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# **Standing Committee on Procedure and House Affairs**

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**EVIDENCE**

**Tuesday, April 27, 2010**

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**Chair**

**Mr. Joe Preston**



## Standing Committee on Procedure and House Affairs

Tuesday, April 27, 2010

• (1130)

[English]

**The Chair (Mr. Joe Preston (Elgin—Middlesex—London, CPC)):** Good morning. I'd like to call our meeting to order.

I recognize that we've had a bit of a late start, so we'll see how much we can get through.

Pursuant to Standing Order 108(3)(a) and the motion adopted by the committee on Thursday, March 11, 2010, we are studying issues related to prorogation.

Our first witness, as we move forward in this study, is Mr. Walsh, the law clerk and parliamentary counsel. Mr. Walsh, I know that you've sent out some information to all of us, but I'll ask you if you have a bit of an opening statement, and then we'll get to questioning.

**Mr. Rob Walsh (Law Clerk and Parliamentary Counsel, House of Commons):** Thank you, Mr. Chairman.

My opening statement is basically a condensation of the letter I sent to you and which I believe has been distributed to members of the committee. If that would facilitate matters, I'll make my opening statement, and we could then move to questions, if there are any.

Mr. Chairman, the issue before this committee, as I understand, is whether prorogation should be legally regulated in some manner, and if so, how. The object would be to remove the Prime Minister's de facto exclusive control of prorogation. It's not my place to address the first question, as this is a political matter. But the second question of how prorogation might be regulated involves consideration of the legal means by which this might be done.

Three questions need to be addressed. First, what is the legal nature and status of the power of prorogation? Second, can prorogation be regulated by the House through its Standing Orders or by Parliament through an act of Parliament? Third, if so, would the legislation be enforceable?

The Governor General's power to prorogue Parliament is a common law prerogative power that, according to unwritten constitutional convention, is exercisable by the Governor General on the advice of, or after consultations with, the Prime Minister. It is one of a number of prerogative powers held by the Governor General as the Queen's representative in Canada.

Another prerogative power held by the Governor General that relates directly to Parliament is the power to dissolve Parliament and call a general election.

[Translation]

Over time, more and more of the Crown's prerogative powers have been taken over by statute, that is, have become statutory powers vested in a minister or other public authority. Those remaining as prerogative powers in the hands of the Crown or the Governor General include, among others, the appointment of the Prime Minister and other ministers, dismissal of the Prime Minister, the summoning, dissolution and prorogation of Parliament, the making of treaties, command of the armed forces and the conferring of honours. Examples of prerogative powers taken over by statute include extradition, granting of pardons, citizenship, incorporations and expropriation.

[English]

The House of Commons, acting through its Standing Orders, only regulates its proceedings and those of its committees. Prorogation is not a proceeding of the House. The Standing Orders of the House have no binding effect outside the business of the House and its committees. This is not to say, however, that the Standing Orders could not set out some adverse procedural consequences for the government if a prorogation were obtained in a manner contrary to the expressed wish of the House.

Some have expressed the view that legislation governing the Governor General's power of prorogation would be a constitutional amendment and would require the consent of the provinces. In my view, while legislation regulating prorogation might be characterized as a constitutional amendment, this does not mean that the legislation would need to be approved by the provinces. I discuss this further in my letter to you on this matter, Mr. Chair, which I believe has been distributed to members of the committee.

[Translation]

One might avoid this legal argument by limiting the legislation to regulating the Prime Minister's role with respect to prorogation. The Governor General's prerogative power of prorogation is not shared with the Prime Minister. The Prime Minister has only an advisory role with respect to the exercise of this power, albeit a necessary prerequisite by constitutional convention. The advisory role of the Prime Minister is based on an unwritten constitutional political convention. If prerogative legal powers can be overtaken by legislation, it must surely be true that unwritten political rules can be overtaken by legislation.

[English]

However, a failure by the Prime Minister to comply with the statutory restrictions imposed on the advisory role of the Prime Minister would not, by itself, invalidate an exercise of the prerogative power of prorogation by the Governor General.

Although it might be possible in theory to draft legislation regulating prorogation, there remains the question of whether such legislation would be enforceable in the courts. Enforceability includes the question of justiciability. The courts consider non-justiciable those matters that do not contain sufficient legal content to enable the court to reach a legal decision on the merits.

The courts have said that the exercise of some prerogative powers, such as the power to dissolve Parliament or to appoint ministers, is not reviewable by the courts because they are not justiciable. Prerogative powers such as the dissolution of Parliament or entering into treaties or taking measures relating to national security, for example, are considered powers that either are political in nature or relate to matters that are not capable of review by a court through a judicial process.

• (1135)

[Translation]

Even if the legislation were drafted in such terms as to present a justiciable issue for the court and the court concluded that the legislation had been violated, there would remain the difficult question of how the court would enforce its decision. Likely, the prorogation would have taken place some months earlier and a new parliamentary session would already be underway. Does the court declare the prorogation invalid, as well as the subsequent parliamentary session and all parliamentary actions up to the time of the court's decision? Or once the court action challenging the prorogation is commenced, should there be no subsequent parliamentary session until the court makes its ruling?

[English]

In my view, the only effective way in which prorogation could be made subject to law and taken out of the hands of the Prime Minister in his advisory role to the Governor General is to make a formal constitutional amendment that would set down the circumstances in which the Governor General could prorogue Parliament, with or without the advice of the Prime Minister.

Thank you, Mr. Chairman.

I'll be pleased to respond to any questions members may have.

**The Chair:** Thank you.

Because of our late start and compressed time, we'll try to do five-minute rounds. I'll be as flexible as I can.

Madam Jennings may start.

**Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.):** Thank you, Mr. Walsh, for your presentation and for the letter in which you explained in great detail your considered view, through the legal lens, of the whole issue of regulating prorogation through either standing orders or legislation of the House of Commons. Your final conclusion is that the only real, effective way would be through a formal constitutional amendment that would

limit or proscribe the Governor General's discretionary authority to prorogue Parliament and establish the conditions.

However, you make the point that the Standing Orders only regulate the business of the House, including the committees, and the conduct of its members in the House, and therefore it has no effect outside of the House of Commons. Then you go on to say that through the Standing Orders the House could regulate something "punitive" for a member, who might happen to be a prime minister, who violates the Standing Orders. Could you expand? I'm having difficulty grasping that.

**Mr. Rob Walsh:** The witness used quotation marks for the word "punitive". I didn't use that word.

**Hon. Marlene Jennings:** No. That's why I'm saying—

**Mr. Rob Walsh:** I'll give you some examples that are simply illustrative. I'm not for a moment recommending that this is the way the House would want to go.

The House can't legislate through standing orders that the Prime Minister shall not prorogue without first giving notice to the House. But who's to say that the House, in the Standing Orders, can't provide that where prorogation takes place without prior notice to the House, there shall be five additional opposition days in the first supply period in the new session, or no government bill shall be considered for a second reading within 60 days of the opening of the session.

I'm just saying you could put a disincentive into your Standing Orders, I suppose. I'm not recommending this, but I'm saying—

**Hon. Marlene Jennings:** I like it.

**Mr. Rob Walsh:** —in theory the House controls its proceedings. It can do what it wants through its Standing Orders to regulate its proceedings. If it wanted to put a disincentive into the Standing Orders to discourage what happened last December, I suppose something along those lines could be done. That's all I meant to say there. There is a possibility of putting a disincentive into your Standing Orders. But standing orders change over time, and all it takes is a change in numbers and what was put in yesterday is gone tomorrow.

**Hon. Marlene Jennings:** Thank you.

Second, there's the real issue of whether or not legislation regulating the Prime Minister's executive authority to ask or advise the Governor General that Parliament be prorogued would be enforceable. Now the quotes are around a term that you yourself used, contrary to when I did that for punitive. That's whether it's "justiciable". If I'm not mistaken, that is one of the issues that came about in the court decision on the...

• (1140)

**Mr. Rob Walsh:** The fixed-date elections?

**Hon. Marlene Jennings:** No. That was one of them, but the other decision had to do with foreign affairs recently. I think it had to do with the Canadian government not requesting no death penalty in the case of a Canadian in the United States. It was very recent. It was with Omar Khadr, but it had to do with foreign affairs and the court ruled that in fact the government had not done everything it should do. It determined that in fact the individual's rights had been violated; however, it left it to the government to come up with the solution.

Would that be a case where the court rules that there is a violation, but because there isn't sufficient law attached to it, a judicial matter, it's not in a position to be able to actually come up with the actual remedy itself?

**Mr. Rob Walsh:** I'm not sure what case you're referring to, but the courts have—

**The Chair:** The time is up, but go ahead and give a short answer.

**Hon. Marlene Jennings:** I'll dig it up.

**Mr. Rob Walsh:** I'm not sure what case the member's referring to, Mr. Chair, but where a prerogative power is exercised or not being exercised and it affects the rights of an individual, then you have a charter argument and the courts will look at the exercise or non-exercise of prerogative powers relative to the rights of an individual under the charter.

We're here now about prorogation, and of course it does not concern the charter; it's a matter purely within Parliament. The justiciability issue, in my view, arises generally where the nature of the legislation in question.... The Fixed Election Dates Act, for example, didn't deal directly with the prime ministerial role. It just had a section that said there shall be elections every four years. The argument was made that it necessarily meant that the traditional role of the Prime Minister was overruled by this provision, and the court didn't accept that argument.

**Hon. Marlene Jennings:** Thank you.

**The Chair:** Mr. Reid.

**Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC):** Thank you.

You made reference to the idea that the Constitution could be amended to permit some kind of restriction on the power of prorogation. As I look at it, there are two ways of accomplishing this, and I'm just wondering which you think is the better.

Section 44 of the amending formula states, and I'm quoting here: "Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons." That suggests a unilateral amendment as long as it's done by means of legislation, as opposed to a motion. But then section 41 requires that when dealing with the office of the Queen or the Governor General you have to have the consent of all the provinces as well as of Parliament. I'm just wondering which of the two strikes you as being the likely or more appropriate one.

**Mr. Rob Walsh:** The one raised by some commentators is section 41, where it's suggested that any legislation pertaining to prorogation would affect or relate to the office of the Governor General and therefore require the consent of the provinces.

It's hard to say what the meaning of "in relation to" the office of the Governor General means, because we had the Royal Assent Act, which went through and didn't mandate that royal consent had to be given in a certain way, but allowed royal consent to be given in writing as opposed to the formal procedure in the Senate, but there was no consent from the provinces. Does that relate to the office of the Governor General?

Do you know what I mean?

**Mr. Scott Reid:** I suppose the implicit understanding was that it related to the powers, as opposed to the technical way in which it's carried out.

● (1145)

**Mr. Rob Walsh:** That's the point. You could argue that—

**Mr. Scott Reid:** By the way, I was the only person in the House of Commons who didn't support that. I denied unanimous consent to that, but that's a separate issue.

**Mr. Rob Walsh:** The relation to the office of the Governor General might be in this context of section 41 contained within the Constitution Act of 1982, which, by the way, relates to the Constitution of Canada, which is defined in section 52. You can argue that section 41 relates only to those provisions in the Constitution Act 1867 and 1982 that relate to the office of the Governor General.

But I can't tell you where the line is between the office of the Governor General and the powers of the Governor General. My discussion, my paper regarding focusing on the Prime Minister's role, was as a possible strategy to avoid that argument. If all you're legislating is the Prime Minister's role, arguably, you're not touching the Governor General's powers or the office of the Governor General and section 41 wouldn't apply.

**Mr. Scott Reid:** Right.

A suggestion has also been made that a codicil could be added to the letters patent that King George VI issued in 1947 relating to the transfer of powers to the Governor General. Somehow, this could be so designed as to, I suppose, instruct the Governor General not to accept certain kinds of advice.

Is there any merit to that suggestion, in your opinion?

**Mr. Rob Walsh:** You used the word "codicil". I think of that in terms of wills, and you'd have to bring back King George VI to execute it.

**Some hon. members:** Oh, oh!

**Mr. Scott Reid:** I perhaps should have used a different term, but I take your point.

**Mr. Rob Walsh:** I'm not sure, actually, Mr. Chairman, whether or not the letters patent of 1947 would have to go back to the Queen of England to be modified there, as opposed to being modified directly here in Canada. Legislation here could do much of that, but I think if you were to actually try to play with that instrument, you might have to go back to the Queen of England.

**Mr. Scott Reid:** That would be the Queen, presumably, acting on the advice of the Prime Minister of Canada.

**Mr. Rob Walsh:** I would think so, yes.

**Mr. Scott Reid:** Thank you.

**The Chair:** Thank you.

Monsieur Paquette.

[*Translation*]

**Mr. Pierre Paquette (Joliette, BQ):** I would like to come back to your conclusion.

You say that the only truly effective way to regulate the prorogation power of both the Prime Minister and the Governor General would be to amend the Constitution. You outlined several possibilities in the answer you provided. Formal constitutional amendments would involve negotiations with the provinces in this case, for example, is that not so?

**Mr. Rob Walsh:** It depends. In my view, if an amendment were made directly to the Constitution, there would be no limit. We could decide on anything with regard to the powers of the Governor General. We could indeed decide whether or not the consent of the provinces is required.

**Mr. Pierre Paquette:** In this case, in your opinion, we could amend the Constitution so as to remove the Governor General's power to prorogue Parliament, and we could do this without having to negotiate with the provinces?

**Mr. Rob Walsh:** With regard to amendments to the Constitution, if we followed the process set out in section 38, we could amend the Constitution to establish rules that would apply to the power to prorogue or to dissolve Parliament, for example.

**Mr. Pierre Paquette:** I also understood that we could have an act framing the Prime Minister's authority with regard to consultation. Furthermore — I wish to ensure that I understood correctly —, you also say that it is somewhat similar to the fixed elections date act: it is a pious wish, but the adoption of such a law would really have no impact legally speaking.

**Mr. Rob Walsh:** The fixed date elections act did not at all deal with the role of the Prime Minister. The purpose of the first section of this act was to amend section 51.6 of the Canada Elections Act, to which the following clarification was added:

56.1 (1) Nothing in this section affects the powers of the Governor General [...]

This gave the Prime Minister the ability to advise the Governor General with regard to the calling of an election. This is indeed a reservation set out in the act:

[...] including the power to dissolve Parliament at the Governor General's discretion.

The Governor General acts in accordance with the advice of the Prime Minister. If this act stated expressly that the Prime Minister could not give advice to the Governor General other than every four years, or something of that nature, it would be a different story.

• (1150)

**Mr. Pierre Paquette:** The way in which the act was drafted therefore left the door open to the Prime Minister.

**Mr. Rob Walsh:** Yes, wide open.

**Mr. Pierre Paquette:** As an example, following prorogation last December 30, certain proposals were put forward, among them that the Prime Minister should provide notice before advising the

Governor General and that there should be a debate or a vote in the House.

In your opinion, is this a path that could be followed? If so, would it be effective?

**Mr. Rob Walsh:** According to the Standing Orders of the House of Commons, as I was saying earlier, if the Prime Minister asks for prorogation before advising the House of Commons, procedural consequences must ensue. However, legally speaking, it must be stated that the Prime Minister is expressly prohibited from asking the Governor General to prorogue Parliament without having given notice to the House of Commons. That is clearly set out in the legislation. Then, there is the problem of knowing what the court will decide.

**Mr. Pierre Paquette:** Indeed.

**Mr. Rob Walsh:** If the Governor General has already authorized prorogation, if a new parliamentary session has begun and the court finally renders a decision, what will happen? Will all of the parliamentary measures taken become invalid?

**Mr. Pierre Paquette:** You talked of the possibility of enforcing a law that would act as a disincentive to having recourse to prorogation. You gave several examples. In the context of the debate that followed prorogation December 30 of last year, a great many concerns were expressed with regard to the fact that the government had put an end to the session in order to prevent the special committee on the Canadian mission to Afghanistan from pursuing its work. Could one of the disincentives be that committees be authorized to continue to work following the prorogation of Parliament?

**Mr. Rob Walsh:** The House of Commons is free to authorize committees to pursue their work after prorogation, but the problem is that Parliament cannot grant parliamentary privileges beyond a parliamentary session. That is where the problem lies. Committees can meet, but...

**Mr. Pierre Paquette:** Thank you, that is very enlightening.

[*English*]

**The Chair:** Thank you.

Mr. Christopherson.

**Mr. David Christopherson (Hamilton Centre, NDP):** Thank you, Chair.

Thank you, Mr. Walsh. It's always stimulating to have you at the end of the table.

If I'm getting this right, we could go to a full-blown constitutional amendment, the usual unexpected unanimity practically, and go through the whole of that, or we could do separate legislation, but not necessarily a constitutional amendment. Or we can do Standing Orders changes, which would not have the effect of prohibiting but would give the House follow-up actions.

Is there anything I'm missing? Is there a piece I'm leaving out?

**Mr. Rob Walsh:** Well, your first point about full-blown constitutional amendment wouldn't necessarily be unanimity; it could be a seven-and-fifty rule.

**Mr. David Christopherson:** Yes, okay, which is politically almost the same thing.

**Mr. Rob Walsh:** Well, section 44 enables there to be legislation pertaining to the federal houses, which wouldn't require the consent of the provinces. So if it's an amendment pertaining simply to the prorogation of the federal house, it may be that you're under section 44 and you don't have to be concerned about getting provincial consent.

**Mr. David Christopherson:** But its enforceability is the problem.

**Mr. Rob Walsh:** That's a good question. People might say you have it in the Constitution, but the courts might still not be able to enforce it. Well, I would take the view that there are some provisions in the Constitution—I know there are—that are there very clearly and arguably aren't enforceable either.

Picture it. You have the Constitution very clearly in an article setting out the circumstances under which prorogation can be sought or prorogation can be given. I find it very hard to believe that the Prime Minister of the day is going to disregard something that is as clearly written in the Constitution and seek a prorogation. Not only that, *a fortiori*, it's not likely that the Governor General of the day is going to grant a prorogation that is recognizably contrary to what's in the Constitution.

There comes a point at which the Constitution sets the rules and the major players acknowledge that: you don't need to worry about court enforcement; it's simply not going to happen. Were it to happen, contrary to the Constitution, then you have a real constitutional crisis, and any court order might be marginal at best in those very extreme circumstances.

• (1155)

**Mr. David Christopherson:** What sort of redress is available to Parliament if we go the standing order route, and maybe even the legislative route? I'm not sure that my question applies to both—you'll know better than I—in terms of not necessarily legally being able to stop it, but to make a statement that this is not expected, in the way that some of the examples you gave earlier about how it could be worded. My question is, if we put such a thing in place, either in a standing order or in legislation—and there may be two different answers to that—what would be the courses of action available to Parliament if that piece of legislation or the standing order was not adhered to?

**Mr. Rob Walsh:** In the case of a standing order, the House would, by its Standing Orders, presumably set out what rules apply in the event that its wish regarding prorogation were not adhered to.

In the case of legislation—

**Mr. David Christopherson:** Sorry, can I stop you there?

We can put penalties in there. Is there anything that ultimately can lead to a contempt?

**Mr. Rob Walsh:** Well, beauty is in the eye of the beholder and contempt is in the eye of the beholder as well, as to whether you consider it that. But don't forget, even though your Standing Orders may make it evident that the House expects to get notice, if that's disregarded and if prorogation is granted, the prorogation is valid. That's a fact.

**Mr. David Christopherson:** Yes, but you could still hold the Prime Minister accountable within Parliament in terms of his actions, even though the legal actions still took place?

**Mr. Rob Walsh:** Listen, the elephant in the room here, which is not being pointed at, is the relationship between the House and the government. There comes a point when you can write all kinds of things on a piece of paper, whether it's standing orders or legislation, but if the confidence of the House in the government is not there, that's where the House goes if the government is acting in a way that is unacceptable to the House.

I appreciate that you'd say why go nuclear with non-confidence when what you're concerned about is something less than that. Well, that's your choice, but then you're saying you do accomplish something.

The parliamentary system doesn't allow for you to have confidence but not have confidence, have it and not have it. It's either you do and the government continues in office, or you say you don't, or you do something that by tradition amounts to non-confidence, in which case the government has to seek an election, and so on.

So the big elephant in the room—which I don't want to bring up, because I'm not advocating that this matter be looked at as a confidence issue but which nonetheless infuses a lot of this discussion—goes to the nature of the relationship between the House of Commons and the government. It's one of accountability, and ultimately it gets to the point where the House has to accept the government's actions, however distasteful they might be: you hold your nose and you're carrying on with confidence in the government, implied if not expressed, or you say no, you don't have confidence, and you know what follows from that.

There isn't any other way of penalizing or slapping the wrist of the government or whatever because they're not doing things that you'd like to see them do.

**Mr. David Christopherson:** Is a motion of contempt, if it carries, the same as a loss of confidence?

**Mr. Rob Walsh:** If the prime minister of the day chooses to take it that way, it could be.

**Mr. David Christopherson:** But by itself, it's not.

**Mr. Rob Walsh:** It's not necessarily. You know, the only thing that really is confidence, apart from the few obvious issues like voting against the budget and so on, is a motion of non-confidence. Now, you can get into other versions of dissatisfaction, other ways of expressing it. It becomes a matter of interpretation. If you want it to be read one way, you should say so.

**Mr. David Christopherson:** Am I done?

**The Chair:** You can have a quick one.

**Mr. David Christopherson:** Thanks.

Assuming we legally can't stop it without a constitutional amendment, which one would be easier for the House to achieve to at least tell the Prime Minister that he violated the rules and that we are going to hold that there be a motion of contempt, and that the members say that rights have been violated—the Standing Orders or the legislation? Which is easier procedurally?

**Mr. Rob Walsh:** Obviously, going by the Standing Orders is easier. A motion is passed in the House, and it's done. Legislation, obviously, takes three stages and both houses.

**Mr. David Christopherson:** The downside, of course, is that the Standing Orders can be removed just as easily in a subsequent Parliament.

Thanks, Chair. I appreciate that.

Thank you, Mr. Walsh.

**The Chair:** Thank you.

I think we have time for one more quick round if there's anybody else who has a couple of questions.

Marlene? No? Okay.

Mr. Lukiwski, you can have a quick one. We'll play around five minutes here, I think.

**Mr. Tom Lukiwski (Regina—Lumsden—Lake Centre, CPC):** Okay. I have just a couple of simple questions.

Obviously provincial governments can prorogue as well. Are they completely separate and apart from the provisions contained in the federal government? In other words, do they have different rules per se they follow, or are they relatively similar?

• (1200)

**Mr. Rob Walsh:** They do not unless there's something in their provincial constitution covering this, but these are all unwritten rules and practices, and they apply in the provincial centres as well as the federal one.

**Mr. Tom Lukiwski:** If there were any changes, any constitutional amendments made at the federal level, would those have any impact on the provinces?

**Mr. Rob Walsh:** They need not. It depends on the terms and on how you draft the amendment and put the amendment in the act. It could be limited to the federal houses. The Governor General and her power are relative to the federal Parliament.

**Mr. Tom Lukiwski:** In other words, it would be a stand-alone or a one-off, if you will, to the federal government.

Going back to comments that David was making and your responses to them, if the House, obviously in a minority government, was offended by prorogation, the obvious remedy could be, following prorogation, to bring forward a non-confidence motion expressing non-confidence in the actions of the government of the Prime Minister. That would be the remedy.

**Mr. Rob Walsh:** That's correct. That would be one remedy, certainly. Another remedy is to have a large debate expressing criticism of the government, and so on, which means confidence continues, but short of actually doing a non-confidence vote it is a matter of debate, perhaps expressing dissatisfaction and unhappiness, etc., but the prorogation is there.

**Mr. Tom Lukiwski:** This is my last question. Just so I'm clear—and I know you've answered it before, so I apologize, but I might have missed something in interpretation—if one wanted to enact a constitutional amendment to deal with prorogation, would one necessarily have to go the seven-and-fifty route, or could it be done somewhat differently?

**Mr. Rob Walsh:** As I say, I think if you were to look at section 44 of the Constitution Act, it provides that “Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.” It doesn't say Parliament as such. Now, it's possibly there, but one would have to get into rather narrow debates and discussions about parsing out those words, etc. Otherwise you're under section 38, which is seven and fifty.

**Mr. Tom Lukiwski:** Also the question is whether or not, because it does have some impact, obviously, on the Governor General because the Prime Minister still has to seek—

**Mr. Rob Walsh:** Then you could be under section 41 and you have to have the consent of the provinces.

**Mr. Tom Lukiwski:** I guess that's where the confusion is, really. I don't know how you resolve this. Something would eventually have to go upstairs to the Supreme Court for a—

**Mr. Rob Walsh:** That's a legal question I think would be justiciable once it becomes apparent what the issue is. Either a constitutional amendment is proposed and a reference goes to the Supreme Court asking if this is okay, or it's enacted, in which case it's challenged later. Then the Supreme Court of Canada has an occasion to rule on it later.

**Mr. Tom Lukiwski:** So it's still a great unknown.

**Mr. Rob Walsh:** Ah, yes.

**Mr. Tom Lukiwski:** All right. Thank you.

**The Chair:** Thank you.

Monsieur Guimond.

[Translation]

**Mr. Michel Guimond (Montmorency—Charlevoix—Haute-Côte-Nord, BQ):** Thank you, Mr. Chairman.

Thank you, Mr. Walsh, for having shared your knowledge with us. We however see that there still remain grey areas.

I would like to come back, not to the December 30, 2009 prorogation, but to that which was granted following the coalition between the Liberal party and the NDP, supported by the Bloc Québécois.

I would like you to take a few minutes to explain to us the distinction between the role of the Governor General and that of the Prime Minister. The Prime Minister, who has a consultative role, initiates the request, but the ultimate decider is the Governor General. But, as we have seen, the Governor General took a long time before reaching a decision. Rumour has it that it was a much longer wait than what the Prime Minister had expected. I would not say that these things are usually automatic, but let us say that, duration wise, you generally have to count on the time it takes to have a cup of tea with a biscuit. The Prime Minister then leaves with his prorogation in hand. I am going to make a political comment, because I am in politics. You, however, must stay on the sidelines. Apparently, the process was so difficult that it could cost Michaëlle Jean her position. Given that the Prime Minister can hold a grudge and that he has a good memory, the renewal of the Governor General's mandate could be in peril.

Could you explain to us the distinction between the role of the Prime Minister and that of the Governor General?

• (1205)

**Mr. Rob Walsh:** Both roles?

**Mr. Michel Guimond:** Yes. The Prime Minister's role is exclusively consultative. The Governor General, however, has certain powers, even if this process is somewhat automatic.

**Mr. Rob Walsh:** It is the Governor General that holds the legal power. The Prime Minister plays a political role. According to an unwritten rule, a constitutional convention, the legal power belongs to the Governor General. It is the Governor General who decides. In a classic situation, the Governor General grants the Prime Minister prorogation in response to the latter's advice. However, the Governor General is empowered to act independently — even going against the Prime Minister — in extreme circumstances. It is difficult to imagine extreme circumstances, but if the Prime Minister was motivated by financial interests or was proven to be corrupt, for example, the Governor General could reject his request.

**Mr. Michel Guimond:** Are you aware of any precedents at any point in the history of Canada? Did it ever happen that in London the representative of the Queen or the Queen herself refused to accede to a political request made by a Prime Minister? You confirmed for me that the Prime Minister has a political role. But we saw that in reaction to the coalition, the Prime Minister thought of using prorogation as a political response to the political move made by the opposition parties.

Have there been any cases where the Governor General clearly said no?

**Mr. Rob Walsh:** With regard to prorogation?

**Mr. Michel Guimond:** Yes.

**Mr. Rob Walsh:** No, that has never happened.

**Mr. Michel Guimond:** And in London?

**Mr. Rob Walsh:** I would have to research the matter. I do not believe that it has ever happened, but the researchers in the Library of Parliament could verify this. It is always possible, because the British have a longer history behind them than we do.

[English]

**The Chair:** Thank you, Michel.

Madam Jennings.

**Hon. Marlene Jennings:** I have one very brief question.

When I did my law school and did constitutional law, for part of the courses we were studying the Canadian government and our Parliament and the constitutional system. I remember discussing the Governor General's authority to dissolve, prorogue, etc., on the advice of the Prime Minister. From my recollection, it appeared that the only people in the room were the Governor General, the Prime Minister, and possibly a staffer to the Governor General. Is that the norm and what we understand publicly? If that's the case, there were articles questioning the presence of the Clerk of the Privy Council, who is ultimately a deputy minister to the Prime Minister. There were other people who were present when the Prime Minister went to the Governor General in December 2008 to request prorogation, if my memory serves me right. If so, was what was reported unusual?

**Mr. Rob Walsh:** I believe it is unusual in the sense that the tradition—there's no constitutional convention that I'm aware of—in the past has been that it was a private meeting of the Prime Minister with, in England, the Queen, and in Canada with the Governor General. I believe that practice may have changed in recent occasions, it would appear, from media reports. I wasn't there, but it appeared from media reports that others have been in the room. I don't know of any rule that says there can't be others in the room. Protocol would suggest it's the Governor General's choice as to who else is in the room. Protocol suggests to me it is. In other words, it would be, I would have thought, contrary to protocol for the Prime Minister to bring along a team of people to sit and watch what he's asking her for, but that's a matter of protocol. It's a tradition, that's all, and understandably so, because it is a matter that is private to the Prime Minister and the Governor General. I don't know if there's any rule of a legal nature or quasi-legal or constitutional convention that requires that.

• (1210)

**Hon. Marlene Jennings:** Thank you.

**The Chair:** Mr. Reid.

**Mr. Scott Reid:** I suppose the relevant consideration would be whether the person is in a position to be privy to matters that are discussed with the Governor General—that is, a privy councillor—or someone else who.... It couldn't, I presume, be a person off the street; there would be a limit as to that kind of person being present.

My understanding is that it's normal for the Governor General to have access to constitutional experts. We are told, although no one knows for sure, that Professor Hogg was one such expert, and there may have been others. Although I don't know this, I assume that what happens is the Governor General consults with them separately. She may get up and leave the room or invite the Prime Minister to leave the room and then discuss that with them without the Prime Minister present. So they aren't actually privy to her discussion with the Prime Minister; they're only privy to her account of what advice she has been proffered.

Does that summarize your understanding of that?

**Mr. Rob Walsh:** That's the report I've seen as well, but I'm not sure what the question is pertaining to that.

**Mr. Scott Reid:** I guess the question is whether what I've just described seems constitutionally proper.

**Mr. Rob Walsh:** Mr. Chairman, I'm winging it a bit here.

I always thought the Governor General, constitutionally, was required or expected to get legal advice from the Privy Council Office, not necessarily in private, away from the Prime Minister. But it could be that she would go to the Privy Council Office to get her legal advice on the question put to her, or any question, but certainly the question or demand put to her by the Prime Minister. And I don't suppose she has to take that advice in the presence of the Prime Minister. She could do it privately.

Going to outside parties I think was a bit of a departure. At least to the extent that we learned about it for the first time, it seems to be a departure. The reason I say this is because I've always thought the Governor General's position is one that has to maintain its political neutrality, and its relationship to the government of the day is one of following the advice of the government of the day. To go to outside parties is to distance yourself from the government of the day and to give yourself a source of advice that could run against the advice of the Prime Minister of the day, whereas the Privy Council Office of course is part of the government that the Prime Minister heads, so advice from the Privy Council Office is arguably consistent with advice from the Prime Minister. The advice from the Privy Council Office is not about whether to prorogue or not, but the legalities of what her role is and that sort of stuff.

To go to an outside party surprised me. There are others who think that's perfectly fine and that she's entitled to do it. It surprised me. I would have thought that she ought to have taken the legal advice from the Privy Council Office and limited it to that, but that's just my own view.

**Mr. Scott Reid:** Thank you.

**The Chair:** Okay. If we can, I'd like to end it there so we can have our second witness. Can we suspend just for a moment, and we'll bring our other witness on?

Mr. Walsh, it's always great to have you here. Thank you so much for your answers to our questions today and to the written document you supplied us with. Don't go far if we need you again.

I'm just kidding.

**Mr. Rob Walsh:** Would you want me to stay here for the next—

**The Chair:** No, no. I'm just teasing. Maybe later on we may actually have more questions of you, but this study will carry on.

**Mr. Rob Walsh:** Well, I can assure you that I will be following the further proceedings with great interest.

**The Chair:** Thank you. It's always nice to know that there's somebody out there watching us.

**Mr. Rob Walsh:** And you may hear from me.

**The Chair:** Thank you very much.

We'll suspend just for a moment, and we'll have our second witness come.

•(1210) \_\_\_\_\_ (Pause) \_\_\_\_\_

•(1215)

**The Chair:** We're back to order.

We have Thomas Hall with us.

My understanding is that you're somewhat familiar with this committee, sir. Do you have an opening statement? Please feel free to give it to us, and then we'll try to ask you some questions about the issue we're studying.

**Mr. Thomas Hall (As an Individual):** Thank you very much, Mr. Chair.

I'd be much more comfortable in Angela's spot as the clerk of the committee than down here. I thought that if I were ever invited to be down at this end, it would be a cold day in the spring, and it is.

**The Chair:** You hit on it.

**Mr. Thomas Hall:** I was right.

I'll just give you a little bit of my background. I don't have a law degree. I'm not a lawyer, but I read a lot. I was a clerk at the House of Commons for over twenty years, and I belong to a group of procedural nerds. We like to think that if Mr. Milliken had not become an MP and had become a clerk instead, he would have been a member of our group.

**The Chair:** Where do you get a membership?

**Mr. Thomas Hall:** We can make him an honorary member.

We do have one researcher from the Library of Parliament who is an honorary member. He used to be the researcher for this committee, in fact, for many, many years.

We discuss things, and we have discussed over the years all kinds of esoteric things, not just the procedure in the House but things like prorogations and dissolutions and constitutional amendments.

I really should mention them, perhaps. One of them still works here at the House of Commons: Terry Moore, in the table research branch. Charles Robert, in the Senate, is a principal clerk there and is very well informed on these issues. And David Gussow is a retired table officer from the House of Commons.

We still communicate with each other and discuss these items. We are all self-taught on these issues. I'm not a political scientist, and I'm not a lawyer, but I like to say that my twenty-some years here gave me a degree in applied parliamentary science.

I agree with everything Mr. Walsh has said to you. What I'll try to do, though, is bring it down from a legal level and make it a little bit more familiar, if I may.

The prerogative powers of the Governor General—or of the crown, I should say, because they are really of the crown and are just transmitted to the Governor General through letters patent from the sovereign in England—are, as Mr. Walsh said, are common law powers. They do not exist in written legislation. Two of them are referred to in our Constitution. These prerogative powers dealing with the relationship of the crown and Parliament are to summon Parliament, to prorogue Parliament, and to dissolve Parliament.

This is all historical, and I think you have to look at prorogation in that light: that it was the crown that needed a Parliament to meet, it was the crown that needed the money, and it was the crown that needed Parliament in order to legislate. So these prerogative powers are all designed, basically, from the crown's perspective to say, "We want to summon you to do this work. You've finished what we assigned you in the throne speech, what we said we wanted you to consider. Go home. But I'm not calling any elections because I may call you back."

Prorogation is actually an extension, a carrying over. If you look at the etymology of the word, it means "to go forward". It doesn't mean to put an end to a session. That's its effect, but it actually is a going forward of Parliament; it's a carrying it over to a later time when a new agenda is going to be presented.

These things are all familiar to you, but if you think about it, when you want to put limitations on prorogation, you're also not just keeping the government from sending you home; you may be doing some other things as well, because prorogation has to take place not just when the agenda is finished, but it may take place because the crown changes who the prime minister is. It may take place because there's an emergency. So you have to be very, very careful in drafting anything that it won't cause a problem that's unforeseen down the road.

For example, the motion that was adopted, that was proposed by Mr. Layton in the House, gives you, I think, seven days for a prorogation. What happens if that's not sufficient? What happens if the Parliament Buildings burn down because they've been neglected so long?

Excuse that reference. I had to get that in.

If they burn down and it takes longer to set up in a new place, when the fire happens you can't get an adjournment motion passed, so somebody has to say, "We're not sitting any more, guys; go home, and we'll set up a temporary place for you."

These are things you have to consider when you start playing around with these prerogative powers, because they do give flexibility. What you've been looking at is a case where many people say it has been abused. Not everyone says that, obviously, but some people say it has been abused. As the lawyers like to say, bad cases make difficult law—or is it difficult cases make bad law? I think I have it backwards. So you have to be very careful and aware of all the repercussions.

•(1220)

I would suggest to you that prorogation may be just the tip of the iceberg, and that what you really want to look at are the prerogative powers and how they affect you. The prerogative power of dissolution has had much more effect on this Parliament and the previous Parliament than anything else, because you can threaten to make something a confidence measure and threaten dissolution. That is a prerogative power that is much more important in the life of a Parliament, particularly in a minority government. You need to expand and look at that.

I should mention to you that the U.K. is looking at prerogative powers. The British are very concerned with some of the aspects of this and are seeking to modernize it. I've sent some references to

your researchers and to the clerk about some of the British publications that have looked into prerogative powers.

By the way, one of them contains in it a suggestion for legislating with regard to the prerogative power dealing with war, declaring war and mobilizing troops. The crown does not have to consult the House of Commons. To his credit, Prime Minister Stephen Harper consulted the House of Commons with regard to Afghanistan, but he didn't have to. The prerogative power allows them to mobilize the troops and send them in, without any agreement of the House of Commons or the Senate.

These kinds of things are being looked at in the U.K. One of the suggestions was that they legislate with regard to this. That was by a committee in the House of Commons, I believe. The House of Lords recommended that a resolution be adopted, and that's very much in accordance with what I think the Liberals and the NDP were looking at, or what you've done. That is, get a resolution through that's very clear and declares the will of Parliament, and it would have the effect of permanency, of something in the Standing Orders, and this would be followed.

The British are very good at following the prescribed plan without having to go to court and getting things enforced. So there's a cultural difference that you may want to take into account, but it is something that's very characteristic of the British. A lot of their conventions work on these assumptions.

I'll just mention to you about prorogations, when they occur. I read the debate that occurred on Mr. Layton's motion in the House about prorogation, and a lot of the comments were made about the frequency of prorogations.

The frequency of prorogations should never really be an issue. I think it's a bit of a red herring for you, because if you're well organized—and here we go back to the British—they start with a throne speech in the fall, set out their legislative program. Remember, until recently, with devolution, they were legislating for the whole country, for everything. They had no provincial legislatures except in Northern Ireland. They finished their program sometime in the late spring or early summer, and then they waited till the fall, prorogued, and started the new session. So the prorogation is annual. That's a very nice, neat, organized way of doing it.

I believe some of the provinces may do it twice a year. I've only worked in one provincial legislature, briefly.

•(1225)

[*Translation*]

Surprisingly enough, it was at the National Assembly of Quebec. I worked there a few years ago. I have to confess that I do not remember if there have been two prorogations or only one.

[*English*]

I will finish very shortly. I know you're looking at the clock.

One of the things that was never mentioned in the media, dealing with the prorogation—and it was said during the debate, I think by Mr. Hill, but I'm maybe wrong there—is about the precious time that was being wasted. This was in a totally different context, but the precious time reference made me think that if anybody should worry about prorogation it should normally be the government, because it only has a certain amount of time to be government with that particular Parliament before another election will come up. And when you send the House away and Parliament away, you're not getting your legislation through, you're not doing any of the things that the people who support you expect you to do. So if anybody should have been concerned about losing precious time because of the length of that last prorogation, I think it should have been the government.

I say this just as friendly advice. I was surprised it wasn't mentioned in any newspaper articles about the fact that you lost that precious time.

From the point of view of the opposition, the precious time was not getting legislation through. They're looking at it from the point of view of being able to scrutinize government—the scrutiny of your work—and to offer advice, or criticism if you will. I see the word “advice” made somebody smile.

I think I should shut up now and see if you have some questions for me.

**The Chair:** Please don't, but let's use it as answers to our questions.

Madam Jennings, you're first.

**Hon. Marlene Jennings:** Thank you, Chair.

Thank you, Mr. Hall. I've read your articles that you've co-authored with W.T. Stanbury in *The Hill Times* with great interest. I note that on February 15, 2010, you wrote an article that says:

Can the Prime Minister's power over prorogation of Parliament be restricted without amending the Constitution? Yes, it can. It's time to start the process now as part of a series of reforms to limit the excessive powers of the PM.

I'll leave it to all of my colleagues here, if they have not already read the article, to do so.

I'll have two questions, depending on your answer to the first. Were you in the room when Mr. Rob Walsh presented and then answered questions of this committee?

**Mr. Thomas Hall:** Yes.

**Hon. Marlene Jennings:** Therefore you heard Mr. Walsh state that on the issue of the Standing Orders, if the Standing Orders are used to attempt to regulate the Prime Minister's discretionary or executive authority to request prorogation, it would not be enforceable, and that if one wishes to go the standing order route, the way to do it would be to say “in the event that the Prime Minister has got, on request, prorogation without having fulfilled X, Y, and Z, in the session following that prorogation...”, and then there could be a series of sanctions. It could say, “for the first 60 days it's all private members' business”. It could say that the government will not be able to move second reading of any government bill for a certain specified number of days.

I would like your view of that.

●(1230)

**Mr. Thomas Hall:** Mr. Walsh and I don't disagree, really. I think it's a question of emphasis in different places.

I liked his suggestion that that's the way you could do the punishments—or the penalties; let's put it that way. It sounds better than punishment.

**Hon. Marlene Jennings:** The disincentives.

**Mr. Thomas Hall:** The “disincentives” was his term, actually, and I think that's a very good idea.

I was taking the point of view of Professor Andrew Heard, the pre-eminent authority on Canadian constitutional conventions, who had written an article in *The Globe and Mail* suggesting that the House could adopt a resolution to express the view that it did not want the Prime Minister, or even the Governor General, to prorogue unless the House had been consulted, except in certain cases, for example—or at least not to prorogue for a longer period than was mentioned, for example, in the motion of Mr. Layton adopted recently by the House. You could have that kind of resolution, according to Professor Heard, and it would serve as a statement of what the House wants.

One of the things I would emphasize is that I would expect the Governor General, whoever it is, to take that into consideration when considering any requests for prorogation by a Prime Minister. For example, whatever you want to put in a resolution in the House, you would have to allow for prorogations when the government decides that it doesn't want to continue its agenda. You would not want to be able to block the government from doing that sensible kind of thing, so you'd have to write that resolution very carefully.

As I said, I question whether seven days is long enough, but that's another matter for debate.

The other thing is that you could put it into law, but I think we look at enforceability too much. Sometimes the statement that this is what we expect, as Mr. Walsh said, in the Constitution.... But even in law, the Governor General is aware of the laws, and if a law says that the Prime Minister is not to advise the Governor General to do something unless the House of Commons has approved, I think the Governor General would very likely say, “I think you'd better go back and get the approval”.

**Hon. Marlene Jennings:** But that didn't seem to work with the fixed election date.

**Mr. Thomas Hall:** Ah, but that was written very badly, and I don't know if it was done on purpose—

**Hon. Marlene Jennings:** Oh, please.

**Mr. Thomas Hall:** —or it was just very sloppy.

**Hon. Marlene Jennings:** You are clearly a generous spirit.

**The Chair:** Thank you.

Mr. Reid.

**Mr. Scott Reid:** Thank you.

At the time of the December 2008 events that led ultimately to the prorogation of the Commons, I recall coming across, in the reading I was doing then, some reference to prorogation traditionally being for a period of not less than 40 days. I haven't been able to locate that source since, so I thought I would just ask the question: was there ever such a tradition, either here or in Britain; and if it ever existed, does it retain any meaning or not?

**Mr. Thomas Hall:** I think the 40 days may come from one of your privileges, as you may know, not to be called to serve on a jury. Another privilege of members of Parliament is not to answer a subpoena to appear as a witness in court. Those are good for 40 days before a session and 40 days after a session. Apparently, it is a tradition that grew up in England.

Normally the proclamation would be issued at least 40 days—or around that, as it varied at different times—before the session began, because people came quite long distances, and in the 1800s and before that, travel wasn't that easy. Then you gave them time to get home, so you gave 40 days afterwards too.

So that may be what the reference was to, that if you are going to prorogue Parliament, there is no point if you are going to have the people go home and then come back again. You want to give them time to actually get home and then to come back again, so the prorogation would have been longer.

Sessions used to be very short, even in early Canada, because this was not a full-time job then. People had farms and they were doctors and lawyers and had their own practices. They had to travel. Some of them still do. They had to travel a great distance to get home, and there was not that much legislation; there was very little government legislation in the early days of Confederation.

• (1235)

**Mr. Scott Reid:** I gather, then, that the 40 days has no meaning any more.

There's a supplemental question I was going to ask with regard to this, and then I have a second line of questioning. The supplemental question I was going to ask is that it sounds like your reference to how things have been done in the United Kingdom is that prorogation occurs at the end of the summer and is followed almost immediately by the Speech from the Throne, as opposed to what has been done in Canada on many occasions, commencing at the beginning of the summer, followed by a speech from the throne at some point in the autumn.

**Mr. Thomas Hall:** It could be done that way, but something in my memory tells me that it was done a little later, just in case an emergency came up during the summer. I may be wrong about that. I don't know.

**Mr. Scott Reid:** Then I wanted to ask you a question in regard to the proposed Standing Orders changes. I'm thinking here of the one to which you referred in your February 15 article, a Liberal proposed change to the Standing Orders. It calls for a certain amount of debate, and notice is given ahead of the rising of the House.

Obviously, if this were to be adopted, it contemplates no prorogations being possible when the House is not actually sitting. So it would deal—I'm thinking of the two most recent prorogations—with the situation that took place in December 2008, and

presumably it would not deal with the prorogation that was announced on December 30, 2009.

Is it actually possible to rewrite the Standing Orders so as to prohibit a prorogation during a period when the House isn't sitting, or is that in fact a procedural impossibility, in your opinion?

**Mr. Thomas Hall:** The way the Liberal proposal was first put forward, I don't think it took into account certain little glitches or difficulties. For example, if you want to prorogue during the summer, say, just before the House is due to return in September, and the House isn't sitting at that time, what would you do? That wasn't covered in their original press release. They didn't cover what you do if the Prime Minister dies. What do you do if his plane crashes, like the Polish president's, heaven forbid? Those kinds of glitches weren't considered.

What do you do if right after an election it's not absolutely clear who might be able to demand the confidence of the House? So the government that was in office before the election continues to meet. It meets the House, and when it meets the House it proposes its throne speech and has a debate on the throne speech, and that's when it's defeated.

**Mr. Scott Reid:** I was thinking of this—Ontario in 1985.

**Mr. Thomas Hall:** Yes. When it's defeated at that point, then the leader of the opposition should normally be the one invited by the crown to form a government.

If that happened, then you would expect the new Prime Minister to want to prorogue, to give a restart, with his own throne speech, and however long that takes. That wasn't envisaged either.

**The Chair:** Thank you, Mr. Reid.

Monsieur Guimond.

[*Translation*]

**Mr. Michel Guimond:** I want to start by telling you, Mr. Hall, that it is a great pleasure to see you back before this committee. You really left your mark as a clerk. I had the opportunity to work with you. You are living proof that retirement has not dampened your intellect. You are still as sharp as ever.

My questions will be along the lines of those of Mr. Reid. You mentioned that you would support changing the Constitution in order to define the circumstances. Let us say we amend the Standing Orders in order to circumscribe the process. You wrote in an article, referring to an academic paper, that if there was a resolution from the House of Commons, this would be a part of the Governor General's consideration. Technically, that is fine. But the last time, the government prorogued on December 30. If we are not sitting, the prorogation procedure is different.

We will rise in June and let us say that after the break, in August, a rumour is going around and is picked up by reporters that the House will not come back on September 20 and that resumption has been delayed until October. How would we be able to meet? Or if the prorogation came into effect quickly and there was no longer a Parliament, how could we meet in order to pass a restrictive resolution or make any decision? We need to look very closely at any amendment to the Standing Orders as well as the feasibility of such an exercise.

●(1240)

**Mr. Thomas Hall:** That is a very good question. I take it that the Prime Minister had made his decision or at least considered the possibility of a prorogation well before the day it was requested.

If we amend the Standing Orders or pass a resolution having the same effect, the Prime Minister would have to take this into account and plan around it. Actually, it was not an emergency prorogation but a well considered prorogation. I believe the Prime Minister had some goals in his mind, among which obviously changing the make-up of Senate committees. He could have debated this well before, there was no urgency to do that on December 30.

**Mr. Michel Guimond:** Exactly. Obviously, he did it with a very precise objective in mind, which I do not question. After all, we are politicians and not members of some church group or bridge club. He obviously did it to annoy the opposition. It was well planned. We could not expect him to say that he seriously considered proroguing the House on December 30 because he wanted to change the composition of the Senate and cool down the special committee on the Canadian mission in Afghanistan which was becoming rather hot, if I may use that phrase.

Mr. Walsh confirmed that the Prime Minister has a political role in this exercise and the Governor General a judicial role.

So I do not understand your comment.

**Mr. Thomas Hall:** Ultimately, if you pass a resolution or amend the Standing Orders or even pass legislation, this will prevent the Prime Minister from using prorogation as a political tool in the way he did.

**Mr. Michel Guimond:** However we will need to look closely at the language. As you mentioned earlier, we got burned with the fixed date election legislation. The government added a little clause saying that elections would be held on a fixed date but that they could be held before that fixed date. This is what gave us the 2006 elections.

[*English*]

**The Chair:** You are over the five minutes there. I was being generous to you, even without knowing I was.

**Mr. Michel Guimond:** You are kidding. Impossible.

**Voices:** Oh, oh!

**The Chair:** I find it that way myself.

Mr. Christopherson.

**Mr. David Christopherson:** Thank you, Chair.

Thank you very much for your presentation. It was very interesting.

I'm finding that my former experience as a house leader in the Ontario Legislature is both helpful and unhelpful. It's helpful because it gives me a sense of the dynamics, but unhelpful because a lot of the details are different. So I'll run with an assumption, and it's based on a different set of standing orders.

Help me understand the difference between a standing order and a resolution of the House.

●(1245)

**Mr. Thomas Hall:** It depends on what kind of resolution you're adopting. A resolution may be just to congratulate somebody. It's an expression of opinion of the House. This would be a resolution. But if it's phrased in such a way that it has permanence—for example, this House considers that it is a violation of its privileges to be prorogued for longer than such and such a period of time, in grandiose words that the British Parliament might use—then it would be clear from the resolution that it was intended to go on, that it wasn't just temporary.

**Mr. David Christopherson:** Thank you.

The resolution in that context, that it's meant to go forward, would it be printed in the Standing Orders? Would it be an addendum to the Standing Orders, or does it exist in its own world?

**Mr. Thomas Hall:** Normally it would not be. It would just appear in the journals of the House. But the House is free to do what it wants. It could add it to the Standing Orders as a separate item. The British normally just adopt and it's in their journals.

**Mr. David Christopherson:** And it has the same effect as Standing Orders?

**Mr. Thomas Hall:** Not the same effect because they're resolutions of things that they won't do or that.... For example, there was a resolution of the British House—and I forget how many years ago it was adopted—saying that they won't consider it a matter of privilege any more if the debates of the British House are published, made public. They just won't entertain a question of privilege about that. That was adopted years ago; it's still in effect and it's not in the Standing Orders. It's that kind of thing: this is the way we're doing that.

**Mr. David Christopherson:** Would the ability of a member of the House to claim their privilege rights be the same procedure? If you feel your rights are violated currently under the Standing Orders, there's a procedure to stand up, make the point with the Speaker, and appeal to the Speaker for some resolution.

I'm just trying to get a sense if they carry exactly the same.... It's something new to me. Do they carry the same relative weight vis-à-vis members' privileges and actions that they can take vis-à-vis those two? Or do the Standing Orders have a slightly different status because they're the Standing Orders?

**Mr. Thomas Hall:** I haven't seen anything in the British writings that would indicate that they raise points of order about this kind of thing.

**Mr. David Christopherson:** So hypothetically, if you had something in the Standing Orders versus in a resolution, members wouldn't lose any rights. There'd be nothing lost between the two. You could still claim your rights under the resolution, the same as you could under the Standing Orders. They would have the same relative weight.

**Mr. Thomas Hall:** Well, they would be the House's rights, not the individual member's. It's Professor Heard who recommended this approach. As I mentioned, I've sent a reference to your clerks and researchers so they can share with you one of the British documents that says it was a House of Lords committee that recommended they do this kind of thing. Basically it's trying to create a new convention saying this is how we're going to operate in the future, this is how we see things as operating. Enforcement is always difficult with these things. That is, it's a difficult question. Basically you're setting down a principle and you expect people to follow it.

**Mr. David Christopherson:** If you went with disincentives and they were carried in Standing Orders, I think we know what that means. If they were carried in resolutions, they'd have the same status?

**Mr. Thomas Hall:** If you're going to have disincentives, I would put them in the Standing Orders. I wouldn't put them in a resolution.

**Mr. David Christopherson:** It's the same procedure for adoption, right?

**Mr. Thomas Hall:** Yes.

**Mr. David Christopherson:** Okay. Thanks.

I don't have a lot of time left.

You mentioned the advice that the GG receives. As I understand it, the Prime Minister meets with the GG and gives advice on the matter that's before the two of them.

Maybe you know about this. I had heard that letters were sent from the official opposition and the other two opposition parties. Either one document was sent or three documents were sent earlier on, in another circumstance, advising the GG. This was when the coalition was coming together. There was an affirmation from the three leaders to the GG saying here's the scenario that exists, please keep it in mind. I've now been told that was never even put in front of the GG, because the Constitution provides that the advice comes from the Prime Minister and doesn't provide for advice from the opposition.

Can you clarify that for me? And secondly, depending on what you say about that, how is a resolution or a standing order of the House put in front of the GG if it isn't put there by the Prime Minister of the day?

• (1250)

**Mr. Thomas Hall:** If I may, I'll answer the last part of that first.

**The Chair:** Please be reasonably quick, because he's out of time.

**Mr. David Christopherson:** Thanks for your indulgence, Mr. Chair.

**Mr. Thomas Hall:** When the Speaker is sworn in, when he appears before the Governor General in the Senate, one of the first things he does is claim the usual rights and privileges. One of those is access to the Governor General at all convenient times. There is a convention, if you will, that the Speaker of the House, when speaking and acting for the House, can meet with the Governor General at any time and inform her of things. He can advise her in that way.

**Mr. David Christopherson:** You said the Senate Speaker, or either one?

**Mr. Thomas Hall:** When he goes into the Senate after he's first been elected, at the opening of a new Parliament, he claims the usual rights and privileges of the House, including access at all convenient times.

**Mr. David Christopherson:** Yes, all right.

**The Chair:** You're out of time.

**Mr. David Christopherson:** Thank you, Chair. I appreciate it. I understand.

**The Chair:** You can give a quick answer, if you have one, to the first question that David asked. If not, we'll stop him there. He's really on a roll today.

**Mr. Thomas Hall:** I'm not sure I remember the first question.

**The Chair:** Okay. That one is finished.

I don't see enough time on the clock to have one more round. I'm happy to entertain some type of one-off questions very quickly for our witness, if there are any. If not, we'll then move forward.

Go ahead.

**Mr. Thomas Hall:** I would comment very briefly on some of the questions that were asked to Mr. Walsh. There was a question from someone about committees.

**The Chair:** At the will of the committee, it's their time you're taking, so I'll have to ask if it meets their approval.

Sure. It's okay.

**Mr. Thomas Hall:** There was a question about committees meeting and changing the Standing Orders to allow this. Mr. Walsh was absolutely right about their privileges.

I would go further. I know I'm disagreeing with something that Errol Mendes, a constitutional law professor, wrote in the *Ottawa Citizen*. He approved of the idea of having committees sit during a prorogation. I think he's totally wrong. I would go so far as to say it's unconstitutional, in the British sense of that term, for committees to sit during a prorogation. I know the Ontario Legislature does this. They've never been challenged on it, but you have no grounds to do it.

The reason is that in your procedures in the House, you are autonomous. The courts cannot interfere in your procedures when you're constituted as a House. When the crown sends you home, there is no House of Commons. For everything the committees do, they're supposed to be portions of the House and acting under the authority of the House. Once you've been prorogued, there is no House.

If it were possible to have committees sit during a prorogation, then you could get around prorogation by saying that the committee of the whole is going to continue sitting. If you can do it for a small committee, you can do it for a larger committee, and a larger committee, and have everybody continue sitting. That's the *reductio ad absurdum* argument. To that question I would say no, don't do it. It's not constitutional and it could cause you problems, as Mr. Walsh pointed out.

I think Mr. Reid asked a question about the effect on the provinces. One of the reasons the Constitution states that we need provincial consent to change the office of the Governor General or the Queen is that if we were to do that, we would affect the provinces.

In the wording of any legislation, you would have to be careful that you're not taking away the power of prorogation from the Queen or the Governor General. You could regulate it. You could limit its application. But if you took it away entirely, it would not be transmitted down to the provinces. I think you'd get into a legal and constitutional issue there. They derive their powers through the letters patent that have been given to the Governor General.

• (1255)

**Mr. David Christopherson:** Mr. Chair.

**The Chair:** Be very quick.

**Mr. David Christopherson:** But through Mr. Reid's questioning, Mr. Walsh did say we could be exclusive and do a one-off that would affect only the federal, as long as we were specific. You're saying the specificity needs to be there.

**Mr. Thomas Hall:** Yes.

**The Chair:** Mr. Reid.

**Mr. Scott Reid:** I gather the point you're making, Mr. Hall, is that unlike Australia, where the state governors are separately appointed by the crown and have a direct relationship back to Buckingham Palace, in Canada the structure is that we have lieutenant-governors in each of the provinces appointed by the Governor General on the advice of the Prime Minister, as opposed to being appointed by the Queen on the advice of the state premier, as in Australia, or provincial premiers here. That's the distinction.

**Mr. Thomas Hall:** Yes.

**The Chair:** Monsieur Paquette will finish off very quickly.

[*Translation*]

**Mr. Pierre Paquette:** I understand that if we restrict prorogation without abolishing it, Parliament will be able to do so without negotiating with the provinces.

**Mr. Thomas Hall:** That is right.

**Mr. Pierre Paquette:** Mr. Walsh referred to section 38, which is the amending formula, but I did not understand why. In fact, the amending formula requires seven provinces and 50% of the population. So how could Parliament circumscribe prorogation without having to consult?

**Mr. Thomas Hall:** There are two provisions. There is first of all section 44 of the Constitution Act of 1982 which allows us to legislate in relation to the Privy Council, for example. So this deals with the advice that members of the Privy Council, such as the Prime Minister, give to the Governor General. We have that right under this section.

As for section 38, I do not remember in what context he referred to it.

**Mr. Pierre Paquette:** He said section 38, but I believe he meant section 44. I believe he misspoke.

**Mr. Thomas Hall:** It might have been a mistake.

**Mr. Pierre Paquette:** I too believe that it would rather be under section 44.

**Mr. Thomas Hall:** Yes.

[*English*]

**The Chair:** Thank you.

I'm sorry, did you have something else, Mr. Hall?

**Mr. Thomas Hall:** No. I think I've bored you enough.

**The Chair:** If you think of anything else for the good of this committee and would like to send it to us in writing, you can also do that.

**Mr. Thomas Hall:** If you need anything I'll be willing to help your researchers.

**The Chair:** Absolutely. Thank you so much for your testimony here today and your answers to our questions. You've helped us a lot.

**Mr. Thomas Hall:** It's been my pleasure.

**The Chair:** We have a long way to go on this study, it appears. But thank you for helping us to start off on a really good foot today.

I thank the members of the committee.

We're adjourned.







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