Department of Justice Canada
Ministère de la Justice Canada

Office of the Assistant Deputy Attorney General
National Litigation Sector
50 O'Connor Street, Suite 600
Ottawa, ON K1A 0H8

Bureau du sous-procureur général adjoint
Secteur national du contentieux
50, rue O'Connor, bureau 600
Ottawa (ON) K1A 0H8

Telephone/Téléphone: 613-404-4731
Fax /Télécopieur: 613-954-1920
Email/Courriel: Elizabeth.Richards@justice.gc.ca

Via E-Filing Portal

Our File Number: LEX-500243537

May 14, 2025

Federal Court of Appeal
180 Queen Street West, Suite 200
Toronto, ON M5V 3L6

Dear Judicial Administrator:

Re: MACKINNON, David et al. v. AGC - CFN: A-131-25

We write further to the Direction in this matter dated April 22, 2025 and ask that you place this letter before Justice Stratas for his consideration.

This matter is moot but the Court retains the discretion to hear the appeal

The Respondent acknowledges the Court's direction setting out the concern that this matter is now moot and asking for submissions on two questions: 1. Whether the relief requested is of any practical use; and 2. If the answer is no, whether the appeal should proceed because the resolution of the issues on appeal is in the public interest.

The test set out in *Borowski v Canada (Attorney General)*[1] has been consistently applied by this Court and others and the parties agree on its basic elements. Pursuant to section 16 of the *Federal Courts Act* and the jurisprudence considering it, a 3-member panel of this Court may dismiss the appeal as moot where a decision of the court will not resolve a live controversy or practically affect legal rights.[2]

The matters raised in this appeal are moot and there is no practical utility to the relief sought. The 44th Parliament was dissolved, a general election was held, and a new Parliament was summoned to meet on May 26, 2025. This appeal does raise important legal issues, however,

[1] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*].
[2] *Federal Courts Act*, RSC 1985, c F-7, s 16 [*Federal Courts Act*]; *Wilson v Meeches*, 2023 FCA 233 at para 33; *Rock-St Laurant v Canada (Citizenship and Immigration)*, 2012 FCA 192 at para 30; *Borowski* at p 353.

that are generally evasive of review because of the short duration of most prorogation periods. It will also be the Respondent's position that the application was properly dismissed by the Federal Court, but that it ought to have been dismissed on the grounds that the matters raised were neither reviewable nor justiciable. The oversight role, if any, of the Courts in relation to advice given by the Prime Minster pursuant to a constitutional convention is an important legal issue and it is in the public interest to have appellate guidance on this issue.

(1) This appeal is factually and legally moot: the relief will not be of any practical use

The application for judicial review underlying the present appeal was brought pursuant to section 18.1 of the *Federal Courts Act* and challenged Prime Minister Trudeau's January 6, 2025 advice to the Governor General of Canada that Parliament be prorogued to March 24, 2025. The Appellants asked that the "decision" of the Prime Minister be set aside and requested a declaration "that the first session of the 44th Parliament of Canada has not been prorogued".[3] The Federal Court dismissed the application on March 6, 2025. In their Notice of Appeal, the Appellants ask that the decision below be set aside and the application be granted.

There is no remaining controversy affecting the parties' rights: as this Court observed, after the Federal Court's decision was released, the 44th Parliament was dissolved[4] and cannot be resumed. In other words, the substratum of the case – the state of facts to which the judicial review related[5] – has disappeared and a declaration regarding the prorogation of the 44th Parliament can have no practical effect.

In response to this Court's Direction, the Appellants emphasize that they are seeking declaratory relief regarding the scope of the power to prorogue. This is not consistent with the relief sought in the application and appeal as pled. In any event, this Court has confirmed that the fact that declaratory relief is sought cannot, by itself, avoid mootness.[6] Moreover, the specific declaratory relief sought by the Appellants, quite apart from being impermissible as a disguised request for mandatory relief that invites the Court to constrain the operation of a constitutional convention[7], would be hollow in light of changed circumstances since the judicial decision was rendered.[8] As a result, this appeal cannot affect the parties' legal rights and cannot grant the Appellants any legally effective remedy, even if their appeal were to succeed.

---

[3] Amended Notice of Application in T-60-25 at para 3(c).
[4] *Proclamation Dissolving Parliament*, SI/2025-57.
[5] *Borowski* at p 354.
[6] *Peckford v Canada (Attorney General)*, 2023 FCA 219 at paras 22–23.
[7] *Canada v BOLOH 1(A)*, 2023 FCA 120 at para 60; *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at pp 881–83.
[8] *Lavoie v Canada (Minister of the Environment)*, 2002 FCA 268 at para 15 [*Lavoie*].

(2) It is nevertheless in the public interest that the appeal be heard

Notwithstanding the appeal's mootness, the Respondent agrees the Court should exercise its discretion to hear it. This is consistent with the position the Respondent took in the Court below.[9]

In deciding whether to hear a moot appeal, this Court must consider: (1) the presence of an adversarial context; (2) the concern for judicial economy and (3) the requirement that this Court be sensitive to its proper role.[10] These factors are not considered mechanically, and the presence of some may overcome the absence of another.[11]

In this case, all three factors weigh in favor of permitting the appeal to proceed. The Federal Court reached the correct outcome, but its reasons are affected by legal error. These errors include, among others, its statements: (1) that the Prime Minister exercises the Crown's prerogative power to prorogue Parliament, which conflates the conventional advisor (the Prime Minister) with the legal decision-maker (the Governor General), contrary to this Court's judgment in *Conacher v Canada (Prime Minister)*[12]; and (2) that the Prime Minister's advice to prorogue is reviewable by the Courts and justiciable.[13] The Respondent intends to make submissions on these issues in its response to the appeal, as it is entitled to do.[14] In the meantime, the Respondent's concern with the decision is relevant to every stage of the *Borowski* analysis that follows.

1. An adversarial context continues to exist

The questions about the legal constraints on prorogation and the role of the Courts in reviewing the exercise of the prorogation power remain in dispute between the parties and should be resolved in this appeal. Because both parties have an interest in having these questions resolved, the Court can be satisfied that an adversarial context continues to exist.[15] Moreover, these underlying questions are largely legal ones that do not depend on the facts of the specific case. It is also open to this Court to limit itself to resolving only those questions that do not depend on specific and moot facts.

---

[9] *MacKinnon v Canada (Attorney General)*, 2025 FC 105 at paras 81–82.
[10] *Borowski* at pp 358–63.
[11] *Borowski*, at p 362.
[12] *MacKinnon v Canada (Attorney General)*, 2025 FC 422 at paras 56–58, 63 [*MacKinnon*]. See *Conacher v Canada (Prime Minister)*, 2010 FCA 131 at paras 5–6 and 11, which concerned the Governor General's analogous prerogative power to dissolve Parliament, whose source is in the same instrument that governs the power to prorogue, the *Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada of 1947*.
[13] *MacKinnon* at paras 78-79 and 96.
[14] *Perka v The Queen*, [1984] 2 SCR 232 at p 240; *Promotion in Motion Inc v Hershey Chocolate & Confectionary LLC*, 2024 FCA 201 at para 8 [*Promotion in Motion*].
[15] *Borowski* at p 360; *Nova Scotia v CUPE, Local 1867*, 2005 NSCA 134 at para 4.

2. Appellate consideration of the underlying questions is warranted

The public importance of the underlying questions, combined with the arguable errors in the application judge's reasons for decision, make it worthwhile to apply judicial resources to resolve this appeal.[16] While the question whether the appeal is moot is considered from the perspective of the legal rights of the party appealing the judgment[17], a Court considering whether to exercise its discretion to hear a moot appeal can properly take into account the position of the Respondent.

Prorogation is a power that has been exercised periodically in Canada since Confederation and is a regular and important feature of Canada's system of parliamentary and responsible government. Yet until this proceeding, prorogation had never faced judicial challenge on public law principles. For the moment, the application judge's decision stands as the sole precedent on the judicial review of this prorogation power. As a result, any ambiguity in the reasons for decision stands to have a disproportionate impact on the jurisprudence.[18] In exercising its discretion to hear the appeal, this Court can properly consider the potential risks associated with a Federal Court decision containing arguable legal errors remaining extant to be used as a precedent in future cases.[19] Furthermore, if the Attorney General of Canada is correct that the advice of a Prime Minister to the Governor General to prorogue is neither reviewable nor justiciable, this Court's decision would, rather than unnecessarily expending judicial resources, deploy them judiciously to prevent future litigation that ought to be doomed to fail.[20]

Additionally, despite prorogation being a parliamentary practice that is of a recurring nature, periods during which Parliament is prorogued are typically of short duration. The uncontested evidence before the Federal Court was that the average prorogation period in Canada has been approximately 40 days.[21] For that reason, the important legal and constitutional questions concerning prorogation are evasive of appellate review. This is an accepted basis for exercising the Court's discretion to hear a moot appeal.[22] Even with a greatly expedited first instance hearing, this matter became moot before an appeal was even commenced.

Lastly, in *Borowski v Canada*, the Supreme Court of Canada recognized a "rather ill-defined" justification for deploying judicial resources to resolve issues of public importance in the public interest to mitigate the social cost of continued uncertainty in the law.[23] This Court has

---

[16] *Borowski* at pp 360–61.
[17] *Forget c Québec (Procureur général)*, [1988] 2 SCR 90 at para 5.
[18] *Selenium Creative Ltd v Edmonton (City)*, 2023 ABCA 312 at paras 11–13.
[19] *Abbot Laboratories v Canada (Minister of Health)*, 2007 FCA 153 at para 4.
[20] *Graff v Alberta (Energy and Utilities Board)*, 2007 ABCA 363 at para 5.
[21] *MacKinnon* at para 290.
[22] *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62 [*Doucet-Boudreau*] at para 20; *Borowski*, at p 360; *Lai v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 222 at para 3.
[23] *Borowski* at p 361; *Doucet-Boudreau* at para 21.

explained that this factor relates to costs to society generally of uncertainty in the law flowing from inaction vis-a-vis the decision under review, over and above the general importance of the underlying questions.[24] Cases in which this factor has prevailed in persuading a court to hear a moot appeal have tended to be those involving matters of broad social and constitutional importance, and in which the parties (including appropriate interveners) have ensured that the court was in a position to make a fully informed decision.[25]

The social cost of prematurely dismissing this appeal as moot would be high. Among the social costs is that any uncertainty in the scope of the legal power to prorogue Parliament and the distinction between the legal and the conventional actor risks uncertainty in the relationship between the Prime Minister and the Governor General of Canada. It also creates distinct challenges for the legal advisors to those actors as it pertains to the future exercise of their legal obligations. If the Court leaves this appeal undecided and the relevant legal and political actors are left under a misapprehension or any confusion about their legal obligations, the result could be constitutional uncertainty. By contrast, appellate guidance on the underlying questions will assist the legal and political actors in their ongoing relationships.[26]

While some of the legal issues underlying this appeal – for example, court enforceability of constitutional conventions – are raised in *Hameed v Canada (Prime Minister)*[27], it is not inevitable that those questions will be decided. The Respondent in that case asserted that the appeal was moot, the parties made submissions on the issue and this Court has not yet ruled on mootness or whether, if the appeal is held to be moot, it would exercise its discretion to decide the appeal.

3. This Court can decide the underlying legal questions

The third factor in the discretionary approach to the mootness doctrine requires the Court to be aware of its role within the adjudicative branch.[28] In hearing this appeal, this Court would not be departing from its accepted role of deciding disputed legal issues. The determination of the legal scope of the prerogative power to prorogue Parliament and by whom it is to be exercised is within the competence of the Courts, as is the determination of what legal questions are reviewable and justiciable.[29] Additionally, where the decision under appeal itself concerns the division of responsibilities between the branches of government, the need for ensuring that the judiciary appreciates its proper role in our political framework in fact militates in

---

[24] *Eli Lilly Canada Inc v Novopharm Ltd*, 2007 FCA 359 at para 36; *Lavoie* at para 14.
[25] *Tamil Co-operative Homes Inc v Arulappah*, [2000] 192 DLR (4th) 177 at para 26.
[26] *Doucet-Boudreau* at para 22; *Schlenker v Torgrimson*, 2013 BCCA 9 at paras 29–31.
[27] *Hameed v Canada (Prime Minister)*, 2024 FC 242. The appeal was argued before this Court on April 7, 2025 and is presently under reserve.
[28] *Borowski* at p 362.
[29] *Reference re Canada Assistance Plan (Canada)*, [1991] 2 SCR 525 at paras 33–34; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 36–37.

favour of hearing an otherwise moot appeal.[30] Moreover, while the underlying issues raised in the appeal are moot, they are not abstract; the appeal would not ask the Court to opine on constitutional issues in the absence of legislation bringing them into play, for example.[31]

Critically, the Attorney General, having succeeded in having the application dismissed, has no independent means to have the Federal Court's legal errors corrected through an appeal or cross-appeal[32] but has every interest in having these errors corrected.

Lastly, because the factual context *is* moot, this Court can hear and decide the questions raised on the appeal without the extremely compressed time pressures that affected the proceeding below.

Next steps

If the Court believes there is a significant issue regarding mootness, it will need to decide whether to refer the matter immediately to a panel or leave mootness to the panel which will hear the appeal against the context of all the legal issues at play. The Respondent defers to this Court's discretion in this regard, as guided by Rule 3 of the *Federal Courts Rules*: the need to secure "the just, most expeditious and least expensive determination of every proceeding on its merits".[33]

Lastly, the Respondent is cognizant that a motion for intervention was filed with the Court on April 22, 2025. Given that the timelines for this proceeding were suspended by the Court's Direction of the same date, if the Court is inclined to allow the appeal to proceed, the Respondent respectfully requests a Direction with respect to when the parties should file their responses to the filed motion for intervention.

Sincerely,

Elizabeth Richards
Chief General Counsel

cc: James Manson and Andre Memauri (Counsel for the Appellants)

---

[30] *Dixon v Canada (Somalia Inquiry Commission)*, [1997] 3 FC 169 (Federal Court of Canada – Appeal Division) at paras 2–3.
[31] *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 48.
[32] *Federal Courts Act*, s 27(1)(a); *Federal Courts Rules*, SOR/98-106, Rule 341(1)(b); *Fournier v Canada (Attorney General)*, 2019 FCA 265 at para 28; *Promotion in Motion* at paras 8, 10.
[33] *Amgen Canada Inc v Apotex Inc*, 2016 FCA 196 at paras 8, 10.