lamont: Mallory Dunlop is a uOttawa law student in the JD/MA program, and she is the English Submissions Manager for Volume 56 of the *OLR*. Both Mallory and Professor MacDonnell were involved in the intervenor submissions to the prorogation challenge.

Stephanie Katajamaki: In this episode, we talk about Chief Justice Crampton's decision on the matter and explore key topics—including jurisdiction, justiciability, and standard of review, as well as the role of the uOttawa Public Law Centre in this challenge to the prorogation.

Zach Auger: Hi Professor MacDonnell, we're so glad to have you on the *OLR* Podcast today. The prorogation has been a topic on all of our minds lately, so it's great to speak with you today since you've written so much on the issue.

Vanessa MacDonnell: Thanks very much for having me, and I'm happy to know that prorogation is a priority issue for our students and others.

Stephanie Katajamaki: Yeah, for sure. Just before we get into the substance of the *MacKinnon* case, which is ultimately what we're going to chat about today, we want to hear about how you got involved. So you're a constitutional law prof here at the University of Ottawa, but you were also an intervenor in the *MacKinnon* case with the uOttawa Public Law Centre. Could you tell us about why you and the Centre got involved?

Vanessa MacDonnell: Absolutely. So we, a couple of years ago, launched something called the Canadian Constitutional Law Initiative, and the idea behind the Initiative was to work with students and with practicing lawyers to intervene before Canadian courts in important constitutional cases. The idea was that the Public Law Centre and its faculty have a lot of expertise in core public law questions, and that we wanted to find a way to bring students into our work… but also to bring some of the work we do to the courts.

And I suppose one of the things that we were thinking at the time was that there was a gap, maybe you would say, in the field of intervenors that we felt that our Initiative, with its commitment to upholding democracy, the rule of law, to ensuring the medium term coherence of constitutional doctrine… that these are sort of fundamental commitments that we could play a useful role in helping to pursue as intervenors, and that, while there are lots of intervenors who intervene very competently in constitutional cases, most of the existing intervenors that appear regularly before the courts have mandates that are a little bit different from that.

And so we started this initiative a couple of years ago, and we've been granted leave to intervene in two cases. The *MacKinnon* case was only the second case that we've gotten involved in, and obviously we had to make a very quick decision about whether we were going to get involved. But I'll say that I think that, when it comes to the *MacKinnon* case, one of the things that favoured us getting involved was the fact that prorogation is something that even constitutional experts don't necessarily know a whole lot about, and this particular legal challenge raised a lot of complex legal questions. Does the Federal Court have jurisdiction to hear this kind of case? Are these questions justiciable? Prorogation has always been regarded as a political process so, you know, is there a role for the courts here? If so, what is that role?

And as we'll discuss, Chief Justice Crampton and the Associate Chief Justice decided that they were going to expedite the matter, and so not only did the case raise big, complex questions, but the Court had committed to trying to hear the case and decide it quickly. So we felt that there was a unique opportunity for us to be helpful, to try to demystify some of these complex issues… and so that's what our initiative has done—supported, I should say, by a tremendous legal team at Torys, who, in both of the interventions that we've been involved in so far, have worked with us to bring forward the strongest possible intervention.

Stephanie Katajamaki: So what role then did you play in the intervention?

Vanessa MacDonnell: Yeah, so as I said, this Initiative is really a partnership. So it's a partnership between the Public Law Centre and our Canadian Constitutional Law Initiative. That Initiative, right now, is led by myself and by Professor Eric Adams, who is a professor at the University of Alberta Law School, one of Canada's top constitutional scholars, and certainly a mentor of mine… as well as the lawyers at Torys: Andrew Bernstein, Jeremy Opolsky, Emily Sherkey, and Hudson Manning. And then we also have been working with teams of students, and Mallory Dunlop, who you're going to be speaking to, or have spoken to, is also part of this Initiative. And so we all basically came together with our lawyers to figure out… what position should the Public Law Centre take here? What role should the courts play in this kind of dispute?

And so, I suppose—our submissions are publicly available. I would say that at the end of the day, our fundamental view was that this really is, for the most part, a political process that should be regulated by politics and by politicians. And when we say that it should be regulated by politicians, we don't necessarily mean that there are no rules involved. What we mean is that, you know, Canada's Constitution has legal elements, but it also has political elements—constitutional conventions in particular.

And so we said that—if you look at the history of prorogation in Canada, there was a big controversy in 2008 about another prorogation at that time. I don't know if anybody suggested that the courts would be the ones to resolve that controversy. It was really not part of the debate. And so for about as long as we've had prorogation, the assumption and the practice has been that, while constitutional rules are relevant, that it's political actors who are in charge of their enforcement.

And I think what really sort of changed the context in Canada was actually a UK case that was decided in 2019. That's a case called *Miller II*, which folks in the UK are extremely familiar with because it had the effect of annulling a prorogation. So in 2019, in the context of Brexit, Prime Minister Boris Johnson tried to prorogue Parliament for five weeks in the lead up to Brexit. And that really had the effect of sidelining Parliament at a critical moment: Johnson knew that Parliament did not support a no-deal Brexit, and so there was this showdown, essentially, between Johnson and Parliament. Johnson tried to prorogue and the Supreme Court told him "no"—unanimously.

And this was a *huge* decision in the UK, and obviously, because of our relationship—legally, historically—with the UK, that precedent was also of significance, I would say, to Canadian courts. Not because it binds us or anything like that, but to have a unanimous Supreme Court in the UK say, "actually, in these exceptional circumstances, there is a role for courts to play in prorogation"… that, I think, opened the door to the possibility of judicial review in a way that had just not really been contemplated in Canada.

So I think that really changed the context and… led to this litigation, but also, as a result, led to quite a complex situation facing the Court. You know, if the Court was going to rule that these matters were justiciable, it was going to open the door to a practice that had never before been recognized in Canada, and moreover, in a context where the weight of authority was that courts don't really have a role here, right? So, you know, I think I've gotten slightly off track, but that's… in that context, we really felt like we had some expertise to share.

Zach Auger: So with that, let's jump into the case itself. So Justice Crampton found that reviewing the exercise of prerogative powers by the Prime Minister was within the scope of the *Federal Courts Act*. But with that being said, the Court also reiterated that courts shouldn't interject on the wisdom or merits of these decisions. How can courts effectively ensure the exercise of prerogative power is legal without interjecting themselves into the politics of the decision?

Vanessa MacDonnell: That's a meaty question. So I mean… maybe I can just say something quickly about what Chief Justice Crampton decided and, I think, the balance that he was trying to strike with this decision. There are lots of places where he could have gone wrong. I think he had to deal with, as I suggested off the top, a number of discrete issues, and I think he actually navigated these issues quite well.

So… the first technical question, which I don't think we need to spend much time on, was whether the Federal Court has jurisdiction to hear these kinds of cases. And actually, the jurisdictional arguments were not obvious here, because the Federal Court is a statutory court, which means it only has the jurisdiction that's been conferred upon it by statute. And so Chief Justice Crampton had to interpret the *Federal Courts Act* and and determine whether there was jurisdiction here. So he concludes that, essentially, because we're dealing with a prorogation… the formal legal power to prorogue Parliament rests with the Governor General, but that the Governor General acts on advice, on the advice of the Prime Minister. While in this particular case the applicants brought a challenge to the advice that was given, Chief Justice Crampton said… here, the advice and the decision are more or less one and the same, and so that means *effectively* what's being challenged here is the exercise of the prerogative, and we know from prior case law that there is some scope to review the exercise of the prerogative power.

So I think there… a couple things are going on. Number one, there was probably a strong interest in finding jurisdiction here; to say that this is just not something that the Federal Court could adjudicate would probably have been less than desirable. But also, as my colleague Paul Daly has written, there is a sort of… a view in the case law, I think it's fair to say, that the Federal Court should interpret its own jurisdiction broadly. And so in this case, the Court concluded that they had jurisdiction… and I think that was really just the entry point for concluding that prerogative powers, like other sources of power, have to be exercised lawfully, right?

So [the] Court then goes on to look at justiciability. So this is the question of, you know, even if the Federal Court has jurisdiction, is the matter so highly political that it's not really the kind of case that a court could decide? And the Court again, I think, is quite careful to say that the sort of central question here—which is, you know, the lawfulness of the advice—that that itself is justiciable, but that in adjudicating the lawfulness of prorogation, there's all sorts of stuff kind of in and around that core question that might not be the kind of thing that the Court could opine on.

And so I think what you see Justice Crampton doing is again trying to say, look—there is a basis for reviewing a prorogation here. In most cases, courts are going to be a light touch, I think it's fair to say, but that possibility exists. And interestingly enough, the mere possibility of judicial review might be enough, I think, to influence the behaviour of politicians who in the future might be considering dubious circumstances where they're seeking to prorogue… where perhaps their motives are legally problematic.

Stephanie Katajamaki: Are there any situations where the court *should* review the government's decision? Like, when do you think the court should step in?

Vanessa MacDonnell: So—and this may harken back to an unfinished answer about how we got involved and what our role was—I think ultimately the position that *we* wanted to take in this particular case was to say [that] courts should not be in the business of adjudicating routine prorogations; that in almost all instances, these are political decisions that are best regulated by the political process.

But I think if you look at what happened in that *Miller II* case, and you look at a situation where—you know, in *Miller II*, the… by sidelining Parliament, what was essentially happening was that Parliament was prevented from playing a role in a very significant constitutional change that was occurring in the UK. And so, in that context, to remove Parliament from the equation really did have this significant constitutional effect. And that really was part of what drove the court's analysis in *Miller II*. So I think, in developing our position, we wanted to say you probably can't and shouldn't close the door completely to the possibility of judicial review. If we got a *Miller II* in Canada, we might well think that, if the Governor General granted the prorogation and it was deeply problematic from a standpoint of constitutional principle, that we might want to have the option of a court intervening to protect constitutional principle.

That is what the courts… you know, they do have a fundamental role to play in upholding constitutional principle here. They're not the primary guardians, but they do have an important role. So we wanted to leave open that possibility for exceptional cases or for real emergencies, but our sense was [that] in the ordinary course, courts shouldn't—they don't really have a role to play here. And I think that's, you know, a position that is actually consistent with what we see in the Federal Court's decision.

So here, in this case, the judicial review application is dismissed, and Chief Justice Crampton seems to—the opening he creates for invalidating a prorogation is exceedingly narrow. It's actually really hard to say, on the basis of the decision, what it would be. So I think he's kind of cracked the door open, [but] most of the time we're going to continue to see this process be politically regulated. And I think that's how it should be. Now, you might see a couple of prorogation challenges come before the courts in the coming years… my guess is that once three or four of these have been batted away, it will become obvious that unless you're dealing with an emergency, this is not a matter for [the] courts. And again, I actually think that's not a bad place to land.

Stephanie Katajamaki: That makes a lot of sense to me, I think. That's a good answer. I'm glad we asked. So we know that one of the limits on prorogation is that it can't be for more than one year. Do you think there should be more robust constitutional restrictions on exercising the prorogation power?

Vanessa MacDonnell: Yeah, that's an interesting question. I guess I would just say that, you know, we have this system where our Canadian Constitution has these different pieces to it, right? Like, we have a written, legal constitution that is enforced by the courts for the most part, and then we have these political rules. And the political rules are, by their nature, very flexible. They don't really take the form of hard limits on things. And again, I think our history of constitutional government shows that actually, that mix of harder legal rules and the softer constitutional practice—this more flexible

political practice—actually works quite well *as long as* the actors in the system respect the rules of the game, right? So as long as politicians understand that, yeah, they're doing politics, but they also have constitutional responsibilities, I'm actually fine with the way things are. I wouldn't be advocating for a more stringent system. I think the way our system has evolved has served us pretty well.

But I do think if you look at what's happening in the United States, for example, right now, and elsewhere where you have political leaders who just don't play by the rules of the game—the kind of norms of the game—then you end up in a lot of trouble. And so… there's a prof at Columbia Law School named Jamal Greene, and he wrote an article in 2018 that he called "Trump as Constitutional Failure". And in that article—the article is all about how Trump's sort of… complete disregard for constitutional norms really reveals the vulnerability of our constitutional systems. So I mean, it is true that these systems we have—especially when they're unwritten, they're flexible, they're based on shared understandings—they can be vulnerable if people decide that they don't want to comply with the basic norms of the system. But I'm also not sure that putting that on a firmer textual or constitutional footing would necessarily, you know, improve things.

So I actually think that the system works fairly well the way it is now. And, you know, I think so far we've been relatively lucky that political actors have not sought to… thwart the Constitution and constitutional norms in the serious ways that we've seen in the US—not to say that our record has has been perfect; it's certainly not. But we're not there yet, and I hope that that continues.

Zach Auger: That's very interesting, thank you. So the Federal Court noted that *Miller II* is the only case in the history of the Commonwealth where a court interfered with prorogation. Why do you think courts have been hesitant to interfere with this power, and why do you think the court's role in reviewing a decision to prorogue Parliament has become such a salient issue today?

Vanessa MacDonnell: Yeah, good question. I think we've never seen judicial review or judicial interference before 2019 because nobody actually thought that was how the system worked, right? And I think, as is so often the case, the system often evolves in response to a crisis. And so in 2019 in the UK, prorogation was a crisis, right? And you had lawyers and legal scholars working together to try to figure out… what's the path through this? Does Boris Johnson really just get to sideline Parliament so close to when the UK is scheduled to leave the EU?

And I think, faced with this particular situation, the UK Supreme Court really thought that, given the nature of the constitutional change that was occurring, that it was intolerable to have Parliament not involved. And so they're very clear in *Miller II*: they say this is basically a "one off", they call it. They say, "we're presented with circumstances that have never been seen before and will likely never be seen again". So they're pretty clear that this is an exceptional, *exceptional* case. But I think, you know, Johnson and the situation put the courts in a corner, right? And so in response, the Court, I think, went to the very limits of its authority, essentially, to invalidate the prorogation. And so I think that's sort of how that precedent came about.

And that, of course, then changes the Canadian context to some degree as well, right? Because we are a part of that Westminster club of countries, and so we are looking at what's happening in other

Westminster states, and the appearance of this major new precedent has implications for us. I actually think that context is essential to understanding the *MacKinnon* case. I think there are things that the Court said and did in *MacKinnon* that it wouldn't have done prior to 2019—that it would not have done without this precedent. So I think that's why we saw this change, and I think the change that we see in the Canadian case is actually quite a modest one. And I think it's really affirming the existence of the courts as a final, *final* backstop, but they are really not the first or even the second line of defence, I think, when it comes to these things. And you know, the Governor General does retain this important role in ensuring that prorogation is consistent with constitutional principle.

And I also think, you know, as citizens, we also all have a role, right? So part of the political regulation of these things is that we have a right to complain if we don't like what our government is doing. So, you know, should Trudeau have prorogued Parliament for 11 weeks? Was he trying to avoid a vote of no confidence? Was he proroguing to allow the Liberals to elect a new leader? How do we feel about that? We *should* talk about that. And that sort of political and constitutional speech is incredibly important to the *political* constitutional regulation of these things.

So, you know, this is probably another reason that we got involved in the litigation. I think you look around the world, at what's happening in democracies around the world, and things feel very fragile. And so it is important for academics, universities, law students to be engaged in these questions and to be debating them. And you know, debating them in the political arena *and* bringing their legal expertise to bear. And sometimes bringing your legal expertise to bear means you say, "courts need to do something here". But sometimes bringing your legal expertise to bear means that you say, "the courts *don't* have a role here", right? Because part of, I think, what these kinds of cases raise are questions about the division of responsibility in a constitutional state: whose job is it to address these kinds of questions or issues? And that's a role, again, that's something that… my colleagues and I at the Public Law Centre spend a lot of time thinking about.

Stephanie Katajamaki: That sounds like a really big question—like, whose role is this? Who should actually be the one to, you know, step in and say, "actually, you can't prorogue Parliament"? So on that, I just want to jump back to what you said about the Governor General.

Vanessa MacDonnell: Yes.

Stephanie Katajamaki: So we know that it's the Governor General who approves the prorogation. Has that always just been more of a symbolic power, like, "my Prime Minister is coming to me, I'm going to grant what the Prime Minister wants"? Or have we seen, maybe, circumstances where it's like, "actually, you can't do that"? So, like, how can the Governor General really step in in that role, would you say?

Vanessa MacDonnell: Yeah, so this is a question about which there is actually, you know, some disagreement, I think I would say. And so the kind of political rules… the conventions that govern here are not entirely clear, I think it's fair to say. And part of why this isn't clear is, of course, because this all happens behind closed doors, right? And so when a prime minister goes to the Governor General and asks for Parliament to be prorogued, that's a private conversation. All we

know is that there's never been a denial of prorogation that we know about—I don't think there has been one, right? And so, if you're an academic trying to understand the dynamics of all of this… So [the] Prime Minister gives advice. What is the nature of this advice? Does the Governor General have this automatic duty to accept it? You know, we're working on the basis of what we know and known precedents, but we're not in the room, and so that makes it kind of tricky.

I would say that the better view, if you look at what's been written on this topic in Canada and in other jurisdictions, the better view is [that] when it comes to a routine prorogation—and by that, I just mean a case that doesn't raise any sort of big red flags because of the length of the prorogation or the circumstances—in a routine prorogation, the Governor General does not have the discretion to refuse to prorogue Parliament. So when you talk about the symbolic role, I think, in that context, that's a fair way of characterizing things. There's no independent power being exercised by the Governor General, and that's because in general, the Governor General acts on the advice of democratically accountable actors, right?

However, there is a view—and this view, I think, has become more widely held probably in the last 15 years—that in circumstances where a prime minister advises the Governor General to prorogue Parliament, in circumstances that seem to violate constitutional principle—so that would include if the Prime Minister asked the Governor General to prorogue in a situation to avoid a vote of non-confidence, or otherwise… outside of the prorogation context, if the Prime Minister were to advise the Governor General to do something that's clearly illegal—the view, increasingly by scholars, is that there is a residual power that the Governor General retains to reject advice that undermines constitutional principle. That residual power is called the reserve powers of the Governor General. What is the scope of those powers? We don't really know.

We don't really know, but there was a prorogation in 2008 that was quite controversial where, just by circumstance—I mean, somebody who is in that room must have talked to somebody, because… [in] 2008, then-Prime Minister Stephen Harper requests a prorogation of Parliament within weeks of forming a new government, and it's in a context where it looks like there is sort of a challenge to his authority—that there may be a vote of no confidence brought in the House, that the government will be brought down, and that a coalition will then go to the Governor General and propose to form government. And so in that situation, Stephen Harper seeks to prorogue Parliament to avoid, it appears, the vote of no confidence. And what occurred when Prime Minister Harper went to see then-Governor General Michaëlle Jean was very interesting because she kept him there for two hours.

And after the conversation, there was a [*The*] *Globe and Mail* article that was written that actually provided, like, a lot of detail about the conversation. I don't know who spoke, but somebody did. And it became obvious that what occurred during this meeting was that there was a bit of a conversation… the Governor General, at one point, leaves the room with her secretary and goes to consult constitutional expert Peter Hogg, and then sort of comes back in and ultimately grants the prorogation. It also appears from the discussion that during the meeting, she makes clear that she's not obligated to grant the prorogation. And so all of that suggests, you know… at the end of the

day, she does prorogue Parliament, right? But all of that suggested that she knew she had a reserve power and that she was willing to exercise it in appropriate circumstances.

So… the better view in Canada is this power exists. It's a very narrow power, and it would only be triggered—because to act against advice means that you are not acting symbolically, right? You're inhabiting your full constitutional powers as Governor General because you are going against the advice of democratically accountable actors. But, I think, in our constitutional order, that's defensible where you're doing so to uphold the Constitution, right? So that power exists, but it's very narrow, and it's not one that we hopefully would see that often. And it's not the kind of thing, I don't think, that is triggered by, you know, a merely long prorogation or by the possibility of a vote of no confidence, where… none of that has really crystallized. It really has to be a deliberate attempt to avoid something that's very imminent, I think. So that I don't think we were here with this particular prorogation, but the idea is [that the] power exists.

And I would just say that this episode has probably focused our attention on the role of the Governor General in a way that—you know, the Governor General is not usually at the centre of our constitutional debates. I do have a terrific doctoral student, Sarah Gagnon, who is looking at the role of the Governor General in prorogation for her doctoral work, but she would be one of a very small number of people who are really deep into this. And so it's interesting for us, I think, as lawyers and constitutional scholars to think again about that role and how it fits because… you don't want to think about the role of courts without also thinking about the role of the other actors in the system, like I said, and here the Governor General is a very important one.

Zach Auger: Yeah, and sort of piggybacking off of that, the respondents argued that as a matter of law, the decision to prorogue was made by the Governor General and not the Prime Minister, and the Prime Minister's advice would then have no legal effect. What did you think of this argument?

Vanessa MacDonnell: So this is actually, I think, a genuinely difficult question: what is the status of the Prime Minister's advice? And, you know, I don't actually know that we have a really solid understanding of that, to be honest with you. And I think… in previous cases, before the *MacKinnon* case, the courts had on at least one occasion, I believe, suggested that the Prime Minister's advice also involved an exercise of the prerogative. And I think that's wrong. I don't think when the Prime Minister gives advice to the Governor General, they're exercising a prerogative power. But they're obviously doing something that has to be sourced somewhere in the Constitution, and there's no question that those conversations are really layered over with convention, with these political rules. So I suppose the position that I would take is, I would say… there are provisions of the *Constitution Act, 1867* that refer to the King's Privy Council performing an advice-giving function, and so the Prime Minister, in advising the Governor General, is probably acting pursuant to those provisions of the Constitution.

But that then raises a whole bunch of questions about what should courts do with something that is merely advice, right? So I think what the Federal Court in *MacKinnon* does is it says "look—the advice and the decision, there's no light in between those two things". Right? The Prime Minister says "prorogue", and that's just what the Governor General does because it's a routine prorogation.

So… Chief Justice Crampton sort of moves over that quite quickly in the *MacKinnon* case, but I do think that this is a difficult and unresolved question, like, what is advice? In other contexts, we know that if someone in government gives *advice*, that's not a decision, right? And so that's something that is not really resolved by the *MacKinnon* case but will be something that people will have to think more about, I think, in future cases.

Zach Auger: Perfect, thank you.

Stephanie Katajamaki: So the respondent argued that the decision to prorogue Parliament was made pursuant to a constitutional convention and was not an exercise of royal prerogative. While the Federal Court ultimately disagreed, do you think that there were any merits to this position?

Vanessa MacDonnell: Yes, yeah. I mean, I do think that… so, we've talked a lot about, what are the rules that govern in this situation, right? And I think it's… I'm content to conclude that when the Prime Minister advises the Governor General to prorogue, there is some legal foundation to that act, which maybe provides a hook for judicial review. But the reality is that constitutional convention largely regulates the relationship between the Prime Minister and the Governor General and so, when prorogation occurs, it's occurring in a space where there might be that kind of thin legal foundation but, in fact, the rules that are operative are, for the most part, convention. And so our position as intervenors was [that] this is an area largely governed—almost overwhelmingly governed—by convention. And courts have to be careful: even if they can identify a legal foundation that permits them to engage in judicial review, even if they accept that, in principle, there are legal limits on the power to prorogue… it's another thing to decide that you're going to enforce that in the context of a concrete case.

So our position was very much that if you want to maintain the balance of legal and political in our constitutional order, judges have to be very careful, and that they should… where the political rules are adequate to do the job—here, the political process reached a satisfactory outcome—then courts shouldn't come in and go looking for legal bases to review something that is a largely political act. Again, I don't think I want to foreclose the possibility that in a true emergency there might be legal principles to be enforced, because courts are ultimately a guardian of the Constitution, but in the ordinary course I think the political rules are the ones that largely govern. And so that was absolutely a position that we supported.

Zach Auger: And the Federal Court identified three questions that [a] court should ask when determining the limits of Crown prerogative powers. Those were: did the decision violate *Charter* rights? did the decision infringe on constitutional norms? and did the decision exceed other legal limits? What other things do you think a court should consider when reviewing a decision like this?

Vanessa MacDonnell: That's another good question. I guess what I would say—and I do very much see this in Chief Justice Crampton's decision—I think courts have to be very cognizant of their role. And of course, their role is to uphold the law. But we also have… political rules that are supposed to resolve most of these issues. And so for me, the most important thing that I was looking for in reading Chief Justice Crampton's opinion was an awareness of the delicacy of the

courts' role here; that… if the courts were to say, "yeah, prorogation; we are fully competent to review prorogation in every case, we will deduce a legal standard that has to be complied with, and will apply it across every prorogation"… I think that would have been very, very problematic, not only because prorogation is largely governed by political rules, but because that would really start the process of opening these political-type decisions up to judicial scrutiny. And prorogation is not the only such rule, right? And this is… not the only such context.

So this is something that I've heard people talk about since this case has been filed. You know, what are the other kinds of decisions that, if prorogation was found to be fully judicially reviewable, might find themselves before the courts? What other kinds of advice does the Prime Minister give to the Governor General? There's advice that's given around appointments; there's the dissolution of Parliament… you start to become concerned that there's sort of judicial creep into areas that have long been regarded as the domain of politicians. And so I think that's probably the number one thing that a judge has to be aware of—that their role here is minimal—and I respect the decision to say [that] there might be a role, we're not going to preclude the *possibility* of a role in the future, but we want to establish from the very beginning that the political rules largely govern here, and that, you know, there are things that courts are not going to be in a good position to adjudicate.

So one of the things that the Court said it wasn't going to be in a good position to adjudicate was the motivations of the Prime Minister in making the decision to prorogue. So, you know, when the Prime Minister came out in front of Rideau Cottage in early January and said, "I'm stepping down, we're going to pick a new leader, and Parliament has been prorogued", he gave an explanation for why Parliament was being prorogued. And Chief Justice Crampton sort of resists the invitation from the applicants to parse out those reasons and decide whether partisan motivations dominated, or improper motives dominated. He basically said, like, a court cannot easily untangle the kind of political parts of this justification from the ones that might be legally relevant. And so I think he was clear that courts are going to have to be very cautious in this context. And I think that's the right thing.

Stephanie Katajamaki: Just on that last little bit there you, do you think the idea of parliamentary privilege kind of influenced that? In the sense that you're not going to call the Prime Minister and say, "why did you make this decision?" Do you think that might have influenced Chief Justice Crampton as well?

Vanessa MacDonnell: I suppose what I would say is that we're not dealing so much with parliamentary privilege as we are trying to understand the motivations of the Prime Minister, but I think the contexts are analogous, right? So for the same reasons why courts generally say, "we're not going to start investigating what parliamentarians said during the legislative process", and why there has to be sort of a zone of protection around the legislative process for the same reasons, courts can't get into trying to understand the diverse reasons behind these kinds of decisions and determine their legitimacy or lawfulness.

I mean, sometimes things will happen… in the UK context in the *Miller* case, Boris Johnson, the court concluded, gave no reason, no justification for the prorogation, and that was actually

important, right? There was a complete absence of justification. You might also get a situation—it seems extremely unlikely, but if you were to get a situation where [the] Prime Minister clearly explained that there was some improper purpose behind a request to prorogue, that might be different, right? But in the absence of that, for courts to go trying to deconstruct these, you know, highly political decisions, I think that kind of brings us into justiciability territory, right? And that's what Chief Justice Graham said. He said that that just goes beyond what courts are capable of.

Stephanie Katajamaki: Thank you, that's really interesting. It just kind of popped into my head.

Vanessa MacDonnell: Yes, of course!

Stephanie Katajamaki: Do you think that, had the Court gone the other way and found that it was overall justiciable, and it's the Court's role to step in, do you think that might have an impact on future prorogations, in the sense that the Prime Minister might stop and say, "wait, maybe I should think about this, the court might tell me to do something differently". Do you think that's something—

Vanessa MacDonnell: So I think this is what makes this decision, you know, quite skilled at the end of the day, is that the application is dismissed. Chief Justice Cramton says, like, the applicants here haven't met their burden of demonstrating that there has been some egregious breach of principle here, and so the case is dismissed. But in doing so, he also does suggest that courts can and will hear these matters, but that a challenge is highly unlikely to succeed unless you're dealing with some sort of, like, quite evident breach of constitutional principle that the courts—within the context of the existing jurisprudence—are capable of giving effect to.

So I think what they've done is [to] sort of say: "Political actors, you have to think twice. You have to think twice that courts could, in the future, invalidate a prorogation. It's not impossible." I think the Court's done enough to establish the possibility of that to… have an impact on political actors, but has also not overstepped its role, because most of the time they shouldn't go anywhere near these kinds of cases, right? But it is, I think, also not a bad thing for political actors to be reminded that there are constitutional limits on the power to prorogue.

Stephanie Katajamaki: Thank you for answering my sidebar question. So while the Court found that the issue of whether the Prime Minister exceeded the legal limits of his authority in deciding to prorogue was… justiciable, the Court found [that] several other issues were non-justiciable, such as the issue of whether a nearly 11 week prorogation constituted a reasonable reset of Parliament. Why do you think these other non-justiciable issues were regarded as matters going to the wisdom, or the merits, of the decision to prorogue?

Vanessa MacDonnell: Yeah, I mean, I think this comes back to some of the things that we've we've talked about in terms of, like, what are the types of questions that a court is competent to adjudicate? But also, you know, what types of inquiries would draw the court into an evaluation of what are essentially political matters? And I think that's where Chief Justice Crampton drew the line, right?

And so I'll say that this was one of the issues that had been anticipated. I have a colleague in the UK, Colm O'Cinneide, and he identified this as an issue when the Canadian case was launched. He said [that] what's interesting about *Miller* is that no justification was offered, and so… the courts were not placed in a position where they had to decide how they would approach reviewing any justification because there was none given. Whereas here… [the] Prime Minister came out, and I'm sure he had been advised that, based on the decision in *Miller II*, it was going to be important to provide a justification for proroguing.

But that sort of set up this question, or this quandary, for the courts. Now that they have an articulated justification for prorogation, what are they going to do with that? And by what standard will they evaluate that when, as Chief Justice Crampton says, there's clearly a mix of things in there? Some of them are political; part of this seems to reflect, you know, a political view of the public interest… and so I think where the lines got drawn was to say there are certain things that, you know, the courts can articulate what the legal limits are, but when it comes to evaluating that justification, they're going to have to be very, very careful. And there, I think—all of these justifications, you know… was this length of a prorogation needed for a reset? Was this really to allow the Liberals to choose a new leader? The Court really backs away from entertaining those questions and says those are not really the kind of thing that we can evaluate properly or should evaluate in our constitutional separation of powers.

Zach Auger: And just to wrap up on the decision, was there anything else about the decision that you found surprising?

Vanessa MacDonnell: I mean, I guess one thing that I would say is this whole thing unfolded extremely quickly, okay? So [at the] beginning of January, Trudeau announces he's stepping down, he's prorogued Parliament. The litigation is initiated almost immediately. Within a couple of weeks, Chief Justice Crampton has indicated that he's going to expedite the matter. The schedule for the exchange of written submissions, hearing the applications for leave to intervene of intervenors… all of this moved exceptionally quickly.

And I will admit that I was worried for the Court that the combination of this extremely tight schedule and the complexity of the issues would make things very challenging, and that the risk of of getting it wrong was probably very high. Again, because… there's no history of reviewing a prorogation in Canada; of courts reviewing a prorogation. And so… I would say that I was impressed with how well the issues were dealt with—given their complexity, given the timeline, and given what I think was some, you know, lack of precision in in the previous case law. There were previous cases that the Court was being invited to rely on where I think the courts had occasionally, you know, not gotten things exactly right.

And I think that this decision will probably age pretty well, in the sense that I think it's pretty nuanced, and even those of us who think, well, the Court could have just said… in this particular case, there's nothing justiciable here. I think that was another possible outcome, and leaving for another day the specter of the kind of emergency—until we actually have an emergency. But I think

this is a decision that—you know, you can quibble with some of the finer points, maybe—but that leaves the law in in a respectable place. I'll be interested, obviously, to hear over time what others have to say about the case as well, but I think that is one thing that I was pleasantly surprised by.

Stephanie Katajamaki: So do you think it's going to be a case that we start studying in, like, Con Law II maybe next year? Is that going to come up?

Vanessa MacDonnell: Yeah, so I mean, the first question will be, will this case be appealed? And you know, we'll know that before too long. So if it's appealed, I guess this will continue. But yeah, I do think this case is significant for a bunch of different reasons. Will it… make its way into the Con Law textbooks? I don't know, but possibly.

Stephanie Katajamaki: So this isn't the first time that we've see a prorogation of Parliament specifically from Prime Minister Trudeau. He did it back in August 2020, and that was in the midst of, you know, the WE Charity scandal, and he was in the middle of doing a cabinet shuffle as well. Back then, we didn't see a judicial challenge. But today we have one. What do you think that distinguishing factor might have been?

Vanessa MacDonnell: Yeah, look, I mean, I think part of what makes this case interesting is that questionable prorogations are not unusual. You can—there are examples. You know, we talk about the 2008 Harper prorogation, but there was a 2010 Harper prorogation, you've mentioned the Trudeau prorogation at the time of the WE Charity scandal, there were questionable instances of prorogation during the Paul Martin government, and there have been ones at the provincial level as well.

So my guess is [that] now that there's a precedent, we might see prorogations challenged again in the future. I don't think they're likely to succeed, and probably, as I mentioned, once there's a few of them, it will probably come to be viewed as not a particularly effective channel for resisting the political decisions of the Prime Minister. But I think, you know, my guess is that it perhaps wasn't viewed as being—that maybe there was some uncertainty about whether there was a basis for a challenge.

I mean, I think here, the length of the prorogation was an issue. It was a long prorogation. I do think the kind of perception of mixed motives also provided a foothold, right? So I think there was enough here to advance sort of a test case, right? That's probably, I mean, I'm totally speculating, obviously.

Stephanie Katajamaki: No, that's great. Thank you for that answer.

Vanessa MacDonnell: Great.

Zach Auger: Well, thank you so much, Professor MacDonnell. We're so glad that you joined us here today, we really appreciate it.

Vanessa MacDonnell: Thanks very much for having me.

Stephanie Katajamaki: Hi Mallory!

Mallory Dunlop: Hi Steph! How's it going?

Stephanie Katajamaki: Good, how are you?

Mallory Dunlop: Good.

Stephanie Katajamaki: So you're a student in the JD/MA program. You're in your fourth year, on the *OLR* Senior Board as our Submissions Manager, and you got involved in the uOttawa Public Law Centre. Could you tell us about how you got involved in the Centre?

Mallory Dunlop: Yeah, so I have been involved this year in the Constitutional Law Initiative, which is a new initiative that's part of the uOttawa Public Law Centre that is headed up by Professor Vanessa MacDonnell. The way I got involved in the Centre—or in the Initiative—was I took Vanessa MacDonnell's Supreme Court seminar course last year in the winter term. And the way the course is structured is that it's designed to give students a sort of introduction to, like, intervening in constitutional law cases. So we did a mock intervention in that course, and then the idea was some of the students in that course would then carry on doing work with Vanessa at the Public Law Centre and at the Constitutional Law Initiative on actual interventions. So the Initiative is seeking to combine academia, practice, and… student engagement in intervening [in] constitutional law cases, and for the purpose of developing good constitutional principles and good constitutional law.

Devon Lamont: That's very interesting. Just wondering—what kind of constitutional law research do you do at this Centre?

Mallory Dunlop: Yeah, so I've been involved this year in two different cases; one was the *Hameed* intervention that we did and another was the prorogation challenge… and both of them had to do with the issue of constitutional conventions, which was something the Constitutional Law Initiative really wanted to intervene on and make sure that good constitutional jurisprudence was developed surrounding constitutional conventions. So a lot of my work was focusing on how constitutional conventions are treated in Canadian constitutional law, when they should be recognized by courts, when they *shouldn't* be recognized by courts—because they are ultimately not legal rules, but political conventions. So the courts have to be a bit careful about when they decide to pronounce on the existence of them, because they're not legally enforceable rules. So yeah, did a lot of work on constitutional conventions.

Stephanie Katajamaki: So a lot of work means probably a lot of research as well. What was the research process like?

Mallory Dunlop: Yeah, so for the *Hameed* intervention, it started off with basically just a lot of looking into the background jurisprudence on constitutional conventions in Canadian law. So

starting with the *Patriation Reference*, which is sort of the main case on how courts deal with constitutional conventions in Canadian law, and then looking at any subsequent cases that have dealt with the issue of conventions and what courts have done when an issue of constitutional convention has been brought up in a proceeding. And then in the probation challenge, a lot of our research from the *Hameed* case was relevant, but it also involved doing a lot more academic research on academic papers and public commentary on the *Miller II* case from the UK Supreme Court, which was being relied on heavily by the applicants in the probation challenge, so looking at differing academic views on the case, yeah, in order to help inform our intervenor submissions.

Devon Lamont: Interesting. How was working on that prorogation case? Because, as you know, we did have a previous conversation with Professor MacDonnell. What was your take on the whole prorogation case, and what were some of the challenges that you faced doing research for that?

Mallory Dunlop: Yeah, so I guess it was really interesting. I felt very honored to be involved in such a, like, very cool, current, very fast moving case that, you know, really had a lot of consequence to our constitutional order. One of the main challenges was the speed in which the case developed. We got leave to intervene and then our factum was due quite quickly after that because there was an expedited hearing date, just… so the case wouldn't be moot if Parliament was ultimately dissolved, but if it had come back, the case wouldn't have had much consequence, so the Federal Court agreed to hear the case pretty quickly. So yeah, getting a lot of research done in a short amount of time was a challenge, and just sort of parsing through all of the academic literature on the *Miller II* case, and, you know, prorogations in Canada was—there's a lot to sift through. So that was a challenge, but it was very interesting, for sure.

Stephanie Katajamaki: And I guess, what was that challenge like as a student? Because, of course, you did all of this in, I'm assuming, February?

Mallory Dunlop: January, yeah.

Stephanie Katajamaki: January is a busy month. How did you manage school and also the research portion?

Mallory Dunlop: I was fortunate enough to be doing a directed research project with Professor MacDonnell in January, so that's sort of, again, one of the reasons was involved in this case, because I was already doing research for her and had the available time to do it. So that just became part of my directed research project. So it was, yeah, very fortuitous in that regard.

Stephanie Katajamaki: So I guess stepping away from the case itself, what do you think it means for students going forward? Do you think it's going to be part of what we're learning maybe next year, or the years to come?

Mallory Dunlop: It'll definitely be an interesting case for law students to learn about in their constitutional law classes, for sure. I think also—just to plug the Constitutional Law Initiative, it's going to be continuing on next year, and I know they want to keep involving students in the

interventions that the Initiative is doing. So I think that this shows that it's a really good opportunity to get students involved in some really interesting, pretty central historic cases, and sort of expose them to that aspect of constitutional litigation that they might not be exposed to otherwise.

Stephanie Katajamaki: And what should students do to get involved in the Initiative?

Mallory Dunlop: Definitely take Professor MacDonnell's Supreme Court seminar course. That's your that's your first step, for sure, and through taking that course, you know, express interest in being involved with the Constitutional Law Initiative. And then you may be invited to participate in the Initiative and in their interventions.

Devon Lamont: We did talk about, you know, what was the most interesting part of this? I think it's super cool that you were part of this. I don't know a whole lot of law students who do actually get to do something of this magnitude, and it's really cool. Congratulations for doing all this. I'm just wondering, not necessarily the most interesting part, but what was your favorite part of the whole experience?

Mallory Dunlop: Oh, I'm going to speak a little bit more generally about, like, being involved in the Constitutional Law Initiative in general. My favorite part has really just been working with the entire group that's involved in the Initiative. So it's made up of litigation leads, so we work with some lawyers from Torys, and academic leads, so Vanessa MacDonnell and another professor from the University of Alberta, Eric Adams, and there was another student, Fionn Ferris involved in the Initiative with us this year as well. So getting to work in that entire group—have team meetings, you know, talk about what we want our arguments to be in the interventions, how we want to approach things—was definitely my favorite part. Like, the collaborative aspect of it.

Devon Lamont: No, it sounds like a really great community of legal students and legal scholars coming together to work on something really important. So yeah, no, that's great. I thank you for your time.

Mallory Dunlop: Thank you guys!

Devon Lamont: This has been very informative, and we're super happy to have you on the *OLR* Podcast.

Mallory Dunlop: Yeah, thank you for having me.

Devon Lamont: This concludes our *OLR* Podcast episode on prorogation in Canada. We are extremely grateful to have had the opportunity to speak with Mallory and Professor MacDonnell.

Stephanie Katajamaki: We would also like to thank the *OLR* Podcast Committee for making this episode possible. Thanks for listening, and you'll hear us next time!