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VIA ONLINE PORTAL

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Judicial Administrator  
Federal Court of Appeal, Ottawa Registry  
90 Sparks Street, Ground Floor  
Ottawa, ON K1A 0H9

Dear Judicial Administrator:

RE: *MacKinnon et al. v. Canada (Attorney General)* (Court File No. A-131-25)

We act for the appellants (the “**Appellants**”) in the above-captioned matter. We are in receipt of Justice Stratas’s direction, dated April 22, 2025 (the “**Direction**”). Pursuant to its terms, we offer the following written submissions in response to the two questions posed, and would ask that you place them before His Honour for his review and consideration.

### Relevant Legal Principles

Before turning to the discrete questions posed by the Court, it will be useful to review the principles and tests governing (a) the doctrine of mootness; and (b) the granting of declarations.

### **Mootness**

In *Borowski v. Canada (Attorney General)*,<sup>1</sup> the Supreme Court of Canada (“**SCC**”) held at page 353:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which merely raises a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case... The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.

Recently, in *International Longshore and Warehouse Union – Canada v. British Columbia Maritime Employers Association*,<sup>2</sup> this Court commented on the *Borowski* test at paragraph 61:

61 A court has discretion to hear an otherwise moot case. In *Borowski*, the Supreme

<sup>1</sup> [Borowski v. Canada \(Attorney General\), \[1989\] 1 SCR 342](#) at page 353 (SCC) [*Borowski*].

<sup>2</sup> [International Longshore and Warehouse Union – Canada v. British Columbia Maritime Employers Association, 2024 FCA 142](#) at paragraph 59 (FCA) [*Int'l Longshore*].

Court of Canada held that factors relevant to the exercise of such discretion include: the ongoing presence of an adversarial context between the parties; consideration of whether deciding the case accords with the proper role of the court; and any special circumstances that warrant hearing of an otherwise moot case. The Supreme Court noted that special circumstances would include where: (1) the case will have a practical effect on the rights of the parties; (2) the case raises reoccurring issues that are dealt with quickly and therefore seldom have an opportunity for review; or (3) hearing the case is in the public interest or raises an issue of public importance: *Borowski* at 358-62.<sup>3</sup>

In *Sierra Club Canada Foundation v. Canada (Environment and Climate Change)*,<sup>4</sup> this Court provided another restatement of the *Borowski* test at paragraphs 63-65:

63 Under the doctrine of mootness, courts may decline to hear a case when its decision will have no practical effects on the rights of the parties. Courts may nevertheless elect to hear a moot case if the circumstances warrant: [*Borowski*]. Thus, the doctrine of mootness involves two steps.

64 In the first step, a court decides whether the case is moot. A case is moot when no live controversy affects the rights of the parties: *Borowski*, at 353-356; *Peckford v. Canada (Attorney General)*, 2023 FCA 219 at para. 9 [*Peckford*].

65 In the second step of the mootness analysis, the court decides whether to exercise its discretion to hear the case despite mootness. In *Borowski*, the Supreme Court formulated three factors to guide courts' exercise of discretion: (1) The presence of an adversarial context; (2) The concern for judicial economy; and (3) The need for the court to be sensitive to its role as the adjudicative branch in our political framework.

## Granting Declarations

In *Daniels v. Canada (Indian Affairs and Northern Development)*,<sup>5</sup> the SCC restated the test for when a declaration should be granted: (1) the party seeking relief must establish that the court has jurisdiction to hear the issue; (2) the question must be real and not theoretical; and (3) the party raising the issue has a genuine interest in its resolution. Further, a declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties.<sup>6</sup>

## Submissions

**Response to Question 1: This appeal is not moot; the relief sought will have practical use.**

The first step of the *Borowski* test is met in this case: this appeal is not moot. A case is not moot if there remains a live controversy in which the relief sought will have a practical effect.<sup>7</sup> The Appellants submit that a "live controversy" clearly still exists about the proper scope of the prorogation power and, in light of that, whether the former Prime Minister lawfully prorogued Parliament on January 6, 2025. The important question of whether Parliament was lawfully prorogued has not disappeared just because Parliament was later dissolved. Prorogation and

<sup>3</sup> *Ibid.*, paragraph 61.

<sup>4</sup> *Sierra Club Canada Foundation v. Canada (Environment and Climate Change)*, 2024 FCA 86 (FCA) [*Sierra Club*].

<sup>5</sup> *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12 (SCC) [*Daniels*].

<sup>6</sup> *Ibid.*, at paragraph 11; See also *Right to Life Association of Toronto and Battista v. Canada (Attorney General)*, 2022 FCA 220 at paragraph 13 (FCA).

<sup>7</sup> *Borowski*, page 353; see also *Sierra Club*, paragraph 63.

dissolution are two different things, involving the exercise of two different Crown prerogatives, and the use of the latter does not cure an unlawful use of the former.

Moreover, this is clearly not a case where a statute or regulation has been repealed or rescinded, such that the underlying issue has truly become academic. On the contrary, the prorogation prerogative continues to exist. The Appellants maintain that the former Prime Minister's decision to invoke that prerogative was unlawful and *ultra vires*. Thus, the underlying "substratum"<sup>8</sup> or "raison d'être"<sup>9</sup> of this litigation has not disappeared at all.

The Appellants cite the following cases in support of their position on this issue:

1. *Corbière v. Hewson*<sup>10</sup> - in this case, the appellant, a band chief, was declared by the Deputy Minister of Northern Affairs to have been absent from three consecutive band council meetings without authorization, and hence effectively removed from office pursuant to s. 78(2) of the Indian Act.<sup>11</sup> The former chief applied for judicial review of the Deputy Minister's decision. The respondents claimed that the matter was moot, since the appellant had since run for re-election as band chief and was defeated.<sup>12</sup> Subsequently, the appellant discovered documents indicating to him that the three meetings that he allegedly had missed were not in fact meetings of the council within the meaning of section 78 of the *Indian Act*.

Ultimately, this Court allowed the appeal and found that the case was not moot, despite the fact that the appellant had been defeated as band chief. Isaac J.A. found that the appellant still sought vindication - which necessarily entailed a proper interpretation of the scope of section 78(2) of the *Indian Act* - which constituted a "live controversy".<sup>13</sup>

2. *Engel v. Alberta (Executive Council)*<sup>14</sup> - this case concerned a provincial election that took place on May 5, 2015 in Alberta. Before the election took place, the applicants had applied for an interim injunction prohibiting the holding of a general election in 2015, which was before the time specified in s. 38.1(2) of the Election Act.<sup>15</sup> Interim relief was denied, and the election proceeded. The applicants' application ultimately proceeded several years after the election had taken place. Mandziuk J. found that the matter was not moot because the applicants "*allege[d] that the governing legislation was breached by the Respondent... these are important questions that, despite the passage of time, could impact the interpretation and application of the Election Act, a subsisting piece of Alberta legislation.*"<sup>16</sup> She held that the issue was "*an important one and ... is deserving of clarification.*"<sup>17</sup>
3. *Schlenker v. Torgrimson*<sup>18</sup> - this case concerned whether elected officials, who had voted to award service contracts to non-profit societies for which they stood as directors, were in a conflict of interest and as a result disqualified from office. The lower court dismissed the case, but the issue was appealed and by the time the matter was before the appellate Court, the

<sup>8</sup> [Int'l Longshore, paragraphs 59-60.](#)

<sup>9</sup> [Borowski](#), page 357.

<sup>10</sup> [Corbière v. Hewson \(1999\), 182 DLR \(4<sup>th</sup>\) 662](#) (FCA) [*Corbière*].

<sup>11</sup> [Indian Act, RSC 1985, c. I-5.](#)

<sup>12</sup> [Corbière](#), paragraph 11.

<sup>13</sup> [Ibid.](#), paragraph 21.

<sup>14</sup> [Engel v. Alberta \(Executive Council\), 2019 ABQB 490](#) (QB) [*Engel*].

<sup>15</sup> [Election Act, RSA 2000, c. E-1.](#)

<sup>16</sup> [Engel, paragraphs 21-22.](#)

<sup>17</sup> [Ibid.](#), [paragraph 24.](#)

<sup>18</sup> [Schlenker v. Torgrimson, 2013 BCCA 9](#) (CA) [*Schlenker*].

penalty of disqualification until the next election was no longer statutorily available as an election had occurred and the respondents did not run again -leaving a declaratory remedy of the alleged conflict of interest as the only available remedy. The Court was not satisfied that the case was moot<sup>19</sup> and found that the case was one of “first impression”. Appellate review had practical utility, as elected officials could wrongly rely on the lower Court decision as guidance and be statutorily absolved of disqualification for relying on such guidance in good faith and it would have a deleterious long-term effect as there would be no motivation to challenge conduct relying on such guidance.<sup>20</sup>

The case at bar is akin to the above three cases. As in *Corbière*, this case involves an analysis of the proper scope of a legal rule: there, it was s. 78(2) of the *Indian Act*; here, it is the scope of the prorogation prerogative. In both cases, the applicants were (and are) attempting to seek justice in the circumstances of their cases. As in *Engel*, the issues raised in this matter are important questions that could impact the interpretation of important legal rules: there, the Alberta *Election Act*; here, the prorogation prerogative. And, as in *Schlenker*, this case concerns a matter of first impression concerning the scope and limits of a prime minister’s advice to prorogue Parliament. Similar to *Schlenker*, the declaratory remedy sought is of practical utility without being moot, since other prime ministers as elected officials could rely on the clarity of the law as reviewed by the appellate Court.

Turning, then, to the Court’s first question, the Appellants submit that this appeal is also not moot because the remedies sought in this case will have significant practical use. However, given the special nature of this case, the “practical use” this case is apt to provide will also be special.

The uniqueness of this case cannot be overstated. **First**, never before in Canada has a court been asked to delineate the scope of a prime minister’s power to advise a governor general to prorogue Parliament, itself an issue of fundamental constitutional significance. This is truly an issue of first impression in Canada. **Second**, we are dealing here with public interest litigation,<sup>21</sup> in a situation where the applicants were granted public interest standing.<sup>22</sup>

Thus, the concept of “practical use” ought not to be construed in the same way as it might in private litigation. It is true that there will be no damage award in this case. It is true that neither party will be awarded a contract, or will be granted refugee status, or anything of that nature. Those are not the types of “practical use” that this case will provide. But that does not mean that the remedies sought in this case will be of no “practical use”.

Rather, the Appellants seek to quash the underlying decision and for declarations. They submit here, as they did below, that the *Daniels* test is met. **First**, this Court has jurisdiction to hear this case. **Second**, the dispute in this case is real and not theoretical, as it relates to a decision that was actually made by the Prime Minister. **Third**, both parties clearly have an ongoing interest in settling this “live controversy” over the scope of a prime minister’s power to advise a governor general to prorogue Parliament.

*Daniels* also holds that the declarations being sought should have “practical utility”. The Applicants submit that they do. The practical use of the relief sought will be for the benefit of not only the Appellants, but also future prime ministers and indeed all Canadians, in helping settle

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<sup>19</sup> *Ibid.*, [paragraph 31](#).

<sup>20</sup> *Ibid.*, [paragraphs 29-31](#).

<sup>21</sup> *MacKinnon et al. v. Canada (Attorney General)*, 2025 FC 422 at [paragraph 312](#) (FC).

<sup>22</sup> *Ibid.*, [paragraph 116](#).

the state of the law concerning the prorogation prerogative, and in providing guidance concerning the circumstances under which the prorogation prerogative can be lawfully employed by a governor general, acting on the advice of a prime minister.

The fact that there might not also be a tangible result in this case (i.e. the resumption of the 44<sup>th</sup> Parliament) should not be of significant concern. The Appellants' focus has always been on the question of the proper scope of a prime minister's authority to prorogue Parliament, and whether the former Prime Minister's decision to prorogue Parliament was within that proper scope. The relief sought (i.e. setting aside the former Prime Minister's decision and declaring that the 44<sup>th</sup> Parliament of Canada was not prorogued) would be as meaningful and useful now as they would have been at first instance. The fact that Parliament was later dissolved does not change the (un)lawfulness of the decision to prorogue.

The Applicants accept that the issuance of a declaration that merely restates existing, settled law would not have practical effect.<sup>23</sup> However, that is not what the requested declarations will do in this case. Rather, they have the potential to provide appellate-level guidance on the important issues raised on this appeal

In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*,<sup>24</sup> the British Columbia Court of Appeal observed that:

[d]eclarations provide legal and practical guidance to governments charged with developing constitutionally compliant policy, and in this sense may have practical utility even in cases where an unconstitutional policy has expired by the time of judgment.<sup>25</sup>

Further, in *UR Pride Centre for Sexuality and Gender Diversity v. Saskatchewan (Minister of Education)*,<sup>26</sup> Justice Megaw (in holding that the Court retained jurisdiction to provide declaratory relief with respect to certain *Charter* violations despite the government's invocation of s. 33 of the *Charter*) wrote at paragraph 165:

[...] the issuance of a declaratory judgment has purpose and meaning beyond necessarily interfering in the operation of legislation validly passed and enacted by the legislative branch of government. It is "an effective and flexible" remedy to provide legal comment on the actions taken by the government. It permits the citizenry to continue to participate in the democracy and to challenge that which a government has done.

The Appellants rely on the above statements of principle set out in these two cases. They urge the Court in this case to view the requested relief in this case in a similar light, and to similar ends in this case. Following *Conseil scolaire*, the requested relief sought in this case can provide legal and practical guidance to the federal government (and future prime ministers, who are charged with developing constitutionally compliant policy and making constitutionally compliant decisions, among them about the exercise of Crown prerogative powers. Following *UR Pride*, the requested relief in this case amounts to an "effective and flexible" remedy, enabling this Court to

<sup>23</sup> See, e.g., *Daniels*, paragraphs 53, 56.

<sup>24</sup> *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2018 BCCA 305 (BCCA) [*Conseil scolaire*].

<sup>25</sup> *Ibid.*, at paragraph 304.

<sup>26</sup> *UR Pride Centre for Sexuality and Gender Diversity v. Saskatchewan (Minister of Education)*, 2024 SKKB 23 (KB) [*UR Pride*]; See also *Prince Albert Right to Life Assn. v. Prince Albert (City)*, 2019 SKQB 143 at paragraph 20 (QB); aff'd 2020 SKCA 96 (CA).

“provide legal comment” on the actions taken by the former Prime Minister. It also permits citizens to continue to participate in democracy and the Appellants to challenge what has been done by the government.

The Appellants rely on the following additional cases in support of their proposition that declarations provide practical utility in cases where they provide legal and practical guidance to governments and other interested parties:

1. *Khadr v. Canada (Prime Minister)*<sup>27</sup> – in this case, the SCC granted Khadr a declaration of unconstitutionality, but did not go further and make positive orders that would interfere with the business of government. The SCC’s goal was clearly to provide guidance to the federal government. It held that the declaration would “*in turn ... provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect to Mr. Khadr, in conformity with the Charter.*”<sup>28</sup>
2. *Hameed v. Canada (Prime Minister)*<sup>29</sup> – in this case, Justice Brown of the Federal Court made a number of declarations concerning the federal government’s failure to fill a significant amount of judicial vacancies across Canada in a timely manner, all clearly in an effort to provide the government with clear guidance on the matter. It is to be noted that the Court did not issue a *mandamus* order, being of the opinion that declaratory relief was sufficient.<sup>30</sup>
3. *The Architectural Institute of British Columbia v. Langford (City)*<sup>31</sup> – here, the Court agreed to issue a declaration in circumstances where “*it would provide guidance to municipal officials exercising their permitting powers.*”<sup>32</sup>

These cases demonstrate the practical utility of the requested relief sought in the sense that it would provide guidance to the relevant stakeholders.

In sum, for the above reasons, there is practical utility in the requested relief. Whether one chooses to analyze the matter in light of the *Daniels* test (for the granting of declaratory relief) or the first step of the *Borowski* test (to determine mootness), the result is the same. If this Court is prepared to conclude that the requested relief can be granted in light of the principles outlined in the above cases, then the Court should likewise have no difficulty concluding that this matter is not moot.

**Response to Question 2: The issues before the Court are of significant public importance; public interest favours the expenditure of judicial resources to hear them.**

The answer to the second question posed by the Court in the Direction is “yes”. Even if the relief sought on this appeal is found to be of no practical use, this appeal is of significant public interest and should still be heard.

As noted above, at the second step of the *Borowski* test, the court must decide whether to exercise its discretion to hear a case despite mootness. Three factors guide courts' exercise of discretion: (1) the presence of an adversarial context; (2) the concern for judicial economy; and (3) the need

<sup>27</sup> [Khadr v. Canada \(Prime Minister\), 2010 SCC 3](#) (SCC).

<sup>28</sup> *Ibid.*, [paragraph 47](#).

<sup>29</sup> [Hameed v. Prime Minister, 2024 FC 242](#) (FC).

<sup>30</sup> *Ibid.*, [paragraph 21](#).

<sup>31</sup> [The Architectural Institute of British Columbia v. Langford \(City\), 2020 BCSC 801](#) (SC).

<sup>32</sup> *Ibid.*, [paragraph 118](#).

for the court to be sensitive to its role as the adjudicative branch in our political framework.<sup>33</sup> The Court's second question focuses on the second factor, which concerns judicial economy. As noted in *Borowski*, the concern for judicial economy as a factor in the decision not to hear a moot case is answered if the "special circumstances" of the case make it worthwhile to apply scarce judicial resources to it.<sup>34</sup>

### Cases that are Evasive of Review

"Special circumstances" can be demonstrated in different ways. For example, the Court in *Borowski* explained that expenditure of judicial resources is warranted in recurring cases that are evasive of review.<sup>35</sup> The following cases illustrate this concept:

1. *Fairbrass v. Hansma*<sup>36</sup> - here, the applicants sought to have the mayor of their township disqualified from office. They were unsuccessful and lodged an appeal in the British Columbia Court of Appeal. However, a local election intervened before the appeal was heard. The Court nonetheless heard the appeal, holding that the appeal raised "a serious issue which was considered by the Supreme Court of British Columbia." The Court continued, "Were we to refuse to hear the appeal as moot, it would be a rare case that could be advanced through the court process, given the election cycle in municipal governance. The issue in this case is serious, the allegations are of consequence, in particular to the respondent, and the issue has the potential arise again in another guise."<sup>37</sup>
2. *Khela v. Mission Institution*<sup>38</sup> - in *Khela*, the Court was asked to clarify the scope of a superior court's review power on an application for *habeas corpus* made by a prison inmate. The Court found that the case before it was moot, but proceeded to hear the case anyway, observing that the nature of *habeas corpus* applications involving the transfer and segregation of inmates is such that the factual circumstances of a given application can change quickly, before an appellate court can review the application judge's decision. This meant that such cases will often be moot before making it to the appellate level - thus, they are "capable of repetition, yet evasive of review".<sup>39</sup>
3. *Campbell v. Canada*<sup>40</sup> - here, in an application for judicial review of a decision denying the applicants access to a crab fishery in 2005, the Court agreed that "given the nature of the judicial review process, it would be practically impossible to hear an application respecting access to the Fishery in any given year before the issue becomes moot and therefore the question would always evade review by the Court".<sup>41</sup>

### Public Interest Cases

The Court in *Borowski* also explained that "special circumstances" also include cases raising issues

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<sup>33</sup> *Sierra Club*, [paragraph 65](#).

<sup>34</sup> *Borowski*, page 360.

<sup>35</sup> *Borowski*, at page 360; see also *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46, at [paragraphs 45-46](#) (SCC).

<sup>36</sup> *Fairbrass v. Hansma*, 2010 BCCA 319 (BCCA) [*Fairbrass*].

<sup>37</sup> *Ibid.*, [paragraph 10](#).

<sup>38</sup> *Khela v. Mission Institution*, 2014 SCC 24 (SCC).

<sup>39</sup> *Ibid.*, [paragraph 14](#).

<sup>40</sup> *Campbell v. Canada (Attorney General)*, 2006 FC 510 (FC).

<sup>41</sup> *Ibid.*, [paragraph 16](#).

of public importance, of which resolution is in the public interest:

There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law.<sup>42</sup>

But what does “in the public interest” mean? The Appellants submit that further guidance with respect to the meaning of “public interest” within this part of the *Borowski* test is found in the following additional cases:

1. *Borowski v. Canada (Attorney General)* – *Borowski* itself provides additional guidance. At paragraph 46, Justice Sopinka held that there is a public interest in addressing the merits of a moot case “in order to settle the state of the law”.<sup>43</sup>
2. *Sunezco International Inc. v. Deputy Minister of National Revenue (Customs & Excise)*<sup>44</sup> – in this case, the Court held that “when judges are asked to review decisions of public authorities, there is an important public interest at stake.”<sup>45</sup>
3. *Campbell v. Canada (Attorney General)*<sup>46</sup> – the Court held at paragraph 16 that it was in the public interest to hear a matter to determine whether a Minister’s decision was made in error or not, because it was unlikely to change on its own in future years and thus would affect the applicants’ future access to a fishery.<sup>47</sup>
4. *Canada (Attorney General) v. Strachan*<sup>48</sup> – in this case, a panel of this Court agreed to hear a case despite it being moot. The appeal involved the interpretation of Rule 45 of the *Federal Courts Rules*. Both litigants agreed that it was “in the public interest” for this Court to “provide some guidance on the proper scope and purpose of Rule 45, and resolve the uncertainty created by the Order under appeal”.<sup>49</sup>

Thus, even if this case is found to be moot (which the Appellants do not concede), “special circumstances” exist that warrant the expenditure of judicial resources to hear the matter.

**First**, this is a prime example of a case that raises an important issue and will occur reasonably frequently, but that is nonetheless likely to be evasive of review. As noted above, since former Prime Minister Mulroney’s time, Parliament has been prorogued thirteen times, with the average period of prorogation being around 40 days. Following *Khela*, *Fairbrass* and *Campbell* above, it would be virtually impossible for a future case challenging a prorogation to come before this

<sup>42</sup> *Borowski*, page 361; See also *E.S. v. Joannou*, 2017 ONCA 655 at paragraph 37 (CA).

<sup>43</sup> *Borowski*, page 364.

<sup>44</sup> *Sunezco International Inc. v. Deputy Minister of National Revenue (Customs & Excise)* (1994), 48 ACWS (3d) 83 (FC).

<sup>45</sup> *Ibid.*, paragraph 13; See also *Gratton v. Canada (Attorney General)* (1999), 160 FTR 99 at paragraph 9 (FC).

<sup>46</sup> *Campbell v. Canada (Attorney General)*, 2006 FC 510 at paragraph 16 (FC).

<sup>47</sup> *Ibid.*, paragraph 16.

<sup>48</sup> *Canada (Attorney General) v. Strachan*, 2006 FCA 135 (FCA).

<sup>49</sup> *Ibid.*, paragraphs 4, 5, 9.

Court in time, before the prorogation period ended.<sup>50</sup> Given the obvious constitutional importance of the issues raised in this matter, appellate-level guidance is warranted – indeed, as the Court is aware, the very same issue raised on this appeal was considered by the UK Supreme Court in 2019 in *R. v. Miller*.<sup>51</sup> There is no reason why this matter should also not be considered by Canadian appellate courts. Yet, given the short duration of prorogations, the possibility of such cases becoming moot before reaching this Court (let alone the SCC) is almost non-existent. Such a state of affairs carries serious and obvious negative consequences for not only the development and clarification of the law in this area, but also the rule of law, Canada’s constitutional order, and the proper functioning of our system of government.

**Second**, there is a significant and obvious public interest component to this appeal.

First, following *Borowski, Campbell and Strachan*, above, there is a public interest in this case in “settling the state of the law” and providing clarity as it relates to the proper scope of the prorogation prerogative. The concerns (i.e. tensions between the rights of women and the rights of a foetus) that were present in *Borowski* are not present here – indeed, the Appellants cannot identify *any* countervailing reasons to conclude that it is not in the public interest to provide interested parties with clarification on the legal and constitutional issues raised on this appeal.

Simply put, it is difficult to conceive of a power of greater consequence in a parliamentary system of democracy than a prime minister’s exercise of the prerogative power resulting in the suspension of Parliament itself. Given the profound implications associated with even the temporary cessation of parliamentary function, questions surrounding the scope, limits and lawful exercise of this prerogative power are of exceptional public importance, particularly since the exercise of the prorogation prerogative has never been challenged in a Canadian court before.

Settling the constitutional balance between the executive and the legislature in the context of the prorogation prerogative is also of significant public importance. When executive power is exercised in a manner that may (or does) frustrate or undermine Parliament’s constitutional role, the public interest is directly engaged; this cries out for the judicial branch to determine the lawfulness of its use, including by appellate review. The public importance in preserving the constitutional boundaries between the executive and legislature, and in preventing the abuse of executive exercise, is fundamental.

Second, following *Sunezco and Gratton*, above, in this case the Court is called upon to review a decision made by not just any public authority, but indeed the most powerful public authority in Canada. There is a clear public interest in having this Court consider the issues raised when a prime minister, the “apex public servant”, takes action that results in the suspension of Parliament for a significant period of time.

Third, as noted above, *Borowski* instructs courts to “weigh the economics of judicial involvement” against the “social cost of continued uncertainty in the law”.<sup>52</sup>

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<sup>50</sup> Recall that even at first instance, this matter was only able to be heard in the Federal Court due to a special order expediting the matter. See [Mackinnon v. Canada \(Attorney General\), 2025 FC 105](#) at paragraphs 58 and 63 (FC).

<sup>51</sup> [R. \(on the application of Miller\) v. The Prime Minister, \[2019\] UKSC 41](#) (UKSC).

<sup>52</sup> [Borowski](#), page 361.

In *Doucet-Boudreau v. Nova Scotia (Department of Education)*, the SCC held at paragraph 21 that “the social cost of uncertainty as to ... available Charter remedies is high”.<sup>53</sup> Similarly, in *R. v. Poulin*, the SCC held that “the value of this Court’s ruling on the proper interpretation of s. 11(i) [of the Charter] clearly outweighs any concerns about limited judicial resources.... There is a clear ‘social cost in leaving the matter undecided’ which outweighs any small cost to this Court associated with deciding the appeal.”<sup>54</sup>

In this case, the social cost of uncertainty is similarly high. There should be no principled difference in the social costs associated with uncertainty between *Charter* cases and other constitutional cases. As in *Doucet-Boudreau* and *Poulin*, here we are also dealing with issues of fundamental constitutional significance, which Chief Justice Crampton acknowledged “go to the heart of our democracy”.<sup>55</sup> The social cost associated with public uncertainty surrounding the exercise of the power to prorogue Parliament cannot be understated, as continued uncertainty undermines public confidence, both in the exercise of executive action at the highest level and also with respect to the administration of justice in overseeing it.

There is also an additional social cost of uncertainty that extends beyond the proper scope of the prorogation prerogative. This second social cost is with respect to broader societal interests in upholding such fundamental constitutional principles as the rule of law,<sup>56</sup> parliamentary sovereignty<sup>57</sup> and the separation of powers,<sup>58</sup> and ensuring that our institutions of government are operating without undue interference from the others.<sup>59</sup> The prospect of these interests being adequately addressed is compromised when cases of fundamental constitutional significance - like this case - are allowed to go unheard.

Thus, it is in the public interest for this Court to decide the questions of national importance raised in this appeal now, rather than cause future litigants and the lower Court to expend further resources later.<sup>60</sup>

All of which is respectfully submitted, with thanks,

CHARTER ADVOCATES CANADA

Per:



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<sup>53</sup> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paragraph 21 (SCC) [*Doucet-Boudreau*].

<sup>54</sup> *R. v. Poulin*, 2019 SCC 47 at paragraph 24 (SCC) [*Poulin*].

<sup>55</sup> *MacKinnon v. Canada (Attorney General)*, 2025 FC 105 at paragraph 94 (FC).

<sup>56</sup> *Reference re Senate Reform*, 2014 SCC 32 at paragraphs 25-26 (SCC).

<sup>57</sup> *Canada (Attorney General) v. Power*, 2024 SCC 26 at paragraph 48 (SCC).

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ontario v. Criminal Lawyers’ Association on Ontario*, 2013 SCC 43 at paragraphs 27-29 (SCC).

<sup>60</sup> *Poulin*, paragraph 24.