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

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**EVIDENCE**

**Tuesday, May 11, 2010**

**Chair**

**Mr. Joe Preston**



## Standing Committee on Procedure and House Affairs

Tuesday, May 11, 2010

• (1105)

[English]

**The Chair (Mr. Joe Preston (Elgin—Middlesex—London, CPC)):** I'm going to call our meeting to order. This is the 14th meeting of the Standing Committee on Procedure and House Affairs. We're continuing our study on prorogation.

I'd like to thank our witnesses for coming today. We have three professors: Nelson Wiseman, Hugo Cyr, and Eric Adams. We're going to have them at the table for the whole two hours, so that will give us a lot more time for questioning today. They're going to start us with an opening statement.

Guests, I'll apologize now for our members. This meeting always takes place over a lunch hour. With the schedules we keep, we won't have time to stop to eat any other time today, so our members will be trying to have their lunch while they're listening to you. I apologize for eating in front of you, even if I do it myself, but it's just a necessity of the job with this committee sitting from eleven until one.

We'll get some opening statements from each of you, and then that hopefully will spur on some questions from each of the members.

Mr. Adams first, please.

**Dr. Eric Adams (Assistant Professor of Law, Faculty of Law, University of Alberta, As an Individual):** Good morning. Thanks for inviting me to speak today.

Of course, it's been a pleasure to follow these proceedings from Edmonton via the Internet these past few weeks, and I know that you've already been left with a great deal of sage advice to ponder.

I'm going to do my best this morning to summon my inner Peter Russell, so here we go.

**Voices:** Oh, oh!

**The Chair:** Did you get lectured again? Oh, sorry, go ahead.

**Dr. Eric Adams:** I hope the committee has received the article I wrote last year, "The Constitutionality of Prorogation". I sent it ahead for translation. I'm happy to speak to that article in questions or to my comments in this brief statement.

I should also say that I've just completed teaching my constitutional law course at the University of Alberta, and the one promise my students extracted from me before the exam was to have no questions on prorogation. As soon as I made that promise I regretted it, because as I sat down to draft the exam, I thought how perfect an essay question this is. It combines all of the wonderful and

rich facets of our constitutional tradition, and there is a lot to disagree about.

Let me for a moment remind you of a little history. In the days surrounding the Prime Minister's request to prorogue Parliament, newspapers variously accused him of insulting the House of Commons, undermining the rights of Parliament, and stifling free speech. A majority of parliamentarians, it was reported, objected to the manoeuvre, and there was public outrage and protest from across one end of the country to the other, said *The Globe and Mail*.

I am speaking, of course, about August 1873, when Lord Dufferin prorogued the second Canadian Parliament at the request of Sir John A. Macdonald, a Prime Minister under siege because of the emerging Pacific scandal. But I would suggest that the lessons of Canadian history extend even farther back than that. In the period before responsible government, prorogation was an often abused power of colonial governors as a way of dispensing with the clamorous presence of legislatures that they would prefer to govern without.

Jonathan Belcher, Jr., the Lieutenant Governor of Nova Scotia, frequently prorogued the legislature of that colony when he felt like it. The Nova Scotians won't be surprised to hear that the elected representatives had very different ideas about how to govern things. The reaction in the 1760s against prorogation was part of a long road to responsible government and a more democratic constitutional order.

We arrive today at a period when prorogation has again emerged from the constitutional shadows. We are confronted by the opportunity and challenge of ensuring that our parliamentary democracy functions in keeping with our constitutional ideals. This is the principal lesson of our constitutional history. Canada possesses a Constitution, in the words of the Constitution Act, 1867, "similar in Principle to that of the United Kingdom", meaning that in addition to its roots in the venerable traditions of parliamentary government, Canada is also guided by unwritten and flexible constitutional conventions. Our Constitution can and does change over time.

Those conventions are often clear in principle but sometimes contestable in application. Like common law itself, the principles that form the foundation of our Constitution are themselves elucidated, reinforced, and sometimes even forged in moments of disagreement.

For that reason, I am relatively sanguine about what others are terming a constitutional crisis. In debating the constitutional moments of December 2008 and 2009—and we have been debating them, not only Parliament but in newspapers, classrooms, academic journals, on blogs, and in living rooms—we're working toward a better understanding of our Constitution and its underpinnings.

I think we are in the midst of constitution-building. And the ongoing debates among citizens, academics, and parliamentarians will ultimately shape the constitutionality of prorogation in the broadest sense.

There are several ways to alter the manner in which the Parliament of Canada can be prorogued. I'll mention them just briefly. I think these types of changes exist on a continuum, from the strict formality of a constitutional amendment on one end, to the more flexible and ongoing process of shaping a constitutional convention on the other. I have little doubt that, carefully drafted, a constitutional amendment under section 44 of the amending formula could constrain the ambit of the Prime Minister's discretion to seek prorogation from the Governor General. I think it's equally the case that legislation could accomplish similar constraints.

• (1110)

The Supreme Court of Canada has made it clear that the crown prerogative, of which the power to prorogue is a clear example, can be abolished or limited by expressly drafted legislation.

There's an important distinction, however, between what the Constitution allows and whether such a change is advisable. Just because the Constitution says you can do something, of course, does not necessarily mean you should. Just as we would hopefully agree that a Prime Minister should not request an open-ended or lengthy prorogation on the eve of a vote of non-confidence that he is likely to lose, so we should also be cautious about over-legalizing and unduly constraining parliamentary processes that for the most part have worked very well over our history.

That is then the challenge for all of us: to fashion parliamentary rules, processes, and conventions that respect Parliament, responsible government, and democracy. The Canadian Constitution depends on noble efforts such as this.

Thank you.

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

Professor Wiseman.

**Dr. Nelson Wiseman (Associate Professor, Department of Political Science, University of Toronto, As an Individual):** Thank you for inviting me.

I haven't benefited from having been in a constitutional law class, or any class, so I'm learning from Eric's comments, as I've learned from the comments of the witnesses who have appeared before you. My comments were drafted right after I was invited here.

I'm a political scientist, and my comments were written and I approach this subject primarily from a political point of view. If my comments are hard-hitting, they've also been moderated and modified by what I've heard from the witnesses from whom I've learned a lot.

I want to thank Angela Crandall for tuning me in, literally, in a way, to the broadcasts by giving me directions on how to access them. I've listened to all of them, and to some I've listened repeatedly, particularly those of your excellent legal counsel, Rob Walsh.

In support of the most recent prorogation of Parliament, the Prime Minister asserted that prorogation is fairly standard procedure. It had occurred 104 times since Confederation. By my count it has occurred 120 times, if we tally prorogations that were followed by dissolutions.

This does not buttress the Prime Minister's point, however, that his recent prorogations have been routine, which is what a Conservative Party e-mail has alleged. The reason is that, with rare exception, prorogation has occurred as described in *Bourinot's Parliamentary Procedure and Practice*. Let me quote him:

As soon as the business of the two houses is concluded, or so nearly completed that there can be no doubt as to the time of prorogation...

Eugene Forsey said the same thing, and let me quote him:

When both houses have finished a session's business, Parliament is "prorogued" until the next session.

Only then is prorogation routine. Forsey considered an unwarranted prorogation a usurpation of the rights of the House of Commons and a travesty of democracy. Prorogation is more than merely delay, for it prevents the House from voting, holding the government to account, and possibly bringing it down.

According to Forsey, an uncalled-for prorogation constitutes a subversion of the Constitution. Courts and lawyers can do absolutely nothing in such cases. Let me quote Forsey again:

The only protection against such conduct is the reserve power of the crown, the Governor General, to refuse such prorogation or dissolution, and, if necessary, to dismiss the Government.

As Forsey's daughter Helen has written, "It doesn't get much clearer than that."

To avoid defeat in December 2008 when little parliamentary business had been conducted—the House had sat for only 13 days—the Prime Minister manipulated the crown's reserve power to prorogue Parliament. In December 2009, after the prorogation, he said prorogation was needed to "recalibrate" his government's agenda. This was an odd rationale, as it meant abandoning half of his government's bills, some of which have since been reintroduced. The Conservative MP for Kelowna ventured that prorogation ensured the government could not be defeated before it tabled its budget. Other members of the Conservative caucus said it was imperative that MPs remain in their ridings to hear constituents' concerns. Responding to public revulsion, the director of communications for the Minister of Finance rhetorically asked, "Where was the outrage toward the previous 104 instances" of prorogation? The answer is simple. No Prime Minister has so abused the power to advise the Governor General to prorogue Parliament.

The Prime Minister's former chief of staff, Tom Flanagan, whom you all know, understood the obvious: the purpose of prorogation was to terminate Parliament's probing of the Afghan detainee issue.

So what has been the record of other prime ministers with respect to prorogation? We heard from Eric that only once, in 1873, has prorogation occurred in the context of parliamentary controversy. Pierre Trudeau prorogued Parliament eight times; in all but one case, it was for less than a day. The exception lasted six days. The Mulroney government prorogued Parliament twice in nine years for a total of 64 days. Jean Chrétien's first three of four prorogations lasted 37 days. This government's last two prorogations alone total 114 days.

Given the contexts in which they occurred, they represent, in my opinion, blatant abuse by the Prime Minister of his power to advise the crown on the exercise of the reserve power.

How long is an unjustified period of prorogation? There is no precise answer. It's like asking how many trees make a forest. Only the Governor General can check such behaviour. Technically, a government or a Prime Minister may ask the Governor General to prorogue Parliament for up to a year—and after meeting for a few hours and having its throne speech voted on, it then may ask for another prolonged prorogation.

• (1115)

Jean Chrétien was lambasted for his last prorogation. It occurred during the transition to a new Prime Minister, a backbencher. It was reasonable that the incoming Prime Minister, Paul Martin, would want a fresh parliamentary session to introduce his own legislative initiatives and not preside over his predecessor's leftovers. To be sure, Chrétien's last prorogation postponed the Auditor General's report on the sponsorship scandal, but no one knew how damning her language would be.

On the heels of public rancour, declining poll numbers, and street demonstrations—between 10,000 and 15,000 people braved the cold weather on January 23, according to media reports—the Prime Minister determined post-prorogation that parliamentarians should forego their planned spring breaks because much work required attention. This rationale amuses, because at least one minister had said the government could accomplish more without Parliament. Why parliamentary work scheduled for January and February required a postponement to March and April is puzzling only to those gullible enough to give credence to the government's shifting and contradictory justifications for prorogation.

Liberal and NDP proposals to limit the Prime Minister's power to advise the prorogation of Parliament may be toothless unless they become, I've been thinking, something of a campaign issue. The Governor General's discretion to deny a Prime Minister's request for Parliament's dissolution became such an issue in 1926. The result demonstrated that the route to abridging prime ministerial power is very slippery. Nothing in any law, motion, or parliamentary standing order regarding prorogation can limit the crown's prerogative power, unless it takes on the status of a convention. Conventions require repeated use, I believe, and especially a willingness by political actors to abide by them. They are reinforced if there is some understanding of them by the public. The opposition parties voted for the government's fixed election date law, but when the Prime Minister violated its spirit, they rolled over. The issue went unmentioned in the leaders' debates, leaders' tours, and campaign advertising. This rendered the law worthless, a waste of your time.

Now the public's widespread misunderstanding of how Parliament functions will be perpetuated unless attention is drawn to the basic rules of Canada's constitutional democracy. In December 2008, the Prime Minister brilliantly convinced much of the public and the media that elections are about choosing a Prime Minister rather than parliamentarians. He proved equally persuasive to the constitutionally unacquainted in asserting that a party's parliamentary plurality democratically trumps Parliament's majority. You cannot fault him. However constitutionally shaky his plea, his political neck was on the line, and he escaped execution. Indeed, it emboldened him.

Abuse of Parliament predates this administration. The Liberals regularly made major policy announcements in Parliament only after they had made them outside Parliament, and they pioneered the arbitrary rescheduling of opposition days to avoid defeat during the dying days of Paul Martin's government. In fact, they wouldn't accept a non-confidence motion when it was put in right in front of their faces. Canada's Parliament, according to the director of the constitution unit at University College London, is "more dysfunctional than any of the other Westminster parliaments...in Australia, New Zealand, the U.K. and Scotland". Only in Canada has a government secured the prorogation of Parliament to save itself from political defeat or difficulty, and only in Canada has a Governor General been a party to that. The next step in Parliament's decline could come with the introduction of the budget at a Tim Hortons, following the model of Ontario's last Conservative government, which presented theirs at a Magna facility.

The Prime Minister's most recent abuse of prorogation proved to be a fiasco. It has many Canadians waking up and realizing that all is not well with their parliamentary system. They have learned that although the Governor General is theoretically able to restrain prime ministerial power, in practice the Prime Minister almost always does what he wants and may effectively undermine Parliament's will.

• (1120)

It seems to me—and I agree with Professor Russell here—that a possible way to limit prime ministerial power with respect to prorogation is to have the four parliamentary party leaders negotiate, sign, and publish a document that sets out specific rules regarding prorogation. Such rules would not limit the reserve powers of the crown, but they could check the Prime Minister's freedom to advise the Governor General on the issue of prorogation. It would offer the Governor General some guidance and relief from difficult positions, such as those in which she was placed by the Prime Minister in his two most recent requests for prorogation.

Whether the opposition makes the power to prorogue or dissolve Parliament an issue at the time of the next election is up to them. If they do not, the cavalier use of prorogation and dissolution by a Prime Minister will only sink deeper roots.

I also have comments—which we can handle in the question period—with respect to the proposals by the other presenters, which have been very informative.

• (1125)

**The Chair:** Super. That's great. I'm glad you've been paying attention beforehand, because it does help us to have you comment on some of the other people's testimony.

Professor Cyr, it's your turn.

[Translation]

**Mr. Hugo Cyr (Professor of Public Law, Faculty of Political Science and Law, Université du Québec à Montréal, As an Individual):** Good morning. Thank you, it is an honour to be invited to take part in the deliberations of the Standing Committee on Procedure and House Affairs.

I hope that my presentation can make even a modest contribution to the committee's discussion of an issue of paramount importance to the development of parliamentary democracy. It is often by taking a step back from standard practices that we rediscover the guiding principles behind those practices. The last two prorogations that we saw seemed to be moving away from those standard practices. The first occurred when the government was facing a possible non-confidence vote and the second when some of the government's actions in the conflict in Afghanistan were the subject of a parliamentary review on alleged human rights violations.

After listening to the previous witnesses, I would say this is really a seminar on constitutional law. Let us hope that this seminar—necessary as a result of recent events—sheds light on how our institutions operate and, in particular, provokes a fuller discussion of how to make those institutions more representative. In fact, the British parliamentary system has evolved through a constant transfer of jurisdiction from the Crown to Parliament, in which elected representatives participate. That evolution gave rise to two cardinal principles of British constitutional law.

First there is the principle of parliamentary sovereignty, which holds that the will of Parliament is above that of the other branches of the government, including the executive. The battle for parliamentary sovereignty was hard-won through the gradual attrition of the Crown's discretionary powers. In fact, according to the traditional definition, the Crown's so-called prerogative powers are nothing more than the remnants of royal powers that have not yet been discarded or abolished through legislation.

Second there is the principle of responsible government, which holds that the government must be accountable to Parliament and cannot legitimately govern unless it has the confidence of the elected members of the House of Commons. I would point out that we have a system of responsible government, which means that the government is responsible to Parliament and that we no longer have what used to be known as a dual Parliament, in which the government was responsible to both the elected officials and the monarch at the same time. Today's concept of responsible government holds that the government is responsible solely to the elected officials. Recognition of that principle put an end to a system of government whereby an unelected executive did not have to report to the elected members of the House of Commons.

Both of those principles, which are at the heart of our constitutional system, stem from the idea that political legitimacy is in the hands of the elected members. Do we need to be reminded of that here? I say “here” because the need for a reminder became apparent just recently; you need only open the newspaper or listen to the radio to see that the need is clear. Do we need to be reminded here that, unlike the presidential system, Canada's executive is not elected? Therefore its democratic legitimacy is only indirect. That legitimacy resides solely in the fact that the executive has the confidence of the elected members and that, in principle—and we saw exceptions to this principle not that long ago—ministers are chosen from among the elected members. Anyone who is appointed a minister without first being elected must still try to get elected at the first opportunity.

All of that may explain the fact that, in Canada, the principle of the separation of powers, at least the separation of the legislative and executive branches, is not quite as cut and dried as in other political systems. In Canada, we have trouble viewing that principle as a true constitutional principle, because of how difficult it is to reconcile with the notion of parliamentary sovereignty.

• (1130)

That being said, the desire of the House of Commons to better govern the use of the prorogation prerogative by requiring the Governor General's approval is in line with the movement to expand the responsibilities of elected members with respect to important decisions on the operation of the government.

When studying the democratic control of the use of prorogation, it is important to consider three key questions. The first is to ask who is currently exercising the prorogation prerogative and under what conditions. I think that question can be dealt with rather quickly. Today, as everyone knows, it is the Governor General who orders the prorogation of Parliament on the advice of the Prime Minister.

The second question is how to limit the use of the prerogative by the Governor General to ensure that its use better reflects democratic values or is at least supported by them. A number of suggestions have been put forward to date. The possibility of a constitutional amendment was discussed, as well as all the difficulties associated with that procedure. The possibility was raised of distinguishing between the duty of the Governor General in this area and her other functions so that the use of the prerogative could be amended through legislation. That is a possible option, albeit a risky one. There was talk of amending the constitutional conventions that set out the conditions in which the Prime Minister can advise that Parliament be prorogued and the conditions in which the Governor General must heed that advice.

I will quickly go through the three criteria, which Peter Russell mentioned, since we often forget to list them. First of all, there is a practice, a single case can be sufficient if there is consent and a good reason. A series of standard practices that lack the consent of the officials and a good reason cannot constitute a custom, thus a practice. Second, there is the feeling of the stakeholders who are connected by the practice. Third, the convention must help the parliamentary system run smoothly.

As for the types of conventions that could be amended, namely, there is the exercise of the prerogative itself. For example, a session could have a minimum duration, as in other parliamentary systems. But amending the constitutional conventions directly related to the exercise of the prorogation prerogative would require limiting the Governor General's discretionary flexibility in exercising that prerogative.

The list of individuals from whom the Governor General is allowed to seek advice or information could be amended. Some have suggested the possibility of the Speaker of the House speaking to the Governor General, which may surprise some people. It is obvious that when a Prime Minister steps down, so the country does not have a Prime Minister, the Governor General is not cut off from all contact with her Parliament. So there are clearly other methods of communication that are already recognized. That aspect could be amended. I would point out that, according to the book on parliamentary procedures, recommendations to the Governor General concerning prorogation constitute what are known as the special prerogatives of the Prime Minister. It should, however, be noted that a number of the prerogatives of the Prime Minister traditionally known as "special" have been amended over the years to give other members the right to exercise them. That is the case with the traditional special prerogative of appointing a provincial administrator. A provincial administrator is someone who replaces the lieutenant-governor if the lieutenant-governor is not available.

Today, when someone needs to be appointed to replace a provincial administrator, for example, it is often done through an Order in Council of the Privy Council. And, in recent years, it has been the heritage ministers making those orders, not the Prime Minister.

• (1135)

So there is some flexibility in those areas.

The fourth option is to create incentives or deterrents to influence the Prime Minister's actions. A motion or amendment to the Standing Orders could be put forward to require the advance notification of the House and the threat of sanctions if the Prime Minister advises the Governor General to prorogue Parliament without the consent of the majority of members.

The fifth option is, I think, new or original. It is based on the fact that because the Governor General is not bound by the advice of the Prime Minister unless he has the confidence of Parliament and given that that confidence is conferred by Parliament itself and not the government, it is up to the House to determine whether the government in power still has the confidence of Parliament. It would be possible to adopt a suspensive condition censorship measure. It could be something along these lines. The Prime Minister would be deemed to have lost the confidence of the House if he were to go to the Governor General to request that Parliament be prorogued without obtaining the prior approval of the majority of members; in that case, as soon as the Prime Minister went to the Governor General without a positive vote, the Governor General would no longer be bound by the Prime Minister's advice because he would have lost the confidence of Parliament.

That is one approach that could make things easier. Regardless of which mechanism is adopted, it is important to ensure that the

Governor General's discretion is reduced as much as possible and respects the will of the elected instrument of the state, in other words, the House of Commons.

There is a third question that needs to be asked: how do we make sure that prorogation does not deprive Canadians of an active Parliament for an undue length of time? You are all familiar with the rule in the Constitution Act, 1982, that sets out one session per year. Parliamentary approval methods of varying lengths of time can be combined. The rules of the House could be amended to allow certain types of committees to continue their activities during prorogation. In fact, if, in general during prorogation, the members are relieved of their parliamentary duties until the House and its committees resume their activities in the new session, it would be nonetheless wrong to think that, for the time in question, Parliament had ceased all of its activities during such a prorogation.

Unless I am mistaken, this committee does not necessarily cease its activities during prorogation or, at the very least, does not lose its members because they are appointed for the entire duration of a Parliament, pursuant to Standing Order 104(1). The speaker, the deputy speaker and the members of the Board of Internal Economy also continue in office. So there is at least one committee that operates during prorogation. Prorogation has no effect on the activities of members involved in parliamentary associations or international and interparliamentary exchange programs. In short, the Standing Order can be amended in this regard.

There is one last option: a recall mechanism could be put in place in the event that the Prime Minister delayed in ordering the opening of a new session. For example, the majority of the Board of Internal Economy could hold a vote, the result of which would then be communicated to the Speaker of the House of Commons, who could in turn speak to the Governor General.

Those are some of the mechanisms I suggest for dealing with these issues. I hope they will serve to enrich your discussion and help you carry out your duty with respect to the evolution of the parliamentary system.

Thank you very much.

[English]

**The Chair:** Thank you. Merci.

Monsieur Proulx, you'll be starting us off today.

Let's try to go with a round of seven minutes, and then we'll add to that after we have a little more time for questioning today.

Please try to direct your question, whether to an individual member of the witness panel or to all, remembering that your time will be inclusive of what you ask and their answers.

Monsieur Proulx.

• (1140)

[Translation]

**Mr. Marcel Proulx (Hull—Aylmer, Lib.):** Thank you, Mr. Chair.

Thank you, Mr. Cyr.

[English]

Thank you, Mr. Wiseman and Mr. Adams, for appearing in front of the committee this morning.

Mr. Wiseman, I have a suspicion that you have ideas you'd like to talk to us about in regard to the possibility of sanctions that have been discussed with previous witnesses. You mention in your opening remarks that:

Nothing in any law, motion, or Parliamentary Standing Order regarding prorogation can limit the crown's prerogative power unless it takes on the status of a convention.

However, could we take action through the Standing Orders to penalize or to slow down the government—for example, if we were to say in the Standing Orders that if the government prorogues, if the governing party prorogues Parliament, when Parliament returns, it will be  $x$  amount of months, or  $x$  amount of weeks, or  $x$  amount of days for the governing party's members to be allowed to table private members' business, or other sanctions towards that particular party?

**Dr. Nelson Wiseman:** That was a suggestion by the clerk, Mr. Walsh, and I thought it was quite innovative. I thought he gave you a number of good ideas there.

Of course, and this is just my understanding—I have to defer to constitutional lawyers and other constitutional experts—what you put in your Standing Orders doesn't matter. It can't limit the Prime Minister, I don't believe, from going to the Governor General. When Parliament is reconvened, I can't see why you can't say there won't be second reading on any bills for 60 or 90 days. That could be something imposed. The prorogation will still have gone on. It's another issue related to dissolution.

Another thing struck me in the discussions. It came up a number of times about amending the Constitution. Section 44 refers to your power to change the executive Government of Canada, the Senate and the House of Commons. Now, provinces have used section 45 repeatedly and creatively since Confederation, which is a power they were given at Confederation—subsection 92(1); it's now section 45. You got that power in 1949, and there seems to be a hesitance.

I think if you pass a law—and I haven't read your fixed election date law, but I did hear the Prime Minister isn't even mentioned in it—why don't you make it explicit that you're doing it pursuant to section 44?

I know Nova Scotia did this when they had a conflict, when they expelled, I believe, an MLA in the late 1980s. His name was MacLean. He raised a charter case around this and the courts did not entertain it. They said this was an example of a province changing its own constitution. So that's one way if you are going to go the legal route. You can do both, but you can do it that way. In other words, you cite section 44 explicitly. I think that would reinforce it. I think that would give the Governor General something of a card in terms of her discussions with the Prime Minister. Her job is partly to advise, warn, and consult.

**Mr. Marcel Proulx:** Thank you.

[Translation]

Mr. Cyr, I found the fifth item you mentioned interesting. It involved the Prime Minister obtaining a show of confidence by the

House of Commons in order to recommend to the Governor General that she prorogue Parliament.

Could you explain how that would work? Before going to the Governor General, would the Prime Minister hold a vote in the House of Commons to obtain the confidence of members, in order to recommend prorogation? Is that it?

● (1145)

**Mr. Hugo Cyr:** Not exactly, because the question that would be put to the House would ask whether Parliament should be prorogued or not. It would not be a confidence vote. A confidence vote could always be added, but the idea is that, before the Prime Minister could go to the Governor General, he would need the approval of the majority of members in the House.

**Mr. Marcel Proulx:** Pardon me for interrupting, but, if I understand correctly, the Prime Minister could not go to the Governor General unless he had the permission of the House of Commons to recommend prorogation.

Is that what you are saying?

**Mr. Hugo Cyr:** Exactly, and if a Standing Order were adopted to that effect and he did not do so, he would be deemed to have lost the confidence of Parliament. That concept is not completely new in constitutional law. England had such a rule about 500 years ago, when the king had to obtain Parliament's approval in order to prorogue it. It fell to the wayside, but history tends to repeat itself, and that could be the case here. It is time to make the use of political institutions more democratic.

**Mr. Marcel Proulx:** To bring about that change or democratization, you suggest taking away the Prime Minister's prerogative power to approach or advise the Governor General. If the Prime Minister were to need the approval of the House of Commons to go and see the Governor General, I am not so sure he would get it all that often.

**Mr. Hugo Cyr:** With a majority government, that approval is guaranteed because the government controls the vote. Given the strong tendency in Canada to toe the party line, it would not be a problem.

In a minority government, it would spark a debate that would have to yield a general consent.

The Standing Order could, however, be drafted in such a way that only the Prime Minister, for instance, would have the power to put the question to the House. It could be structured so that the Prime Minister would retain the right to take the prorogation initiative, instead of letting everyone move a vote on a resolution, a motion on prorogation—somewhat similar to the idea that only the government can introduce a money bill.

That would respect the principle of government initiative while requiring the consent of the elected members.

**Mr. Marcel Proulx:** I am not sure whether—



[English]

**The Chair:** Thank you. You're already at seven minutes.

**Mr. Marcel Proulx:** Already?

**The Chair:** You're 49 seconds past seven minutes. Do you see how flexible I'm being today? This is incredible.

Mr. Reid, I think you're next.

[Translation]

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

I have two questions. The first is for Professor Cyr, and the second is for all the witnesses.

Professor Cyr, to your knowledge, is there another parliament in the Commonwealth that has a preventative non-confidence motion?

**Mr. Hugo Cyr:** I have not seen it in other Commonwealth parliaments, but I have to admit that I have not checked them all. The idea is, however, inspired by various forms of rationalized parliamentary government, obviously tailored to British-style parliamentarism.

**Mr. Scott Reid:** Is it discussed in academic parliamentary literature?

**Mr. Hugo Cyr:** The literature dealing with rationalized parliamentary government frequently discusses mechanisms to ensure that dissolution or prorogation happens only with the approval of elected members. It exists in various countries that have a parliamentary, non-presidential regime or, at the very least, a parliamentary or semi-presidential regime.

The problem is that we tend to compare ourselves to the presidential system, which has a strong separation of powers, such as in the United States, for example, which has an elected president and an executive that derives all of its legitimacy from a vote. The president is not elected directly but by the electoral college. There is a risk in trying to import concepts from the systems of other countries with whom we may share a common language but not any institutional similarities. As far as those institutional similarities go, British parliamentarism may be a lot closer to other forms of parliamentary government, such as Germany's, than ours is to that of the United States.

• (1150)

[English]

**Mr. Scott Reid:** The next question is for all three witnesses.

From listening to discussions with our previous witnesses about conventions and the attempt to develop conventions, it seems to me that we are all at fault—not just the witnesses, but also members of the committee, including me—in assuming that these conventions would, in some respects, be binding on the actors involved. That seems to suggest that we're assuming that they would be binding on the politicians. I think that's probably a mistake. I think if we could develop a convention, it would be one that would be binding on the Governor General. It would really be a question of being a convention on when it is inappropriate to receive advice from the Prime Minister and to reject that advice.

In the same way, when a Prime Minister comes and says, "I've just lost an election, but I'd like to stay on anyway", the Governor General, necessarily, is bound by convention to reject that advice and say that he or she is going to go to the leader of the party that has the majority in the House in such a situation.

Similarly, it seems to me that this isn't really about limiting existing reserve powers. Rather, it is about redirecting powers.

I thought about how to ask this question. I'm not sure this is the best way, but let's try this out. We have two prorogations that have occurred in the past couple of years, and they are the subject of our hearings. Let's say that you had been the person on the telephone offering counsel to the Governor General at the time she received advice from the Prime Minister to prorogue. What advice would you have given? What kinds of rules would allow the counsel to reject the advice the Prime Minister was giving?

I'm not sure who to start with.

**The Chair:** Make it a short phone call.

**Dr. Eric Adams:** One of the things that I think has come up in these hearings is the scope of the Governor General to take advice. I think an important distinction here is the ability to take advice and the ability to gather information. I think sometimes those concepts have been blended here, and unfortunately so.

I think it's clear in our constitutional system that the Governor General is to seek advice from the Prime Minister. But I think she's fully open to availing herself of all kinds of information that will help her make her decision as to whether she should accept that advice or not. That can include, I think, what we call in the legal world taking judicial notice of notorious facts: Is there a government-in-waiting ready to take over? What do scholars and pundits and the public think about what is happening?

Our conventions have a kind of democratic legitimacy to them through this information gathering that the Governor General is fully able to engage in. I wanted to make that point.

If I were on the phone with the Governor General on the two prorogations, and I make this argument in the article I've penned, I would have thought that she made the right choice. And I think she made it artfully, in that I don't think it was a rubber-stamped decision. There were considerations to weigh, and there was a calculus to weigh. If the factors had been slightly different, her decision might have been different.

Taking in this information gathering, as I've suggested, and a number of considerations, she made artful choices. If you change some of those considerations, then we might see different results.

Peter Russell presented the most compelling case. What if a Prime Minister is about to lose a vote of non-confidence, and he or she comes to the Governor General and says, "Let's prorogue. I don't know when we're coming back. Maybe it's 12 months from now. But I'm going to govern for the next 12 months. A day before, I was about to lose the confidence of the House of Commons. I'm going to appoint judges to the Supreme Court, and I'm going to continue to hold the reins of power." Surely a Governor General is able to say that this is inappropriate.

• (1155)

**The Chair:** Mr. Reid, your time is now complete. We'll see if we can get those answers through other questions. That'll be the best we can do.

Mr. Paquette, you're up.

[Translation]

**Mr. Pierre Paquette (Joliette, BQ):** Does anyone want to respond to Mr. Reid's question? It is quite relevant, in my view.

Mr. Wiseman, go ahead.

[English]

**Dr. Nelson Wiseman:** I'll respond. Mr. Reid raised the issue of the last two prorogations. They were very different, of course. The last one, the most recent one, was a slam dunk.

The one that was really contentious was the first one. This one stirred up a hornet's nest because it was perceived by the public as being unfair. Last time we had people demonstrating in the streets for a coalition and many more people demonstrating against the coalition. Public opinion was overwhelmingly opposed.

This time we didn't have anybody in the streets saying that they think this prorogation is an excellent idea.

**The Chair:** We're going to have to suspend for a minute. That is a fire alarm.

• \_\_\_\_\_ (Pause) \_\_\_\_\_

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• (1220)

**The Chair:** We will call the meeting back to order. I'm happy to see you all gathered back very quickly.

Monsieur Paquette, you were up, and some of the witnesses were still answering a question, which was really Monsieur Reid's question. We'll carry on from there. We'll give you a full seven minutes, because we forgot to stop the clock and apparently it was 25 minutes.

[Translation]

**Mr. Pierre Paquette:** Mr. Wiseman, could you finish what you were saying? You started to answer Mr. Reid's question.

[English]

**Dr. Nelson Wiseman:** Thank you. I'm trying to recollect the question.

**Mr. Pierre Paquette:** Maybe we can ask the—

**The Chair:** It was to do with the powers of the Governor General.

**Dr. Nelson Wiseman:** These two prorogations were very, very different, except that this one was really a slam dunk.

Ned Franks said—and I shared this with Scott Reid outside—and I was struck by this comment, that the Constitution is what happens. He also cited a case in King Charles in the 1600s. Mr. Cyr discussed what happened 500 years ago, what happens in other systems. If the Constitution is what happens, the most important thing is what has happened recently.

The reason prorogation is the issue it is, from a legal point of view, is not so much what happened on December 30, 2009; it's what happened on December 4, 2008. Adrienne Clarkson also points this out in the forward to this book. She felt that had the government been defeated on an issue of confidence within the first six months after an election, she would have shopped around for another government to see if it was viable. Here we had a case where Parliament had really not conducted any business in December 2008.

We have had a transformation in the constitutional culture in terms of public opinion.

I am throwing together a number of thoughts, and one is this. We have talked about institutional transfer. What has the experience been in the provinces? I don't think you're going to find anything there because prorogation hasn't been controversial. I taught provincial politics for 25 years and I never ran into the term in anything I read, although it was more on the political side than on the governmental side.

On constitutional transfer, institutional transfer from other countries, Britain is the most relevant. We've seen it in Canada. But we've noticed that constitutional paths diverge. We noticed that Ontario's committees continue during prorogation; your committees cease to exist.

Mr. Hall's opinion is that this isn't constitutional. Why not? We go along different paths. And the path we're on now, which I think is dreadfully unfortunate, is going to lead to a different political configuration in terms of a coalition. It's basically telling the opposition that unless you get your act together before the Speech from the Throne, this government can do anything it wants with prorogation and manipulating the House for up to one year.

I ran into Jack Layton and David Smith on separate occasions during the month of January 2009 when the coalition issue was up in the air. The point I made...and I heard Jay Hill make it on TV, and to me it was very compelling: "You heard what the government said in the fiscal update before you voted for the Speech from the Throne. Did you or did you not have confidence in the government? You went ahead and voted for the Speech from the Throne." There is no hemi-, demi-, semi-confidence. I think Mr. Walsh said this: you either have confidence or you don't have confidence in the government.

We're in a situation now where the opposition wants to rein in the government but not throw it out because they're afraid of the political consequences. They might not do well. That's a calculation you do. You're driven more maybe by polls than by principles, but you have to get elected; I can stick to the classroom.

•(1225)

**The Chair:** Thank you.

[Translation]

**Mr. Hugo Cyr:** I will quickly comment on those two points.

With respect to the last point, I said that it was necessary to limit the discretionary powers of the Governor General. Faced with a Prime Minister who had the confidence of the members, the Governor General had no choice but to prorogue Parliament. She might have been forced into it or agreed reluctantly. But she did not have a choice, and that is the reason I think we are now discussing possible amendments. To prevent such a situation from happening again.

As for the first point, the problem for the Governor General was knowing whether the Prime Minister still had the confidence of Parliament. There are two possible interpretations. Some say that in order to establish that the Prime Minister has lost the confidence of Parliament, there must be a vote in the House to that effect. Others say that other pieces of information are sufficient to prove that the Prime Minister has lost the confidence of Parliament: letters, parliamentary debates and so forth.

In the midst of such a controversy, I would have recommended that the Governor General wait, given the fact that a confidence vote was going to be held soon. Obviously, she did not do what I would have recommended.

I would have expected her to tell the Prime Minister that he was serving as acting prime minister, pending a new confidence vote. She did not do that, given that a Supreme Court judge was appointed during prorogation, as were some senators, something that an interim government cannot do.

**Mr. Pierre Paquette:** First of all, I want to tell Mr. Wiseman that, during the first week of the election campaign following Mr. Harper's broken promise to hold elections on a fixed date, the Bloc Québécois did most of its campaigning on that point. That may round out the story.

Now, I want to come back to the method. The most recent prorogation took place when Parliament was not sitting. It happened while Parliament was on Christmas break, so it was pretty hard to consult the members of Parliament.

The House could adopt a motion to the effect that the Prime Minister cannot approach the Governor General without having first consulted the House, otherwise he would be deemed to have lost the confidence of the House. Could we put forward such a motion on an opposition day? If adopted, could it actually become law? Is it necessary to change the rules of the House? How would we have to go about it, in your opinion, Mr. Cyr?

If anyone else would like to respond, feel free.

[English]

**The Chair:** A very short answer.

[Translation]

**Mr. Hugo Cyr:** In my view, a motion of that nature would help to clearly establish whether the government in power had the confidence of Parliament or not. Once the suspensive condition

were met, the Prime Minister would be deemed to have lost the confidence of Parliament, and that information could be conveyed to the Governor General. That way, it would not matter if it happened while the House was in session or not.

•(1230)

**Mr. Pierre Paquette:** I....oh!

[English]

**The Chair:** We're going to have to—

[Translation]

**Mr. Hugo Cyr:** There was something crunchy.

[English]

**The Chair:** I know. You did a great job of letting them answer Mr. Reid's question. I'm assuming that Mr. Christopherson will do the same for you.

Mr. Christopherson, you're up.

**Mr. David Christopherson (Hamilton Centre, NDP):** Mr. Chair, we can see you're not infallible.

I want to turn to Professor Adams. Just a couple of quotes from your brief, at the very end:

There are good reasons, beyond the allure of tradition, for keeping our constitutional conventions as they are—unwritten, flexible, and the subject of occasional controversy and disagreement.

Unwritten constitutional conventions similarly enable the Governor General to respond to new and unanticipated situations moored to principle but not constrained by prescribed text.

What struck me was not so much on our side of it, if you will, the House, but with the GG. I was born in 1954, so my mum's generation was still incredibly deferential to the monarch, and still is—not just the respect we all have, but that deference, it's almost mystical. The generation following me has very little of that left. So by leaving things uncertain but still maintaining an appointed GG, how do we square that with democratic principles?

I'm once removed here, but I want to get your sense of the relationship between responsible government, accountability, and democracy as the foundation for all our actions, and yet at the very top of our government pyramid sits someone who is an appointee.

I'm thinking of the ridiculousness of a whole country sitting by its TV sets captivated by a pair of doors. We watched for two hours. Then when it was all over we didn't even get an explanation from the person who made the decision. I'm having a great deal of trouble, and I wouldn't mind your thoughts on how we are doing all this at the same time. We are talking about responsible government, accountability, democracy, and then we have the sight of someone who is appointed making a decision about who the government is and we don't even get an explanation.

I'd like all three of you to give me your thoughts on that, please.

**Dr. Eric Adams:** I'm happy to do so.

We have a constitutional system in which tremendous power is held by a number of appointed officials. We've got nine judges on the Supreme Court of Canada to make important decisions every day about our rights and freedoms and the powers of government. We're not rioting in the streets about anti-democracy in that institution. We've got appointed senators. We've got the head of the CRTC. That's an appointed position, and it affects the types of shows I can watch. We also have a Governor General who has a number of prerogatives as head of state—she doesn't use them often, but they are there—to protect a constitutional system that has many layers and in which different arms of government coordinate in important ways.

So to me this is not the antithesis of a democratic system; it is fully democratic in that its working parts function cohesively. When those parts cease to work appropriately—and maybe we have moments when we want to add democratic impulses to certain of our appointing processes, say how judges get appointed to the Supreme Court—we can democratize that process to a certain extent. But I don't think we're going to start electing judges in this country, for the very good reason that appointed officials have important roles to play in our constitutional democracy.

So I'm not troubled by the role the Governor General plays as head of state. Her function is to protect the Constitution for the citizens of Canada where elected representatives may on occasion depart from constitutional conventions that are important.

**The Chair:** Thank you.

There are three minutes left, so a little bit from each of the other witnesses.

**Dr. Nelson Wiseman:** You know that you just raised all these very heavy terms: democracy, accountability, deference. Where to begin?

I don't share the same view of what democracy is. Democracy isn't something you define in terms of elections or not. It's something you experience, you feel, you sense when something's democratic or not. I'm hesitant about electing the Governor General. The position ought not to be politicized in that kind of way. In fact, I'm very concerned about the debate we're having right now in the country about who should be the next Governor General.

We've had a shift in the political and popular culture, as you point out, from deference to a sense of greater participation. You had Christopher White here. What I found most interesting about all of his comments is that there were 200,000 people on his Facebook, but now there are only a few dozen activists. If I'm not mistaken, I think there were probably five times as many people on Facebook suggesting that Stockwell Day should have his name changed to Doris Day. That isn't sufficient to run public policy. I don't think public policy should be run on public opinion, although you have to be sensitive to it in terms of getting elected.

On accountability and the appointment of the Governor General, one way you can construct it from a democratic principle point of view is that the Prime Minister does have the confidence of the House and he makes these appointments. The Governor General is one of them. He makes other appointments. If people are so outraged about all the appointments the Prime Minister makes, they have a

nuclear bomb, as he does. He can dissolve the House and you can vote non-confidence. That's the kind of system we're trapped in.

I'm hoping—and I think this is what most Canadians want—that we'll move to maybe a more consensual type of arrangement. And we've had this. We've had this in Canada. In the 1970s and the 1980s, Canadians said they were happy with minority governments both federally and in the province of Ontario. MLAs in that province, based on a survey done by Vaughan Lyon and published in the *Canadian Journal of Political Science*, found that experience was positive.

In recent years, we're finding minority governments are more dysfunctional, and they're reminding me of what occurred in the early sixties—1962, 1963, 1965—when the main issue in the elections wasn't policy; it was majority government, the Liberals arguing it has to be a Liberal majority and the Conservatives arguing it has to be a Conservative majority. From the NDP, incidentally, Tommy Douglas said, "What do you want stable majority government for? You know what stables smell like." That was the only position he could argue.

I don't have an answer. I just have some—

● (1235)

**The Chair:** I'm sorry, but we have run out of time there too.

I'd like to go to about a five-minute round, if we can. I will counsel both the party members and the witnesses that the more succinct and short the answers, the more people will get a chance. I hate leaving the table without everybody getting a chance.

We'll go to Mr. Cuzner, and if you finish quickly, we'll share that time.

**Mr. Rodger Cuzner (Cape Breton—Canso, Lib.):** Okay. That's great. I will be quick.

Just more for curiosity than adding anything to the debate, but on the comment from the director of the constitution unit of University College London about the Canadian Parliament being more dysfunctional than any of the other Westminster models, was that a general statement or did that follow the last prorogation? Could you just put that in context as to where that came from?

**Dr. Nelson Wiseman:** I looked him up. His name is Robert Hazell. Canada is not his specialty. This quote appeared in a Canadian Press report, and it appeared last year... No, it appeared this year, after this second prorogation.

**Mr. Rodger Cuzner:** So it was a comment that probably would have been prompted by the prorogation.

**Dr. Nelson Wiseman:** Yes.

**Mr. Rodger Cuzner:** With regard to the constitutional or institutional transfer that you had commented on—and the others may want to comment on this as well—and the difference that in some jurisdictions committees can sit and in others they don't sit, I'd like to get some insight.

Through your reading and studies, is there any evidence that any other jurisdiction would have used prorogation to offset a loss in confidence and a loss of power? Have you witnessed that? Or could you at least share comments about what is articulated around prorogation in those other jurisdictions? I guess I'll just throw it out like that.

• (1240)

**Dr. Nelson Wiseman:** I simply haven't seen the issue come up. I teach a very large first-year course now. It's at the second-year level. It's called Canadian democracy. The textbook is over 600 pages. The word "prorogation" appears once in it, and it's not defined. It simply says that the Governor General has these powers to summon, prorogue, and dissolve Parliament, but in practice they're in effect exercised by the Prime Minister. That's the beginning and the end of it.

If you go through, for example, a publication like *Canadian Parliamentary Review*, which is written by parliamentary scientists like Ned Franks and Thomas Hall, the issue hasn't been there because it's never been used, and in my opinion now abused, the way it has been in the last 16 months, or perceived to have been used. And that's why this committee is meeting. It's inconceivable to me—five years ago—that you would be dealing with this issue.

So I haven't seen anything in the provinces.

What has happened... I recall that a hundred years ago the Liberal government in Saskatchewan was being criticized because the premier was making announcements about what would be in the budget before it was made in the House. But we've seen over the years, with the introduction of television, and—I don't know how to put it—partly the Americanization of politics, more and more of the vital things that you had responsibility for are now being done outside of the House. The Liberals demanded that we get updates from the government as a condition of passing the budget a year ago January. Well, then we started getting the updates in Kitchener and in Saint John, New Brunswick. And hey, what happened to the Parliament of Canada?

I fear that the next step is going to be that perhaps the Speech from the Throne will be on *Canadian Idol* or something; it's not going to be in the Canadian House of Commons.

**The Chair:** Or *So You Think You Can Dance*.

Thank you. You have one minute left, Mr. Cuzner.

**Dr. Eric Adams:** May I simply say I'm not an expert on Australian constitutional law, but I do know that the issues that have come up, and that this committee might want to acquaint itself with, are some of the controversies in Australia. There is a simmering controversy about whether committees can continue to sit after prorogation, after the Australian Parliament has prorogued, and some differences about whether the power of the Governor General to prorogue the Australian Parliament also includes the Senate. Can the Senate continue to sit? There are differences of opinion there. Some

of that might be helpful, but I'm not the person to give that information.

**The Chair:** Thank you for the additional work.

You have half a minute. No? Okay, great.

Mr. Albrecht, and again, share if you can.

**Mr. Harold Albrecht (Kitchener—Conestoga, CPC):** Thank you, Mr. Chair. I'll do my best to be quick.

First of all, Professor Wiseman, thank you for highlighting Kitchener. It's a great place to be.

I'm not a graduate of a political science program, nor am I a lawyer, so I'm finding this discussion very educational. And I think the variety of responses from the experts indicates how complex this issue is.

Professor Wiseman, in your opening remarks you used terminology such as "My critique was hard-hitting", and so on. Then you went on to say something about your position having somewhat moderated. We heard the same from Professor Weinstock a week or so ago when he said much the same thing. In terms of the moderation of your position, could you be specific on what issues your position has moderated?

I'll put my second question in and give you the entire time to answer.

On page 4 of the English version of your comments, you say, "A possible way to limit prime ministerial power...", and then you go on to say that such "a document that sets out specific rules... Such rules would not limit the reserve powers of the Crown but they would check the prime minister's freedom...". I find those two concepts totally contradictory, and maybe you could help me to understand how they're not.

Could you cover those two questions? Then I'd like to share the rest of my time, three seconds, with Mr. Lauzon.

**The Chair:** Go ahead, Professor Wiseman.

**Dr. Nelson Wiseman:** Okay. If you read my paper, it was essentially written before you started to meet. I'm not as familiar as you are with parliamentary procedure and the Standing Orders, and I'm not a lawyer.

I thought the only way these things would count would be in an election when they're made to be an issue. The government then feels the party that gets elected has its feet to the fire and this is what it's promised to do.

I've learned since then. I've found the comments to be confusing and confounding, but it's illuminating for all of us to hear all of the different perspectives.

I think you can do things with the Standing Orders. You can't keep the Prime Minister from going to the Governor General, but you could impose what I think have been called disincentives by Madam Jennings or Mr. Walsh.

You can pass a law. Any law you pass is part of the Constitution of Canada, in the sense that there's parliamentary supremacy. It comes under section 44, for example, when you revise the distribution of boundaries.

I like the proposal, which I have in the paper and which Russell also proposes, that the most effective way is for all the political actors, the leaders of all of the political parties, to agree that this is the way you act. It's not a matter of limiting the crown's reserved power. That is still there. The actors are limiting their own discretion in going to the Governor General. If all of the parties were to sign a document...I think New Zealand has something like that, where it's understood what happens.

You've put the Governor General in a dreadful position right now. I'm sorry.

• (1245)

**Mr. Harold Albrecht:** Could I clarify this? You're suggesting a time limited self-restriction of the current players.

**Dr. Nelson Wiseman:** No, it's not time limited. Russell made a very good point that it's not going to count if one person, especially the Prime Minister, has the confidence and exempts himself from it. But if you can get all of the party leaders to agree this is how things will work after an election or before a prorogation, it's then understood. It will be carried on to the next party leader. It will be carried on. That's what I'm getting at.

I think it's our best hope. I'm not optimistic that it will happen, because there are great advantages right now for the Prime Minister.

I'm worried that just as this government learned from the last government about how to start playing around with opposition days, which had never happened, the next government will also ask why they should make an agreement about prorogation. It's going to tie their hands.

They can also use it as a manipulative tool. The Governor General is going to have to take their advice because she took the advice of the last Prime Minister after 13 days. That's the danger we're getting into.

**Mr. Harold Albrecht:** Guy, I told you that you'd have three seconds.

**The Chair:** You have 30 seconds, Mr. Lauzon.

**Mr. Harold Albrecht:** That's 10 times more than I thought it would be.

**Mr. Guy Lauzon (Stormont—Dundas—South Glengarry, CPC):** Professor Wiseman, you mentioned that the two prorogations lasted a total of 114 days. Technically, of course, that's correct. But how many days of the House sitting did we lose during those two prorogations?

**Dr. Nelson Wiseman:** You only lost 22 days on this most recent one. I saw that point made by Mr. Lukiwski in the May 3 issue of *The Hill Times*.

The point is this. What happened to your committees? Why was the House prorogued?

**Mr. Guy Lauzon:** Yes. I have one other quick question.

**The Chair:** There's flexibility from the chair.

**Mr. Guy Lauzon:** I think it was Professor Franks who said prorogation is basically an issue in minority governments. It's happened three times since Confederation that we've had minority governments use prorogation.

Quite frankly, I think he gave us four options. He said his preferred option was that we basically leave it as it is. What do you think of that?

**The Chair:** You can give a quick answer.

**Dr. Nelson Wiseman:** I don't agree because of what's happened. I want to avoid the crises we've had.

**Mr. Guy Lauzon:** Okay. Thank you.

**The Chair:** That's great.

Monsieur Blais, welcome today. You have five minutes. You can share with your friends too, of course.

[Translation]

**Mr. Raynald Blais (Gaspésie—Îles-de-la-Madeleine, BQ):** Thank you very much.

I know I am chiming in late in the game. But there are a few things I want to know about, and I will get into them as simply as possible, without simplifying the debate, of course.

If I understand correctly, there are constitutional rules that govern when Parliament can and cannot be prorogued, depending on the circumstances at play. It is not clearly defined, as I understand it. There is also the executive branch, the power of the Prime Minister to do what he pleases, to a certain extent. As long as the constitutional rules have not been set out clearly, is this not a red herring? Will it be absolutely necessary to clarify the Constitution, so as to ultimately clear up any confusion regarding prorogation, the rules of application, the appropriate procedure, the individual with the authority and so forth?

**Mr. Hugo Cyr:** I can answer that.

First of all, it is important to understand that the Constitution uses minimal wording. It represents the bones, and the constitutional conventions flesh it out. For example, the actual position of Prime Minister is not mentioned in the Constitution Act, 1867. It is mentioned just once in the Constitution Act, 1982, and only to indicate that the Prime Minister must convene a meeting of the first ministers of the provinces. But we cannot deny that the role of the Prime Minister exists in Canada's Constitution; it exists through convention.

Through this debate, we can specify the conditions in which the power pursuant to the prerogative of the Prime Minister can be exercised, in other words, the power to ask the Governor General to prorogue Parliament. What I tried to focus on were the various ways of limiting that power and ensuring that it reflects the will of the elected majority as closely as possible.

I pointed out that the executive branch, as it is currently constituted, does not have democratic legitimacy, except indirectly. In other words, its democratic legitimacy is based on the simple notion that the person with the executive power has the confidence of the elected members. It is not a system whereby someone is elected to head the executive branch, over and above the rest. Nor is it a system whereby the executive branch has legitimacy pursuant to royal confidence. Today, confidence comes solely from the elected members.

In short, it relates to what we are trying to do. Through various means, I think we can limit that discretionary power. We are not working in a vacuum, we are truly in the process of defining the Constitution. The Constitution can be amended other than through formal amendment. There are also a number of possible options.

• (1250)

**Mr. Raynald Blais:** Mr. Wiseman.

[English]

**Dr. Nelson Wiseman:** You're raising the question of how much... As Professor Cyr says, we have a minimalist Constitution, in terms of what's written. Compared with the British, it's maximalist, and the reason we had to write a Constitution, even though we said we wanted one similar in principle to that of the United Kingdom, is that we agreed to have a federal state. So we had to spell out who was going to be responsible for municipal affairs and culture, and who was going to be responsible for lighthouses and buoys, and the post office. So we had to write down something. Now the French tradition is much more of a codified tradition, the civil law tradition. We have more of the common law tradition.

There are arguments for both of them, and there are strong tendencies on both sides. I think Trudeau reflected the desire for something written, whereas a lot of people liked the courts before and dealing with the old Bill of Rights—and correct me here, Eric—and felt that Canadians enjoyed the existing rights in the Bill of Rights and weren't prepared to expand beyond that. We are now talking about whether we should try to codify rules regarding prorogation or dissolution, or other reserve powers. I take it that we've restricted some prerogative powers of the crown in the past. We have.

I think the Governor General should continue to have some discretion. The danger—and I don't know if Ned Franks or Mr. Hall said this—is that if you start codifying, you may be tying your hands in terms of unanticipated situations that might arise. Yes, it was Mr. Hall who said that. He used the example of fire breaking out in the House of Commons, where you have to have something happen before something else happens.

So this is for you to decide. If it's an issue of sufficient importance and you feel so outraged by the way prorogation has been used, I think you could use the legislative route. But if one of the parties, especially the governing party, does not buy into it, this won't have the same legitimacy. I say this because once the Prime Minister leaves this House and goes to the Governor General, it's without reference to your Standing Orders. He's her primary constitutional advisor. She doesn't have to agree to what he says, but she certainly has to consider it. Who elected her? Who gave her confidence?

**The Chair:** Thank you.

I'm sorry, but we're well overtime.

Mr. Christopherson for a question, if you have one.

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

Professor Cyr, you made a comment, and if I misunderstood, then obviously please correct me.

Professor Russell said in part, “Such an addition”, meaning a change in the Standing Orders, which is the motion to us sitting here now:

Such an addition...would surely be as binding on the prime minister as all other standing orders. Failure of a prime minister to observe the standing order could result in a ruling of contempt of Parliament and a defeat of the government on a non-confidence motion.

We've also talked about potential disincentives to a Prime Minister: losing the right to second reading for a period of time, introduction of bills, all kinds of things, but you introduced what I thought was a new concept and I wanted to tease it out a bit, if you will. I jotted down that we could word something in such a way that the Standing Orders would say the government would be considered to have lost the confidence of the House if the following, etc. I have never heard of a confidence motion coming in through the back door. Confidence is pretty big. As one professor said—it might have been Professor Russell—the majority vote in the House of Commons is what gives you the licence to be the government.

Do you feel strongly that you could do that? Could you load up a disincentive that says you will have de facto lost the confidence if... and then whatever you say after that? Do you really believe that will work?

First of all, do I have it right? If so, just give me your thoughts on why you think that would work.

• (1255)

**Mr. Hugo Cyr:** Okay. I'll express myself in English because I just want to make sure this will be correctly understood by everyone. I fully trust the translators, but maybe this time I'll just say it directly in my own words.

I do believe that you understood correctly what I suggested. In recent times it has often been suggested that it is up to the government to decide whether something is an issue of confidence or not. It is not up to the government to say so. When there is a majority in Parliament, there is no issue. When the government says it is a confidence issue, because the government has a majority of the seats, then obviously it is a confidence issue. Otherwise, it is up to Parliament to decide whether something is a confidence issue or not.

I do believe it would be possible to say in advance what would be considered a non-confidence vote. If I had suggested that a failed attempt to introduce a financial bill would be considered a confidence issue, I don't think that would have raised that many eyebrows. Of course, in itself, failing to pass a financial bill is not necessarily a non-confidence vote, as we have seen in the past. It has happened that the Liberals suggested a money bill, it didn't pass, and very quickly they were able to garner the Social Credit vote to make sure Parliament would not fall. In my view, there is no reason why we cannot set in advance what would be considered an issue that would raise non-confidence by Parliament in the government, similar to stating in advance that not passing a money bill would be considered a confidence issue. I would suggest that you could set any other suspensive conditions for the equivalent of a non-confidence vote.

**Mr. David Christopherson:** Have you any other thoughts—the other two?

**Dr. Nelson Wiseman:** I am skeptical about this. A number of you were in the House in 2005 when you tried to bring down the Martin government. You all insisted this was a confidence matter, and they said no, it was attached to a committee's report and therefore was a procedural motion.

The people who decide whether it's confidence or not on these bills are the government. It's not the opposition, unless it's explicit you're voting non-confidence. We saw this in the 2005 case, when you said, "We're voting non-confidence in you, but the only way we can do it is by attaching it to this committee report." The government said, "Well, too bad, that's a procedural way. It isn't the formal motion of non-confidence. We haven't given't you an opportunity to vote on it."

Correct me if I'm wrong. Didn't the Prime Minister earlier this year say every bill would be a matter of confidence? So the government does decide whether it wants to fall on the long gun... Any piece of legislation it wants to introduce is confidence.

● (1300)

**The Chair:** We're pretty much out of time.

Mr. Adams, do you have any comment on that?

Then thank you all for coming today. I apologize on behalf of the fire crew.

Mr. Reid, did you have a point of order?

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

On a point of order, Mr. Chair, we did lose some of our time here. We had three witnesses today instead of two, and I thought this was a particularly productive panel. I don't want us to make a decision now to bind ourselves, but we should give ourselves the opportunity of inviting these witnesses back.

At the very least, we should extend to them the same invitation we have given to Mr. Hall, as they see things transpiring and further testimony, of sending written material that could be distributed to committee members.

**The Chair:** Great. Your chair will take the blame for three witnesses on one day. We will attempt not to do that, but sometimes scheduling works that way. And I thank you for bringing up the future information piece.

I challenge you all and ask you all, if you're glued to your TV sets watching this committee—that's not likely the case, but if you hear us venture into an area where you have an opinion, please send it forward to us. We'll attempt to use all the information that we get in our final report moving forward.

Thank you very much for that, and thank you again for attending today. I am sorry that we did miss part of it, so we will leave open the opportunity to call you back at some future date if we find we need to. The study is going on somewhat long.

For the committee's business piece, on Thursday there will be two more witnesses on prorogation, and then we'll be in our constituencies for a week.

The week we're back will not be about prorogation. On Tuesday it will be the main estimates, with the Speaker and the Chief Electoral Officer. On Thursday, the report will be ready on the use of technology in the House, so we'll do that, and then a bit of committee business after that.

We'll go back to prorogation right after that, with an idea of when we will finish and when the report will be ready.

Thank you.

The meeting is adjourned.









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