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Chair

Mr. Joe Preston

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● (1110)

[*English*]

The Chair (Mr. Joe Preston (Elgin—Middlesex—London, CPC)): I'd like to call to order meeting number 12 of the Standing Committee on Procedure and House Affairs. We're just a little late getting started. Immigration was in here before us this morning, solving the country's problems.

We are continuing our study related to issues of prorogation. Our first witness this morning is Mr. Pelletier from the University of Ottawa. I'm glad you travelled all the way here today for us.

As is our norm, we'll have Professor Pelletier give us a bit of an opening statement. We have one hour with each of our witnesses today, so we'll probably use five-minute rounds to start off with, but let's see how well we can do. We'll get started.

Professor Pelletier, I give the floor to you.

[*Translation*]

Prof. Benoît Pelletier (Full Professor, Faculty of Law, University of Ottawa, As an Individual): Thank you very much, Mr. Chair.

Ladies and gentlemen, thank you for inviting me to appear today to discuss a matter of great importance, as we know: prorogation. I was asked to address the issue from a relatively theoretical perspective. As I understand it, there is no bill under consideration at this time. Consequently, we will essentially be looking at the parameters of prorogation and trying to identify its specific characteristics. We also want to look into the future and try to see what limits could be placed on the Crown's power to prorogue Parliament. Or, we may want to see—again, looking to the future, how prorogation might—or might not—be used in future.

First of all, with your permission, I would like to make some preliminary comments that are related, to a greater or lesser extent, to the theme of prorogation. In many cases, I will not be telling you anything that you do not already know. Still, it is important to make a couple of points when examining the issue of prorogation.

First of all, parliaments, including the current one, basically have three functions. The fist two are well-known; the third, which I would like to address, is overlooked more often than not.

Of course, there is the major function of passing legislation, which is central to the legislative process.

The second one is monitoring the government, its decisions, its actions and, of course, its spending, etc.

The third major function which, as I said, is overshadowed more often than the other two, is Parliament's role in legitimizing the government.

In fact, it is Parliament which gives the government its legitimacy. Indeed, that role is central to the principle of responsible government. The principle of responsible government, or ministerial responsibility, means that, in order to retain its political legitimacy, the government must constantly enjoy the support of a majority of elected members of Parliament. This suggests that there is, in fact, a direct connection between parliamentary activity and a government's legitimacy.

In my opinion, it goes much further than just the principle of ministerial responsibility. Ministerial responsibility—when it applies—is brutal and stringent in its application. If the government loses the confidence of the elected members and, in most cases, when the issue is an important one or one where the House of Commons' confidence in the government is at stake, the government must offer its resignation to the Governor General. Those are the most obvious cases where the principle of ministerial responsibility applies—which, once again, is connected to the government's legitimization by Parliament.

I said that it goes further than that. Indeed, the weaker the Parliament—and I did not say “inactive”, nor did I talk about dissolution or the triggering of a general election, because that is not necessary—the less it is able to fulfill its functions or responsibilities. The less Parliament is valued, the less likely it is that Canadians will have a positive view of Parliament and, normally, the less political legitimacy the government can claim. In other words, there is a direct connection between Parliament's legitimacy and Parliament's effectiveness, and the legitimacy a government can claim.

Consequently, a government should normally be concerned about the health of Parliament. It should, at the very least, be respectful of parliamentary activity, because its own political legitimacy to govern is at stake.

The second major observation is that the separation of powers here in Canada is flexible. As you know, in our parliamentary system, which takes its inspiration from the Westminster model, government members—at least, the vast majority of its members—are also elected by the people, and therefore sit in Parliament where they are accountable for their decisions and their actions.

So, in Canada, we have a flexible separation of powers, unlike the system in other countries, particularly the United States, where the separation of powers is a little more rigid. In this country, the parliamentary system is characterized by the coexistence of powers, as some say. Others even talk about combined powers—in other words, a kind of cooperation that must exist between the executive and the legislative branches in order for Parliament to function.

To ensure that cooperation—or at the very least, the harmonious coexistence of the legislative and executive branches—there are a number of mechanisms—what are known as checks and balances. In other words, Parliament has a number of ways of either punishing the government, or limiting its ambitions—or, at the very least, imposing its will on the government. The reverse is also true: the government has a number of ways of punishing Parliament, making it more docile, balancing its influence, calling on it to show wisdom or simply imposing its will on Parliament.

In the first category, of course, there are mechanisms which Parliament can access to limit the executive power. There is the question period—as you know—parliamentary committees, and the process for passing legislation, which necessarily leads to debate, discussion, amendments and votes. There is also the process for approving government spending, as well as the principle of ministerial responsibility. That is Parliament's most effective recourse when it comes to punishing a government. Indeed, ministerial responsibility allows it to withdraw its confidence in the government and, on major, important questions, to force the government to resign.

On the other side, as I said, the government also has ways whereby it can impose its will on Parliament. The two most well-known and, probably, most effective mechanisms are dissolution and prorogation. By extension, I could add a third mechanism, which is summoning Parliament. Therefore, the government has two important tools at his disposal to discipline Parliament or, at least, impose its will on Parliament—once again, they are prorogation and dissolution. By extension, we could add a third mechanism, which is summoning Parliament.

That brings me to a third point. We are part of a system where the Prime Minister has boundless power. Of course, that can be said for the Executive as a whole, but it is obviously the case for the Prime Minister. The latter has a huge amount of power. I do not need to describe it. I think that you are well aware of the extent of that power. And that prime ministerial power is necessarily seen by some Canadians as a source of imbalance in the power relationship between Parliament and the Executive. As a country, if we were to move in any particular direction, in my opinion, it would be to further limit the power of the Executive, as opposed to further limiting the power of Parliament. In other words, if there was a need to rebalance the forces within our system, that rebalancing should not involve greater government control over parliamentary activities; on the contrary, it should mean a strengthening of Parliament's powers in relation to the Executive.

My fourth observation is that the power to prorogue Parliament is a prerogative of the Crown.

● (1115)

Because it is a prerogative, that power should in theory—and I emphasize the words “in theory”—be subject to certain limits. However, I will qualify that quite considerably, as you will see. This power can be limited by legislation, unless it can be demonstrated that the prorogation power enjoys formal constitutional protections. What are those prerogatives? Basically, they are powers that the Crown is able to exercise simply because they have not been removed by Parliament.They are therefore powers derived from that period where all the powers of the state were vested in the sovereign. Obviously, we are going back to our ancestor, the United Kingdom. Slowly, the sovereign's powers were removed in favour of Parliament. By its very nature, a prerogative can be limited or circumscribed by legislation. That prerogative only exists insofar as Parliament has not appropriated that power. It only exists insofar as Parliament has agreed that it should remain with the Crown, unless —and this is an important distinction—it is not possible to demonstrate that the prerogative—in this case, the power to prorogue Parliament—enjoys constitutional protection.

So, the question is whether, in the Canadian context, the power to prorogue Parliament enjoys such constitutional protection. If the answer is yes, that means that no legislation can limit or abolish that power. At the very least, it cannot be limited in such a way as to alter it. If the answer is no—in other words, if the prorogation power does not enjoy constitutional protection of any kind—the normal rule is that legislation can limit the Crown's prerogative to prorogue Parliament.

One initial observation can be made. Unlike the power to dissolve Parliament, nowhere in the Canadian Constitution or the Constitution Act, 1867, for example, is there any mention of explicit constitutional protection for the prorogation power. The reason I say “unlike the power to dissolve Parliament”, is that this specific power is laid out in the Constitution Act, 1867. The legislation refers to it. Of course, that is connected to the maximum term of a Parliament, which is five years, as you know. That has not only been the case since the Charter was adopted in 1982. The provision providing for a maximum term of five years for Parliament has been in place since 1867. The power to dissolve the House of Commons is connected to the maximum term of an election mandate—the term for Parliament —and means that the Governor General can dissolve the House of Commons before the five-year term is up, if the circumstances warrant, obviously. However, there is absolutely no explicit protection for the power to prorogue Parliament.

At the same time, the Constitution does provide that the House of Commons must meet at least once a year. There must be one session every year, at least. Like the other one, that provision does not only flow from the Constitution Act, 1982; it was also part of the Constitution Act, 1867. That is all there is that can in any way be connected to the power to prorogue Parliament; however, in this particular case, the connection is a very indirect one.

Does that mean that the prorogation power enjoys no constitutional protection? That is difficult to say, because there is no explicit constitutional protection; at the same time, it could be argued that it enjoys tacit constitutional protection.

● (1120)

In my opinion, prorogation can be seen as a component of the separation of powers in government. The separation of powers is obviously a pillar of the Canadian state, and there is every reason to believe that the Supreme Court of Canada would recognize that even the principle of the separation of powers is based on the Constitution. In other words, the separation of powers enjoys tacit constitutional protection, and because the power to prorogue is a critical component of the separation of powers, it, too, enjoys that same constitutional protection.

None of this is absolutely clear; we are dealing with assumptions. But this is one that I, personally, subscribe to. Therefore, I support the theory that the separation of powers enjoys implicit constitutional protection and that, by that very fact, the power to prorogue Parliament, which is connected to the separation of powers, enjoys that same protection.

What is the basis for that protection? It may be derived from the preamble of the Constitution Act, 1867, which originally—in 1867—gave Canadians a Constitution that rested on the same principles as that of Great Britain. Clearly, under the preamble, there is protection for the separation of powers—this was a recognized principle in the United Kingdom in 1867—and, by extension, for the power to prorogue. As I said, that power is an essential component of the separation of powers.

Were it not derived from the preamble, the Supreme Court of Canada could find that the separation of powers is an inherent constitutional principle and, by that very fact, that the power to prorogue, which is one of its essential conditions, also enjoys inherent constitutional protection.

These inherent constitutional principles can be found, in particular, in the Reference re Secession of Quebec, a ruling handed down by the Supreme Court of Canada in 1998, as you know. Of course, the Court did not identify the separation of powers as an inherent principle in that ruling, but the logic followed by the Supreme Court in the Reference re Secession of Quebec, which relies on the identification of inherent constitutional principles, would, in my view, support the theory that the separation of powers is also an inherent constitutional principle—even though, as I just said, the Supreme Court did not recognize it as such in the above-mentioned reference. However, no one believes that the principles identified by the Court in that reference are exhaustive. Therefore, there could be others, including the separation of powers. If the separation of powers does enjoy such implicit constitutional protection, either under the preamble of the Constitution Act, 1867, or as an inherent constitutional principle, the odds are that the power to prorogue, which is an essential component of the separation of powers, enjoys exactly the same protection.

That leads me to the next point. If it is true that the prorogation power enjoys constitutional protection under the theory I have just put forward—either through the preamble of the Constitution Act, 1867 or as an inherent constitutional principle—then how can this constitutional principle be amended or revoked? If this principle truly enjoys the constitutional protection I have just described, the odds are that it can only be amended or revoked in accordance with subsection 41(a) of the Constitution Act, 1982, which provides for unanimous consent with respect to anything dealing with “the office of the Queen, the Governor General and the Lieutenant Governor”.

● (1125)

It is important to remember, however, that were we to conclude that, contrary to my claim, the prorogation power does not enjoy implicit or tacit constitutional protection, subsection 41(a) would probably not apply, as it deals with amendments to the Constitution of Canada. In that case, a simple Act of Parliament could limit, and even do away with the power to prorogue—the Crown prerogative that I described previously. However, if it is given constitutional status, as I believe it has, any amendment should be subject to the rule of unanimous consent laid out in subsection 41(a).

So, as I see it, that is pretty much the constitutional setting, so to speak, as regards the power to prorogue Parliament. In addition to that constitutional setting, there are, of course, a whole series of questions which are political in nature. For example, could too frequent use of the power to prorogue Parliament have the effect of weakening Parliament and destabilizing parliamentary activity? And does it not ultimately place too much power in the hands of the Executive, compared to the Legislative Branch? I honestly believe it does. I think that repeated, regular or even annual use of prorogation in our political system—specific to Canada—would run the risk of making Parliament extremely weak in relation to the government. That is even more so the case because, as I said earlier, our system is one where the powers of the Prime Minister and the Executive are already immeasurable, and probably excessive compared to those of Parliament.

If we were to do something in this area, in my opinion, any actions take us in the opposite direction. In other words, we should not be increasing the government's power, as I mentioned earlier, by allowing it to prorogue the House of Commons on a regular, or even, annual basis. It should be the opposite. The powers of Parliament should be strengthened in relation to those of the Executive and the government.

● (1130)

[*English*]

The Chair: Thank you for laying out the arguments for us, and let's see if we can get some thoughts going on some questions.

Monsieur Proulx, are you going first for us today?

[*Translation*]

Mr. Marcel Proulx (Hull—Aylmer, Lib.): Yes, Mr. Chairman.

[*English*]

The Chair: Great. Let's try five minutes and see if we can get a good round in, and if there's a bit of time after that, we'll do some—

Mr. Marcel Proulx: Or if my questions are good, you'll give me more time?

The Chair: You know I always do.

Mr. Marcel Proulx: Thank you.

[*Translation*]

Mr. Pelletier, thank you for agreeing to appear before the Committee this morning. After hearing your comments this morning, I have no doubt that many people at this table will want to register for your courses at the university. It is a very complicated subject, but a very interesting one as well.

Let us assume, Mr. Pelletier, that your theory is correct—note that I said "let us assume". Are there any options open to us, without our necessarily limiting the right to prorogue Parliament? Could we attach consequences to prorogation? This has been raised in previous meetings. For example, if the government decided to prorogue Parliament, when Parliament returned, for a certain number of months, the government would not be entitled to private members' business or other options it might normally have in the House. It would be kind of… I don't mean an obstacle. But it would be something that would cause the government to reflect or would perhaps carry with it certain consequences, because Parliament had been prorogued. The government would be forced to consider the pros and cons before deciding whether it was worth it.

Prof. Benoît Pelletier: In the answer I am going to give you, I am assuming that my own theory is the correct one, even though I am not entirely sure of that.

Mr. Marcel Proulx: That is what I said, "let us assume that your theory is correct".

Prof. Benoît Pelletier: Indeed, no expert appearing before you could discuss these issues with total certainty, unless his primary goal was to convince you. It is impossible to discuss these matters with complete certainty, because there are no provisions that expressly deal with this.

In my view, the very definition of a prerogative is that it can be exercised on a discretionary basis. When a prerogative can no longer be exercised in certain circumstances prescribed by law, it is no longer a prerogative. For a prerogative to be a prerogative and remain so, I believe it must respect the Crown's discretion—in other words, the Prime Minister's discretion as senior advisor to the Governor General. So, the Crown's discretion to exercise that power, when it sees fit, must be respected.

Could there be an annual prorogation, such as in Great Britain? Probably, but that would not prevent other prorogations from occurring during the year. Insofar as the Crown's discretion to prorogue Parliament when it sees fit is respected, in my view, the nature of the prerogative remains intact. So, that was my first point.

The second point is that the limitations you referred to must not be such that they would alter the prerogative. They must not, in terms of their number, significance or scope, be of a nature that would ultimately invalidate the power to prorogue Parliament. Basically, any conditions placed on the exercise of that power must not be so onerous that, once again, they alter the spirit of a prerogative which is linked to the Crown's discretion.

However, is it conceivable to introduce restrictions that would mean a government would suffer the consequences of proroguing Parliament? In my opinion, that is certainly conceivable. Again, it would be possible only if the prorogation power were not altered. In other words, those restrictions must be sufficiently explicit on paper for one to conclude that the prorogation power is not altered and that what is at stake is not a Crown prerogative.

● (1135)

[*English*]

The Chair: Thank you.

We're right on five, so let's see if we can get a whole round in.

Mr. Marcel Proulx: It was a good question.

The Chair: It was a great question, and did you see the answer you got? It was really good.

Mr. Reid, it's up to you.

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

The Chair: I see you've brought your own timer today. You're not trusting the chair.

Mr. Scott Reid: I don't trust myself, Mr. Chair. I want to make sure I keep within my time limits.

Welcome, Professor Pelletier. It's a pleasure to have you here.

One of the things I thought would be helpful for us as we go through this process of looking at prorogation, and legitimate limits on prorogation, is looking for some comparison elsewhere, in particular examples from other Westminster systems, other countries that use the same system, and more particularly what has happened in the experience of Canada's provinces.

I find we don't get as much useful material as we might hope to find. The phenomenon of repeated minority governments is something that doesn't occur that often, either in Canadian federal practice—it did occur in the 1960s and back in the 1920s—or in provincial practice. I think I'm right in saying that in Quebec there's only been one minority government in the past century. Is that correct?

Prof. Benoît Pelletier: That is correct; unfortunately, there was one.

Mr. Scott Reid: All the discussion about prorogation in a highly disciplined party system is irrelevant when you've got a majority government, which is the majority of Canada's experience both federally and provincially.

Obviously, had there been a majority government, say, as of December 30, nobody could have argued on prorogation, "Well, this is being done in order to prevent committee hearings from taking place; it's something the government doesn't want to have too many hearings into, and those committee hearings have been shut down simply by the government ordering its members, who form the majority of that committee, not to call for a meeting." That would have been the end of that.

Likewise, the prorogation that took place a year earlier would obviously not have occurred. The parties representing a minority in the Parliament could hardly have said, "We have a coalition that we would like to now replace the government."

I actually am interested in your provincial experience, although that was a very brief government. I don't know if there were any prorogations.

Prof. Benoît Pelletier: No, there were not.

Mr. Scott Reid: Okay. Was that about two years or a year and a half?

Prof. Benoît Pelletier: It was 2007 to 2008, for a year and a half, without any prorogation.

Mr. Scott Reid: The question I have here is really more conceptual. I think I'm probably going to ask the same question to Professor Franks.

Isn't the fundamental problem we have here, at a conceptual level, that we are trying to find a proper use for a tool that most of the time in our constitutional history has been used in an utterly different way under utterly different circumstances that simply aren't relevant to our current circumstances? Aren't we really struggling, then, not with the question of how to prevent prime ministerial dictatorship, which is going to occur anyway when you have a majority government, just as it does in every province, but rather we are trying to deal with how to make minority governments work better, but we haven't actually agreed on how minority governments ought to actually work?

I'll throw that question out to you, and you can answer it when you like.

● (1140)

Prof. Benoît Pelletier: I'm not sure I'll answer as fully as maybe you would like me to, but first I'd say that Canadians now react very strongly to the use of the power to prorogue, and it's quite surprising, because there have been many prorogations in Canada's history—more than 105. So why is it that the population now reacts so strongly when prorogations happen, as was the case last December and January?

It might be because now the population feels that the power of the executive has become too strong vis-à-vis the power of Parliament. I would say that many Canadians—not all of them, of course, because some people are not interested in these questions and are too cynical about Parliament itself to really defend it or protect it—are extremely preoccupied by the overwhelming power of the executive compared to that of Parliament. They would like some kind of limits on the executive powers.

Some people, I would say, do support the idea that this Parliament brings limits to the power to prorogue, that is, the power of the crown but mostly of the government, as you know, and of the Prime Minister. But then I would say to be very careful, because this is still a prerogative, and it should stay as it is, in my view. Moreover, I said before that it has some implicit or tacit constitutional protections, so I think we should be very careful not to react too spontaneously, but to examine all these questions in depth, as this committee is doing, without any pressure from the outside.

This being said, what is interesting, though, is to see that in the United Kingdom there is an annual prorogation. Can you believe it? The country that gave birth to Canada is a country that now has an annual prorogation, but there's not the same political context. I would say the party line, the party discipline, is not what it is in Canada. In Canada the party discipline is stronger than what exists in the United Kingdom. Because of the party discipline and the power of the Prime Minister and the executive over the members of Parliament, the population would like to see the situation being reversed and Parliament being reaffirmed vis-à-vis the government, and if that's the case, then an annual prorogation would not be the solution at all. It would be worse because it would strengthen the power of the executive, vis-à-vis Parliament, when most Canadians want the opposite.

The Chair: Thank you.

We went a little long there, but I thought we were getting a good answer, so we went with it.

● (1145)

Mr. Marcel Proulx: I noticed that.

The Chair: It's good to be noticed.

Monsieur Paquette, are you up today?

Thank you, and welcome, again, today.

[*Translation*]

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

Thank you for your opening remarks, Mr. Pelletier. I was already somewhat aware of your theory. I do want to thank you for accepting the Committee's invitation to appear.

As you mentioned, the Committee is studying this matter to see if there is something that can be done, or whether the idea of limiting the Prime Minister's power to prorogue Parliament is going nowhere.

I would like you to explain once again—because I did not do much constitutional law at university—why you believe the power to prorogue is a component of the separation of powers.

Mr. Benoît Pelletier: Once again, it is connected to the checks and balances I referred to when I began my opening remarks. In other words, Parliament has a certain number of mechanisms available to it to discipline the government.

I mentioned question period, committees and ministerial responsibility itself. As for the government, it also has a certain number of tools available to it to pressure Parliament, and those tools are well known. The primary ones are dissolution, of course, and prorogation. And, by extension, as I said, summoning Parliament.

Those are the mechanisms that are deemed to provide for checks and balances between the executive branch and the legislative branch within our parliamentary system.

With that background, I have concluded that the prorogation power is tied to the separation of powers, because it provides for these checks and balances between the legislative branch and the executive branch. It contributes to those checks and balances. Therefore, I do not see how the prorogation power could be dissociated from the very principle of the separation of powers.

Obviously, other experts may not share my opinion, but as I see it, it is really one of the checks and balances that are essential to our parliamentary system.

Mr. Pierre Paquette: So far, a great many people have presented their views on this. I am thinking in particular of Professor Mendes, from the University of Ottawa, whom you probably know. He said that, without affecting the Governor General's power to prorogue, it would be possible to limit the ability of the Prime Minister, as senior advisor, to go to the Governor General to ask that Parliament be prorogued.

Some have compared this to Bill C-16 on fixed date elections. Basically, it is the House of Commons expressing its wish that the government not call elections for partisan reasons and that it have a fixed term of office. However, we also know that in that bill, there was a provision that did not challenge… In a way, it is wishful thinking. And Mr. Mendes explained that, even if it is wishful thinking, over time, a kind of constitutional convention is established whereby the prorogation power cannot be exercised outside of the conditions laid out in the legislation.

In fact, he made a number of suggestions, and I would like to run them by you to see what you think.

First of all, he talked about using the Standing Orders of the House of Commons to prevent the Prime Minister from asking for prorogation in the first year following a Speech from the Throne.

Also, the Prime Minister would have to advise the Senate and the House of Commons in order for there to be a debate subsequently—in other words, a prorogation could not last more than one month. He also proposed a number of other things that would result in the establishment of constitutional conventions, which would become binding over time.

Is that an avenue that could be explored or are we really looking at a constitutional amendment?

Mr. Benoît Pelletier: As you describe it, I would say it is not as conceivable as Mr. Mendes has presented it to be.

The first point is that many experts only consider subsection 41(a) of the Constitution Act, 1982, which deals with the office of the Queen. Everyone agrees that the office of the Queen cannot be changed without a formal constitutional amendment.

I go a little further than that, as I believe the prorogation power itself enjoys constitutional protection as a component of the separation of powers. Without even talking about the office of the Queen, I believe the power to prorogue Parliament, as a discretionary power and prerogative, enjoys constitutional protection.

If that is the case, it means that no significant limits can be placed on the Crown's discretion.

The restrictions you referred to earlier, such as preventing prorogation from taking place—

● (1150)

Mr. Pierre Paquette: There would be a political price to pay.

Mr. Benoît Pelletier: Yes, but I am not sure that this would, in fact, be feasible from a legal standpoint. I believe the prerogative is protected constitutionally and implies discretion. That discretion cannot be touched, and legislation must not prejudicially affect it.

There is a second point as well. You talked about the legislation on fixed date elections, but I am sure you noted that the principle of ministerial responsibility is nevertheless protected and respected in that legislation. In my opinion, it is a poor example under the circumstances. The principle under discussion here is left intact—in other words, the primary principle, that being ministerial responsibility. If I apply the same argument to prorogation, I would say that you would also have to respect the principle of prorogation in any bill that attempted to set parameters around it. This goes back to what I said earlier: the legislation must not be so broad as to alter the prorogation power or place excessive limits on that power.

Finally, you referred to the establishment of a possible constitutional convention. The fact remains, however, that even if a constitutional convention were to be established whereby the government had to show self-discipline in its use of prorogation, if the government were to decide one day that it was no longer going to show that kind of self-discipline, in my view, the Constitution would trump that constitutional convention. And, since I believe the prorogation power enjoys implicit constitutional protection, once again, that protection would trump the constitutional convention.

Mr. Pierre Paquette: Do I have any time left?

[*English*]

The Chair: We're at seven and a half minutes. So we're being very good today.

Mr. Christopherson, you're up.

Mr. David Christopherson (Hamilton Centre, NDP): Thank you, Chair. I appreciate that.

Thank you very much, Professor, for being here today.

At the risk of speaking out of turn—and I'll hear if I have—I think most of us accept that the power to prorogue exists in the Constitution. If we want to change prorogation in any way, we're talking about a constitutional amendment. And in speaking on this, I'm a layperson, not an academic, so I am going to say all of the following in pedestrian language. What we're looking at is making changes to the procedures that happen prior to the Prime Minister of the day taking the request formally to the GG. We accept that the GG has that residual or direct authority. What we're questioning is whether we can put certain restrictions on the Prime Minister that would not have constitutional backing, but would be enforceable through an array of other things, including some disincentives that would be in place. For instance, it's been mentioned that maybe a Prime Minister who prorogues without following a procedure in a resolution or in the Standing Orders would not be allowed to introduce certain government bills and wouldn't be able to do certain things that normally they would, so that there is a political price. The array of disincentives is a detail that we're not yet at. What we're still trying to come to grips with I think is the concept of where we can work and what our options are within that.

So I just want the following to be clear. When you talk about constitutional power, Professor, you are talking about the crown and not the Prime Minister per se. So my question would be....

Oh, I see you shaking your head, so I'd better stop there.

Prof. Benoît Pelletier: When I talk about the power of the crown, it is de facto the power of the Prime Minister. I don't know any power of the crown that is a real power of the crown and not exercised under, I would say, the influence of the Prime Minister. So in today's world, the power of the crown is de facto exercised by the Prime Minister.

● (1155)

Mr. David Christopherson: Are you suggesting that the GG has no reserve discretionary decision-making power?

Prof. Benoît Pelletier: Exactly. With regard to prorogation, yes, this is my—

Mr. David Christopherson: I'm sorry, I just want to be clear, sir. You are suggesting that the GG would not have the right to say no.

Prof. Benoît Pelletier: Exactly—concerning prorogation. Concerning dissolution, it would be something different because of the consequences.

Mr. David Christopherson: Okay. But what about changing his actions then, the procedures—he, she, the Prime Minister—everything that happened prior to the actual meeting.

Prof. Benoît Pelletier: Then could you impose some limits on the power of the crown to prorogue, under the influence of the Prime Minister?

Mr. David Christopherson: I see. You're making the link so strong. You're saying that anything we bind the Prime Minister to means we're trying to do it to the—

Prof. Benoît Pelletier: No.

Mr. David Christopherson: All right. Then I'm not understanding it.

Prof. Benoît Pelletier: Could you impose some limits? The answer is yes. That is what I said to Mr. Proulx before. But there is a limit to what you could do in terms of limits. The limits themselves should be limited, because if you go too far you change the nature of the power itself, and it's not a prerogative animal. Where is the line? It is very difficult to draw. Where is the line between what you can do and what you cannot do? It's difficult to say.

So could there be some limits? My answer is yes, as I said to Mr. Proulx before. But there is a limit to what you can do in terms of limiting—

Mr. David Christopherson: Can you give us an example of what you could do?

Prof. Benoît Pelletier: If you prohibit the use of the power to prorogue for a certain period of time, in my view, it goes against the nature of prerogative. Prerogative is something that can be used at the discretion of the crown, de facto the Prime Minister. So if you limit the period during which prorogation is possible and not possible, you go too far.

Mr. David Christopherson: I'm going to run out of time, sir. That's why I'm interrupting, and I do apologize for that.

The Chair: That will be very soon.

Mr. David Christopherson: Yes, I figured that.

I'm not advocating this, but the motion that got us here reads:

> That, in the opinion of the House, the Prime Minister shall not advise the Governor General to prorogue any session of any Parliament for longer than seven calendar days without a specific resolution of this House of Commons to support such a prorogation.

Is that within the range of options you think Parliament has, or do you think that has already stepped over the line?

Prof. Benoît Pelletier: I did not have time to study this very closely, but a priori I would say it might go too far.

● (1200)

Mr. David Christopherson: Really? You're telling me that's what we can't do, so what do you think we can do?

Prof. Benoît Pelletier: As Mr. Proulx said, there can be consequences when prorogation is used. You can say that if you use prorogation, these are the consequences you will have to assume, but these consequences come after the prorogation. If you want to limit prorogation before it is done, limit the power itself. But no one can be certain.

You said right at the beginning, if I understood you well, that many experts agree this is protected under paragraph 41(a) of the Constitution Act, 1982, “the office of the Queen, the Governor General and the Lieutenant Governor”. I'm still talking about the power to prorogue.

If it is true that many experts agree it's protected under paragraph 41(a), then it means it's provided for in the Constitution. If it's in the Constitution, where is it exactly? If it is in the Constitution, where does that power begin and where does it end? That's the question I raise before this committee.

I personally think it has an implicit constitutional protection. If that is true, how can Parliament limit the Constitution of Canada? That's the main question. If it can do so, to what extent can it do so?

The Chair: Thank you.

We have used all of our time for this witness. I'm happy to take a couple of one-off questions, but it will cut into the time of our next witness. I'll have to do it from a balanced point of view.

Let's have very quick questions and answers.

Madam Jennings.

[*Translation*]

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): If I am not mistaken, in terms of our ability to restrict that power, your opinion is that it cannot be done, although Parliament could decide that there would be specific consequences under certain circumstances. Parliament's law officer told us precisely that. Rather than invoking a standing order stating that the Prime Minister cannot request prorogation without meeting such and such a condition, Parliament could simply say that there would be this or that consequence if the Prime Minister requested prorogation without doing that.

In your mind, would that counter any weakening of Parliament, so that Parliament, as we say in English,

[*English*]

flexes its muscles. It says you can do what you want, but we're warning you that if you do certain things we don't like, here are the consequences.

[*Translation*]

Mr. Benoît Pelletier: Yes, exactly. I believe certain restrictions could be imposed, such as the ones Mr. Proulx referred to. There could ultimately be consequences from exercising the power to prorogue Parliament. There could also be acceptable limits—once again, provided that they do not alter the nature of the prerogative.

Mr. Marcel Proulx: Such as what?

Mr. Benoît Pelletier: We would have to see just how far we can go. I have no specific ideas on that. To be frank, however, it could not, as I see it, have the effect of emasculating the prerogative or removing its discretionary nature.

If I say to you that you have the prerogative of deciding who, in this room, will have the right to leave, I presume that I am giving you some discretion.

[*English*]

The term “prerogative” implies a discretion, in my view. If there is no discretion there is no prerogative. If the prerogative is constitutionally protected, it means that this discretion is constitutionally protected. If it is, then a law from this Parliament could not limit that discretion.

The Chair: Thank you.

Mr. Lukiwski.

Mr. Tom Lukiwski (Regina—Lumsden—Lake Centre, CPC): Thank you, Chair.

Thank you, Professor Pelletier, for being here. The discussion has been fascinating, but I now have more questions than answers after an hour of your presentation.

One of the questions—based on some of the conversation suggesting that perhaps there could be consequences to the government—was whether prorogation should be used indiscriminately, if I can use that term.

I go back to what you said at the outset, that there are really three basic roles of government. The primary one is to pass legislation. When you talk about putting limits on the limits of the consequences, if any of the consequences were to inhibit the government's ability to pass legislation, would that overstep the boundaries of the limits you say might be able to be enacted to...?

Prof. Benoît Pelletier: I don't think so. In my view—and I may be mistaken—it's not the government that passes legislation; it's Parliament itself.

Mr. Tom Lukiwski: But if Parliament were not allowed...? For example, one of the things Mr. Christopherson said that was bandied about this committee was that a consequence of the Prime Minister using prorogation indiscriminately might be that he wouldn't be able to introduce legislation for a certain period of time. Wouldn't that be viewed as inhibiting the ability of the government and Parliament to pass legislation?

Prof. Benoît Pelletier: It's hard to say. I did not study all this at length. I would say that if Parliament itself speaks, it might be feasible to have some limits on the power to introduce bills. This has to be studied, because in the Constitution Act, 1867, there is a provision that says different kinds of bills can only be proposed by the government itself. There could be an argument that this provision protects the right to submit bills. If this is the case, if you limit that right, then you go against the Constitution. That all has to be studied very carefully.

My message today is this. Contrary to many Canadian citizens who would like to see a ban on prorogations and to have the current government pay the price for the practice that has existed for years in this country, I say be very careful. Don't go too far in banning or limiting the power to prorogue, but at the same time try to find some way to restore the authority of Parliament vis-à-vis that of the government. If bringing some limitations to the power to prorogue is a way to restore the authority of Parliament vis-à-vis the government, then it has to be studied, and it must be studied with an open mind. That's my view.

● (1205)

Mr. Tom Lukiwski: Thank you.

The Chair: Great. Thank you.

It's been fascinating. Professor Pelletier, perhaps with the will of the committee, we may even have to have you back at some point to answer some more questions, or, if you don't mind, we may send you a letter asking you some more questions. I thank you for your appearance here today, and thank you for all the knowledge you've given us.

Prof. Benoît Pelletier: Mr. Chair, thank you for having received me. If you ever have a bill to study, I'd be pleased to study it with you.

The Chair: You want to come. All right. Super. You're invited.

I will suspend the committee for about one minute while we switch witnesses.

● _____ (Pause) _____

●

The Chair: Let's call the meeting back to order so we can have as much time as possible with Professor Franks.

It's good to have you here today, sir. It's always special to have you. You got to hear a bit of Professor Pelletier. I know it would be a boring world if we all agreed with everyone, so you're going to make it less boring today, I hope.

Let me give you the opportunity for an opening statement. Brief is better because we'll get more questions if you're brief. If you're not, it means we're getting knowledge anyway, so I'm okay.

I give you the floor. Thank you very much for coming.

● (1210)

Dr. Ned Franks (Professor Emeritus, Department of Political Studies, Queen's University, As an Individual): Thank you, Mr. Chairman.

I was very interested in some of Professor Pelletier's remarks, and I don't agree with some of them. As I go through, I'll try to explain that.

I did produce a written document, which I believe is being translated and passed on to you.

The Chair: Yes, we have it, but it's not finished being translated yet, so we can't distribute it. We'll get it to the committee at some point, but it probably will not be today.

Dr. Ned Franks: Okay, good. But that does mean I can read out some pieces here.

The Chair: You can certainly read from it, yes.

Dr. Ned Franks: I begin by saying that prorogation is not a dirty word. Prorogation is a necessary and useful tool for ending a session of Parliament and beginning a new one between general elections. Then I go on to a section of what prorogation is.

I make the distinction between prorogation and adjournment, because I think that's often confused and misunderstood. Adjournment, historically and at present, is in the control of the House of Commons, and prorogation is done by the Governor General, the crown, on the advice of the Prime Minister.

When and why has prorogation been abused? I believe there's been some confusion on this, so you will excuse me if I go into some detail. In 1873, Sir John A. MacDonald, Prime Minister, fearing a non-confidence vote over the Pacific scandal, asked the Governor General, Lord Dufferin, to prorogue Parliament in order to avoid a vote of confidence.

Dufferin thought long and hard and he consulted widely, including with the British government. After much deliberation, Dufferin granted MacDonald the prorogation, but he limited it to 10 weeks, which was tacked on to the end of the summer adjournment. Parliament did not meet between May 25 and October 12 of that year. When they did meet, MacDonald still faced a vote of confidence. He found he was still losing support and he resigned on November 5.

Sir Alexander Mackenzie took over as Prime Minister two days later, and he requested, and was granted, a prorogation of Parliament that same day. Without meeting again, Canada's second Parliament was dissolved on January 2, 1874. A general election was held on January 22, and Mackenzie won handily. If Prime Minister MacDonald did abuse prorogation by using it to avoid a vote of confidence, retribution was only delayed, not prevented. Mackenzie did not last long as Prime Minister, as most of you know. They said his greatest virtue of being Prime Minister was that he had been a stonemason and his greatest weakness as a Prime Minister was that he had been a stonemason.

In November 2008, Prime Minister Harper, soon after an election, and after Parliament had sat for only 13 days, faced an imminent vote of confidence, which he likely would have lost. Even though the three opposition parties, which together enjoyed a majority in the House, had publicly committed themselves to supporting a coalition government composed of Liberal and NDP parties, the Governor General, Michaëlle Jean, granted Mr. Harper's request. Scholars do not agree on whether or not the Governor General made the correct decision in terms of constitutional traditions and practices. The Liberal Party had a new leader and the unity of the three opposition parties had disintegrated by the time the new session began in late January 2009.

I should make it clear at this point that I am on the side of those who believe she made the right decision.

In December 2009, while Parliament was adjourned, Prime Minister Harper requested a prorogation. This appeared to be a strategic move by Prime Minister Harper to gain a majority in the Senate, and he succeeded in delaying criticism over the Afghan detainee issue, though it came back with a vengeance when Parliament reconvened in March 2010. This prorogation, while it did not raise any significant constitutional issues, did lead to a lot of controversy over the use and abuse of prime ministerial power to bypass and avoid Parliament by advising the Governor General to prorogue Parliament. And of course that's why we're meeting here today on this.

There is one issue that I want to emphasize, and that is the November 2003 adjournment by Prime Minister Chrétien. While the House was adjourned then, Prime Minister Chrétien advised the Governor General to prorogue Parliament. This has frequently been cited as an example of abuse because it is claimed that it permitted Mr. Chrétien to avoid having to accept the Auditor General's report on the sponsorship affair. At the time, Prime Minister Chrétien had no need to prorogue Parliament to prevent tabling of the Auditor General's report because Parliament had already been adjourned. Reports cannot be tabled in the House while it is adjourned. Quite likely, the early adjournment of the session—normally it would have been a month later, in December—had something to do with delaying the tabling of the Auditor General's report. Prorogation did not and could not.... Mr. Martin replaced Mr. Chrétien as Prime Minister on December 12, 2003, during a period of prorogation. The reason for the prorogation almost certainly was to facilitate the change of prime ministers and allow the new Prime Minister, Paul Martin, to start with a clean slate. It had nothing to do with the timing of the tabling of the Auditor General's report.

This prorogation followed normal parliamentary procedures. It did not at the time, and does not now, raise any constitutional or other issues about the abuse of prorogation. I just want to make that clear.

● (1215)

Here is a question: does Parliament have the constitutional power to constrain, through legislation or other means, the Prime Minister's use of prorogation? And here I take issue with some people you have heard from.

This question has been raised in relation to the recent problems in Canada, with the claim being made that prorogation is a prerogative power of the crown and cannot be limited by Parliament. This is not correct.

The British Parliament has legislated to restrict prorogation several times. In 1640, when Parliament and King Charles I were at loggerheads over a taxation issue, Parliament passed an act that prevented its dissolution or prorogation without Parliament's consent. The act stated:

> …that this...parliament, now assembled, shall not be dissolved, unless it be by Act of Parliament to be passed for that purpose. Nor shall it be, at any time or times, during the continuance thereof, prorogued or adjourned, unless it be by act of parliament to be likewise passed for that purpose.

Parliament went on to abuse this power by continuing to sit for nine years without dissolution, the infamous Long Parliament. Whether or not the Long Parliament was a worse abuse than the governing of Britain by Charles I as an absolute monarch in the absence of Parliament for the preceding 11 years is irrelevant. The point is that the British Parliament asserted its fundamental constitutional right to govern its own affairs in deciding at that time that it, and it alone, could choose when it should be dissolved or prorogued. This was merely a claim of constitutional power. The British monarch still retains the power to prorogue, though, as in Canada, this power is exercised on the advice of the Prime Minister.

Nevertheless, the British Parliament has not been reticent in passing legislation to set limits on prorogation. It passed acts in both 1867 and 1918 that ensured that the period of prorogation after an election—after the writs are returned, in Canadian parlance—would be sufficiently long to allow members to attend the opening of the new Parliament. This was especially important in 1918 to give members who were serving in the armed forces enough time to get back to England from overseas.

Section II.18 of the Constitution Act, 1867, as amended, states that the Canadian Parliament has the same powers that the British Parliament had in 1867:

> 18. The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act [1867]...and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.

The British Parliament legislated on prorogation in 1867 and 1918. Therefore, the Canadian Parliament also has that power. Prorogation has not been a contentious issue in Britain for many centuries. Sessions there continue to run on an annual schedule, and the British Parliament is normally prorogued, much as it used to happen in the Canadian Senate, through a ceremony in the House of Lords in which the Queen or her representative lists the accomplishments of the session and states the date for the reconvening of Parliament.

The period of the prorogation in Britain normally lasts a week or so and occurs in the fall. The long summer break, not the period of prorogation, is the pause that refreshes the British Parliament and parliamentarians.

I want to emphasize this next point, because I think there's some confusion on it. This power of Parliament to legislate on prorogation does not affect the reserve powers of the crown. Governor General Michaëlle Jean would have exercised these reserve powers if she had refused Prime Minister Harper’s advice to prorogue in 2008.

The reserve powers of the crown are not defined. The fact that they exist simply affirms that it might be in the national interest, on rare occasions, for a British monarch or a Canadian Governor General to ignore or go against the advice of a Prime Minister, or even act independently of the advice or lack of advice from a Prime Minister. In other words, the legislation on prorogation in Britain does not affect those reserve powers, and it would not in Canada.

● (1220)

If Britain were to undergo a lengthy period of what the British term a hung Parliament and in Canada a minority government, a British Prime Minister, following Stephen Harper’s example, might well want to use prorogation as a political tactic. The British Parliament might then have to decide—as might the Canadian—that restrictions must be placed on the Prime Minister’s powers to advise prorogation.

What are the options for reform? Parliament has the power to define the circumstances in which a parliamentary session can be prorogued and the sessions and conditions of prorogation. Perhaps the simplest way to do this would be for Parliament to define through legislation the terms, conditions, and occasions on which the Prime Minister can advise the Governor General to prorogue a session.

Trying to limit the Prime Minister's power to advise prorogation through a motion risks a defiant Prime Minister saying that the motion itself is only advisory and does not constitute a compelling instruction requiring obedience.

Some of the options, listed roughly from least to most dramatic, are:

Number one, do nothing. With only three contentious prorogations in over 140 years, this problem does not seem to be the most pressing facing Canada. On the other hand, with two contentious prorogations within less than two years and the prospect of continuing minority Parliaments and governments, a review of prorogation in all its aspects is a timely exercise.

I should add there that the ultimate consequences of the act of the government, regardless of what Parliament does, is what the electorate thinks of it. I think we have to bear in mind when we're tinkering with constitutional machinery such as prorogation that ultimately the electorate is going to pass its judgment. Often we have to defer our own judgment to the electorate.

Number two, we can prevent a Parliament from being prorogued until a session has lasted a decent period of time. This has its attractions, but it risks preventing Parliament from having short sessions, which are appropriate in some circumstances. For example, in the first session of the 34th Parliament in 1988-89, the House of Commons sat only 11 days and only one bill was introduced. It received royal assent, but that bill—the free trade legislation with the United States—had been far and away the most important issue in the preceding election campaign. I believe that short session was appropriate and so was prorogation.

Number three, limit the duration of a prorogation. In theory, the Constitution Act of 1867 does not prevent a government from terminating a session early in a year and then delaying holding the next session until late the following year. In other words, theoretically the Constitution permits Parliament to go nearly two years without meeting.

The fifth session of the 18th Parliament, from 1936 to 1940, lasted only six days and the sixth session lasted less than one day. It met and was adjourned the same day—January 25, 1940. In other words, between June 3, 1939, and May 16, 1940—a period of more than 11 months—the House of Commons sat only seven days. Canada declared war against Germany on the 10th of September 1939, during the six-day session of that September.

For the remainder of this crucial period, Canada was governed without the participation of Parliament. This absence of a parliamentary presence for a crucial period, as Canada mobilized for World War II, did not arouse a great deal of indignation and protest at the time. The less than one day session of January 25, 1940, was simply to ensure that Parliament met at least once during that year.

Number four, we can require the House of Commons' support for a prorogation. The discretion to advise prorogation could be taken away from the Prime Minister and in effect given to the House of Commons. In other words, Parliament could legislate that the Prime Minister may only advise the Governor General to prorogue Parliament when the House has passed a motion to that effect. If the House was adjourned and not in session when the Prime Minister wanted to prorogue a session—and this has occurred frequently in the past—the advice to prorogue would have to be supported by party leaders representing a majority of the House of Commons.

I could go on, but I shall stop here, emphasizing that prorogation should not be considered in isolation. The parliamentary system in Canada is under stress from a great many pressures and a great many different functions and areas. The use and abuse of prorogation is only one way that governments respond to these stresses. Many, but perhaps not all, of these stresses are the product of continuing minority Parliaments. I think Britain is looking at us with great interest at this point in time to learn, if possible, and benefit from our experience.

Thank you, Mr. Chair.

● (1225)

The Chair: If I had known we were being looked at from afar, I would have worn a better suit.

Voices: Oh, oh!

The Chair: Madam Jennings, it is up to you to start off in this round. Thanks.

Hon. Marlene Jennings: Thank you, Chair.

Thank you, Mr. Franks, for your presentation. I appreciate the clarity with which you presented your views, especially the view that you do not agree with those who claim or argue that Parliament cannot in any way limit the discretionary power of the Prime Minister to request prorogation on the basis that it would be unconstitutional, according to those who argue that we can't do it, giving the examples of Westminster, which in fact has legislated.

Given that you believe Parliament can limit the discretionary power of the Prime Minister to advise the Governor General to use her reserve powers and prorogue Parliament, do you believe it needs to be done by legislation, or could it be done by Standing Orders of the House of Commons, or by a combination of both?

Dr. Ned Franks: In normal times, I would say Standing Orders would suffice because Standing Orders are the rules of Parliament and should be respected as such. They aren't always. That's why I suggested that if something is done, it should be done through legislation.

To carry it through, my belief is if you use legislation, you should not tinker. The examples I gave of long sessions, short sessions, long prorogations, short prorogations, I think indicate that we can't cover all circumstances in legislation. We have to leave something to somebody's good judgment. That's why I say, one, legislation, and, two, a majority of the House to support a prorogation.

I'm not sure that's the right way to go, but I don't think Standing Orders are the right way to go.

Hon. Marlene Jennings: Okay. Thank you.

We had Professor Peter Russell here. One of the points he made is that a lot of what happens in our constitutional parliamentary democracy is by constitutional conventions that are not necessarily written. His view was that the most ideal way in which to achieve a situation whereby Parliament would be able to express itself on the issue of prorogation at any time it might arise would be for a constitutional convention achieved through agreement of all parties.

Dr. Ned Franks: That would not be a convention, in my view.

Hon. Marlene Jennings: I think I expressed correctly what he stated.

Dr. Ned Franks: Yes, but you can't assert a convention by saying "this is a convention". What you're saying is "we think this ought to be a convention". It doesn't mean that it is.

I will quote what a British Member of Parliament said, which I think applies to this sort of thing: "The Constitution is what happens."

Hon. Marlene Jennings: Okay.

So although you do not recommend going by Standing Orders, you do acquiesce that it is a possibility, that it is one mechanism. Should Parliament, the House of Commons, decide to go via the route of Standing Orders, and given that Standing Orders were developed and adopted by majority vote, and that in future the sitting prime ministers adhere to those Standing Orders, do you believe that would, at some point, become part of a constitutional convention?

● (1230)

Dr. Ned Franks: Yes, but I have given examples—I didn't read the full paper—of sessions that lasted less than a day. I've given examples of prorogation that lasted a year. If I wanted to give examples of lengths of sessions, I could go up to over three years, or again, less than a day.

My mind has a seizure at the thought of trying to write a Standing Order that would permit a prorogation after less than a day's session or prorogation lasting almost a year, or sessions that are less than a day or sessions that are three years long.

At some point, we have to accept that we can't specify all the events and reasons that are going to affect these things.

Hon. Marlene Jennings: Could it not then be a Standing Order that would simply state, in general terms, in those cases when the Prime Minister has not consulted the House of Commons prior to advising the Governor General to prorogue, the first order of business, when the House comes back, will be a discussion or a debate on that issue?

Dr. Ned Franks: Absolutely, and there are options like that. What you're doing is not restricting the right or the power, or whatever you want to call it, to advise prorogation; we are insisting that the House of Commons have a hand in making the Prime Minister accept responsibility for the consequences of his or her actions. That, I don't think, is very contentious. Perhaps it's a good way to go. But you must appreciate that you're not doing anything on prorogation itself. You're simply doing something on the order of House of Commons business.

The Chair: You have thirty seconds if you want it.

Hon. Marlene Jennings: I'm fine.

The Chair: That's excellent.

I think I have Mr. Reid again.

Mr. Scott Reid: Thank you.

Professor Franks, I'd like to come back to section 18 of the British North America Act in a moment. But first, with regard to conventions and how one could establish conventions, I'm going to posit two possible outcomes that could have been exercised the first week the House was back in session at the beginning of 2009 or 2010.

Within a week of coming back, a motion of non-confidence is introduced. It says that whereas it was illegitimate to prorogue Parliament in order to do whatever it was the Prime Minister was trying to achieve, the House has lost confidence in the government. On the basis of that, if the majority votes in favour of the motion, we have an election. The voters bring back a government that is not a Conservative government—maybe it is the Liberals, or a minority or a majority, whatever. That would suggest to me that after that experience, we would say a convention exists.

In contrast, if we have an election on that basis and a Conservative government is returned, it would suggest to me that, more or less, a convention doesn't exist on this subject.

In terms of determining when a convention comes into existence, is my understanding of those scenarios a reasonable one in your mind?

Dr. Ned Franks: There's an expression, if I can remember it: one swallow does not make a summer. I don't think one motion in Parliament establishes a convention.

Mr. Scott Reid: It's through an election, though, and voters have gone out to say that they think....

Dr. Ned Franks: No, I don't think the voters establish conventions either. I think they're much more complex than that.

The point of these issues is that they can be argued in many different directions. Conventions, by and large, are loose. I mean, there are some pretty tight ones. For instance, if a government loses a vote that is declared a vote of confidence—that's a convention—then the government must either resign or ask for an election and dissolution of the House. That, I think, is about as ironclad as you can get, and it's very simple. But when people vote, I do not believe they vote on prorogation; they vote on the whole record of the government.

I mean, we're not, as they used to say in Russia, the working class united in objecting to the government's improper use of prorogation. Our working class isn't united. And I still suspect that there's a pretty high proportion of Canadians, and probably even politicians, who don't appreciate what prorogation technically is.

● (1235)

Mr. Scott Reid: Actually, to be honest, I thought you were going to say that you thought my hypothesis was valid.

Actually, it gets at the essence of what I was trying to get at anyway, which is that conventions can't just be invented out of thin air. It's really hard to establish them. It doesn't happen because some person in the political system would like it to happen`it happens because there is more widespread agreement.

Dr. Ned Franks: Some conventions can be enforced in the courts, and I believe that the confidence convention could be. But many conventions are simply what one might call a condensation of expert opinion on what actually happened in the past, and that is open to contestation. That is why I emphasize that, in my view, yes, we have the power in the Canadian Parliament to legislate on prorogation and to define its terms, but other people argue the other side.

Mr. Scott Reid: I have one last question. I have less than a minute left to ask and get your answers.

Section 18 of the BNA Act, 1867, which you cited, speaks to the privileges, immunities, and powers held by the Parliament of Canada, the Senate and the House of Commons of Canada, and links them to the powers that existed in the British Parliament circa 1867, at the time of its passage. You dealt with how that relates to the passing of laws, acts of Parliament, that would govern prorogation. The suggestion came up earlier with our first witness that you could perhaps use Standing Orders to deny the government the right to introduce certain kinds of legislation if, in the minds of Parliament, it had improperly used prorogation prior to the return of the House.

It seems to me that trying to limit the government's ability to introduce legislation in the House would go beyond the powers that had existed in the British Parliament circa 1867 by means of a Standing Order. They could not have done that then, and I think, therefore, you couldn't do that now. But I'd be interested in seeing if you agree with that assessment.

Dr. Ned Franks: I think that is a more dubious approach than legislation. I can look at it and see so many ramifications that I have worries. It's sort of the parliamentary equivalent of a school teacher saying, “Go stand in the corner and don't say anything for the next two hours.” I don't think that's the way that our Parliament wants to relate to government; at least I hope it isn't.

Mr. Scott Reid: I think in fact you'd make the country partly ungovernable, and hence you'd be better off simply voting non-confidence and having an election to see if the voters agree with you.

Dr. Ned Franks: Well, yes. Again, I can't see prorogation being a major election issue, but I do think that when people vote...you know, it's only putting a mark on a piece of paper, but it's one of the most complex acts that we do in our lives, because it's the summation of everything we have thought about the government, the opposition, everything else, what we feel about ourselves, what we feel about the country, what we feel about the future, all put into one little X.

The closest we've ever come, I think, to an election on one issue was the one I referred to with the Mulroney government, the election on free trade, but even that was a more complex thing than only free trade. So I worry about getting an election on prorogation, because if I were going to list the top 20 issues that concern Canadians, prorogation would not be among them.

The Chair: Thank you, Mr. Reid.

Mr. Scott Reid: Thank you very much.

The Chair: Monsieur Paquette, are you up again?

[*Translation*]

Mr. Pierre Paquette: First of all, thank you for your presentation. I am very anxious to read your actual brief.

Since you began your presentation by saying that you disagree in some respects with Professor Pelletier, could you tell us what you think of his theory that the right to prorogue Parliament, even for the Prime Minister, enjoys tacit constitutional protection and that it is a component of the separation of powers between the executive and the House of Commons?

I saw that you were here earlier, so you heard his comments regarding the mechanisms available to the House of Commons and to the Executive, or the Prime Minister. He identified two in particular: dissolution and prorogation, which are untouchable from a constitutional standpoint. Ultimately, the only way to place limits on the prorogation power—this is his conclusion—would be through a full constitutional amendment. What are your views on that?

● (1240)

Dr. Ned Franks: You are right. I do not agree with Professor Pelletier.

[*English*]

The reason I don't agree is that the British Parliament has legislated on prorogation, and my reading of that legislation—I've read the text of the three acts—is that it says nothing about the powers of the crown. It simply says prorogation shall not occur.

Now, what we could do in Canada is not legislate on prorogation but on the Prime Minister's right to advise the crown, his powers to advise the crown. I suggest in my paper that that's a safe way to go, but my reading of British precedent is that the British Parliament has never been in any doubt about its power to regulate the use of prorogation through legislation. It has never had any doubt. It had that power in 1867, it had it in 1918, and doubtless it believes it still has it.

[*Translation*]

Mr. Pierre Paquette: Were these laws challenged in the British Supreme Court?

Dr. Ned Franks: They have never been challenged in England. There is no doubt in my mind, however, that they would be challenged here in Canada.

Mr. Pierre Paquette: Yes, it certainly looks that way.

I have one last question. Professor Mendes also suggested that the Speaker of the House of Commons has the tacit constitutional power to advise the Governor General and that he could therefore convey the will of Parliament to the Governor General, asking that the request to prorogue not be granted.

Do you believe that power really exists?

Dr. Ned Franks: That is very interesting.

[*English*]

I would say no. The Governor General can talk to anybody he or she wants to talk to. Governor General Michaëlle Jean, Governor General Clarkson before her, and presumably previous governors general have consulted people.

There's the recognized legal representative or the legal adviser to the Governor General, Professor Peter Hogg, but there are many others who are consulted by governors general. Certainly, the Governor General could consult the Speaker of the House. He is one of the eminent recognized positions of authority in our Constitution.

But for formal advice, which is advice in a constitutional sense and a legal sense, the only person who can advise the Governor General is the Prime Minister. It is a very powerful convention. It's a convention, but it's one that is the absolute base of our system of responsible government, government in Parliament, and the crown being part of Parliament, as well as a separate body, which is the personification of the crown in the Governor General.

Let me see if I can explain it a little differently. I have no doubt that when issues like prorogation or dissolution come up, the governors general widely consult. For example, if you read Adrienne Clarkson's memoirs, she makes it very clear that when Prime Minister Martin was returned with a minority in 2004 or 2005, it was almost evenly balanced. I believe it's the Parliament in which Peter Milliken as Speaker cast more deciding votes than had ever been cast before. That's in total and not just for any Speaker.

● (1245)

[*Translation*]

Mr. Pierre Paquette: I believe it will make five years this week. Time certainly flies, does it not?

[*English*]

Dr. Ned Franks: *C'est formidable*.

In her memoirs, she says that she consulted widely and carefully on the question. If Mr. Martin were defeated soon after the House met and he requested dissolution, and there was an alternative government in waiting, should she grant him the dissolution or refuse his advice? In the memoirs, she concluded that within four months after Parliament met, she would refuse the request for dissolution. After that, she would accept it.

That's hypothetical, and another Governor General might think the same thing, but it gives you a very clear example of a Governor General facing a question wherein she might have to reject the advice of a Prime Minister. She consulted widely. In an informal sense, she received advice or opinions from the people she consulted with, but it wasn't advice in a constitutional sense.

We have to be very careful about the fact that the Speaker of the House of Commons would be giving views and opinions and not constitutional advice.

[*Translation*]

Mr. Pierre Paquette: Thank you, Mr. Franks.

[*English*]

The Chair: Mr. Christopherson.

Mr. David Christopherson: Thank you very much, Chair.

Professor, it's good to see you again.

Dr. Ned Franks: It's nice to see you, sir.

Mr. David Christopherson: It's good to be working together again.

I'm going to take advantage of you being here to ask one quick question, because we may be heading here. If a motion of contempt is passed, can it be deemed to be confidence? Some are asking how you can find a government or ministers of a government in contempt and still be able to say that you have confidence in the government. Some are suggesting you could put in the resolution that this is clearly not a motion of confidence. In other words, if there were a desire to find contempt but not trigger an election, could that be done, or does one inadvertently lead you to two, whether you like it or not?

Dr. Ned Franks: No. I have not examined the historical precedence on this. I suspect if we looked very carefully we would find many times over history that ministers of the crown were found in contempt or the equivalent—impeachment used to be the most common thing there—and it did not force the government to resign. Whether that's true for a Prime Minister I don't know, but a Prime Minister, as we understand it, is a relatively recent innovation—less than 200 years old.

The answer there is very curious. Procedural motions are not, in their nature, confidence. I'll give you an example of something that I consider should be a motion of procedure that we've never had in Canada and that I'd like to see.

I have found over the years that the Budget Implementation Act gets bigger and bigger and covers an awful lot of things not included in the budget sometimes. The Senate recommended that the Budget Implementation Act be divided into several and go to the different committees for examination. I certainly think that should happen. That would be a procedural motion, and I don't think it would be a vote of confidence.

Just as an aside, one of the reasons I get excited about that is because I'm an avid whitewater canoeist, and the one last year, in my view, doesn't protect whitewater rivers adequately enough.

Mr. David Christopherson: Thank you.

I'm going to jump straight to a question that I hope you can launch from, in terms of the various components. All I want to do is put in front of you the motion that the House carried, which was:

> the Prime Minister shall not advise the Governor General to prorogue any session of any Parliament for longer than seven calendar days without a specific resolution of this House of Commons to support such a prorogation.

Professor, can I include your thoughts on that as a Standing Order change or resolution, but also as legislation—whether one or the other or a complement? I know you're not keen on the Standing Order part, so I'm ready for that.

● (1250)

Dr. Ned Franks: One of the wonderful virtues of the parliamentary system is that the Constitution is what happens. Our Constitution is a little bit written; the British Constitution is a whole series of cases and events with many conflicting things.

I tried to give examples of prorogations that were very short and happened after a session that only lasted a few days and prorogations that were very long and happened after long sessions. Every one of those was justifiable.

I had a feeling that motion covered too little and didn't really cover it in a way I was comfortable with. You wanted to get at the Prime Minister advising prorogation in order to escape the scrutiny of Parliament. Every time I go back to it I say that if it is going to be entrenched in Standing Orders or legislation, it has to be that prorogation be supported by a motion in the House of Commons.

Mr. David Christopherson: Do you believe that is a reasonable restriction or a constitutionally allowable restriction on the powers of the PM?

Dr. Ned Franks: Oh, gosh, I haver back and forth on that. I could live with it. As you can appreciate, the only time it would be significant would be in a minority Parliament. Of course, those are the only times when prorogation becomes a dirty word.

I always wind up in this by saying that the more we leave to the good sense of the electorate, and the more that politicians of all stripes are trembling in their boots at the thought of how what they do affects the electorate, the better we are as a country. That's hyperbole; I hope you'll forgive me.

I'm uneasy about either legislation or Standing Orders. I think it's like a split decision in the House. I have to vote with the noes on this. In other words, don't change it; keep the discussion going. I think I'd wind up arguing we should not alter the present system, but we should make sure that our processes of Parliament—and this is a very good one—educate the media, the public, parliamentarians as to the issues and implications of prorogation so that we can understand it better.

You will recall that I gave the example of the 2003 prorogation as a non-issue. That has been so misunderstood in the press that I find it quite depressing that this is brought out time and time again as an example of an abusive prorogation. If it was an abuse, it was an abuse of the adjournment, and the adjournment was on a motion of the House because it wasn't in accordance with the normal Standing Orders.

Mr. David Christopherson: Your lack of clarity is affecting my sense of where you're at.

Dr. Ned Franks: Join the crowd, sir.

The Chair: It is going to be a very short one, a quick question, if you want it, or we can finish where we are.

Mr. Lauzon and Mr. Reid each had one quick question.

David, you might have one, too.

Okay, let's go fast.

Guy.

Mr. Guy Lauzon (Stormont—Dundas—South Glengarry, CPC): Very quickly, I believe you gave us basically four options that we might want to consider or that you thought might be viable. One of them was to do nothing. Three contentious prorogations in a number of years...and to rephrase what you said, there are a heck of a lot more important issues that we should be dealing with. Thank you for that.

The other point you made is that the only time prorogation is an issue is in minority Parliaments.

It was interesting when you said that if you were to list the top 20 issues, prorogation might not be in the top 40, but certainly not in the top 20. A lot was made of the fact that 140,000 people, I believe, went on Facebook and declared that they were against prorogation. Many of them, we've come to find out, don't know how to spell prorogation and don't understand what prorogation means, as per what you said. Yet still, during all of this, we have 33 million Canadians undergoing a recession. You mentioned the good sense of the electorate. If we were doing something so terribly wrong in the country, I would think the electorate would look after that.

What are the positives about just leaving it the way it is? Here we are, spending all this time and effort, for what? Maybe you could just give us some information on that.

● (1255)

Dr. Ned Franks: I am a retired professor, but I spent a lot of my career getting students to think that simple questions were difficult and difficult questions were simple.

On the prorogation one, I think that Parliament has served as a very good professor for the country because you've shown the country that this relatively simple thing of ending a session can be very complicated and has to be thought about.

I think what you're doing here and what's happened in the past is extremely useful. Whatever else comes out of it, we'll have a better educated press and electorate.

Mr. Guy Lauzon: Certainly we don't need a sledgehammer to kill this mosquito.

The Chair: Thank you, Mr. Lauzon.

I'll go to Mr. Christopherson and then back to you, Mr. Reid. Let's go quickly so that we can get it in.

Mr. David Christopherson: I'm trying to clarify a matter and I don't even know where to go to get it straightened out. I'm referring to the letter signed by the opposition parties that was meant to convey to the Governor General that should she decline the advice of the Prime Minister, she would find there was an alternative majority in waiting. The question is, did that letter get in front of the Governor General?

Based on the fact that only the Prime Minister can offer formal advice, some of us have been informed that the letter never really got there, even though it's in the media and it's out there; technically, and for legal purposes, it was never in front of the Governor General.

Can you clarify that one and the circumstances around that sort of thing, and how Parliament, if it's a minority, can convey a majority opinion to the Governor General, should it be different from the advice being received from the Prime Minister?

Dr. Ned Franks: At the time, the Governor General was in Africa on a state visit, I believe. I doubt that the letter, as a physical entity, was conveyed to her; I have no doubt that the contents were. I have absolutely no doubt, none whatsoever, that at the time the Governor General made her decision in 2008, she was fully aware of the contents of that letter.

I've written about this. Rightly or wrongly, I believe that a main consideration that she took into account—and I say "I believe" because I don't know—was the viability of the coalition expressed there. It was quite different in Ontario in 1985, because there was very little doubt that the two opposition parties would support one of them in government for a time. You can remember that there was a very effective argument, though constitutionally not a terribly enlightening one, from the Prime Minister's side that he was elected Prime Minister and that this would be an illegitimate government.

Mr. David Christopherson: Nonsense.

Dr. Ned Franks: Well, we'll just leave it aside there.

The Chair: Go ahead, Mr. Reid, quickly.

Mr. Scott Reid: Thank you.

I take your point about Jean Chrétien's prorogation in 2003 in order to avoid an Auditor General's report, but it does raise the question of whether the prorogation was illegitimate. The House was adjourned in order to avoid receipt of the Auditor General's report, so wasn't the adjournment illegitimate to the same extent?

● (1300)

Dr. Ned Franks: I had a talk once with that wonderful Swedish sociologist—or whatever you want to call him—Gunnar Myrdal. I used the expression "illegitimate", and he said, "You should never call a child illegitimate, because no child is illegitimate. Illegitimacy is in the eye of the beholder."

I have not checked on the records, but I'm pretty certain that there was a motion of the House to adjourn and that it passed.

Mr. Scott Reid: It was a majority government. The Prime Minister could get whatever he wanted. This is a fundamental problem, I think. I'm not critiquing you; it's just an observation that all this talk about the abuse of prime ministerial powers is always in the context of minority governments. Once you get a majority government, we're back to the Prime Minister's word being fiat.

Dr. Ned Franks: In terms of parliamentary government, I would say that a decision by a majority of the House on an issue—and that majority has been as many as seven members on some occasions—is constitutionally both a legitimate and a legal answer. I might not like it.

The Chair: Thank you all. We've had another great committee meeting.

Professor Franks, thank you for your help today. Please watch what we do here and see if you can add in any way in the future too. We'd be happy to hear from you if you see our work going astray even. Thank you for what you've been able to do.

Dr. Ned Franks: I'd be more than happy to help you. Thank you, sir.

The Chair: Thank you.

The meeting is adjourned.

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