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# Standing Committee on Procedure and House Affairs

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## Tuesday, June 1, 2010

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## Chair

**Mr. Joe Preston**

# Standing Committee on Procedure and House Affairs

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● (1105)

[*English*]

**The Chair (Mr. Joe Preston (Elgin—Middlesex—London, CPC)):** I'll call the meeting to order. This is meeting number 17 of the Standing Committee on Procedure and House Affairs. We are studying prorogation.

Members, we will be having Professor Heard as our first witness today for approximately an hour. We have some committee business we're going to be looking at in the second hour. That will include how we're going forward on this study and a discussion of the calendar for Thursday.

Professor Heard, it's great to have you here today. We'd love to have you give us an opening statement. I know that you've been watching us, and it's great to know people have been watching our committee from afar.

Please give us a bit of an opening statement. We'll get to members' questions right after that.

Professor Heard, I give you the floor.

[*Translation*]

**Prof. Andrew Heard (Associate Professor, Department of Political Science, Simon Fraser University, As an Individual):** Thank you, Mr. Chair.

First I want to thank you for inviting me.

[*English*]

It's a great pleasure to be here in the nation's capital and to visit from the west coast.

There is a range of topics you've already covered in your previous meetings that I'd be delighted to discuss in the question period that follows, including the nature of constitutional conventions, constitutional amendment procedures, the role of the Governor General, and who can offer advice.

In my introductory comments, however, I'd like to tackle two basic questions. The first is a relatively easy one for me to answer: should we try to limit the power of prorogation?

Prorogation is usually a routine matter that resets the parliamentary agenda. In many parliaments around the Commonwealth, prorogation occurs on an annual basis. In Great Britain, for example, it occurs every November. But this schedule simply does not leave enough time for the proper consideration of complex matters, and many parliaments now allow the reinstatement of business at an advanced stage in the new session.

Given the widespread reinstatement of unfinished business, some political systems have questioned the basic value of dividing parliaments into separate sessions. The modern practice in New Zealand, for example, is to operate the whole three-year lifespan of Parliament as one session. Even if prorogation were to occur, New Zealand provides that business does not lapse. In addition, it is even possible to reinstate business from a previous Parliament.

It is important to note that prorogation can be used constructively in emergencies to suspend Parliament until it becomes practical to resume business.

In rare circumstances, however, prorogation can be used by the crown to interfere in the House's ability to conduct business. Prorogation in these cases is intended to prevent the House from holding the government to account. This third category of prorogation effectively turns the clock back to a bygone era, when the crown prorogued or dissolved Parliament whenever it felt seriously challenged.

As a result, I believe it would be appropriate for the House to defend itself against such interference, assert its right to control its own affairs, and limit the power of prorogation.

The second question I'll address is much more difficult to answer: how should the power of prorogation be regulated?

The essential principle, in my view, is that the consent of the House of Commons should normally be obtained before Parliament is prorogued. I say “normally” since we must allow for the unexpected arising of acts of violence, epidemics, natural disasters, etc., that could prevent the House from deliberating.

A variety of tools is available to achieve this principle of consent: a constitutional convention; a motion in the House of Commons; a change to the Standing Orders; statutory changes to the Parliament of Canada Act; modifications to the letters patent; and constitutional amendment. In the end, it may take a combination of methods.

One could tackle the problem directly by changing the Governor General's powers of prorogation, but there are also other indirect ways to achieve much the same results. You've heard suggestions that the Standing Orders might be changed to provide disincentives, but I'm not sure that the ones considered would be enough to be effective.

Even so, I do think that Standing Orders could be used to good effect. For example, they could be amended to say that all business would be automatically reinstated following prorogation unless the House decides otherwise.

The Standing Orders could stipulate that a vote on reinstatement be held within a certain number of days at the start of a session. This way, a government could reset the parliamentary agenda if it wished, provided a majority of the House agrees.

Another option would be to create a set period for a session of Parliament. Since the life of this Parliament is now limited to four years, the Parliament of Canada Act could stipulate that there shall normally be two sessions of Parliament. One could simply leave the length of those two sessions to be worked out in practice or stipulate a clear length for the sessions. In either event, however, one would have to allow for prorogation to deal with emergencies.

Neither of these changes would, in themselves, achieve the desired effect of ensuring that the House normally consents to prorogation. They would have to be coupled with some other statement about the need for this consent and those statements should be very clear and strongly worded.

It might be sufficient for the House to pass a motion declaring that it views prorogation without its consent to be an obstruction of the House's ability to conduct business. The Standing Orders could then set out the procedure for providing that assent.

Legislation to this effect would, of course, have an even stronger effect.

● (1110)

In any case, one would still have to make provision for prorogation to deal with emergencies.

Alternatively, as you have already heard, one could pass a motion declaring that any government that prorogued Parliament without consent would forfeit the confidence of the House. The weakness in this approach is that it would provide an easy way for a government to seek an early dissolution under the fixed election date legislation.

If one were to make legislative changes, there's the added concern that a formal constitutional amendment might be required because the powers of the Governor General are involved. This is an interesting and complex issue that I'd be happy to explore, but let me simply say at this stage that there is a strong argument that Parliament can legislate on prorogation or the length of parliamentary sessions.

Unfortunately, reliance on disincentives that occur after the fact may not be effective enough. It may ultimately be necessary to provide a way to ensure that wrongful prorogations do not occur in the first place.

The solution need not be found in trying to constrain the Governor General's power of prorogation. It may be enough to empower the Governor General to exercise her reserve powers to refuse advice from the Prime Minister.

The House might, as part of any motions on the subject, declare that it approves of the Governor General's refusal of any advice to prorogue that is not agreed to by the House and not needed to deal with an emergency. In essence, such a refusal would be exercised with the blessing of the elected House of Commons.

In conclusion, I believe it would be wise to establish a rule that the House of Commons should normally consent to prorogation. There is a wide range of options available to achieve this goal, and a combination of approaches might be required to ensure compliance.

Thank you.

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

Madam Jennings, you're up.

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

Thank you, Professor Heard.

This committee is looking at the possibility of amending the Standing Orders. You've dealt with the issue of how that might happen, but you also said that, should the House of Commons decide to adopt a motion declaring that prorogation without its consent could be deemed contempt of Parliament, one might wish to have legislation accompanying such a motion to make it that much stronger.

When you discussed the possibility of legislative changes, you stated that a strong argument can be made that Parliament can legislate on the issue of prorogation without constitutional amendments being required to do so. Could you expound a little on that?

**Prof. Andrew Heard:** Do you mean on the ability to legislate on prorogation and length of sessions?

● (1115)

**Hon. Marlene Jennings:** Yes.

**Prof. Andrew Heard:** As you've heard before, the real stumbling block is the requirement for unanimous consent dealing with amendments to the office of Governor General. There are a number of constitutional scholars who believe that the office of Governor General includes all the powers of the Governor General, so in effect one can't touch the Governor General, and the provinces can't touch the Lieutenant Governor.

I'm not persuaded by this argument because I believe it may be unworkable. The powers of our vice-regal officers are a combination of common law and statutory powers. The normal rule that has been established by the Supreme Court of Canada is that common law prerogative powers can be appealed or amended at any time by ordinary statute. That's a fundamental principle of the British constitutional law that we've adopted.

Before 1982, there was a wide range of legislative changes made to the prerogative powers. It would be an absolute nightmare to actually sort out, across all 11 jurisdictions, which matters are still common law prerogative powers and which have been changed by statutory powers.

And I think it would be very odd to move from a principle that Parliament can at any time legislate on the prerogative powers, to move from that position to one where you need the unanimous consent of 11 legislatures to make any changes to the common law powers. That, to me, turns on its head one of the most basic principles of parliamentary sovereignty over the crown. So I would read the office of Governor General as a very narrow construction, largely relating to the existence and perhaps the appointment of people to that office.

**Hon. Marlene Jennings:** You say that a myriad of legislation has amended common law powers. Can you give us some examples?

**Prof. Andrew Heard:** There's one that this committee looked at a few years back when it came to the fixed election date legislation and looking at dissolution. We commonly talk about dissolution being a prerogative of the crown. What we know of dissolution is that it is actually three different acts: one of them is dissolving the House; the next one is setting the election date; and the third one is summoning the Parliament to another session.

The actual dissolution and the summoning are matters that are covered in the Constitution Act, 1867. Some people say that did or did not disturb the common law powers. We don't know for sure whether it has, but there's certainly an overlap, and normally one would say that the statutory law has displaced the common law powers.

They are clearly constitutional, in a sense, because they're referred to in the 1867 act. However, the actual act of setting an election date and starting an election is a statutory power of the Governor in Council under the Canada Elections Act. That same change has been made in 9 out of the 10 provinces, whereby the actual instigation of an election is done by the Governor in Council.

Newfoundland is the only province where—by statute, actually, not common law anymore—the start of an election is begun by the Lieutenant Governor under statute. In Great Britain, it still remains a common law power of the monarch to dissolve and call an election.

So that's one example of changes that have been made and differences in different jurisdictions.

**Hon. Marlene Jennings:** Okay. There's another point that I would like to hear more about from you. You were talking about possible legislative changes. My notes say that the House might declare that it would approve of a refusal by the Governor General to acquiesce to a request from the Prime Minister to prorogue when that request doesn't meet certain conditions or standards. Now, I may have added on that last little piece, because my notes don't continue so I'm trying to make sense of that sentence.

But I would like to hear you further on that, because we have had witnesses before us who have talked about how, either through Standing Orders or through legislation, the House could attempt to limit or set conditions whereby it would approve of a prime ministerial request for prorogation under certain circumstances, and if that request did not meet the circumstances, there could be disincentives.

We have also heard from other witnesses who have suggested that, should the House decide to put any kind of limits or make its views known in any way on the issue of the authority to request prorogation by a Prime Minister, the Speaker could inform the Governor General. Then, I'm assuming, that would fall into the situation you mentioned: that if the House did act in that way, the Governor General would have an arsenal for refusing.

● (1120)

**Prof. Andrew Heard:** Yes. There's a number of issues in your comments.

**Hon. Marlene Jennings:** Yes, that's typical, and all of my colleagues are saying, “Yes, that's Marlene”.

**The Chair:** And you have 20 seconds left.

**Voices:** Oh, oh!

**Prof. Andrew Heard:** Let me start with perhaps the more interesting one, and one that's been debated in some of your previous testimony, and that is the ability of the Speaker to be in contact with the Governor General, shall we say. I think it is in fact a clear and ancient right of the Speaker to have an access to the monarch or the monarch's representatives to convey the wishes of the House. This is a very ancient and well-established right that arose as Parliament was asserting its power to the crown.

This was most recently and clearly reaffirmed by Speaker Milliken in November 2005, when there was a motion passed asking the Speaker to inform the Governor General that, if there were to be an election, the House would prefer the election to be held on a certain day. There was some discussion as to whether this motion could be put and whether the Speaker could in fact approach the Governor General.

The Speaker ruled that the House could make any kind of motion to express an opinion and that he, as a servant of the House, would be more than willing to have a cup of tea with the Governor General and inform her of the House's opinion, but while he was putting it in a whimsical way, this was a very clear affirmation of the Speaker's acceptance of his right to inform the Governor General of the House's motions.

So yes, that could be one way: to create a mechanism whereby the Governor General is directly informed that a majority of the House holds a certain opinion on prorogation. The suggestion I made was essentially to pass a motion that was worded in an enduring way, so that there would be a sort of standing authorization from the House to refuse assent that had not previously been consented to by the House or needed for an emergency.

**The Chair:** Thank you.

You're just a little over, Madam Jennings.

I do this so seldom, but I want to ask a question. If the Speaker has the ability to ask for advice, does the Speaker of the Senate have the same ability?

**Prof. Andrew Heard:** That's a very good question.

**The Chair:** I always have good questions; I don't know the answers.

**Prof. Andrew Heard:** What I know from history is that it was the Commons Speaker who consistently asserted that right. One would think so, because out of the British traditions, the Speaker of the House of Lords is in fact a cabinet minister and a member of the Privy Council. So one would assume that there is a form for the Senate Speaker.

**The Chair:** And if the advice from the two was contrary...?

**Prof. Andrew Heard:** That would be very interesting.

**Voices:** Oh, oh!

**The Chair:** Yes, it would be, wouldn't it?

Mr. Lukiwski, I'll let you go from there. I'm sorry, but I just had to satisfy an urge.

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

Thank you, Professor Heard, for being here.

I'd like to hear a little more of your analysis and your opinion, at least on how prorogation could be limited within our current constitutional conventions. You mentioned, for an example, that particularly in a minority Parliament, if we had fixed election dates, a government wishing to force an election or break a fixed election date could perhaps request prorogation. If it was refused by the House, that would potentially trigger an election.

You also mentioned that you anticipate—and correct me if I'm wrong, I don't want to be putting words in your mouth—or at least foresee a situation whereby, through a combination of changes to the Standing Orders, statutory or legislative changes, and those types of approaches, Parliament wouldn't necessarily have to amend the Constitution.

Here's my first question. Are there other Westminster models of government you're aware of that have such a combination of factors and that allows what you're suggesting should be done here in regard to the limits to the government's ability to prorogue?

**Prof. Andrew Heard:** I'm not aware of deliberate attempts to try to change the powers to prorogue. The closest one can come to it is in New Zealand, where they've simply abandoned the notion of sessions, and recent Parliaments have one session for the whole Parliament.

To the extent that there's been discussion of it, it has been questioning the value of proroguing at all. One of the big concerns is how parliamentary business gets lost; it becomes much less efficient to have to restart or pick and choose the business that is carried over.

For the most part, it simply has not been an issue in most parliaments. The only example I'm aware of, in a modern post-World War II parliament where a prorogation occurred in circumstances similar to those of 2008, occurred in Sri Lanka—in 2001, I believe—where there was an impending confidence motion that the government was set to lose and the House was prorogued.

But in the thriving democracies, this has simply never been used that way. The power of prorogation has not been a political issue so there hasn't been an attempt to try to regulate it. We're discussing it in Canada because there were these controversial examples and the question has arisen; we can perhaps live with the examples that have occurred, but there may be different circumstances in the future that we want to try to avoid. So we were essentially carving fresh ground here.

● (1125)

**Mr. Tom Lukiwski:** All right. I guess it leads to this question, because we're asking constitutional experts and scholars to come here and to perhaps give their advice, but more importantly, I think, to give their opinions. If you had the ultimate power to deal with the issues of prorogation, how would you deal with them?

For example, would you eliminate the ability to prorogue altogether, such as in New Zealand, or would you, through a combination of changes to the Standing Orders, legislative changes, or whatever, deal with prorogation in a manner that you think would satisfy both the will of Parliament but also the constitutional ability of a government to prorogue? What would you suggest if you had free rein to develop a set of protocols?

**Prof. Andrew Heard:** Ultimately, I'm skeptical of the value of prorogation. I think there are certain circumstances in which it is useful to reset the parliamentary agenda and start a new session, but they are rare, so maybe the compromise would be to have set sessions so there is no issue of manipulation of timing and agendas and so on.

My initial preference would be to say that in a four-year Parliament there shall be two sessions, providing another session to deal with some emergency or other. In my view, that could and should be able to be put into the Parliament of Canada Act so that it's a legislated stipulation that there will be two sessions.

One could just simply leave it at that. It would work out to roughly a two-year period, probably, or one could say that the second September following an election, there shall be a new session. There are fewer constitutional questions if you just say there will be two sessions of Parliament, normally, because then you haven't really disturbed the Governor General's power of when to call it. If you try to nail down the date, then some people would argue you're actually taking the discretion away from the Governor General.

I believe that Parliament has the right and power to do that anyway, through ordinary legislation that would fulfill the requirements under section 44, unilateral amendments to the Constitution if need be. To recap, my short answer is to simply state there will be normally two sessions of Parliament and put it in the statute. One could leave a little wiggle room for the government or one could stipulate that it would be in the second September.

**The Chair:** You have one left.

**Mr. Tom Lukiwski:** You'd mentioned in your comments that you weren't a big fan of prorogation and the right of governments to prorogue. But you mentioned in your opening statements that obviously, from time to time, and history has proven this to be true, there are extraordinary circumstances—for example, in a time of war—when it would be certainly the right of government and probably the need of Parliament to prorogue to deal with those extraordinary changes in circumstances. Do you think there should be some sort of extraordinary measures protocol put in place?

**Prof. Andrew Heard:** Absolutely. I think it's essential that some exception is made for emergency situations. There's no doubt that something terrible could happen and Parliament simply could not meet, or if it were to meet, it would have to fundamentally reorder itself. Prorogation then is essential.

As well, I wouldn't like to see set periods for a prorogation, because in an emergency situation or a war one might need to have a very extended period when the House is prorogued. But those are exceptions to the rule rather than what should and could be the norm in everyday Parliament.

● (1130)

**Mr. Tom Lukiwski:** Do you think those extraordinary measure protocols would—

**The Chair:** Your time is up, Mr. Lukiwski.

**Mr. Tom Lukiwski:** Sorry, Chair.

We'll get back to you.

**The Chair:** Sorry, Mr. Lukiwski.

Monsieur Guimond.

[*Translation*]

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

Professor, thank you for having come all this way for this presentation. You are working in the department of political science. Thus, you should be able to appreciate the difference between... Is it all right?

**Prof. Andrew Heard:** Yes.

**Mr. Michel Guimond:** You are able to appreciate the difference between the legality of an act done by a prime minister, or by a government, and the morality of the same act. With regard to legality, the Prime Minister may have the right to prorogue at will, on a monthly basis if it pleases him, but the fact of proroguing in order to avoid facing a storm or facing timelines that might be embarrassing for him is a different matter. I would like to hear you regarding these two points of view.

[*English*]

**Prof. Andrew Heard:** You are quite right to distinguish between trying to set legal or formal limits on the Prime Minister's prorogation powers and talking about the moral constraints. We've operated until recently on those moral constraints.

The constitutional conventions that had built up, the informal ways of doing it, and the moral expectations of it were essentially that the power of prorogation would only be used for procedural or policy agenda matters, not as a confrontation with the House of Commons. It's really just the more recent events that created this controversy that prorogation could perhaps be used to challenge the right of the House of Commons to deal with business before it. That brings us here today.

In one respect, it would be great if we did not even need to discuss this and if that moral consensus had held that prorogation should be an agenda issue rather than a power issue between the crown and the House of Commons. Ultimately, whatever route is chosen has to depend upon a moral consensus that the Prime Minister's power should not be used to confront the House or to shut down the House.

It doesn't matter whether you put it in the Standing Orders or the legislation. A very determined Prime Minister could still push this to the limit, and the ultimate protection in Canada is a moral consensus that it is wrong for the crown to use its powers in this fashion.

[*Translation*]

**Mr. Michel Guimond:** You began your presentation—right from the very first words of your presentation—by drawing a parallel with the British system where prorogation has practically become an institution. In fact, every year, there is a prorogation and the new session begins by a Speech from the Throne.

This makes me think—I am not criticizing you and I do not want to provoke you into an argument over this—that you are trivializing things and making them less dramatic than they are. I don't know the exact term for this in French. You seem to be saying that what happened here in Canada... because you strongly suspect that if you have been called up as a witness and that this question is now being studied... A letter with several points was sent by the leader of the Liberal Party, Mr. Ignatieff, and a motion was tabled by Mr. Layton on behalf of the NDP. Consequently, if we study this issue, this repeated use of prorogation each time something happens that the Prime Minister finds inconvenient, it is because this subject is of concern to parliamentarians. Now you seem to be-trivializing both events by telling us that in any case, in England, there is a prorogation every November.

● (1135)

[*English*]

**Prof. Andrew Heard:** I think what I was trying to convey is that in some political systems prorogation is simply a matter of routine. It's not a matter of controversy at all; it's just simply done on an annual basis in Great Britain. Here, in Canadian Parliament, up until the 1980s, prorogation appeared roughly on an annual basis as well. It was only in the 1980s and 1990s that everyone switched to roughly a two-year session.

In my comments, I was trying to convey that there is a routine way in which prorogation has been used, and it's not controversial in that sense. The difficulty with this routine prorogation is that it prevents a long-term study of measures before the House, and the solution had been to carry forward or reinstate a lot of business from the previous House.

That has led to a questioning of the value of the prorogation at all and that's where I have some skepticism of the value of prorogation. When two-thirds or three-quarters of the business is routinely reinstated, why do we bother with the prorogation?

I do get concerned and I get very passionate about prorogation being used in the third sense, that of the crown trying to shut down the House of Commons and prevent the House of Commons from doing its business. That's why I would suggest some fairly strong language in any measures dealing with prorogation: to try to avoid this extremely rare and hopefully not repeated instance.

[*Translation*]

**Mr. Michel Guimond:** Have I any time left?

[*English*]

**The Chair:** You have 30 seconds.

[*Translation*]

**Mr. Michel Guimond:** In that case, I will come back during the second round of questions.

[*English*]

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

Oh, I'm sorry. I was ignoring Mr. Christopherson. I was about to move on.

David.

**Mr. David Christopherson (Hamilton Centre, NDP):** Thank you, Chair. My apologies for being late. The public accounts committee ran late, so I wasn't here for the opening remarks. Unfortunately, without any written remarks, I may just have limited questions because I don't want to ask things that have already been dealt with.

But to pick up on what you just said, which I did hear, you mentioned that what should be in place is strong language—I think you used the term "strong language"—to prevent any potential abuse. Can I push that a little further? What kind of strong language? How should that be structured?

Because that is our concern. It's not the regularization. We've all accepted that it's a regular part of business, notwithstanding your comments that we could do without it. But it is the potential abuse and the notion that what happened could ever be repeated again, or something worse; that is what many of us are trying to prevent. So when you say "strong language", sir, what should we be looking at? What are some ideas?

**Prof. Andrew Heard:** One suggestion I had given was a motion to declare that the House views prorogation without its consent as an obstruction of the House's ability to conduct business. I use that language because it then raises the issue of a possible contempt motion.

And here, I would become schizophrenic, because I think it's important to have very strong language that ups the ante. I do have a serious hesitation about constructing something where it automatically becomes a matter of confidence, because if the House is going to rule on the government being in contempt of the House, the government, I think, would quite naturally say that this is a matter of confidence. How can the House have confidence in a government that is in contempt of it?

There are two ways around that. One is for the House to further refine this. If it feels that it wants to make prorogation a matter of ordinary business, the House could, as part of the motion, say that "this shall not be a matter of confidence", that this is very serious, but we're exclusively saying this is not a matter of confidence. That's a two-edged sword as well, but if it's made a matter of confidence, then the government is upping the ante, and it could resign, if it lost the motion, and call an early election.

One of my earlier comments was that the difficulty in making it an automatic confidence issue is that a government could use prorogation, then, as a means to call an early election under the fixed election date legislation.

● (1140)

**Mr. David Christopherson:** I apologize if you've already commented on this, but what are your thoughts on the notion of penalties should the Prime Minister go to the GG without first securing a majority vote of the House?

**Prof. Andrew Heard:** One suggestion I had was for the House to pass a motion saying that it would support or approve—some kind of wording like that—the Governor General refusing a prorogation that hadn't been heard without its consent or was needed for an emergency. In that sense, the Governor General would be acting to reflect the wishes of the elected House of Commons rather than purely on personal prerogatives. The idea would be then to empower the Governor General to prevent a wrongful prorogation to occur in the first place.

Again, it's a two-edged sword, because if advice from the Prime Minister is refused, the Prime Minister could go all the way and resign and then you'd have quite a sweet pickle. However, if this is coupled with some kind of motion that, as I said, defuses this and says that this is not a matter of confidence, then the Governor General would be quite authorized, I think, to refuse a resignation and say, "Sorry, I don't accept your resignation, as the whole issue is this Parliament must continue to do its business, and you're the Prime Minister, so get on and govern".

We've had some examples in the past of vice-regal people refusing advice and the first minister carrying on. In Newfoundland in 1971 the premier wanted an election. The Lieutenant Governor privately said no and the premier simply carried on, because the Lieutenant Governor said, "I'm saying no because we had an election recently and I want to see this government function". So the premier said okay. It was some months later that an election was in fact held, once it became clear that the House couldn't function.

I think this is an important principle to re-establish: that refused advise should not automatically authorize a Prime Minister to resign and make it a confidence issue. What we're trying to instill here is the ethos that Parliament should be allowed to function while it can and the government should continue to govern while it can.

**Mr. David Christopherson:** In earlier comments, did you have a preference for a resolution, a change to the Standing Orders, a legislative change, or all of the above?

**Prof. Andrew Heard:** All of the above. The main preference, as I had voiced to an earlier question, was to take the matter off the agenda, perhaps by just saying that there should normally be two sessions in a Parliament, with or without setting when the second session—

**Mr. David Christopherson:** A minority or a majority...?

**Prof. Andrew Heard:** Yes. So you would have two two-year sessions in a Parliament. Just make it routine and carry on. Allow for emergencies and prorogation and that kind of circumstance, but let's just defuse the issue and ensure that Parliament gets on with its business.

**Mr. David Christopherson:** Good. Thanks, Chair.

**The Chair:** Thank you.

We are moving to a five-minute round now. We're going to try to get in everybody who wanted a question today.

Madam Jennings, let's go to that and see if we can do it.

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

I just want to make sure that I understand some of the suggestions you've made, both to Monsieur Guimond and to Mr. Christopherson.

The House could adopt a motion amending the Standing Orders, I assume, which would indicate that the House views prorogation without its consent as an obstruction to it conducting its normal business. A second motion—or it could be included in the same motion—would stipulate that it's not a matter of confidence. And/or another motion amending the Standing Orders would state, "That the House of Commons would approve a decision by the Governor General not to acquiesce to a Prime Minister's request for prorogation without consent of the House". Either included in that, or in a separate motion, it would stipulate that it also would not be a matter of confidence.

Did I understand you correctly?

**Prof. Andrew Heard:** That's close enough. Yes.

**Hon. Marlene Jennings:** Okay. So "close enough": does that mean 90 out of 100 or 60 out of 100?

**Voices:** Oh, oh!

**Prof. Andrew Heard:** I'm drawing a distinction between perhaps an ordinary motion that simply states an opinion of the House and is recorded and could be worded in a way that is an enduring statement of a House position, not the opinion of the day. I believe the House can pass an ordinary motion that is meant to have a definitive statement and an enduring kind of quality. The statements about unauthorized prorogation being an obstruction of the House could be in that kind of context.

One could put those statements in the Standing Orders. I prefer to see the Standing Orders limited to more of a procedural matter, but the House can put whatever it wants in the Standing Orders. The Quebec National Assembly last year tried to put a definition of confidence matters in theirs, so you could put whatever you want in the Standing Orders, perhaps as a preamble to a section that lays out when and how consent should be given by the House of Commons.

You could do it either way. The value of putting it in the Standing Orders is that there is no question, then, that this is meant to be an enduring statement. If it's a motion passed in the 40th Parliament, when we come to the 44th Parliament, the government could say, "That was back in the 40th Parliament and we've moved on since then".

● (1145)

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

**The Chair:** Mr. Albrecht.

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

Thank you, Mr. Heard, for being here today as well.

I read your article dated December 2008. In the middle of that article you make the statement that "...the advice to prorogue parliament is arguably quite unconstitutional". Yet at the beginning of the article, you point out, "The Governor General has reached a very difficult and historic decision...", and you go on to point out, "A difficult decision implies that there are good reasons to decide in either direction...". You say that "...the Governor General has a duty to intervene in the political process as little as possible."

Your second point reads as follows: ...the governor general is bound to normally act on any constitutional advice offered by a prime minister who commands the confidence of a majority in the House of Commons. Since the Conservative government won the confidence votes held on the speech from the throne in the last week of November, Mr. Harper could apparently address the governor general with authority.

In my opinion, those two thoughts from the middle of your article and the ones at the beginning are somewhat at opposite ends of the spectrum. This confirms what we've observed in the last number of weeks as we've tried to study this issue. We hear a wide variety of opinions from different experts from all across the country.

My question is this. If you were writing this article today, are there any positions that would be modified in light of what's happened since that prorogation? Or would it be 99% the same as what you wrote in 2008? I don't know if you get the gist of my question. It's a long question.

**Prof. Andrew Heard:** I have in fact written two further pieces on the 2008 prorogation, in which I enlarge on a number of issues. My conclusion ends up being the same, but I think my appreciation of the nuances and the appreciation that there really is a considerable foundation for the opposing arguments.... And this is one of the perks of being an academic: one can say that the other position is brilliant, but I just happen to like mine a little more or find it a little more convincing.

In terms of the 2008 prorogation, very clearly, there are strong arguments to be made that the Governor General should have acted on the advice. The normal position is that so long as the government has a relatively fresh confidence mandate from the House of Commons, it can insist on most matters put to the Governor General. The exception to that in this case was, I felt, that it was unconstitutional advice in trying to prorogue the House while a clear confidence motion was on the agenda and would be held within a matter of days. That's where I had problems with it.

**Mr. Harold Albrecht:** I guess the point I'm trying to highlight there is that the very recent adoption of the throne speech clearly—politically, at least—gave a clear understanding that Parliament actually was giving the Prime Minister and the government its confidence.

**Prof. Andrew Heard:** Yes, and normally that would be definitive, and I think the procedural gaffe since Confederation was made by the official opposition in not standing up on that Thursday afternoon and asking the Speaker to defer the vote until Monday. It was nonsensical, in my view, for the three different parties to stand up and decry the economic statement and say they would be voting against it, and then an hour later walk into the House and vote confidence in the same government. It was a piece of parliamentary theatre that I appreciated from afar.

● (1150)

**Mr. Harold Albrecht:** Thank you.

**The Chair:** Monsieur Guimond, to finish your thoughts...?

Madame Gagnon.

[*Translation*]

**Ms. Christiane Gagnon (Québec, BQ):** I would like you to inform us about how parliamentary work is done in Great Britain. You said that prorogation of Parliament has already been decided there.

Does this annul all ongoing work or does it have any influence on the quantity of work done by the Parliament? You can imagine that there are fixed dates for prorogations that come back with increasing frequency! Tell us a bit about the mechanics. Tell us how it works.

[*English*]

**Prof. Andrew Heard:** As far as I understand it, there is a routine reinstatement of a large amount of business; it's not all the business, but a large amount of business is routinely reinstated. So matters that began in one session would be picked up in the next session from essentially where they were previously. That's my understanding.

I could be misinformed on that, but in effect, it's something similar to what occurs in this House of Commons, where in recent years a fair number of the matters that died on the order paper are reinstated in the next session, essentially where they were before. I think that's the case in most of the modern parliaments; there's quite a wide scale of reinstatement of business.

What is unusual in some instances is that in some parliaments, the existing parliament can state that they want these particular issues to carry over into the next session. So it would be possible, where prorogation is done on a regular basis, that prior to prorogation the House passes a motion saying that "Bills 34, 36, and 59 shall be reinstated", and this in effect gives no option to the House or the government in the next session.

In New Zealand, they did that with their parliament. You could reinstate issues from one parliament to another, which would be curious, because then an election could occur between events, and the election could be fought on issues where the public was saying, "We reject those policies that were being proposed in the old parliament".

That's one reason why, in 2005, New Zealand stopped the ability of a current parliament to state that matters shall be carried forward into a new parliament, because they believed that things should be left to a new parliament to decide whether they're carried forward. That's very different from a new session of the same parliament, where there's no theoretical problem of the same parliament binding itself to carry matters forward.

[*Translation*]

**Ms. Christiane Gagnon:** Thank you.

I think that Michel had another question.

**Mr. Michel Guimond:** Yes, I will be brief, Mr. Chair.

I just want to finish the question that I wanted to put to you at the end of the previous round table.

As chance would have it, over the past two years, the Prime Minister used prorogation in December, at the end of the year. As you remember, it was two years ago. This was in order to avoid facing a Liberal-NDP coalition supported by the Bloc Québécois. He resorted to prorogation. And this time, on December 30, 2009, it was in order to avoid the whole issue of Afghan prisoners, etc.

If, as in England, Parliament was prorogued on December 31 of each year, would we have to change various legal and legislative instruments to avoid...? The event happened in late December. Now if the House must be prorogued in December of each year, and if in March or in September, some other event occurs, some other coalition or some other documents that the government does not want to show, the Prime Minister could once again resort to prorogation if we had not limited this power.

● (1155)

[*English*]

**Prof. Andrew Heard:** This is one reason I was suggesting that the Standing Orders might be amended to state that all business would be carried over from one session to another, so if you had a routine prorogation at a set date, the normal understanding would be that all matters would be reinstated. The government has the advantage of a prorogation gap, as it were, to let matters settle, come back with a throne speech, re-present its position, and have a confidence motion, but then carry on with the business that was largely on the agenda before, with some new items.

If it wished to reset the parliamentary agenda, then there would be provision for the routine consideration, at the beginning of the new session, of whether those matters would be fully reinstated or whether we would pick and choose from those. But I think the effect of a regular prorogation, with the assumption that all business will carry over unless the House decides otherwise, creates a disincentive for tactical prorogation and still allows the business of Parliament to be continued and reset if the majority of the House feels it should be reset.

**The Chair:** Thank you, Monsieur Guimond.

Mr. Cuzner, do you have a quick question or two?

**Mr. Rodger Cuzner (Cape Breton—Canso, Lib.):** I do. I'm confident that they'll add nothing to our study, but I'm just sort of nosy on this.

Just prior to the 2008 prorogation, a furor erupted around the coalition. As a political scientist, a respected professional in your field, were you somewhat surprised by the lack of understanding of the Canadian parliamentary system that was shown by a lot of the electorate with regard to the legitimacy or illegitimacy of the coalition?

Again, I don't think this will add anything to our discussion here, but I'd just like to get your opinion.

**Prof. Andrew Heard:** You've touched on an interesting issue. I think that gets to the heart of whether we could just rely on constitutional conventions and the informal understandings that had kind of structured prorogation powers. Up until perhaps 15 or 20 years ago, I think there was a very strong understanding of the nature of conventions and the importance of these moral rules, at least amongst the governing class.

What I've seen in the last 15 or 20 years is an erosion of the consensus on the value of those rules as a set of rules, and a belief among many actors, and even among scholars as well, that conventions are simply a guide and they can be adjusted at will and in effect what happens at the end of the day will be whatever happens—that these are not binding rules in the large sense, except for a very small number of them.

So at an elite level, there's been an erosion of the consensus on these rules. Out in the general public, their understanding of what goes on is reflected in this erosion of the consensus. So their understanding of what goes on in Parliament and what happens with an election has been undermined by very conflicting messages coming from the governing classes, political commentators, and so on.

The net result is a very low level of political literacy. I'm not surprised, because I teach a first-year political science class every year, and I'm always wildly entertained by what my students believe are in fact the rules of the game. Also, during the 2008 episode, I did a number of open-line radio shows, and I can only say that I was entertained by the passionate views, in particular those on the legitimacy of the coalition and whether in fact a new government could be formed so soon after an election. Something that particularly had me impassioned was the attacks on the legitimacy of the Bloc Québécois participating in it.

I had a very entertaining open-line radio session in Alberta in trying to convince Albertans that the Bloc Québécois was in fact a very constructive presence in our political system, and we were very fortunate to have a political party such as the Bloc Québécois pursuing their dreams through the electoral process. As a result, it is all the more important that our electoral process be held to the highest integrity and the rules involved be maintained as much as we can.

● (1200)

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

Mr. Reid.

And I'd like to point out that we've had everybody ask a question today. I had it all covered until Mr. Lauzon walked back into the room, so we may have to give him a chance after you're done.

**Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC):** Thank you, Professor Heard. I'm not sure whether our Bloc Québécois members want to laugh or cry at the news that you think they are a wonderful and permanent addition to the Canadian political scene.

**Voices:** Oh, oh!

**Mr. Scott Reid:** At any rate, I've read your book. This is quite an old edition of your book that I have here. Has a new one come out or is this still—

**Prof. Andrew Heard:** I'm in the middle of writing the second edition now, so all of this is happening at a wonderful time for me.

**Mr. Scott Reid:** I suppose it's just as well that you didn't publish it right before we had the 2008 prorogation.

**Prof. Andrew Heard:** That's right.

**Mr. Scott Reid:** It's true.

Anyway, I read this many years ago and very much enjoyed it, and I'm sure I'll enjoy what you come out with when you do your update.

I was comparing your notes with regard to the Governor General's powers with those comments that have been made by some other authors. For example, I have a paper here by Bradley Miller, from the University of Western Ontario, on conventions relating to the prorogation of Parliament.

You talked about one of the things that I want to ask you about, but I'm not sure you're conclusive in what you arrive at here. It is dealing with whether Governors General or Lieutenant Governors, as the case may be, should be regarded as having some degree of genuine discretionary powers, or simply as people who could be following a rule book and it almost doesn't matter who they have in there— they just have to find the right rule and then follow it through.

It's almost as complicated as the rules of golf, in that there's a rule for absolutely everything you do, and presumably every golfer should be able to do the same thing.

You give an example from 1986, when the Nova Scotia Supreme Court made a ruling that a Lieutenant Governor could have rejected some advice, which suggests that he could have rejected or accepted it. Maybe I'll just ask the question that way. What is your sense? Is there actual discretion in situations such as the prorogation situation?

**Prof. Andrew Heard:** This is something I've actually given a fair amount of thought to and have been rewriting that chapter on the Governor General earlier this year.

I would say yes: there is very important discretion left to the Governor General to decide whether to do this or to do that. But the most important caveat I now add to that statement is that while the Governor General or Lieutenant Governor has the freedom to make a decision one way or the other in certain circumstances, this is not in fact entirely their personal decision.

Whatever action the Governor General takes must be something that the government at least acquiesces to, so the prerogative powers do not simply say the Governor General can do whatever she wants. It's that the Governor General can do whatever she wants and have a government agree to, whether it's the current government or a new government.

If the Governor General is going to refuse the advice of the Prime Minister, this could lead to a resignation. So the Governor General must know in advance of considering a refusal whether in fact she could form a viable government that would take political responsibility for it. This is something I stress: whatever action the Governor General takes has to be something that the elected politicians are willing to take political responsibility for, whether it's the government of the day or a new government.

So there is discretion, but it's not by any means that a Governor General can simply do whatever she feels is best. She can only do what the current government or a replacement government is willing to acquiesce to and, ultimately, defend to the public.

**Mr. Scott Reid:** Okay.

I have a second question that I'll give briefly because I know I'm running out of time. In each case, we're faced with a prorogation in the context of a minority parliament—obviously it's great to be a majority parliament—but at the point at which the House returns, there always remains the option of the House choosing to defeat the government at that point.

**Prof. Andrew Heard:** Right.

**Mr. Scott Reid:** It seems to me that this has significant implications in that, effectively, prorogation in the event.... I'll start with in the event of an electorate that doesn't support the government; it's just simply a way of putting off the inevitable.

I suppose that in the event as we had in 2008-2009, that of a situation in which the House of Commons hadn't supported or, given a chance to vote, wouldn't have supported the government, but in the event of an election, the voters, it seems, would have re-elected the government and perhaps given it a majority based upon the considerations that the electorate was applying at the time and what the polls say....

I struggle with how one empowers the House of Commons to a greater degree through rule changes without effectively disempowering the voters. I want your thoughts on that, if you could, please.

● (1205)

**Prof. Andrew Heard:** There's no easy answer to that one. It comes back to an early question of how the public views the political system and the rules and the facts of the case. I think one unfortunate misunderstanding among many in the public is a very fractured notion of what the role of the House of Commons is in the political system.

A long succession of majority governments in the 20th century kind of established the notion that the government is completely in control and the House is there simply as a debating forum and to stamp the government's business. What we have in the 21st century are more minority governments, which are bringing home the issue that the government has a right to set the policy agenda, but the House of Commons must be in control of approving that business and deciding who has the legitimate right to govern, particularly following an election.

I think one step of reasserting the House's primacy in the political system would be to require the House's consent to prorogation, because it is a practical and a symbolic statement that the House is the one that's been elected by the people and the House should be ultimately in control of its affairs and the parliamentary process. The government of the day has a very important right to propose matters, but it's the House that actually disposes of how they will be approved or not, or changed.

My suggestion about trying to have some kind of statement in the regulation of prorogation is tied up in a belief that it is important to make some kind of visible and public reinstatement of the House of Commons in the political process.

I'm sorry. That's a very convoluted and torturous answer to what was a good question.

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

**The Chair:** Monsieur Lauzon, for a short question, and we'll finish up.

**Mr. Guy Lauzon (Stormont—Dundas—South Glengarry, CPC):** I have a very quick question as we're over time.

Thank you for being here, Professor Heard. We've had other academics appear before us and have had these interesting discussions.

You mentioned in your opening comments that prorogation is usually a routine matter. Really controversial prorogations haven't come up very often in our short history.

After speaking about this with different professors and different academics, I'm paraphrasing here, but at the end of the day after a lot of discussion I think that at least some of them said that you have to be very careful here, because you might be going down a slippery slope, or you might be getting into areas where you really don't want to go to. Maybe we are overreacting to the exception. Maybe the rule isn't so bad. We have to be careful not to overreact to this exception.

I think it was Professor Franks who said that it probably isn't worth going there, that probably we should maintain the status quo. Do you have any thoughts about that?

**Prof. Andrew Heard:** Yes. I do appreciate the kind of extraordinary circumstances that have brought us to this juncture, but I think the likely continuation of minority governments, in the intermediate future anyway, makes it important for the House to consider the role of the House in the governing process and the parliamentary agenda-setting process.

I think it is a very valuable exercise for the House to establish its role in consenting to prorogation. I think it's part of this process of re-establishing the identity and the legitimacy of the House in its relationship with the government of the day. I think that is a very worthwhile exercise for future governments: to be reminded that the House is the master of its own affairs and that the government needs the consent of the House.

I think it's important to do this. The suggestions I've tried to make should allow for some degree of flexibility in terms of dealing with unforeseen circumstances, but in the routine day-to-day process of parliamentary business, I think the emphasis should be on being able to get as much business done as possible. If the House wants to continue in a longer session, perhaps it should have the freedom to do so. If it's a fixed session, that's fine, but the House should decide, as a House, how long it sits and when it has finished its business.

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

● (1210)

**The Chair:** Thank you.

Professor Heard, we thank you for coming today. I have one quick question. I know the committee will allow it because I've only had one today and I don't normally ask any.

Monsieur Lauzon stated that most of this happens during minority governments. Prorogation is almost a non-issue during majority governments, but you gave your view on that piece.

But we've had other witnesses who have said to us that some of what you're asking about, or that we've been talking about here, is creating new conventions, either through motions or...you gave a fairly long list of how to create that new convention. But many have suggested to us that the convention can't be created by a minority and—I'll use the words of Professor Russell—it will take “all the actors in this game” for us to create a new convention.

What's your view on it being done while there is a minority? Because perhaps it would not be all of the actors who would be involved in creating the convention.

**Prof. Andrew Heard:** I think that's a very good and piercing question, actually.

**The Chair:** Thank you. That's twice today. Could somebody mark this down?

**Voices:** Oh, oh!

**Prof. Andrew Heard:** There are two ways to answer that. One way is that if one was just going to set out to create a new convention, I think Professor Russell was suggesting there'd be some statement that was agreed to by all the leaders of the parties and you would need all four in order to do it, and that would be, in essence, the normal way of instantly creating a new convention, because all the major actors would have agreed.

There's a different sense in which a convention relating to Parliament may be created, and that is where the majority makes a motion and declares something to be the case. It could be on what does or does not constitute a matter of confidence, for example. In that case, in my view, it doesn't matter whether the government agrees or not. If the majority of the House says that this is or is not a matter of confidence, that is a definitive statement, and it changes the constitutional convention relating to confidence. It can do that because the essence of confidence is whatever the House says is confidence or not.

In terms of prorogation and so on, it's one of those situations where the House's opinion is in fact ultimately the most determinative. If a majority passes it with the dissent of the government, then I would say that the majority has still created a convention that is binding on the government.

**The Chair:** Thank you for your time.

We've gone a little over because I know you've travelled a long way, and I wanted to give everybody a chance. Thank you so much for answering all of our questions today. It has really added to our confusion.... No—

**Voices:** Oh, oh!

**The Chair:** It has added to the mix that we have to deal with on this issue.

Again, thank you.

We'll suspend just for a short period, and then we'll do committee business. Will we go in camera? It's simply to talk about other witnesses on this study and the discussion on technologies, so if it's all right with the committee, we'll go in camera to do so.

[*Proceedings continue in camera*]

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