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Chair

Mr. Joe Preston

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● (1105)

[*English*]

The Chair (Mr. Joe Preston (Elgin—Middlesex—London, CPC)): Order. Good morning. We're going to get started.

This is meeting eleven of the Standing Committee on Procedure and House Affairs. Today we're still dealing with, pursuant to Standing Order 108(3)(a) and the motion adopted by the committee on Thursday, March 11, 2010, a study of issues related to prorogation.

We have with us this morning Professor Mendes for our first hour, and another witness in our second hour. We'll try to do questioning much like we did in the last meeting. It seemed to work out well for us.

Professor Mendes, do you have an opening statement? If so, please deliver it and then we'll go to questions.

Professor Errol Mendes (Professor, Constitutional and International Law, University of Ottawa, As an Individual): Thank you for inviting me here. I do have a presentation. I think it's both in English and French, which I think the clerk has. I won't read all of it because of the time limit, but I'll see how far I can go.

The foundation of our constitutional democracy rests on the principle of responsible government. The historic ruling by the House of Commons Speaker, Peter Milliken, just a few days ago on the documents relating to the Afghan detainee issue has reinforced this fundamental nature of Canadian democracy. The principle of responsible government requires that the government of the day, be it a majority government or a minority government, maintain the confidence of the House of Commons. Maintaining the confidence of the House of Commons requires the government to fully respect the constitutionally protected parliamentary privileges of all members of the House.

[*Translation*]

Our democracy cannot be maintained by the manipulation of the PM's conventional powers and the Governor General's prerogative powers that were ironically designed to promote democratic accountability in the Parliamentary system we inherited from Great Britain.

[*English*]

The Supreme Court of Canada in two major decisions has confirmed that the parliamentary privileges include holding the government to account and, as such, is the Constitution of Canada.

This foundation of democracy can be undermined by the misuse of conventional powers of the Prime Minister to advise the Governor General to prorogue Parliament to avoid a clear loss of confidence of the House or to violate the parliamentary privileges of Canadians' elected representatives, such as proroguing to shut down parliamentary committees that are investigating serious allegations. The ability to hold senior government officials to account is at the core of parliamentary privilege, as the Speaker has just ruled.

[*Translation*]

A proper democratic use of the prerogative power is a legitimate power to end one session of Parliament after a substantial part of the legislative agenda has been fulfilled leading to a new Speech from the Throne.

[*English*]

There have been many prorogation requests by former governments and Prime Ministers, and in the early decades of the Canadian Parliament, the practice was to end a session of Parliament by prorogation rather than a lengthy adjournment. In 1982, the Standing Orders were introduced to establish fixed sessions, which have resulted in approximately 2.1 prorogations for each Parliament.

These are facts that have to be taken into account whenever there are statements made that prorogation is quite routine and has occurred 104 times before. The present 40th Parliament had three throne speeches by March 3, 2010, in four years as compared to the four prorogations by the previous government in ten years.

In order to protect these fundamental principles of our constitutional democracy and to protect the constitutionally protected parliamentary privileges of the House of Commons, I suggest that it is possible to establish a process that will lead to the establishment of binding conventional rules. This can be achieved by the passing of standing orders and supporting legislation that will achieve the following.

Firstly, by standing orders of the House of Commons, limit the conventional power of the Prime Minister to request the prorogation of Parliament from the Governor General within the first year following any Speech from the Throne unless the House of Commons consents and indicates that the government maintains the confidence of the House.

[*Translation*]

Secondly, the Standing Orders can require the Prime Minister to give advance notice to both the House of Commons and Senate of the intention to seek prorogation with a statement as to why such a request does not interfere with the Parliamentary privileges of members of the House and that it is not designed to avoid losing the confidence of the House. The statement should also be immediately debated in the House.

[*English*]

Third, the standing orders can also limit the duration of any prorogation to no more than one calendar month.

Fourth, the process leading to a binding conventional rule in this regard could include the passing of supporting legislation to reinforce the above standing orders as suggested by opposition parties. This legislation should make it clear that while the reserve powers of the Governor General to consent or refuse the request remains unfettered, the legislation should be exclusively focused on limiting the conventional powers of the Prime Minster to seek such a request in certain situations. Now, it is acknowledged that there is some constitutional uncertainty as to whether a Prime Minister and a government can violate this curtailment of his conventional powers by hiding behind the reserve powers of the Governor General. The legislation mirroring the standing orders would be aimed primarily at aiding in the creation of binding conventional rules that are broken only at political cost.

Finally, the standing orders and the legislation can be formally transmitted by the Speaker of the House of Commons to the Governor General to inform her of the will of the Canadian people as represented through the Parliament of Canada, that she—if she is reappointed—and future Governor Generals should exercise their reserve powers to stop future anti-democratic prorogations that severely undermine the principles of responsible government. Now, there is an unwritten conventional power, based on the rights and privileges of the Speaker on behalf of the House of Commons, to have the ability to advise the Governor General on issues relating to the foundations of responsible government, and certainly the curtailment of the power of the Prime Minister to advise on prorogation against the wishes of the House of Commons would fall within the power of the Speaker of the House of Commons to advise the Governor General. It is not only the Prime Minister who has the power to advise the Governor General. What is not really known is that it is also the Speaker of the House of Commons, speaking on behalf of the House of Commons, who has the right to advise the Governor General.

In this fashion, conventional rules will be the bulwark against the ability of the Prime Minister to prorogue to avoid confidence votes or to shut down the ability of Parliament and its committees to hold the government to account. There are numerous examples of binding conventional rules that limit the Prime Minister and the government from performing certain functions, even though it is legally and constitutionally permitted to do so. Perhaps the most famous example of this is the ability of the federal government to seek the disallowance of provincial legislation. It has never been exercised—or at least once, in the early days of Parliament. The conventional rules prevent any possibility of that ability to exercise it.

It should also be kept in mind that the only thing that stopped Prime Minister Pierre Trudeau from repatriating the Constitution without substantial provincial consent was the power of conventional rules.

Responsible government demands that those who have power act responsibly in the interests of Canada. They should not be in it for themselves.

Thank you.

● (1110)

The Chair: Thank you, Professor.

Madam Jennings, are you going to take the first round?

We're going to try five minutes and see if we can get through a couple of rounds.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Certainly. Thank you, Chair.

Thank you, Professor Mendes—one, for agreeing to appear before this committee, and two, for the presentation you've just made.

I would like to go back and confirm that you have followed the presentation that was made by Rob Walsh, the law clerk and parliamentary counsel, when he appeared before this committee.

Prof. Errol Mendes: Yes, I have.

Hon. Marlene Jennings: Did you also follow the presentation of Thomas Hall, a retired former procedural clerk of the House of Commons?

Prof. Errol Mendes: Yes.

Hon. Marlene Jennings: Therefore, I would like you to comment a little further on the issue of a suggestion that Rob Walsh made that changes to the standing order, as proposed by some opposition parties, would in fact have no effect in the sense that if the Prime Minister of the day ignored them, went and requested prorogation, and that prorogation was given by the GG, the prorogation itself would remain valid and legal. Therefore, the committee and the House, if we want to go that route of limiting the Prime Minister's authority and prerogative to request prorogation, we might want to go the route of having standing orders that would be punitive—well, he actually said, "disincentives"; I should stop using the word "punitive", because that's not the word that Mr. Walsh used.

Secondly, I'd like to hear a little bit more from you on the issue of the unwritten conventional law or right of the Speaker to advise the Governor General of the will of the House.

Prof. Errol Mendes: Firstly, in terms of the idea of putting disincentives into the standing orders, that's certainly possible. While legally, yes, the Prime Minister can disobey it, as he did with the fixed election law, what I'm suggesting in terms of the standing orders, plus the supporting legislation, is the creation of a binding conventional rule that will in effect have severe political consequences, and potentially for the Governor General to exercise her reserve powers to refuse a prorogation, which is in direct violation of the House of Commons.

Hon. Marlene Jennings: And the Speaker?

Prof. Errol Mendes: What's little known is that the Speaker can exercise the rights and privileges on behalf of the House of Commons to seek to advise the Governor General on issues that relate to responsible government. The Prime Minister is not the only one who has the ability to advise the Governor General. The Speaker also has that power.

Hon. Marlene Jennings: Thank you.

How much time do I have?

The Chair: You have two minutes.

Hon. Marlene Jennings: That's wonderful.

Some of my colleagues in the House like to recall the coalition government agreement between the Liberals and the NDP in 2008 and the fact that a letter was sent by the Liberals, and a letter that was signed by the leaders of opposition parties, to the Governor General.

Had this little-known rule been known that the Speaker has the right to provide advice to the Governor General of the will of the House, and had in fact there been some type of a motion in the House, then the Speaker and the House could have at the time, if it were adopted in that motion, instructed the Speaker to inform the Governor General formally of what had been happening or whatever.

● (1115)

Prof. Errol Mendes: Well, that could certainly have been a possibility.

In terms of the letter, I actually question whether she even read it. Given the fact that under strict parliamentary or constitutional tradition, she's only supposed to seek the advice of the Privy Council, I wonder whether she even saw that letter.

Hon. Marlene Jennings: That's why I'm saying that had this little-known rule about the Speaker been better known among all parliamentarians—not one parliamentarian from any party has ever raised this issue—there might have been a different route.

Prof. Errol Mendes: Absolutely. What I'm suggesting here is for Parliament to take action to essentially put in place certain types of standing orders, plus the supporting legislation, to create the conventional rule that no future Prime Minister can violate—they can legally, but at immense cost politically—and potentially allow the Governor General to exercise his or her reserve powers to refuse the prorogation.

Hon. Marlene Jennings: The package you're proposing would incorporate that there would be clear instructions from the House to the Speaker to advise, formally advise, the Governor General of the will of the House.

Prof. Errol Mendes: Absolutely. I'm suggesting that once the standing orders are actually made, they are immediately transmitted to the Governor General so that she has advance notice that if anything like this were to happen again, there would be a potential for the Speaker to represent the will of the House of Commons in the future.

Hon. Marlene Jennings: Thank you.

The Chair: Very good. You're almost right on time, too.

Hon. Marlene Jennings: There you go.

The Chair: Mr. Reid.

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

Welcome, Professor Mendes; glad to see you.

Based on what we've just heard—Madam Jennings' suggestion and your response—I could be wrong, but I have the impression that two different paths are being suggested, or two different considerations are at work here.

One is conventional constitutional obligations, which, as Dicey said, are those that are enforced by public opinion writ large, by public pressure, by an expectation that norms have been developed and political actors ought not to violate those norms. I think that was the avenue you were taking in your presentation.

Although I could be wrong, it sounds to me that what Madam Jennings is suggesting is actually a rule that says the Governor General will actually take the advice of the Speaker over that of the Prime Minister under certain circumstances, that it's not being enforced by public opinion but it's being enforced by a convention binding upon the Governor General. The Governor General would be acting unconstitutionally, in the British sense, in the conventional sense, to take the Prime Minister's advice.

In other words, it's not a matter of the public getting around to punishing the Prime Minister. It's a matter of the Governor General responding to a different set of expectations.

Prof. Errol Mendes: Yes, you're right. Until there is a constitutional amendment under section 41 of the Constitution Act, 1982, the powers and the office of the Governor General really cannot be affected. So she has the ability to exercise her reserve powers either to agree or disagree.

But what I think has happened with the Governor General over many decades, if not centuries, is that he or she is acutely aware of the rules of conventions. That is why, in certain circumstances, the Governor General has refused to accept the advice, such as in the King-Byng affair.

So it is very important to stress that conventional rules are not legal rules; however, they can be as binding on actors as legal rules.

● (1120)

Mr. Scott Reid: You did mention that in Canadian constitutional history, as opposed to that of, say, Australia in 1975, or elsewhere in the Commonwealth, there is really just the one precedent—I think I'm right—post-Confederation of a Governor General not taking advice from the Prime Minister.

Is that right? Is it just the one time?

Prof. Errol Mendes: Well, no; there was the King-Byng affair, but it was a different situation.

Mr. Scott Reid: Right, but just the one....

What I'm getting at here is that in terms of taking advice from the Speaker, I just wanted to ask you, (a), what the matters are—if you're familiar with this—on which the....not the general thoughts about the House Commons, but where that actually applies, the Speaker offering advice to the Governor General, and it being taken? And (b), if I'm not mistaken, the underlying convention, or the foundational basis, on which the convention of the taking advice from the Prime Minister rests is this: the Governor General, or the Queen, takes advice only from a single source, as opposed to saying, "I can consult, and therefore effectively pick and choose."

I'm wondering how we deal with having multiple sources. I think that is a real shift, having multiple sources of advice coming to the Governor General, and the Governor General choosing. Perhaps I'm wrong, but does that not seem to you like a very substantial shift in the role of the Governor General to something that hasn't existed for a very long time under our system—having multiple sources of advice on which the executive can choose?

Prof. Errol Mendes: It's my opinion that the reason why the Speaker would have that power is that, as we saw just yesterday, he is in effect the guardian, so to speak, at least in terms of principles, of the rights and privilege of you, the elected members of the House of Commons. So that core foundational right of elected members of the House of Commons is actually...as I mentioned, on two occasions the Supreme Court of Canada has said it's part of the Constitution of Canada. And given that, that makes those rights and privileges on equal power to the powers of the Governor General.

Therefore, when the Speaker exercises his duty to uphold the rights and privileges of the elected members of the House of Commons, he's actually acting on the basis of that constitutional power to seek to advise the Governor General. You may call it multiple actors, but it's based on sound constitutional principles.

Mr. Scott Reid: I've taken up enough time, so thank you very much.

Prof. Errol Mendes: Thank you.

The Chair: Thank you, Mr. Reid.

Monsieur Paquette.

[*Translation*]

Mr. Pierre Paquette (Joliette, BQ): Thank you very much.

I have already read some of your articles. I will have the occasion to come back to them. What follows is along the lines of Hon. Marlene Jennings' question. When Mr. Walsh testified, he said that the Standing Orders were designed in such a way that, even if we prosecuted the Prime Minister and the government for not following these Standing Orders, a new session would have started by the time the procedure could be followed. What would the legitimacy of the new session be if the court decided that prorogation was illegitimate or illegal? I wonder if you have thought about that.

Second, the question was perhaps asked, but I cannot remember the answer. Several of your proposals could not have been implemented last December 30 because we were not sitting. Did you think about a Plan B?

Third, at the end of your article published in the *Ottawa Citizen*, there is a call to arms, saying that the opposition parties could foster social and political movements across Canada during a prorogation. Last time, that was done spontaneously through the Internet . Could you comment on your own proposal?

Prof. Errol Mendes: I will answer in English, because I can express myself better.

Mr. Pierre Paquette: Do you understand French?

Prof. Errol Mendes: Yes, yes.

Mr. Pierre Paquette: You are better than my mother. She does not understand English, but she speaks it.

Some hon. members: Ha, ha!

Prof. Errol Mendes: Maybe I am...

[*English*]

eligible to sit on the Supreme Court of Canada?

At any rate, to answer the first part of your question, as I mentioned to Madam Jennings, with regard to the disincentives that were suggested, it's certainly possible. But I think the task for the opposition, and for the other parties too.... It should be in the interests of all parties to set up a system whereby the democratic foundations of our country are observed. Those are only triggered after an act happens that the opposition disagrees with. As I think one of the witnesses said, it is punitive in nature.

What I'm trying to suggest here is to avoid that happening in the first place. In other words, you would put in place structures that would make any future Prime Minister very wary—and make it potentially suicidal for him or her—if he or she tried to do what was attempted in the last few years. That's why I'm suggesting that proactive rather than reactive systems be put in place.

I'll answer your last question next, mainly because I've forgotten what your second question was. One of the reasons I suggested that there be civil society support for what I'm suggesting here is that I was fascinated by how average Canadians, who had never been interested in anything concerning the Parliament of Canada, were so outraged by what had happened. I think it's very important for our democracy that people who normally are not political junkies or part of the chattering classes understand how important it is for our country to keep its system of responsible government. The ability to make this known to their MPs and to make it known to other civil society networks reinforces the creation of a conventional rule.

I say this because a conventional rule really arises under two conditions. One is where there is usage, and that's why I'm suggesting the standing orders. Secondly, there is a sense that the actors have to be bound by it. There's nothing more powerful than an MP's own constituency telling an elected MP that he or she should be bound by this type of process. So that's part of the ability to reinforce the creation of a binding conventional rule.

I'm sorry, what was your second question?

● (1125)

[*Translation*]

Mr. Pierre Paquette: You did answer partially. Last December 30, at least two of your suggestions could not have been implemented. At the same time, the idea is to create rules that dissuade a prime minister.

If I understand correctly, when you talk about binding conventional rules...

[*English*]

The Chair: Monsieur Paquette, I'm sorry, but we are at five minutes.

[*Translation*]

Mr. Pierre Paquette: Already? We will come back to this.

[*English*]

The Chair: Time goes fast when you're having fun.

Mr. Lukiwski....

Or no, I'm sorry, it's Mr. Christopherson.

Mr. David Christopherson (Hamilton Centre, NDP): It's all right, Chair. No problem. Thank you.

Thank you very much, Mr. Mendes, for your attendance. It's been very enlightening. It's been a little bit of a different approach from....

I want to follow up on where Madam Jennings was, because it was after the fact...and I raised this at an earlier meeting here. I was told that the GG did not see the letters that were signed by the party leaders because of the issue of "only the Prime Minister can give advice".

As to conflicting advice, that's not really a problem. When the GG is consulting with the Privy Council members, they may be getting all kinds of different advice about what to do.

But on the issue of the Speaker being able to...I'm very curious on that. What would the process be for the conveying from Parliament?

I also want to say, to get this out there, that even now the government still has a problem understanding the separation between the executive council and the majority rule of Parliament. The majority rule of Parliament is supreme: you become Prime Minister through a majority vote of the House of Commons. That is why so many of us were upset over the nonsense being spewed by the Prime Minister the last time—about something being undemocratic, and hijacking, and coup, and all of that. I mean, it worked well politically, I'd give you your due there, but it was way the hell off the reality.

The reason we don't normally see that is that with majority governments, the matter of a confidence vote is not even paid any attention to, because you're going to win every vote 10 times out of 10. It only arises with minority governments. Therefore, the notion is absolutely wrong that advice coming from the Speaker—if it were even equal to that of the Prime Minister—is somehow a misrepresentation of fair justice. It seems to me that it makes every sense in the world that the GG would be aware of the advice of the Prime Minister of the day, but if there were a majority opinion from Parliament that's different, then the GG needs to hear that, too.

I'm curious about what the process is. Is it just an ordinary motion passed by a majority that says, "We convey the following to the GG", and empower the Speaker to do that? Is it that straightforward?

● (1130)

Prof. Errol Mendes: The Speaker, as we've seen on several occasions now, has a lot of powers to advise that things be carried out, and this could be one of them. Yes, you could have a formal resolution.

The other thing, which came up in the previous session, is that resolutions, if they're structured properly, can have as much power as standing orders. A resolution properly crafted asking the Speaker to do this could be the way by which it could happen.

Mr. David Christopherson: Right. And I think from previous discussions, we've determined that resolutions can either be a part of the standing order document or not, depending on the will of Parliament.

Prof. Errol Mendes: Right.

Mr. David Christopherson: Okay. Thanks.

Let me pick up on what you said about being proactive rather than reactive. Can you expand on that for me? The point has been made that the suggestions you have put forth here really wouldn't have applied to the situation we had earlier, or late last year.

I'm wondering how it would be beneficial, if we took a proactive rather than a reactive approach. Can you help me understand that?

Prof. Errol Mendes: It's essentially to stop future types of prorogation. Absolutely it wouldn't have helped in the last one, because there was no real understanding of how to deal with the situation. Maybe we should have learned after the first one, in 2008, but nothing happened after the first one in 2008. What I'm suggesting is to do a proactive process that will prevent future ones from happening.

I don't disagree with what was suggested in terms of potential disincentives, and maybe you should consider that. But that essentially is saying to go ahead and do it, and we'll try to stop you working for a time period in terms of the prohibition on reintroducing legislation, or I think the other suggestion was opposition days, if I remember correctly.

If a Prime Minister really wants to steam full ahead, he may accept that. What I'm suggesting is to put in place enough powerful supports for a conventional rule that it would be suicide.

Mr. David Christopherson: Again, that would be....? Can you break down for me the points of that convention?

Prof. Errol Mendes: It would be the combination of standing orders plus supporting legislation to create a binding conventional rule that would allow the Speaker to basically say to the Governor General: you have the power under your reserve powers to refuse the prorogation. There would be no need for a constitutional amendment in that case.

Mr. David Christopherson: Right.

Again, though, the ultimate stoppage is a constitutional amendment. I don't think we're going to go down that road.

Prof. Errol Mendes: Yes. It's impossible anyway, because essentially you would need the consent of all the provinces.

Mr. David Christopherson: Agreed. I said that to Walsh the other day, and he jumped down my throat. I said it only takes 50%, or is it 50% plus seven, or...? What's the formula?

In a practical sense, it has to be unanimity.

Prof. Errol Mendes: There is academic disagreement. The actual constitution talks about the "office of the Governor General", which would definitely require unanimity under article 41. But I think the Clerk mentioned the possibility of distinguishing the "powers" of the Governor General as opposed to the "office" of the Governor General. That would require less than unanimity.

I don't think we should go down that road. As we've found out in the past, even constitutional amendments requiring less than unanimity are almost impossible.

Mr. David Christopherson: How would we send the Speaker to speak on behalf of Parliament if the Prime Minister prorogues the House and you can't get into the House to move the motion?

The Chair: Maybe we'll get an answer to that from one of the next questions.

Mr. David Christopherson: Maybe we will, Chair.

Thank you.

The Chair: That finishes our first round.

We're going to try a second round. I'm going to keep it at five minutes, but if you don't need to use your whole time and would like one of your colleagues to get a chance to ask questions, it would be really good if you did that.

Madam Jennings.

Hon. Marlene Jennings: Thank you, Chair.

Again, thank you, Professor Mendes. I find that the more questions that are asked of you, the clearer things become.

My understanding, then, would be that going the constitutional route would create major headaches, and there is a very good chance it would not succeed. However, this other route that you are proposing, which is amending the Standing Orders and bringing in supporting legislation in order to create a new conventional rule, could and most likely would be successful, in that it would then provide a way for the House of Commons to express its will, exert its will, and ensure that the Governor General, whose authority to dissolve or to prorogue a session would remain unfettered...but a way to ensure that the Governor General would be informed of this new conventional rule.

I don't have any other questions, but I wanted to ensure that this was very clear.

If my colleague has no questions, then I'll....

● (1135)

The Chair: Thank you for sharing. It's good to see it.

Mr. Lukiwski, I think you're sharing with one of your colleagues too.

Mr. Tom Lukiwski (Regina—Lumsden—Lake Centre, CPC): I didn't know that, but thanks for advising me.

Voices: Oh, oh!

Mr. Tom Lukiwski: Thanks to Marlene for giving up her time.

Here is one quick point and then a question, Professor. Thank you for being here.

The point I would make in respect to David's point about advice from the Speaker to the Governor General—and perhaps at the end, if you have time to comment on this, I'd welcome your comments—is that my understanding from a constitutional perspective is that there's a big difference between "advice" in the constitutional sense and just giving information. To David's point, that the letter may or may not have been read, I don't know, but how does the Speaker give information to the GG that there is a coalition, or an agreement among the opposition parties, that they can do whatever they want to do? That letter is more an informational piece, as I interpret it, than "advice" in the constitutional sense. Before you depart from the meeting, I'd like to hear an answer to that.

My question is something from our previous meeting, with Rob Walsh and Thomas Hall. I'm sure you've seen or listened carefully to the testimony of both of them.

Mr. Hall basically disagreed with you, in an article you had written in the *Ottawa Citizen*, on whether or not committees could be allowed to meet during prorogation. You argued that they could sit. Mr. Hall argued that it would not—in his opinion at least—be constitutional to do so, because once the House closes down, committees cease to function. In fact, if committees—he was referring to standing committees—continued to sit, then there would be nothing to suggest that a Committee of the Whole would not be able to sit. That would in fact just do an end-run on prorogation.

I'd be interested to hear your interpretation concerning Mr. Hall's point, which disagrees, I think fundamentally, with yours, and whether or not you have a counter-argument to Mr. Hall's point on the unconstitutionality of committees sitting during prorogation.

Prof. Errol Mendes: Actually, I don't disagree with him. I think what I was saying in the *Ottawa Citizen* was misunderstood, and I wish it hadn't been edited the way it was.

Committees can do whatever they want. They can basically sit in between sessions, as the Afghan committee did during the prorogation. The only problem is that the witnesses will not be covered by parliamentary privilege. I know that firsthand, because I appeared before the Afghan committee during the prorogation period and I was acutely aware that I did not have privilege. That's actually the reason I decided—I think I was the first one who said—that there was a clear breach of privilege in the refusal to hand over on the detainees. I knew when I was presenting it that there was no parliamentary privilege on my behalf.

So committees can do basically whatever they want. The only problem is whether or not the witnesses will be covered by parliamentary privilege.

Mr. Tom Lukiwski: If you're saying committees can sit, I'm not sure, outside of the lack of immunity, what other weight or powers they may or may not have. His point is that if a smaller committee can sit, then why not a Committee of the Whole—which in effect, then, would mean that Parliament was still sitting?

Prof. Errol Mendes: As I said, because there's no parliamentary privilege, the chances of that happening are actually almost zero. In addition, why would the Committee of the Whole sit? If, as happened with the Afghan committee, there was a specific issue that they wanted to deal with.... I was asked to give my opinion on whether there was a clear breach of privilege by the refusal to hand over on the detainee issue, and I felt that I could brave the risks of not having parliamentary privilege and appear before the committee, and I did.

Mr. Tom Lukiwski: Mr. Hall was saying that he believes—it's his opinion, at least—it's unconstitutional. You're saying committees can sit, that they can do whatever they want. But what about the constitutional argument?

Prof. Errol Mendes: It depends what comes out of that committee. As happened with the committee I appeared before, I think there was a general agreement among the people who were there that there was evidence of a clear breach of privilege, and that carried on into the House. Nothing was actually decided at that committee meeting, but there was a very important input, by me and others—I think I appeared with Colonel Drapeau, who reinforced my testimony—and that input was put into the House of Commons and ultimately, I was glad to see, was confirmed by the Speaker yesterday.

● (1140)

Mr. Tom Lukiwski: I think—

Prof. Errol Mendes: I'm sorry; let me answer both questions.

Mr. Tom Lukiwski: Yes, indeed; there's a bit of time left.

Prof. Errol Mendes: I understand the potential catch-22 that you're putting forward, but keep in mind that I don't think there's ever been a prorogation in Canadian history when there was not some notice given—if not formal, then informal notice—at which point, if there is any evidence that the Prime Minister is attempting something that would be trying to avoid a clear vote on confidence or undermining the parliamentary privileges of committees, the Speaker can then advise the Governor General that there is a problem here. Again, as I'm saying, it's not a legal rule, but it gives her the ability to use her reserve powers to do that.

If you can tell me of any prorogation that happened without some type of formal notice, then, I agree, my position would be a problem.

The Chair: Monsieur Paquette, you're up.

[*Translation*]

Mr. Pierre Paquette: I just wanted to ask the question I was not able to ask earlier, because I want to understand this clearly.

You are talking about a process leading to a binding conventional rule. This conventional rule would be created around Standing Orders and perhaps some legislation. It would become binding when a government's prime minister breaks it and pays the political price for it. Over time, the prime ministers who follow will understand that, if they do not comply with this rule, which will then be better known, they will pay the political price.

Do I understand the process correctly?

[*English*]

Prof. Errol Mendes: Yes, but in addition to paying the political price there is the potential for the Governor General—having been given the advice on the rights and privileges of the House of Commons—to then use her reserve powers to refuse the prorogation.

So there are two possible consequences to it: one is the political price; the second, the ability of the Governor General to have ammunition to refuse the prorogation.

[*Translation*]

Mr. Pierre Paquette: Okay, thank you.

[*English*]

The Chair: Wow. We're doing great.

I have Mr. Albrecht and Mr. Holder for quick questions, and then we'll come back to David, if we can.

Mr. Harold Albrecht (Kitchener—Conestoga, CPC): Thank you, Mr. Chair.

First I have a comment, and then a quick question.

Mr. Mendes, you mentioned the encouragement of civil society to get involved in...and I think we're all aware of the Facebook group. You say that average Canadians were “outraged”. I guess I would question that, first of all on the basis of the very small number, in relative terms, in Facebook groups, and second, on the basis of the very easy way of getting involved. If that's political involvement, I fear for our country: simply point and click. So I would debate that.

The second point I would make relates to page 3 of your presentation. You suggest that the Standing Orders be amended to not allow prorogation within the first year following a throne speech.

How is prorogation in the first year more of a threat to democracy than the formation of a coalition within a few weeks after an election in which Canadians have clearly indicated who they would like to serve as their government?

Prof. Errol Mendes: I'm here to present more legal analysis, but as you force me to, I will venture into other areas.

Firstly, in terms of your argument that 225,000 people on Facebook is nothing, well, I'd like you to tell them that.

Mr. Harold Albrecht: I didn't say “nothing”.

Prof. Errol Mendes: I'm sure some of them are in your constituency.

Mr. Harold Albrecht: With respect, sir, I said a very small group “in relative terms”.

Prof. Errol Mendes: And secondly—

Mr. Harold Albrecht: The percentage of Canadian citizens was very small.

Prof. Errol Mendes: —I'm not going to go into the political analysis, but the polling has clearly shown that Canadians were exercised by it, and it reflects itself in even present polling numbers. That's all I want to say in terms of the political ramifications of what happened.

I'm sorry, what was your other part?

Mr. Harold Albrecht: I'm just wondering how prorogation within a year following a throne speech—or earlier than a year—could possibly be construed to be more of a threat to democracy than the formation of a coalition within a few weeks after an election having taken place.

Prof. Errol Mendes: Again, that is venturing into the political realm, but I'll try to answer it anyway.

I think the most foundational duty, or the basis of our constitutional democracy, is responsible government: that the executive is responsible to the elected members and only is allowed to hold power as long as it has the confidence of the House. Nothing could be more sacred than that principle.

And so, even after a throne speech, if the government loses the confidence vote, our democracy demands that there be an election—there is no choice—rather than having a thing....

Let me finish.

If, however, there is an ability on the part of the other parties in the House of Commons to avoid a very expensive election, the Governor General then, as has happened in the past, has the ability to seek whether or not the opposition together can form a government.

And in terms of saying that is illegitimate, or a coup—that's outrageous in terms of the constitutional history of this country.

● (1145)

Mr. Harold Albrecht: I certainly agree, sir—

Prof. Errol Mendes: That's basically saying that what Robert Borden did was outrageous and that what happened with David Peterson in Ontario was outrageous.

I mean, it's just beyond any type of convincing rebuttal.

The Chair: Mr. Holder, do you have a question?

Mr. Ed Holder (London West, CPC): Well, thank God Mr. Rae, when he was Premier of Ontario, didn't do outrageous things.

I want to say a couple of things. You've prefaced many of your comments, sir, with "it is my opinion". I appreciate the candour, because I respect that it is your opinion. Just like the opinion that the first minister gives to the Governor General, you're certainly giving us your opinion as well.

You said that you agree that the constitutional approach is not the way to go. Your appeal to constituent groups, as I've heard your testimony today, gives me the sense that you're trying to make the civil society argument. That is, what you can't get through the front door, you're trying to get through the back door. That's just how I feel in terms of how you presented.

Here's my question to you. You've indicated that the Speaker has equal power to the Prime Minister in terms of appeals to the Governor General. I'm actually quite shocked by that in terms of the ability of the Speaker to advise the Governor General.

Where is the precedent for that, in Canada, where that has happened to this point?

Prof. Errol Mendes: Let me first deal with the preamble to your question.

First, I did not base these arguments only on the civil society basis of the conventional rule. I'm basing it on the elected members deciding to put in place standing orders that will then create the conventional rule.

So it's quite a diversion to say that I'm basing it on civil society—but I'm hoping that civil society would strongly support it, as they did, as they indicated they would, during the prorogation debate.

Mr. Ed Holder: As "some" did, to be clear.

Prof. Errol Mendes: Well, we could go back into that debate again. However, the power of the Speaker, as was evidenced yesterday, comes from the Speaker being, if you like, the guardian of the rights and privileges of the elected members of the House of Commons—

Mr. Ed Holder: Sir, I don't mean to interrupt, but we have limited time.

The Chair: I'm going to stop you, Mr. Holder. You're past your time—

Mr. Ed Holder: But, Mr. Chair, I did ask a question, which was not answered. I asked him where the Canadian precedent was, and I would appreciate an answer.

The Chair: We'll see if during Mr. Christopherson's questioning we can actually get that answer, too. We got one of his during one of ours. It sounds like we're trading today.

Go ahead, David.

Mr. David Christopherson: Thanks, Chair, I appreciate that.

Before I go to my questions, I want to do a follow-up. You know, what concerns me is not so much that the government members know what the law of the Constitution is and they're spinning it; that wouldn't bother me as much as the concern that they really don't get it that the ultimate source of power in Canada comes from a majority vote of the House of Commons.

Correct me if I'm wrong, but after an election, there has to be a vote at some point to determine whether the person who is currently the Prime Minister continues to have the confidence of the House, which is a majority vote. The people don't elect a Prime Minister; they elect a House of Commons. If that person can't get a majority vote, and we've just had an election, the GG has the option of going to anyone else in the House who she has reason to believe might be able to muster a majority vote of confidence, because that's the source of power.

Did I say anything that was incorrect?

Prof. Errol Mendes: You were perfectly accurate in everything you said.

Mr. David Christopherson: Thank you very much.

Going back to the Speaker, we were....

Pardon me?

An hon. member: Even though the throne speech...[*Inaudible—Editor*].

Mr. David Christopherson: What's that got to do with it?

The Chair: Excuse me; speak through the chair or to the witness, please.

Mr. David Christopherson: Thank you.

The Chair: We'll get along a lot better if you just talk to me, David.

Mr. David Christopherson: Are they done?

The Chair: That was good: you asked me that question, David. That's a lot better.

Mr. David Christopherson: I know where the power is in this room.

The Chair: So we're ready for your next question.

Mr. David Christopherson: Thank you very much, Chair. I appreciate that.

I just want to go back to something. You were asking about the proactive and reactive, and you were asking for a scenario.

I haven't thought this all the way through, but it is a most recent example. The Prime Minister didn't even have the courtesy to go to see the GG. He placed a phone call. I'm surprised that he didn't just send her a quick e-mail and then suspend Parliament.

In that case, I don't think there was any real notice. I stand to be corrected if House leaders knew or if party leaders were given the courtesy, but as a member of Parliament, I learned about it through the media. It was already a done deal.

I'm just asking how we would then trigger the right of Parliament to have our Speaker go and give the majority point of view to the GG, in addition to the point of view of the Prime Minister, if we're already in regular recess, over, say, the Christmas period. How do we do that?

● (1150)

Prof. Errol Mendes: First, once you've done your standing orders and the supporting legislation, they can be transmitted in advance, before anything happens. In addition, in the situation you mentioned, I think there was almost a week's discussion—by the chattering classes, I admit—that prorogation was imminent. But certainly you can actually combine that by sending the standing orders you've already done plus the legislation so that there is advance notice.

Mr. David Christopherson: Fair enough. I made note that you can build those in—i.e., fire off the information for the GG to be aware of, keep it on file if it turns up there. I get that. What I don't quite understand, though, is let's say there are particular aspects to this particular situation. We can make up any kind of scenario. Let's assume there are pieces of information that are above and beyond what was given in the prior notice that are specific to this prorogation.

How then would the members of Parliament, through the Speaker, activate the Speaker going to give the GG...? Does he or she have the right to do it on their own accord, or do they need that motion? In which case, I'm back to my original question: how do we get the motion if the House isn't sitting when the prorogation takes place?

Prof. Errol Mendes: That's where the possibility of not having the system be effective could work out. I think the most you can hope for, if this system is put in place, is that the Governor General will have enough knowledge about the rights and privileges of the elected members that he or she will be able to exercise the reserve powers in a way that preserves the rights and privileges of the House of Commons.

It's not going to be totally guaranteed, but given the fact that the Governor General will have sufficient information about what the will of the House is, I hope that will be sufficient. Keep in mind also that the other sanction is the political cost. If you look at some of the most important conventional rules, it's the political cost that has kept the conventional rule binding, in terms of the disallowance power, for over a century. It was only the political cost.

Mr. David Christopherson: Do I have more time? Okay.

The rule of thumb that I was advised that people use is that if it is within the first three to six months, the GG almost has a responsibility to seek if there's another majority, rather than plunge the country into an election. Between six and nine months, it's kind of questionable. After nine months, it's probably enough time that the GG would likely say she can't go from the results of the last election, there is too much water under the bridge, and she's going to call for a new election.

Do you agree with those kinds of thumbnails?

Prof. Errol Mendes: I completely agree. I think the nine-month period is probably the cut-off point.

Mr. David Christopherson: Had there been a throne speech adopted in the first month, and then three months later there was a reason for a motion of non-confidence to be put, whatever that might be, and it was carried, does that then go to the GG? Are we then in a situation when she either has to find a new Prime Minister to continue the government or call an election?

Prof. Errol Mendes: Let me answer your question in a roundabout way. I think it's important to lay a bigger framework than just to have potential questions that divide parties.

Canada is probably facing many minority governments. Given the structure of the parties in power right now, we could be facing minority governments for the next 10 to 20 years. If we don't have consensus on whether or not you can form coalitions based on simple majorities, then this country is in trouble.

Therefore, all parties need to have a consensus on what could happen when there's just a one-member majority. In that case, the failure to do that could be catastrophic for this country, I think. Therefore, it's in the interest of all parties to come up with those types of limitations. Ultimately all parties could benefit from those types of rules.

Mr. David Christopherson: The Conservatives will see it a lot clearer when they're on the opposition benches.

The Chair: It's amazing that our longest round of questioning went well after we said we're going to go really short now.

One-off questions, if we can, please. We have a little bit of time left.

Madam Jennings, if you'd like, and then I have Mr. Reid. Then we'll see if there's time for anyone else after that.

Go ahead.

● (1155)

Hon. Marlene Jennings: I want to come back to this issue: under responsible government, under our constitutional parliamentary democracy, the government governs as long as it enjoys the confidence of the House. I believe yesterday that Prime Minister Harper himself stated exactly that.

So when a throne speech, for instance, is adopted, it means that government enjoys the confidence of the House. It could be that on the next day, 10 days, or 10 months later, there are other confidence votes, some of which are deemed by the Prime Minister to be confidence, and he could do that virtually every time there's a vote; others are deemed to be confidence by conventional rule. It means then that the House again expresses its confidence or lack thereof in the government. If the House expresses a lack of confidence in the government, then we are in a situation where ultimately the Governor General with her unfettered authority could dissolve government on the advice of the Prime Minister or not.

I just want to make sure that my understanding of our constitution and our constitutional parliamentary democracy does in fact work in the way I've just described it. I don't want to invite the scorn of my colleague Dave. I want him to know that I do understand it.

Voices: Oh, oh!

The Chair: Could you give a quick answer so that we can get to others?

Prof. Errol Mendes: Absolutely.

I don't think there is any disagreement from what I've heard from both Madam Jennings and Mr. Christopherson, but it is very important to understand that even where you have a throne speech where, following the throne speech, because of a poison pill put in by the government it is unacceptable for the opposition to take that poison pill—I think everyone knows what I'm talking about—it is absolutely within the constitutional authority of the parties that want to form a coalition and become the government to go to the Governor General and say that they have the ability to form a government. And anybody who says that is a form of coup, a form of irresponsible government, is not understanding the foundations of our democracy.

The Chair: Thank you.

Mr. Reid.

Mr. Scott Reid: Thank you, Mr. Chair.

I think we're all aware of the fact that the Speaker of the House has the right, indeed the obligation, to inform the Governor General of the House's privileges, and he does so in a ceremonial manner when he attends in the Senate the Speech from the Throne. I think there is a distinction between informing, stating the rights that exist outside the powers of the Governor General, because under our Constitution and that of the British...the crown, while it retains some powers, doesn't have all powers, and laws must be passed by the houses of Parliament and then go to the Queen or the Governor General, as the case may be, for signature. The same thing applies: our legalities are not decided upon by the Queen or the Governor General but by the courts. No money can be spent without the approval of the House of Commons and so on.

That's not advising the Governor General. That's informing her of the fact that we are asserting the rights that exist under our Constitution. Advising is different. Advising relates to the Governor General's exercise of her powers, the powers that actually remain in her hands, the executive powers. I'm genuinely unaware of any cases where the Speaker provides advice.

Going back to Mr. Holder's question, can you provide any examples in Canadian constitutional history or indeed in British constitutional history within the last couple of centuries, or indeed the provincial constitutional history of our provinces, where the Speaker is advising the Queen/Governor General, or Lieutenant-Governor as the case may be, as to the use of the actual powers residing in the executive as opposed to informing her of the other powers that are not within her purview?

● (1200)

Prof. Errol Mendes: Mr. Reid, thank you very much. I actually think you have answered the question that Mr. Holder was asking as to what the precedents are. That is precisely what I was suggesting: that when one talks about advice....

Let's face it, there wasn't much advice given to the Governor General by the Prime Minister when he prorogued for the second time. It was “Do it”, basically. So the—

Mr. Scott Reid: Sorry, but that is advice—you're quite right—and advice is in practice giving an instruction. Formally it's “I think you should do this”, but in fact it's always giving an instruction. The only recourse the Governor General has in a given time is to say, “I reject it, and therefore you're fired as Prime Minister.” That's how the system works, as the conventions are set up.

Prof. Errol Mendes: Mr. Reid, you are absolutely right on everything you've said, and that's the reason why I think it is sufficient for the Speaker to basically present the Standing Orders to the Governor General so that it is informing the Governor General that this is what the will of the House, of Parliament, is. Therefore, she can then use her reserve powers to reject the advice.

So thank you very much. I think you've reinforced what my position is.

Mr. Scott Reid: Well, I'm glad to be helpful.

Voices: Oh, oh!

The Chair: I feel the love.

Mr. Holder first, and if there is time, I'd like one question too, if we could.

Mr. David Christopherson: And I just want to place a quick motion, if there is time, Chair.

Mr. Ed Holder: Some of you who sit in committee with me know that I have a Cape Breton mother.

I'll tell you, Professor, you have more opinions than she does, and that takes some doing. I say that with great regard.

Another one of your opinions was when you declared the members opposite as “the coalition”. I'd like to defend them, if I could—but you have given them a formal title, and that's your opinion, I know.

An hon. member: We'll take it.

Mr. Ed Holder: I knew you would, actually.

The Chair: Through the chair, please, through the chair.

Mr. Ed Holder: Through the chair, yes, because they are interrupting me, Chair.

Here's my question for you, if I can. I want to come back to the question I asked. I would appreciate it if you would undertake to provide a formal response as well of your comments. Give us a letter so that I can get some context for this, because, if you don't mind, you're a professor and you research things and you'll do this thoughtfully.

I asked you, and apparently my preamble was a little long so I didn't give you the chance to properly answer—

The Chair: It seems to be the flavour of the day.

Mr. Ed Holder: You gave your opinion that the Speaker has the power to advise the Governor General. I asked you where, in Canadian parliamentary history, was the precedent.

Prof. Errol Mendes: Mr. Reid just answered your question, that essentially the Speaker has the ability to inform the Governor General—

Mr. Ed Holder: I asked where the precedent was, sir, where it's been done.

Prof. Errol Mendes: The—

Mr. Ed Holder: Not where you give your opinion that it might be possible. Where is the precedent that it has been actually done, sir?

Prof. Errol Mendes: I keep on answering the same question. I think Mr. Reid has answered you.

Mr. Ed Holder: Well, answer me, then. Pretend I didn't hear it.

Prof. Errol Mendes: The Speaker has the ability, and has done on many occasions, to inform the Governor General of the way in which the...and he's says it's ceremonial, but it could easily extend to basically informing the Governor General of what the Standing Orders are all about.

Mr. Ed Holder: But it's not supposition. I'm asking you....

Perhaps what I'll do is I'll ask you to take that back, research it, and could I, through the chair, ask you to bring back a formal response not of what could be but what has been? That's what precedent means.

Could I ask you, please, sir? Thank you.

The Chair: If there are cases of it, we'd love to hear them.

Prof. Errol Mendes: Let me answer that question. There has never been a case—

Mr. Ed Holder: Ah! Thank you.

Prof. Errol Mendes: —that deals with—

Mr. Ed Holder: That's it. That's all.

Prof. Errol Mendes: He doesn't even let me finish the answer.

There has never been a situation where the Governor General has refused to sign legislation. Does that mean to say that there isn't a conventional rule, that the Governor General cannot refuse to sign legislation?

I think the trap that Mr. Holder wants me to go into is one that is irresponsible, and I will not fall into it.

Thank you.

Mr. Ed Holder: So you will not undertake to this committee to do that, to put that in writing, sir?

That is my ask on behalf of this committee, Chair.

The Chair: On behalf of this committee, we'll ask you if you can supply us with any case where that has been done, where advice has been given from a Speaker of a House to the Governor General, or the Lieutenant-Governor on a provincial case. Please let us know.

Prof. Errol Mendes: I've just answered the question.

The Chair: Okay. Thank you.

We've gone over our time with Professor Mendes.

We have to thank him for being here today.

We now welcome Professor Russell.

Do we need to suspend to move from one witness to the other?

Some hon. members: No.

The Chair: Then let's do it.

I would suggest that we move forward with Professor Russell for an opening statement.

I know you've just run in, you've hurried out of a cab, and all of that security stuff.

Professor Peter Russell (Professor Emeritus, Department of Political Science, University of Toronto, As an Individual): Porter screwed up this morning. They'll probably sue me...and cancel.

No, they're usually pretty good.

The Chair: Be careful of what you say.

Prof. Peter Russell: Pardon me?

The Chair: Be careful of who you say something about.

Prof. Peter Russell: Yes, I know. Maybe I can resort to parliamentary privilege today.

The Chair: All right, Professor Russell, it's great to have you here today.

Prof. Peter Russell: I do have an opening statement.

● (1205)

The Chair: Please carry on then. Thank you, welcome, all of the above—now let's go.

Prof. Peter Russell: I am very pleased to be here, Mr. Chairman.

The question before us is one of profound importance to Canadian parliamentary democracy, the rules of which are not written in law books or the formal Constitution; they depend mostly on agreed-upon principles, practices, and conventions, meaning that you people—you members of Parliament from all parties—are required to agree. When you don't agree, you leave the country without rules and you leave your Governor General, whom I sometimes advise, in the position of being a referee in a game in which the players don't agree on the rules. So I am delighted to see members of all parties here trying to work on this one issue of prorogation. It is just one of several on which consensus is lacking and convention is needed, and I'm very pleased that you're here.

You have my statement. I'll go over it quickly and tell you some things I'm sure you know.

Prorogation is the ending of a session of Parliament without dissolving Parliament. Normally it's an uncontentious event in the life of Parliament, and not controversial. Its normal use is to bring a session to an end when much of the work of the session is done and there is a recognized need for a seasonal break. A new session of Parliament is opened after the break with a Speech from the Throne setting out a new government agenda. That's the norm, and indeed all the prorogations that I'm familiar with have basically been of that kind.

The power to prorogue, the legal power to prorogue, does not rest with you. It does not rest with the Prime Minister. It quite clearly rests with the crown. As of King George VI's letters patent in 1947, that particular power of the crown, along with the power to dissolve and summon Parliament, was to be exercised by the Governor General of Canada from then on.

Well-established constitutional convention requires that the Governor General exercise this power only—only—on the advice of her chief constitutional adviser, the Prime Minister of Canada. That's the normal rule.

Recent controversy has arisen over whether there are any circumstances in which the Governor General should question and possibly decline a Prime Minister's request for prorogation. In the two situations that have provoked the controversy, we're concerned with whether prorogation was being advised by a Prime Minister to avoid the government's accountability to the House of Commons.

Prime Minister Harper's advice on December 4, 2008, that the Governor General should prorogue Parliament appeared to many to be aimed at avoiding an imminent vote of confidence in the House of Commons. As you know, the confidence of the House of Commons is literally the licence to govern in Canada. The Prime Minister's advice on December 30, 2009, that the Governor General should prorogue Parliament appeared to be aimed at avoiding the scrutiny of a House of Commons committee looking into the treatment of Afghan detainees.

Constitutionally, this controversy raises the issue of whether any—*any*—discretionary power at all is reserved to the Governor General in exercising the power to prorogue Parliament.

In Canada's system of parliamentary government as it's evolved over about 150 years, constitutional convention requires that the Governor General normally exercise the legal powers vested in the crown on the advice of ministers responsible to the House of Commons to achieve a responsible government.

However, there's a strong case for holding that in certain exceptional circumstances the Governor General, as a representative of the crown, must hold in reserve a discretionary power to refuse a Prime Minister's advice.

● (1210)

The principle governing the use of such a reserve power of the crown would be that its use—a discretionary decision of the Governor General—is necessary to prevent the undermining of responsible parliamentary government. That's the key to when it's proper for the Governor General to decline to follow the advice of a Prime Minister.

In the case of prorogation, one can conjure up a situation in which a Prime Minister facing defeat in the House of Commons advises the Governor General to prorogue Parliament, not for a few weeks as was done on December 4, 2008, but for an indefinite period of time: "Your Excellency, just prorogue Parliament, and when I'm damned ready for it, you can bring it back, and I'm not saying when that will be." Now, if the Governor General had no discretion—none—and had to always do what the Prime Minister advised, then, I think, given that possible situation, parliamentary democracy would be in great jeopardy, if that advice had to be followed.

Nothing like the situation I've conjured up has happened in Canada. Nonetheless, the possibility that such advice "might" be rendered surely creates a strong case for holding that in receiving prime ministerial advice for prorogation, the Governor General has to be regarded as more than a clerk—a royal clerk, a clerk with a crown on—who just says, "What do you want? Oh, you want prorogation. Yes, here it is. I'm not going to ask any questions. Go away; prorogue the people's House, the biggest democratic institution in Canada. I don't know what you're doing, but I'm just a clerk here. I have to do whatever you tell me to do."

In our constitutional system, we look to constitutional conventions for the rules governing the proper use of legal powers. That's what conventions are; they're political agreements. That's why I emphasize it's crucial for you folks to agree on the proper use of political power. In this case it's the proper use of the Governor General's legal power to prorogue or to refuse a prorogation.

Does the Governor General ever have the right to reject a Prime Minister's advice to prorogue Parliament? If the Governor General has that reserve power, under what circumstances can it be used? Under what circumstances is it proper for her to refuse a request and advice to prorogue?

Do we have in Canada today, as I speak, a constitutional convention governing this situation? Remember, the situation isn't the normal advice for proroguing toward the end of a session when everything is done and it's time for summer holiday, Christmas break, or whatever. It's when it's highly controversial and a large part of the country and the political system think it's a way of avoiding accountability to Parliament. Has the Governor General reserve power in these situations, and precisely under what circumstances is it to be used?

In paragraph 9—you'll forgive me—is a little diversion about how you figure out—how you figure out—whether there is a constitutional convention. They're spooky things, aren't they? You can't just look them up in a book. They're not even like your Standing Orders. Speaker Milliken has an easier job, in a way. He has Bourinot and all those books. Constitutional conventions are not easily identified, particularly when they're hotly contested.

The Supreme Court of Canada made a decision on the occasion of patriating the Constitution without provincial consent. The Government of Canada was going to change the Constitution of the country in fundamental ways by going to Britain without the consent of the provinces. That situation was not governed by anything in the Constitution Act, 1867. It is silent on amending the Constitution, but is governed entirely by constitutional convention.

The Supreme Court had to work hard on whether there was a constitutional convention in that situation, and how to go about finding out if there was one. I will quote a paragraph on how the Supreme Court laid down a methodology—not just for them but for us too. It's a pretty good methodology. It's been widely accepted by those who write about the Constitution and teach it in our schools and universities. It's worth reading carefully.

● (1215)

This is what the Supreme Court of Canada said in figuring out whether there was a constitutional convention requiring provincial consent before asking Britain to amend the Constitution of Canada.

They began with, “We have to ask ourselves three questions”.

Notice it's three questions. A lot of people think it's just their first question, “What are the precedents?” They say, okay, so that's it: “What are the precedents?”

But the Supreme Court quite rightly goes on, drawing on massive literature on the writing on constitutional convention. They didn't make this up. They were like students reading all the key books and pulling out of those books what they learned.

They second thing they say you have to ask, which is crucial, is “Did the actors in the precedents”—the key political people, really, in the precedents—“believe that they were bound by a rule?” There was a rule and they were bound by it, and by that they mean politically bound—morally bound, if you like.

The third one is the one that I find is most often forgotten: “Is there a reason for the rule?” The Supreme Court adds an important thought that we should all keep in mind:

> A single precedent with a good reason may be enough to establish a rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.

The Chair: Professor, we're limited to one o'clock as our end time, and we'd like to get some questions in.

Prof. Peter Russell: I want you to get this, though.

Have you had anyone discuss this Supreme Court ruling on how you identify convention?

The Chair: No, no, and I'm not suggesting—

Prof. Peter Russell: Are we not talking about conventions?

The Chair: Yes.

Prof. Peter Russell: Wouldn't it be useful to think carefully about the highest court in the land drawing on the wisdom not of only Canadian constitutional scholarship but Commonwealth and British constitutional scholarship on how we think it should be done? I think it's worth a minute or two.

The Chair: Sir, I'm not questioning—

Mr. Scott Reid: Mr. Chair, I have a point of order.

The Chair: Go ahead.

Mr. Scott Reid: I think we can all agree that we would like to hear the rest of what Professor Russell has to say, so therefore we can all agree to give him a bit more time than what we had originally anticipated.

The Chair: Okay.

Prof. Peter Russell: Thank you very much.

Hon. Marlene Jennings: I agree with Mr. Reid.

May I also suggest that in terms of asking questions of Mr. Reid, if we are unable to do so—

Prof. Peter Russell: I'm “Russell”.

Hon. Marlene Jennings: Oh, I'm sorry, Professor Russell.

I suggest that if we are unable to ask questions of Professor Russell, we invite him back.

The Chair: We could do both of those things. Thank you. It's at the will of the committee.

Prof. Peter Russell: I'm almost done. I'm sorry, I'm a long-winded guy.

I wanted to apply that Supreme Court methodology to the issue before us: conventions concerning prorogation.

First, there are plenty of precedents of uncontested requests for prorogation, but to the best of my knowledge there have been no situations analogous to either 2008 or 2009, both situations where prorogation was contested because its purpose appeared to be to avoid the government's accountability to Parliament. Nor was there any indication in those uncontested precedents that the actors in the precedents—that is, the government and opposition political leaders—believed they were bound by a rule that it is legitimate for the government to advise prorogation at any time, for any length of time, and for any reason whatsoever.

If such a rule were to be put forward, it is difficult to think of the reason that might be given for such a rule other than that in a democracy the Prime Minister should always get his way. But I comment that while such a reason might be considered appropriate in a democracy in which the head of government, the Prime Minister, is directly elected by the people—that might be all right—it is not appropriate in a parliamentary democracy where the Prime Minister depends for his licence to govern on the confidence of and accountability to Parliament.

So I would have to conclude that we do not have a constitutional convention governing contested requests for prorogation.

The next page has a couple of suggestions on where you might go.

The first is to realize that constitutional conventions do not always arise gradually, historically, through precedents. They can come from an agreement made by the relevant political actors on a grave matter of great importance, a disputed matter. I give the example of the Balfour Declaration in 1926, that in effect changed the British Empire into the British Commonwealth of Nations, and an agreement on the equal status of the United Kingdom, Australia, Canada, Eire, New Zealand, and South Africa. That was done through a conference, a meeting of prime ministers. They issued a declaration that they all agreed to. It was fundamental in changing the constitutional status of these countries.

In paragraph 11, I deal with the one motion we've had during this contested period, the one indication of a possible basis for a convention. As you all know, on March 17 of this year, the House of Commons passed a motion that was moved by the Honourable Jack Layton requiring that the Prime Minister seek the consent of the House of Commons before advising of a prorogation of more than seven days.

This motion cannot, in my view, be regarded as a constitutional convention, because it was opposed by the Prime Minister and members of the government caucus. The Prime Minister in particular is one of the key actors involved in prorogation, and he would not feel bound by the Layton motion. But that motion, I suggest—always hopeful—could be an important step towards establishing a constitutional convention, if it becomes the basis for discussing, in this committee or a special committee struck for the purpose, the possibility of an agreement on conditions that should apply to prime ministerial advice to prorogue.

So far we have not really heard what conditions, if any, the Conservatives think should apply to the rendering of such advice. Hearing the government's case would be a very valuable thing for Canada.

If the parties did agree on rules that should govern prime ministerial advice to the Governor General to prorogue, in my view such an agreement would be a constitutional convention. You would have created a constitutional convention, and as such it would not be legally binding. Constitutional conventions, as our Supreme Court has said, will not be enforced by the court, but they could be identified by the court. They can settle arguments about them, but they won't enforce them. Such a convention would have great political force and it would in all likelihood be complied with by the Governor General.

● (1220)

Finally, I've heard, as one does reading the papers and *Hansard*, of a possibility of the Standing Orders of the House being changed, possibly along the lines of something like the Layton motion, through a majority vote in the House but with the Conservatives, the government caucus members, still opposing the motion. What about that?

Well, of course my view is it's not a constitutional convention, but such an addition to the Standing Orders would surely be as binding on the Prime Minister as all other standing orders are. Failure of a Prime Minister to observe this new standing order, if one were added to the Standing Orders, could result in a ruling or a finding of contempt of Parliament and a possible defeat of the government on a non-confidence motion.

According to constitutional convention, a Governor General would be entitled to dismiss a Prime Minister who refused to resign or ask for a dissolution—I should have added that—after losing a vote of no confidence in the House.

I've put my own view in the final paragraph, and I thank you for the time to get here.

I believe it would be best for Canada to have the rules governing prime ministerial requests for prorogation settled in a consensual manner by our elected political leaders. Closing down Parliament, the people's house, the democratic institution of this country, is not a routine event. It's an act of great importance to parliamentary democracy in Canada. Canadians will be ill-served by their elected representatives if they're unable to reach an agreement on this matter and leave the country vulnerable to another grave political constitutional crisis with no rule in place to govern the crisis.

Thank you.

● (1225)

The Chair: Thank you, Professor.

We have a bit of time, so Madam Jennings, you're up first.

Let's try to be as succinct with our questions and answers as we can, and we'll see how many people get a chance.

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

Thank you, Professor Russell. I apologize for mixing up your name earlier. There's no excuse for that, so I abjectly apologize.

I understand clearly what your position is. I also understand that, in your expert opinion, a standing order that would prescribe conditions that need to be met for the Prime Minister to request prorogation would not constitute, in your view, a constitutional convention.

Prof. Peter Russell: Not if it weren't agreed to by one of the key players, which is the Prime Minister, and the Prime Minister's party colleagues.

Hon. Marlene Jennings: Okay. So if it were a simple majority vote—

Prof. Peter Russell: No.

Hon. Marlene Jennings: —but there were not votes from all parties represented in the House in favour, then it would not constitute a....

Prof. Peter Russell: Yes.

Hon. Marlene Jennings: Okay.

Prof. Peter Russell: I'm going very much by the Supreme Court, which said the key actors must feel bound by the rule.

Hon. Marlene Jennings: Yes.

My next question is this. If there were such standing orders and supporting legislation, adopted by the majority of the House, possibly rejected by one party—it could be the ruling party, it could be another party—would the two together constitute constitutional convention?

Prof. Peter Russell: In my judgment, no, not if the Prime Minister and the particularly important party he leads have opposed it.

Hon. Marlene Jennings: But then what do you have where, for instance, it's adopted and all parties agree? Then it's a conventional—

Prof. Peter Russell: Oh, if all parties agree, terrific. I would prefer not to have legislation, if all parties agree.

Once you get into legislation, you risk two things. One is that you risk appeals to the court to interpret the legislation, and in this kind of matter, with all due respect to our judges in Canada, including the nine on the Supreme Court, I don't think they should be called upon to settle these disputes, which arise typically soon after an election. To be doing the sort of Bush-Gore act and not knowing who's governing, while huge cases are argued before the Supreme Court of Canada for weeks or for months, sounds to me like a bad idea.

The other thing is that once you get into legislation, you may be on the edge of at least an argument that you're somehow changing the powers of the crown by law, by a formal statute. That gets you into the constitutional amendment issue that any change in the powers of the monarchy, the crown, the crown's representative in Canada, requires unanimous consent of all the provinces.

I'm not saying it would automatically, but you would get people saying, “That statute looks to us like a disguised attempt to amend the Constitution by law.”

Hon. Marlene Jennings: Yes, but then using that logic, the fixed election day legislation clearly stipulated that it in no way affected the unfettered authority of the Governor General to dissolve Parliament and call an election. And the courts, in a lawsuit in the courts, ruled that the Governor General's authority was not unfettered.

So if you had legislation that made that same point again, then would it not survive a...?

Prof. Peter Russell: Again, the worry with your example and the Federal Court's treatment of the case—and I wrote the affidavit, for those who thought the request for dissolution on September 7, 2008, violated a constitutional convention—

Hon. Marlene Jennings: Really?

Prof. Peter Russell: —based on the debate in not this committee but the one that dealt with Bill C-16....

All parties were in agreement that snap elections would no longer be appropriate. The Prime Minister made a fantastically good speech in Vancouver saying that the fundamental purpose was indeed to have an even playing field among the parties, whereas in a snap election, the government has the advantage of finding the opposition in disarray, or down in the polls, in calling an election even though it hasn't been defeated in the House. But when the Governor General was confronted with the request, there was no indication from the opposition, certainly from the leader of the opposition, that he was willing to form a government if Mr. Harper's request was refused. There was no serious protest from the opposition parties.

I watched this very closely, as someone who has to advise the Governor General; the Governor General really had no real option. The lesson of that is that the law isn't worth much if the fundamental political reason for it, which was to avoid opportunistic snap elections, is just discarded, not just by government leaders but by opposition leaders within almost months of the law being put to the test.

I thought it was a devastating walking away of a very sound political agreement—not just by the government; let me emphasize that.

So I'm much more comfortable with legislation that has majority or even all-party support. More than legislation, just make an agreement as the heads of state did in 1926 in London—surely you're up to that—and say, under what conditions can prorogation be advised, and under what conditions does it require something more than just the Prime Minister requesting it?

I think that should be a political agreement rather than legislation. I feel strongly about that. That's my number one choice.

● (1230)

The Chair: Thank you, Madam Jennings.

Mr. Reid.

Mr. Scott Reid: Thank you, Professor Russell.

Before I get to questions, I want to start by editorializing for a moment.

I agree with you that the courts are reluctant, with good reason, and we should be reluctant as well to give them political questions. Of course, the American Supreme Court actually has a doctrine regarding political questions, which they put in place following what was an ineffective attempt to force them to adjudicate the resolution to Dorr's Rebellion in the 1840s. I think their reasoning is wise.

I'm not sure I do agree with you on the example of the Balfour Declaration. I don't doubt that it was an agreement that was not legislated, but it only needed to have power for five years until the Statute of Westminster had gone through, unless I'm mistaken.

Prof. Peter Russell: No, it's much, much more. The Statute of Westminster settled one, but only one, issue. It didn't even settle that fully. It settled that where United Kingdom laws and the laws of any of the now independent, autonomous nation-states of the Commonwealth were in collision—let's say New Zealand had a law on trust that was different from the U.K. law on trust—the New Zealand law, or any of the Commonwealth domestic laws, would prevail, with one exception, and that was Canada. Because our constitution remained an act of the U.K. Parliament until 1982, that particular British law remained sovereign, superior in force to any Canadian law. It was to settle that issue that there were two or three meetings of prime ministers leading to it, which Mr. Bennett was part of in the early days of his administration, and that was the basic issue.

In fact, the key problem with the Statute of Westminster was finding a solution to the Canadian problem. But the big issue was on foreign affairs particularly; the Balfour Declaration is particularly pertinent for foreign affairs. Take a declaration of war. In 1914, the United Kingdom declared war and we were at war like that. In 1939, because of the Balfour Declaration, the United Kingdom declared war and our Prime Minister said, "Well, we'll have a discussion, and I think we'll probably be there." But we weren't automatically at war.

There's nothing in the Statute of Westminster about that. Declarations of wars aren't acts. The Balfour Declaration is fundamental to the equality of the member nation states of the Commonwealth.

● (1235)

Mr. Scott Reid: I shouldn't have asked you that question. That was very informative, but it used up three minutes.

Some hon. members: Oh, oh!

Prof. Peter Russell: I just wanted to make sure you saw its importance. It has served us well, too.

Mr. Scott Reid: Yes, but that took me off the track I wanted to go down, which actually comes from your book, *Two Cheers for Minority Government*. This came out, perhaps unfortunately, shortly before the events that have brought you here today, but you do have some material in there that's of interest.

In particular, you relied heavily on Jonathan Boston's book, where he's dealing with New Zealand and trying to advise New Zealanders who I think have accepted that they're into a realm of more or less perpetual minority governments. As to what goes on in non-Westminster systems in Europe with the idea of drawing lessons that can then be applied to the New Zealand situation, I think our discussions tend to revolve in this committee around the more recent prorogation, where this is really not an issue. It's the former prorogation and the attempt to replace the government with another government that is at issue there.

At any rate, just in passing, I'd like to get information on something. You cite Boston's citation of Germany, Spain, and Sweden as permitting what are called "constructive non-confidence votes", and I gather only constructive non-confidence votes—that is, votes in which not only do we say we have no confidence in the government but we would have confidence in a government led by so-and-so.

Prof. Peter Russell: That's right.

Mr. Scott Reid: That seems to me to be something where, if we were to adopt something like this, one has actually moved from the Westminster model, in which a non-confidence vote leads to an election.

Am I wrong? Is that not effectively a revolution in the conventions that govern us?

Prof. Peter Russell: It would certainly be a change, Mr. Reid.

We can change governments without an election—at least, most constitutional scholars have thought so—if, after an election, the incumbent government meets the House and wants to carry on but is quickly defeated and there's a clear alternative. One can argue about how much time must have elapsed since the election—or how little time has elapsed—but if it's still only a few weeks or a few months, most constitutional scholars think if there's an alternative government, and the Governor General, or the Lieutenant-Governor in the case of a province, thinks it does have a pretty clear chance of having the confidence, you can change governments.

The Chair: Thank you, Mr. Reid—

Prof. Peter Russell: So that's there now.

What you do with a constructive vote of non-confidence is that you would all have to agree on it. And in doing it, you'd have to recognize that this is quite a big change. A constructive vote of non-confidence—again, a vote saying "We don't have any confidence in this government, but we do have confidence, and a majority of us would support, this party, with this leader, if they formed the government"—could come any time during a parliamentary session, as has happened in Germany, not just a few weeks or months after the election.

So that would certainly be a different way of operating our parliamentary system. I happen to think it would be healthy change, because it would make all members of Parliament very careful about confidence votes and save the country from constantly being on the brink of election. I think that being constantly on the brink of the election is not good for the steady legislative work of Parliament or the steady kind of leadership you want in government.

I hope this is something you will be thinking about.

I'm glad you asked the question.

● (1240)

The Chair: I am too. Thank you.

Monsieur Guimond.

[*Translation*]

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

I should have brought my stopwatch to see how much...

[*English*]

Prof. Peter Russell: Okay. I've got the right channel now.

[*Translation*]

Mr. Michel Guimond: I hope this technical difficulty will not affect my time.

Professor Russell, thank you for appearing before us. Unlike Mr. Reid, I cannot pretend to have read your book from beginning to end. My parliamentary activities and my weekend commitments require so much work that I have no time to read it.

But I took the time to listen to you and to read your notes. By the way, your document is very well written, both in English and in French. In both languages, in the second paragraph, you bring up the idea of what is "normal" twice: "Normally, prorogation is an uncontentious event in the life of a Parliament. Its normal use is to bring a session to an end..."

Later in the text, you say that there has really been controversy seeing that Prime Minister Harper used it twice, two Decembers in a row. There is no need for me to remind you of the two controversial incidents since everyone here is in the know.

Actually, you have some doubts about the political use of prorogation. Could you comment on the issue quickly? Do not give me a four-minute answer because I only have five minutes and I have other questions.

[*English*]

Prof. Peter Russell: I'm sorry, but what was your question?

[*Translation*]

Mr. Michel Guimond: We must define prorogation so that it does not become a political tool. Is that what you are recommending?

[*English*]

Prof. Peter Russell: I'm recommending that this committee and your House, of which you are a part, reach an agreement on how you're to be closed down. That's a crucial part of the life of any body, and I think you have to decide.

The idea that you can be closed down anytime, for any length of time, for any reason, by the Prime Minister, even a Prime Minister who doesn't have a majority in your House, strikes me as making you very vulnerable, if I may say so, to being shut down in all kinds of situations. And many of the people of Canada are very disturbed by it; they're not disturbed when prorogation is used normally.

You have, in the Layton motion, one way of doing it. I must underline that none of the other Westminster parliamentary countries have crafted a rule for this. I've checked with New Zealand, Australia, and the United Kingdom. They haven't had this great public controversy about prorogation.

So you are in uncharted territory, sir, and I think you have to discuss what kind of rule would make some sense to you all, not just to the three parties who passed the Layton motion.

[*Translation*]

Mr. Michel Guimond: You are aware that the Standing Committee on Procedure and House Affairs has the power to amend the Standing Orders of the House of Commons. Is that so?

● (1245)

Prof. Peter Russell: Yes.

Mr. Michel Guimond: Let us suppose that a motion is introduced at the Standing Committee on Procedure and House Affairs, that it is adopted by a unanimous or majority vote, and that we then report to the House to amend the Standing Orders in order to define the principles of prorogation. You seem to say that this would be progress and that it would become a constitutional convention. You go even further by saying that Mr. Layton's motion is the starting point for amending the constitutional convention.

If the Standing Orders of the House are amended to include the prorogation procedures, would the Prime Minister have no other choice but to comply with the Standing Orders of the House or he would be found in contempt of Parliament?

[*English*]

Prof. Peter Russell: Yes; I think the country would be better off, though, if you could reach a unanimous decision.

I read the debate very carefully on the Layton motion on March 17. I read the government comments on it. I read them very carefully. I didn't see anything put forward by the government on what they thought the rule should be, other than possibly—they never stated it as crudely, or rudely, maybe, as I did, or as straightforwardly as I did—to have any requests for prorogation, of any length of time, no time limit at all, it doesn't matter. If, unlike Mr. Harper's request, a Prime Minister said, "Shut down the House; just shut it down, and I'll let you know, Madam, when it can come back", I haven't heard from the government—Canada hasn't heard, your committee hasn't heard, as far as I know the House of Commons hasn't heard—on what is the government's position on the rule that should govern requests of the Prime Minister.

Until you have a good discussion of that, I don't think we're going to get very far, other than perhaps laying the groundwork for another crisis—a standing order change, opposed by the government; a new standing order, violated by the Prime Minister; and then we're into a crisis.

You may say, "Well, the Prime Minister is just wrong, and we'll defeat him and we'll fight an election on it." Okay—but I don't think that's the way most Canadians want parliamentary government to be conducted in Canada, to have elections fought over vital rules, be they on the access of a committee to security documents or on the rules governing prorogation.

You have a responsibility, you members of Parliament, to try to work it out here. Can you imagine an election over these matters? You know what an election is all about—TV advertising, spin doctors. Do you think that's a good way of resolving fundamental rules of how you operate parliamentary democracy? I do not.

I'm sorry to go on here, but I'm trying to put all your feet to the fire. You've got a job to do—not to just go back to the Canadian people with parliamentary democracy in Canada in disarray because there's not an agreement on fundamental rules because you haven't even worked at it.

The Chair: Sorry, Mr. Guimond; but I don't even know how you could look at me, assuming there was more time still.

Voices: Oh, oh!

An hon. member: All that from one question.

The Chair: Mr. Christopherson.

Mr. David Christopherson: Well, on my way back from the woodshed—

Some hon. members: Oh, oh!

Mr. David Christopherson: —I would muster up the courage to ask a couple of questions.

First of all, I want to thank you, Professor. I envy those who were your students. I'm sure they got the message, whatever it was you were conveying. You're an excellent teacher. Thank you for that.

I have two questions, if I have time.

First, I'm surprised no one has gotten back to this. The previous speaker, Professor Mendes, was putting forward the notion—his opinion—that under our Constitution, the Speaker has the right to provide advice to the GG on behalf of a majority of Parliament where the Speaker, or that majority, would believe the advice is contrary to that of the Prime Minister.

It took us all by surprise, because there were letters signed by the leaders, in the one crisis we got into, that, should the GG not allow the prorogation, there was a good chance of a majority to be found.

To our understanding—we don't know for sure yet, because a lot of this happens in the dark—we don't think that letter ever got in front of the GG. It could have changed history if it had. Therefore, the question of whether or not our Speaker would have the constitutional right, upon a motion of the House, to convey an opinion to the GG, where a decision is being put in front of him or her by the Prime Minister, that may be contrary, would be allowed. Had that happened and the letter been forwarded, who knows how history would have turned out?

Could you give us your thoughts on Professor Mendes' contention that this constitutional right exists for the majority of Parliament and the Speaker?

● (1250)

Prof. Peter Russell: There is not, to my knowledge, either convention or written law on who can speak and advise the Governor General. I've advised the Governor General, and I'm sure as hell, as a professor, not mentioned in any law or convention. The Governor General gets advice, seeks advice, from a number of sources. I'm not even a lawyer.

As to whether it would be proper for the Governor General to hear advice from the Speaker, in my view, it's just fine. I think the Speaker has to think carefully about it, because if the Speaker is getting into a hot political issue and the Speaker's legitimacy.... We know that we've evolved the office of the Speaker so the legitimacy is based on the consent of the various parties of Parliament, and it's seen to be a position that's independent of any partisan affiliation. So I think the Speaker would have to think very carefully about going out.

Anybody who thinks letters addressed to the Governor General don't arrive and get read should be very careful about asserting that unless they have very strong evidence. The premise of your question, that the famous letter, which millions of Canadians actually saw in their newspapers and on television, never got the eye of the Governor General, to me is a pretty outlandish kind of possibility.

But if you want to assert that, then I think you should check it out.

Mr. David Christopherson: Well, if I can—

Prof. Peter Russell: Oh, I think you can. I think the Governor General's staff might give you an answer as to whether she saw the letter or not.

Mr. David Christopherson: Yes. And the issue, of course, becomes not whether she as an ordinary person might have seen it in the media and things like that; it's a matter of whether, under legal process, she can actually consider that as part of her judgment.

Prof. Peter Russell: Oh, heavens, yes. A letter is a letter. We all know what was in that letter. We all even know the order of the names.

Good Lord; I mean, these people are active. They get up, and they just soak everything up—including the Governor General, and her staff, and her advisers—every day, just like you.

Mr. David Christopherson: Professor, would it be in order for us to send a letter to the GG asking for clarification? Because we really don't know, sir.

Prof. Peter Russell: Sure. You can write anything to the Governor General.

Some hon. members: Oh, oh!

Prof. Peter Russell: Certainly you can.

An hon. member: You have my permission too.

Mr. David Christopherson: If the clowns are finished, we'll carry on. Don't worry about them.

Thanks.

The Chair: Great.

Madam Jennings.

Oh, I think we'll do quick little questions, if we can.

I can just imagine how that's going to look, but go ahead.

Hon. Marlene Jennings: I actually have no further questions.

I simply want to state, on behalf of my Liberal colleagues—I hope I can speak for the other colleagues around this table—thank you so much, Professor Russell. Your presentation here has been a mini course, intense and condensed, on constitutional parliamentary democracy, on the issue of constitutional conventions, and on the roles, authority, and prerogative of the different branches.

I just want to thank you for that.

Some hon. members: Hear, hear!

The Chair: With the permission of the committee, the chair would love to ask a question.

Some hon. members: Agreed.

The Chair: The chair doesn't get do this very often.

It will be just a short one. Somebody turn on the clock.

Professor Mendes suggested here that by changing standing orders and maybe even moving relevant legislation that went with it, we could create convention.

Prof. Peter Russell: Oh, I think you can, but I don't think you need to do all that to create a convention.

If the leaders of the four parliamentary parties sat in a room, after getting advice and drafts from their various helpers, and came out of the room and said, "After meeting, we now agree," just as the prime ministers of the countries of the Commonwealth, that's all you need. It's not fancy and fussy and difficult.

The Chair: I suggest that one is total agreement and cooperation in that level of agreement, but the other can be done through simple majority. The creating of new standing orders or the creating of legislation that goes with it can actually be done with one, or two, or three parties kicking and screaming.

Are you suggesting that, if that were done, that would not be creating a legitimate—

Prof. Peter Russell: I don't think it creates as solid a foundation for going forward as an agreement of all the parties, and it leaves before us the possibility of a crisis. Most Canadians do not want another crisis of this kind.

● (1255)

The Chair: I agree, sir. That's why I'm trying to get at what a convention truly is, and how we might arrive at one. Thank you.

A one-off question from Mr. Holder?

Mr. Ed Holder: Yes, please.

Actually, if you'd humour me, it ties into what Mr. Christopherson said: three brief yes-no answers, that's all.

These are based on what Mr. Mendes said.

I think your question, David, was the right one.

First, sir, yes or no: the Speaker has the power to advise the Governor General.

Prof. Peter Russell: "Advise"....

Mr. Ed Holder: I'm just taking his direct quote. Yes or no?

Prof. Peter Russell: "Communicate", yes.

Mr. Ed Holder: Question two: the Speaker has equal power—this is what he said, "equal power"—to advise the Governor General as the Prime Minister. Yes or no?

Prof. Peter Russell: Oh, no, I don't agree with that. The Prime Minister is the chief constitutional adviser of governments in all the Westminster countries.

Hon. Marlene Jennings: On a point of order, I believe that Mr. Holder may be unwittingly, unintentionally, mischaracterizing the statements and affirmations that Professor Mendes made here.

He did not state that the Speaker—

The Chair: We'll check the blues.

Mr. Ed Holder: Thank you.

I do many things unwittingly, so that's always possible, but I thought that's what I heard. We'll clarify with the blues.

Question three: it's the Governor General's role to respond to the will of the people.

Prof. Peter Russell: The Governor General most certainly makes all her decisions for the well-being and welfare of Canadians, and, on these constitutional matters, as close as she can get to it, to figure out what most Canadians desire in the circumstances.

She is not there to exercise her personal judgment or any kind of ideological view. She's got to look at the country and the situation it's in and try to come up with a decision that's in the best interests of Canadians. She seeks that kind of advice from her advisers.

Mr. Ed Holder: I thought that's what we did in the House too.

Thank you.

The Chair: Mr. Lukiwski, you've been kind of pawing at the table there. I'll let you go with a quick one.

Mr. Tom Lukiwski: Thank you, Chair.

Thank you, Professor Russell. I agree with my colleague Marlene that it's been....

It happens the odd time, Marlene. Don't have a heart attack.

One time I actually agreed with Yvon Godin twice in one meeting. I thought he was going to faint.

It's been very instructive, and more than that; what David said about your being a good teacher, I concur. It's always been my contention that a good teacher is about more than just imparting dry, factual information; it's the presentation skills that come along with it. You are far better, sir, than many we have seen at this committee.

My question to you is along the line of constitutionality versus democratic will. You've just referred to the fact that the Governor General is really responsive to the wishes of Canadians. It really comes down to a situation we had two years ago, when a prorogation took place. That's when there was an opportunity for the three opposition parties to present their case to the Governor General requesting that they be given the opportunity to form a coalition government. The prorogation took place shortly thereafter.

I have no argument with the fact that from a constitutional standpoint, that could occur, quite correct. But how would you, sir—this is more of a political debate argument, and I understand that—interpret it if the following hypothetical scenario took place? Let's say there was a coalition agreement among three opposition parties shortly after a federal election—I'm talking within weeks or months—but it was demonstrated empirically that the majority of Canadians, over 50%, did not want that coalition government to govern.

From a constitutional standpoint, it was certainly within the constitutional purview for a coalition government to govern. But the Governor General also was aware that the majority of Canadians wanted no part of that.

● (1300)

The Chair: Excuse me, Mr. Lukiwski.

Yes, Ms. Hall Findlay.

Ms. Martha Hall Findlay (Willowdale, Lib.): Thank you, Mr. Chair.

I just want to say that I don't know that there is any way that anyone could say there was an empirical—

Mr. Tom Lukiwski: I'm saying hypothetically.

Prof. Peter Russell: I'll deal with that.

Some hon. members: Oh, oh!

Ms. Martha Hall Findlay: Thank you.

Mr. Tom Lukiwski: Let me rephrase: rather than empirical, what if—

Prof. Peter Russell: No, I think I got your question.

Some hon.members: Oh, oh!

Prof. Peter Russell: The Governor General, in making a judgment call on whether an alternative Prime Minister—in that case, Mr. Dion—could command the confidence of the House of Commons, would not be governed by Gallup polls. Polling is not a good gauge of what people in high office should be doing for the will of the people. It's based on all kinds of vagaries of the day. It's not a good way of testing the "will" of the people.

What the Governor General would have to be very clear about is whether that government would have the confidence of the House of Commons. That's the licence to govern, not a day-to-day referendum of the people, but would a majority of the members of the House of Commons support it. That's the consideration.

As someone who was involved in advising the Governor General, the Gallup polls, steamed, I might say, by some tremendous publicity about the evil of coalitions, which are almost the norm in the parliamentary world, would not be considered an accurate view of the will of the people.

Mr. Tom Lukiwski: Thank you for that.

The Chair: Thank you, Professor Russell. You have moved to the top of my favourite witnesses, and that's a tough hill to climb, I'll tell you.

Thank you so, so much for coming today. It has been an education for me.

Prof. Peter Russell: I wish you real success. I think many Canadians do. You have a big challenge. I hope you're up to it.

Some hon. members: Hear, hear!

The Chair: Thank you.

David, we're real close. What have you got?

Mr. David Christopherson: I've been trying to get the floor for a while.

All I wanted to do was to see if we could get agreement to ask Mr. Walsh to give us his opinion on the notion of the Speaker being able to give advice to the GG.

The Chair: I will ask that. Mr. Walsh has made himself available to the chair for that, so I will ask that question.

Mr. David Christopherson: Thank you.

The Chair: The meeting is adjourned.

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