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The UKSCâ€™s Prorogation Ruling and Its Implications for Public Law

On September 24, 2019, the United Kingdom Supreme Court released a historic decision nullifying the recent prorogation of Parliament obtained on the advice of the British Prime Minister. The implications of the decision are potentially far-reaching as a matter of public law, even though the Court took pains to describe its decision as a “one off.”

In *Miller, R (on the application of) v The Prime Minister*, and its companion case *Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*, the United Kingdom Supreme Court was faced with two appeals of conflicting decisions as to the validity of the decision of the Prime Minister to advise the Queen to prorogue Parliament in the face of a looming deadline for the United Kingdom to leave the European Union on October 31, 2019.

In *Miller*, a Division of the High Court in England and Wales had ruled that the Court could not review the actions of the Prime Minister because the appropriateness of the Prime Minister’s actions was not “justiciable” in the sense that there were no judicial or legal standards by which to assess the legality of the decision. As a political issue it was “impossible” to assess whether the Prime Minister’s advice concerning prorogation was unlawful with reference to any standard.

In *Cherry*, a Scottish decision, the Inner House took a different approach. It accepted that decisions made on the basis of legitimate political considerations alone are not justiciable in the sense of being reviewable on recognizable public law tests of reasonableness. But the Inner House held that it could, and in the result did, set aside the Prime Minister’s decision because it was held to have been motivated by the improper purpose of stymying Parliamentary scrutiny of the executive.

Surprisingly, the Supreme Court resolved the appeals of these two decisions by knocking out a premise common to each—namely that the express rationale for seeking prorogation was not subject to review. The Supreme Court ruled that the Court is always competent to rule on the extent and limits of prerogative power. No power can be without limits at all, and the Courts are always competent to rule on what

those limits are. In the case of the power to seek prorogation of Parliament, the power is limited by the related constitutional principles of Parliamentary sovereignty and the accountability of the executive to Parliament.

The Court went on to conclude that a decision to advise the monarch to prorogue Parliament will be unlawful if it 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 assessing what constitutes “reasonable justification” the Court is required to be sensitive to the responsibilities and experience of the Prime Minister and to proceed with appropriate caution.

What is striking about the Supreme Court’s decision is the manner in which it applied this test. The Prime Minster had offered reasons for the decision to prorogue, notably the fact that the current session of Parliament had been long by historical standards, that introducing new Bills during the session risked prolonging it even further, that there was minimal further business that had to be concluded before the session ended, and that comparatively few sitting days would be lost, since Parliament would normally recess during the period in question for party conferences. Moreover, it was submitted on behalf of the Prime Minister that there would remain three weeks for Parliament to consider any approach to the looming Brexit deadline.

The Supreme Court ruled that these offered justifications did not explain the length of the prorogation in the face of the significant interference with Parliament’s functions during the critical period in advance of the Brexit deadline. Strikingly, the Court concluded that in spite of the submissions offered on behalf of the Prime Minister, it was “impossible” for the Court “to conclude, on the evidence which has been put before us, that there was any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five weeks, from 9th or 12th September until 14th October.”

Notably, because the Court concluded that the absence of rational justification for the length of the prorogation rendered it unlawful, it did not have to adopt the more legally straightforward—but politically charged—approach adopted by the Inner House, which was to rule that the Prime Minister’s offered reasons were not the real reasons for proroguing Parliament and that the prorogation was tainted by the improper motive of reducing the time available for Parliamentary scrutiny of Brexit.

From a Canadian perspective, the United Kingdom Supreme

Court's decision to evaluate the lawfulness of the decision to seek prorogation is unexceptional—it has long been accepted in Canada that prerogative power is reviewable for legality. Moreover, the Inner House's decision to review the *bona fides* of the Prime Minister's offered reasons is also unexceptional for Canadian observers familiar with the principle –accepted since at least *Roncarelli v Dupessis* –that no public power is beyond review, at least for *bona fides*.

What strikes a Canadian observer about the Supreme Court's decision is the degree to which the Court was prepared to scrutinize and review the *substance* of the Prime Minister's decision in assessing whether there was a reasonable justification for it. This result is especially striking in a case where three judges of the High Court had earlier described such an exercise as not simply inappropriate, but "impossible." A unanimous 11-judge panel of the Supreme Court found that this exercise was not simply possible, but justified in the circumstances.

In the abstract, it is hard to argue with a probing examination of a "reasonable justification" for a public authority's decision, regardless of the nature of the power being exercised. But the devil is in the details. When it comes to polycentric questions requiring a balancing of pragmatic political reality, policy priorities, and large questions of legal principle, it is very easy for Courts to pre-determine policy outcomes by framing the issue to favour a desired outcome. It is open to question whether the Court's focus on the pragmatic question of whether five weeks was truly needed could be used as a wedge to expand judicial scrutiny of legitimate policy decisions in the future, notwithstanding the United Kingdom Supreme Court's description of its own decision as a "one off".

In public law, there is an inescapable tension between the need to ensure rational justification for the exercise of public power and the need to avoid turning legitimate disputes about public policy into legal questions belonging to the Courts. This is just as true in Canada as it is in the United Kingdom. Canadian lawyers await the Supreme Court's decision in in the combined appeals of *National Football League v Attorney General of Canada*, and *Minister of Citizenship and Immigration v Vavilov*. The Supreme Court of Canada openly stated that these appeals would be an occasion to reconsider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v New Brunswick*.

As much as Courts struggle to draw clear lines, today's decision of the United Kingdom Supreme Court illustrates the immense challenges Courts face when significant questions of

legal principle collide with political issues of historic magnitude.