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Chair

Mr. Joe Preston

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•(1105)

[English]

The Chair (Mr. Joe Preston (Elgin—Middlesex—London, CPC)): Good morning.

We are here for meeting 26 of the procedure and House affairs standing committee. Today we are in public because we are going to be discussing some options from one of the studies that we have...I was going to say “completed”, but we haven't completed it. It's one of the studies that we're kind of in the middle of.

What we were faced with this time was that, of the members, five of them are new to the study. Five of them weren't here when we did it. So we thought that we would try this. It's a unique thing. I've never seen it done before, but I'm happy to do it. I think it's a great idea.

Andre, one of our crack researchers, is going to give us some summary of testimony. That's always tough to do, because it's really picking out the good things that somebody said in an hour and putting them into 15 or 20 minutes. It's not very easy to do. We're going to do that today, and we're going to try to break it down into the pieces that Andre has laid out. I'd like to discuss each of the pieces.

I would like to lead the committee...and you know the chair should never do that, but we have so many priorities on our plate right now, I want us not to come to a conclusion as to what we're doing today, after this, until we've also seen the same options paper from the Referendum Act and also have seen Mr. Chong's stuff. We can then plan our priorities based on what the collective committee knows to be fact. Some of you are new, and so we'll gather that.

Ms. Yasmin Ratansi (Don Valley East, Lib.): Yes. You know that we are new also to the Referendum Act, so you'll have to at least edify us, and if we ask you questions based on our ignorance, you'll have to bear with us.

The Chair: Absolutely.

Today is supposed to be just informative, and lots of questions would be best.

Mr. Christopherson.

Mr. David Christopherson (Hamilton Centre, NDP): Perhaps I can build on where you are, Chair.

I'm asking colleagues: I'm assuming that the other three caucuses are in the same boat as me—namely, given the nature of what we're dealing with here, this isn't just any old bill. Of course, that's not saying that any old bill isn't important. My point is that I'm going to

need an opportunity in the process to go back to my caucus to give them a sense of where the issue is, what the dynamics of the committee are, and also to get their marching orders, quite frankly, in terms of where I'm going to be. I would think that might apply, given the nature of what we're looking at here, to everybody, whether it's Mr. Chong's suggestions, the referendum, or the electoral change.

All of that, at least for me, process-wise, Chair, will involve me at some point being able to go back to my caucus with the lay of the land, my recommendations, and asking for my marching orders. Then I come back here and engage others with hopefully the same mandate to make decisions, yes or no.

I guess I'm asking, as much as anything, Chair, are colleagues from other caucuses in the same boat? Is that a step they need to build into this too?

The Chair: Yes—

Ms. Yasmin Ratansi: To follow Mr. Christopherson's point, it's a very intelligent way of doing this. I do not know who from the Conservative caucus is new. You have the memory, transference of knowledge, but we don't.

Could you tell us who the new members are on this committee?

The Chair: Mr. Weston is new.

I think Mr. Hoback came about partway through the study, so he's kind of new. He has some of it in his head and some that we've told him.

The rest of us were all present during the whole study. Some were awake.

Voices: Oh, oh!

Ms. Yasmin Ratansi: So you're the old warhorses, then.

The Chair: Yes, apparently.

On this side, Madame DeBellefeuille was here for some of it, correct?

[Translation]

Mrs. Claude DeBellefeuille (Beauharnois—Salaberry, BQ): No. That is what I wanted to tell you.

[English]

The Chair: No? And here I was hoping.

[Translation]

Mrs. Claude DeBellefeuille: It was Mr. Guimond and Mr. Paquette who were here. I have not sat in on any meetings dealing with prorogation.

[English]

The Chair: Ah, that's great, we have Monsieur Paquette back. He'll be an expert for us today.

What we're suggesting and what I'd like today—as Mr. Christopherson said this, I saw a lot of nodding—is that we come to almost no conclusions, except let's hear from the analysts some of the testimony that's out there, gain all the knowledge we can, ask questions about it. But let's wait until after we've done the same thing with the referendum, the same thing with Mr. Chong, and a little bit more, perhaps on the Chief Electoral Officer stuff, before we decide how we fill in those last four or five meetings we have before Christmas, and which of these it will be.

Let's throw it over to Andre.

Andre, you've done fantastic work on this. I'm going to let you present it by section and then answer questions. Those of us who were here before will also try to answer some of the questions.

It's your floor. Go.

Mr. Andre Barnes (Committee Researcher): The committee began its study on issues related to prorogation on April 27 of this year. There were nine meetings. We heard from 16 witnesses prior to the adjournment for summer.

The suggestions made by these witnesses were many, to say the least, somewhere in the range of perhaps two dozen. Of these I was able to group them into seven categories. Overall, there does not appear to be a best approach or a consensus on the best approach to restrict prorogation, or whether or not to even do so. There is, of course, as I noted, some similarity, some agreement, and some overlap between the suggestions, and these were grouped together into seven categories in the paper.

I guess the best way to proceed is to begin. Again, these categories are in no particular order, nor are the suggestions within the categories in any particular order.

To begin with, a suggestion was made to amend the Standing Orders of the House of Commons. Mr. Walsh reminded the committee that the Standing Orders regulate the proceedings of the House, and that prorogation is not a proceeding of the House. As such, a standing order could not be put in place that would prevent a prorogation from occurring.

He, along with other witnesses, did note, though, that a disincentive could be built in post-prorogation, if it were the will of the committee to suggest that.

A number of witnesses—

•(1110)

Ms. Yasmin Ratansi: Can we ask questions as we go along? We didn't hear the witnesses, so....

What sort of disincentive are you talking about?

Mr. Andre Barnes: He had mentioned—

The Chair: Can I rule on that first?

Ms. Yasmin Ratansi: Sure.

The Chair: Let's do the section on the questions about standing orders. Your question may be answered by one of his further statements. We're only going to do section A, then we'll discuss it, and we'll move on from there.

Ms. Yasmin Ratansi: Fantastic.

The Chair: So let's try that.

Mr. Andre Barnes: Other witnesses had suggested that it would be helpful to include an amendment in the Standing Orders in respect of giving notice of a prorogation prior to prorogation occurring, and that the want of a prorogation should be debated and voted upon.

There were other suggestions as well in respect to amending the Standing Orders. These included that the House could not be prorogued while seized with a motion of confidence, and that indeed a definition of confidence ought to be included in the Standing Orders as well.

Another suggestion included that certain committees ought to be able to carry on after prorogation occurs. As far as that's concerned, at present, Mr. Walsh reminded the committee that if a committee were to try to meet during a prorogation period, they would not enjoy parliamentary privilege.

That's the overview to do with the amendments of the Standing Orders. Please feel free to ask any questions.

The Chair: Ms. Ratansi.

Ms. Yasmin Ratansi: I looked at what Mr. Heard was saying about disincentives. I do not think that they're strong enough. What was the disincentive, and how does it affect the parliamentary procedure?

Mr. Andre Barnes: Mr. Walsh was the first to bring forward the idea of disincentives. He said not that he would suggest to do so, but his disincentives that he had mentioned—

Ms. Yasmin Ratansi: You have two bullet points there.

Mr. Andre Barnes: No, I didn't list his actual disincentives. For example, he said:

...there shall be five additional opposition days in the first supply period in the new session, or no government bill shall be considered for a second reading within 60 days of the opening of the session.

He provided those two examples, and of course Mr. Heard provided his two as well.

Ms. Yasmin Ratansi: Mr. Reid, can I finish...or are you trying to explain this part?

Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC): Yes, I am.

I think the key thing with his suggestions was he was saying that, from a legal point of view, there's nothing you can do through the Standing Orders that can prevent a prorogation from occurring. You can only have after-the-fact punishments, if you wish, that take place after Parliament is resumed.

I think that's the thrust of it. The actual suggestions were more or less off-the-cuff illustrations of that.

Ms. Yasmin Ratansi: Okay, thank you.

So whenever we give sanctions, if they do not have teeth, does it make sense, and is it what the committee posed?

The Chair: We have made no proposals.

Ms. Yasmin Ratansi: No, no—posed a question, when they were talking about disincentives.

Mr. Harold Albrecht (Kitchener—Conestoga, CPC): Mr. Chair, I don't think it's so much not having teeth; it's a deterrent after the fact. So when a prime minister is considering whether or not to prorogue, he'd have to consider that when he gets back he'll have to wait for 90 days to introduce government legislation. It's those kinds of deterrents—potential deterrents.

The Chair: On some of the deterrents that were mentioned, I tend to agree with Mr. Reid: many of these things were way off the cuff. I don't even know if they were things we could legally do, but they were talked about.

Ms. Yasmin Ratansi: Thank you.

The Chair: Are there other questions on the Standing Orders change section?

Mr. Christopherson.

• (1115)

Mr. David Christopherson: Thanks, Chair.

Under the first paragraph, you mention that if a committee sat during a prorogation period they wouldn't have parliamentary privilege. Can that be extended? Do we have the authority to change that aspect as Parliament?

The Chair: If I remember right, the witnesses we asked—and I'm sorry, I don't mean to speak on your behalf—said that, no, it's a constitutional change. We could not somehow just buy an insurance policy to cover privilege during the time of prorogation. If the House is not sitting, there is no member's privilege.

Mr. Lukiwski.

Mr. Tom Lukiwski (Regina—Lumsden—Lake Centre, CPC): Further to Yasmin's question and the whole thing about disincentives, I think Scott and Harold were right; most of the disincentives that were discussed were really sort of just blue-skied, right? But if there are to be disincentives, obviously we would have to look at them very carefully.

As an example, every time that Parliament is reconvened, or a new session of Parliament begins, there's a pro forma bill that comes in. It's usually called Bill C-1. That gives the government the authority to introduce legislation. That could—I don't know the answer to this—if that were delayed 60 days, or 90 days, or whatever, also inhibit the introduction of private members' bills.

So if you are looking at disincentives, as I think the point was made by a number of our witnesses, you have to look very carefully at the consequences of each of the disincentives to make sure that what you're hoping for is actually what you get, as opposed to unintended consequences, and that may be one of the unintended consequences.

I think the whole issue of disincentives would almost be a separate study, because it really is very tricky at times to come up with something that doesn't impact negatively on other parts of the legislative proceedings.

The Chair: I remember Professor Russell, my favourite witness of all time—he will forever be my favourite witness—admonishing the chair once during his testimony about, you know, just shut up and listen, kid, because we're going to tell you what happens.

Voices: Oh, oh!

The Chair: I'm paraphrasing his words there, of course....

Mr. Scott Reid: It's almost a direct quote.

Voices: Oh, oh!

The Chair: The crack analyst says, yes, I was right there.

At any rate—this is further to what Mr. Lukiwski said—he said not to use “gotcha” politics with this, because whenever you try, you mess up. I think those were his words, too; don't play gotcha with it, because it's going to be tougher.

So that pretty much sums up that part.

Are there further questions on the section on Standing Orders and the testimony that we heard?

Great.

Andre, you can move on to enacting legislation.

Mr. Andre Barnes: Some witnesses suggested that legislation ought to be enacted. Among them, Mr. Franks and Mr. Adams suggested that, in their opinion, the federal Parliament could legislate in respect to prorogation.

On the other hand, Mr. Pelletier stated that legislation could only be brought forward in respect of prorogation if it was found that the power of prorogation did not enjoy constitutional protection. It was his view, and he was not certain, that the prerogative power of prorogation did in fact enjoy tacit constitutional protection as part of the separation of powers in the Constitution.

Similarly, Mr. Russell noted that the bringing forward and passing of legislation in respect of prorogation could run the risk of a potential judicial review. So it might not be, in his view, the soundest way to go about restricting the power of prorogation.

In addition, there was a suggestion by Mr. Topp—his was in conjunction with a standing order change as well—that he would like to see the House not be able to prorogue when seized by a matter of confidence.

Lastly, Mr. Heard suggested that it would be possible to normalize prorogations. Given that there is a set election period of four years, one could, for example, state that a prorogation must occur at a midway point, or that a Parliament will be composed of two sessions, and that could be legislated.

The Chair: Are there questions on that?

Ms. Ratansi.

Ms. Yasmin Ratansi: I just need clarification.

Mr. Pelletier suggested that legislation could only be brought forward in respect of prorogation, that the power of prorogation did not enjoy constitutional protection.

At the moment, within the Constitution, the Prime Minister has the right to prorogue Parliament, correct?

• (1120)

The Chair: Wrong. The Prime Minister has the opportunity to ask the Governor General to prorogue Parliament.

Ms. Yasmin Ratansi: Yes, sorry, for sure; that's the technical—

The Chair: It's the Governor General who does that.

But that's where the Constitution is on it, right? He or she does not, of course, have to say yes.

Ms. Yasmin Ratansi: So if the power of prorogation did not enjoy constitutional protection, what did he mean by that?

Mr. Andre Barnes: It was a very elaborate discussion. He went through the separation of powers that he saw in the Constitution, and among them was the prorogation power. He felt that this was part of the Constitution, the prorogation power, in that it enjoyed tacit constitutional protection as part of the Constitution, either in the preamble or he found it elsewhere. So you could not necessarily legislate to do with the Constitution without a constitutional amendment.

Ms. Yasmin Ratansi: Mr. Reid, do you want to explain this further?

Voices: Oh, oh!

Mr. Andre Barnes: And the witness was not certain, by the way.

Mr. Scott Reid: Yes, and I think that's the problem. The term "prorogation" is not actually mentioned in the Constitution, but the preamble to the 1867 Constitution says that whereas the provinces—which it then lists—are desirous of creating a Constitution for Canada "similar in Principle to that of the United Kingdom", in the United Kingdom, the practice of prorogation had pre-existed. So the question is to what degree....

Of course, we've used prorogation in practice, and the question is to what degree, formally, prorogation exists and what kinds of limitations there are on our ability to make changes to it, and, if so, who would make those changes. We have more than one constitutional amending formula in terms of limitations that would be placed on it.

Then, separate from that discussion of the pure legalities, which presumably you can only resolve by submitting a reference question to the Supreme Court, there is the question—I think Andrew Heard was addressing this to some degree, because he's an expert on

constitutional conventions—of the degree, conventionally, to which the Prime Minister's ability to make recommendations to the Governor General on what to do is limited. That's the question we're struggling with over here.

The Chair: Are there further questions—on the ability to pass legislation, or about legislation—on this matter?

There's nothing? Okay.

Andre, let's move on to amending the Constitution.

Mr. Andre Barnes: Other witnesses suggested an amendment to the Constitution. Indeed, Mr. Walsh suggested that, in his view, the only surefire way to make the power of prorogation subject to law was through a formal constitutional amendment. The formula to be used would depend on the purpose of this constitutional amendment.

Indeed, Mr. Adams agreed with this statement. In fact, he stated that the Prime Minister's discretion to seek prorogation from the Governor General could in fact be constrained, and there were two parts to that. There was the ability of the Prime Minister to advise the Governor General and then there was the Governor General's discretion to grant prorogation. Mr. Adams felt that you could constrain the Prime Minister's ability to advise the Governor General through a constitutional amendment.

Ms. Yasmin Ratansi: When we have these recommendations or suggestions made, supposing we as a committee were to take option C; would we do a study on it? What would be our next step?

This is a subject that would really get everybody's hackles up, so what would we be doing?

The Chair: I'll let Mr. Lukiwski respond, and then I'll answer.

Mr. Tom Lukiwski: That's a great question, Yasmin, because we went over a lot of ground when we had these witnesses come forward.

I think one of the larger questions this committee has to determine is just that: what do we do with this now? As we've discussed over the past couple of meetings, we have a fairly heavy agenda as a committee with other issues, whether it be the Referendum Act or Michael Chong's bill, etc.

I guess, Chair, I would ask you at the end of our discussion here to maybe conduct a bit of a walk-around or consultation with all members of this committee to see if there is a consensus to pursue this now or if we should go back to the agenda that we'd established through the steering committee and put this on the back burner for a while. I think Yasmin is right; if you want to get into this, it's going to take a while. There could be a number of different studies. Just the mere fact of looking at changing the Standing Orders might involve a pretty intensive study. Certainly amending the Constitution would take, I think, an awful lot of time.

So there's that larger question this committee has to discuss—namely, what do we do with this? It's good to get everybody briefed up, because many members weren't here when we had that discussion, but where we go from here I think is the big question.

I'll look for your leadership on that one, sir.

•(1125)

The Chair: Thank you, Mr. Lukiwski. You summed up fairly closely to where I am.

I would think that when we go to the opinion paper on the Referendum Act, it's going to be a much more black-and-white situation. I'm prejudging, but it's going to be, "You can either do this or this, or you can do that or that, or this matches this up with the provincial referendum act".

This was really intriguing. I have already shared my views on Professor Russell, but almost all the witnesses brought forward five, ten meetings' worth of study. Everything they said was, gee, you know, we could go down that path, or we could go down this path. But it just has become.... You know, a snowball collects snow as it rolls down the hill. Each thing that was brought up had something in it, and it was—as you said—gee, that would really be neat to do, but it's a whole separate way to go on it.

This committee will have to decide at the end of the day where we are on this study and which direction we'll take. But let's wait until the end to try to decide that. As I said, let's maybe wait until the end of the other presentations on the Referendum Act, and Mr. Chong's stuff, to say, "I really like that prorogation thing, but maybe we'd better go this way, because it's real work". I'm not saying this isn't, but sometimes I go to the library for fun and other times I go for research, and these are....

Mr. Christopherson.

Mr. David Christopherson: Thanks, Chair.

Mr. Scott Reid: On a point of order, Mr. Chair, I do go to the library for fun, and I never see you there.

Voices: Oh, oh!

The Chair: I've got a better library—

An hon. member: [*Inaudible—Editor*]

Mr. David Christopherson: Three floors down, doing back handspings.

The Chair: Go ahead, Mr. Christopherson.

Mr. David Christopherson: Thanks, Chair.

I know you're allowing discussion that's maybe a little out of sequence, but I want to remind everybody that we do have a starting point. The House, by majority vote, passed the following on March 17:

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

Now, I know we're not mandated at all, and we're not constrained, but in terms of proceeding, let's remember what was sent here. That is a starting point to at least focus our discussions—

The Chair: Absolutely. And most of the questions—

Mr. David Christopherson: It has at least majority support to get it here at least, so it is a starting point.

The Chair: Absolutely. Most of the witnesses were asked about that motion, and they were asked for their opinion as to how—

Mr. David Christopherson: Yes. It wasn't just a blank slate.

The Chair: Absolutely.

Mr. Paquette.

[*Translation*]

Mr. Pierre Paquette (Joliette, BQ): We must simply remember that all of this flows, as has already been mentioned, from the prorogation December 30th last. We began our work and heard witnesses, but we did not hear that many of them. I do not think we should abandon our study.

In my opinion, we should resume our study, but perhaps rather by setting up a smaller subcommittee of the House of Common's Standing Committee on Procedure and House Affairs. Perhaps we should not be asking the full committee to do this work, given that there are other items. However, I do not think it would be appropriate at this time to abandon this issue simply because there is no very clear path in front of us.

I am therefore open to pursuing this work in another way, perhaps through the establishment of a sub-committee. All in all, my feeling is that we must pursue this work.

[*English*]

The Chair: I'm sorry if I've given the impression that I'm suggesting that. I am suggesting that we hear all of what we have.

Mr. Paquette, you were here for most of this, but many weren't. We're trying to bring them up to the same speed we're at and then have the committee decide whether a subcommittee is appropriate, how many weeks will we set aside to carry on. We're not yet suggesting anything about our priorities.

The next part, then, is proposals made in respect of establishing a constitutional convention.

Andre.

Mr. Andre Barnes: These are in no particular order.

Mr. Mendes had suggested that in a sort of cumulative effect, amendments to the Standing Orders and enacting legislation would in fact be tantamount to a binding constitutional convention, in his view.

Mr. Russell suggested in his opinion that the most enduring manner to restrict the use of prorogation would be for all the parties in the House to enter into unanimous political agreement to abide by certain principles with respect to prorogation. He noted it would require the key players to abide by these principles over time for this to have any strength, or any teeth, and over time that might result in a constitutional convention.

Mr. Wiseman was also of the same opinion, in that such an agreement could provide some relief or some guidance to a Governor General who was placed in a difficult situation.

•(1130)

The Chair: Are there questions on the constitutional convention piece?

It's a fairly specific piece. Conventions happen over long periods of time, not because you say they're happening. This really was the information we were given.

Yes, Mr. Reid.

Mr. Scott Reid: On this, Mr. Chair, if anybody wants to consult it, the best source on constitutional conventions is actually Professor Andrew Heard's book, *Canadian Constitutional Conventions*.

One of the things he is just repeating is that the British writings on the subject say there are two ways a convention can be achieved. One is through the unanimous consent of all the relevant actors, and the other, if one of the actors is not agreeable to it, is ultimately that it gets tested in the political arena, because it's conventional. These things are politically enforceable, which means by an election. So if there are two different sides with different opinions on the appropriate course of action, you have an election to resolve the matter, as in 1926 over the powers of the Governor General, where, effectively, that was the subject of the election. This means that if there isn't an agreement—and I think, as a practical matter, there might not be agreement between the government and opposition parties on this—the only way to actually test whether a prorogation is legitimate is to have something occur like this.

Back at the end of 2008, the Prime Minister asked for prorogation. He was granted it. The House came back eventually. If the government were then defeated on that issue, an election would follow and we would figure out whether, in the end, people agreed with the former government or the former opposition.

So I think we could reflect something like this in what we write, that ultimately there's not really anything we can do here that would result in it being a convention or not.

Ms. Yasmin Ratansi: Just for some clarification, how do they differentiate between a constitutional convention and a referendum?

The Chair: A convention is....

Sorry, Andre, go ahead.

Mr. Andre Barnes: A constitutional convention is a practice that is established over time. A referendum is a poll of the people at one particular instant.

Ms. Yasmin Ratansi: But that would lead to the same question, wouldn't it.

The Chair: It may become a convention if it were a referendum that was passed and then followed. Fifty years from now, 15 people could sit around a table like this and say that's a convention, because it's actually happened.

Monsieur Paquette.

[*Translation*]

Mr. Pierre Paquette: I had indeed raised my hand.

Over the summer I met a constitutional expert and used this opportunity to ask him what is a constitutional convention. He gave me an example that I found very telling. On an escalator, whether in the subway or a store, everybody stands on the right-hand side to leave space on the left for those who want to climb the steps. Not long ago, I was on an escalator with my young son and we were blocking the way for those who wanted to climb. People started to

get upset and we moved to the right-hand side. This is a constitutional convention.

As that professor explained to me, the funny thing is that this is a convention, but one that allows the commission of an illegal act. Indeed, one is not supposed to climb the steps of an escalator, one is supposed to keep one's hand on the railing. I believe this corroborates what we have been told in more technical terms.

[*English*]

The Chair: But there's no law anywhere that says you must enter at the right of an escalator. That's a convention.

Ms. Foote.

Ms. Judy Foote (Random—Burin—St. George's, Lib.): Looking at section D here, with respect to a constitutional convention, there seems to be a marked difference between what Mr. Mendes proposed and what Mr. Russell and Mr. Wiseman suggested.

Was Mr. Russell or Mr. Wiseman asked about whether or not a constitutional convention would be something we might want to consider, or were they very explicit that a political agreement among parties would be a better way to go?

Mr. Andre Barnes: Mr. Russell and Mr. Wiseman brought that forward. They were not prompted on that.

In terms of Mr. Mendes's suggestion, that was his view. Whether or not what that amounts to is...you know, it's his view that he put forward, so I won't comment on it.

Ms. Judy Foote: There just seems to be such a difference of opinion in terms of—

The Chair: Sometimes it's the case that you have three experts in the room, each with a different opinion. Well, who's the real expert? Let's bring in a fourth and tell them they're all wrong.

Voices: Oh, oh!

The Chair: That's truly what we were faced with.

Mr. Albrecht.

• (1135)

Mr. Harold Albrecht: I think there really wasn't that big of a disagreement on this point. It was simply a matter of pointing out that you could get four political parties today to agree to *x*, but unless they were to keep doing that over time, it may never amount to more than a one-time deal, because you could have the players change next time around and the whole thing would be out the window.

So the convention needs repetition for it to become a convention.

The Chair: Are there further questions on the establishment of a constitutional convention?

All right, let's look at the testimony on proposals made with respect to the Governor General.

Andre.

Mr. Andre Barnes: In both instances the witnesses had suggested modifying or altering to do with the relationship between the Governor General...that presupposed that the system itself with respect to prorogation was fine in the status quo. In fact one of the witnesses, Mr. Monahan, stated that hard cases make bad law, and that if we want to fix something, we ought to look at the process through which a Governor General is appointed. We should try to make that as open and accessible to all the parties in the House as possible, or at the very least the Prime Minister should not appoint someone over the objections of the opposition.

Mr. Miller suggested that Parliament ought to convey its desire to the Governor General's office that it take steps to become more transparent in its decision-making. He provided the example that the Governor General's office could make public statements about the criteria the Governor General would use for decisions regarding the use of the Crown's reserved powers.

The Chair: Are there questions about this section, about the powers of the Governor General?

All right. It's pretty straightforward.

Then we have other options and "prescriptive statements", which is a good catch-all phrase.

Mr. Andre Barnes: This is where I put, to use the chair's expression, one-off options. Some of them were in fact means and not ends, so I ended up putting them there. They simply said this is what should happen, but they did not suggest the avenue to get there, whereas the paper was sort of organized by avenues. So they ended up being in this category.

Mr. Walsh brought up having a look at the letters patent of 1947. Mr. Mendes suggested that the Speaker had a role to play in bringing the will of the House to the Governor General. It should be noted, of course, that several witnesses, including Mr. Franks and Mr. Monahan, said that the Governor General was free to consult with as many people as he or she saw fit, but only the recognized legal adviser could provide legal advice to the Governor General.

Mr. Franks ends up in this category with his suggestions that do not have means to attain these ends, necessarily, but he thought it might be fruitful for the committee to consider preventing Parliament from being prorogued until a session had lasted a decent period of time, limiting the duration of a prorogation, or requiring the Commons' support for a prorogation.

Mr. Cyr proposed an interesting measure that was at least translated as a "suspensive condition censorship measure". Under this option the Prime Minister would be required to obtain the approval of the majority of the House of Commons for a prorogation, and a failure to do so would be tantamount to a loss of confidence. If the Prime Minister did not have the confidence of the House anymore, the Governor General would not be required to take the Prime Minister's advice.

Mr. Cyr also proposed a recall mechanism that could be put in place to bring the House back in case a prorogation lasted longer than seemed desirable.

Then Mr. Heard, as was mentioned earlier about amending the Standing Orders of the House of Commons, said that, circumstances

permitting, it would be best to obtain the consent of the majority of the House of Commons prior to a prorogation. He did not mention specifically what legal measure he would implement to arrive at this end.

The Chair: Mr. Christopherson.

Mr. David Christopherson: I just wanted to raise the issue of Mr. Heard's suggestion, in the last paragraph, where the notes say that he stated that "a variety of procedural and legal tools could be put to work, either alone or in conjunction".

Weren't there other presenters who made the same argument that there isn't one fell swoop that's going to do it, and that we ought to be looking at perhaps a number of measures like changing the Standing Orders, having a piece of legislation, and doing combinations of things?

• (1140)

Mr. Andre Barnes: He wanted to bring forward the idea of obtaining the majority consensus prior to a prorogation occurring. That was just for that particular measure. Yes, there were witnesses, including Mr. Mendes, who thought there should be a standing order amendment and a piece of legislation. Mr. Franks actually weighed a number of different legislative avenues out loud as he went along. He thought some of them were okay and some were less okay.

Mr. David Christopherson: I just think it's important to underscore the fact that we don't necessarily have to find the one perfect tool that will work. There were a number of people who suggested you may need a number of these working in concert to achieve the goal, especially if you're going to avoid the process of a constitutional amendment.

Thank you.

The Chair: Madam Ratansi, and then Mr. Reid.

Ms. Yasmin Ratansi: This is an edification question. Historically, has the Speaker ever been consulted to give the Governor General advice on prorogation or not?

Mr. Andre Barnes: Mr. Mendes had noted that, in his view, there was an unwritten practice whereby—when prompted, I believe he noted this—the Speaker does, at the beginning of a session, bring something to the Governor General...?

Mr. Michel Bédard (Committee Researcher): At the beginning of every session, there is a claim from the Speaker to the Governor General so that parliamentary privileges are granted to the members of the elected chamber of the House of Commons, but this is a practice. The privileges of the members in the House of Commons are already in the Constitution.

Ms. Yasmin Ratansi: But for him to approach the Governor General and advise the Governor General that the majority of the House does not want prorogation has never historically occurred, has it?

A voice: Not as—

Ms. Yasmin Ratansi: No.

The Chair: I don't think we have a way of knowing that—there were certainly experts here—because, of course, it's not open advice to the Governor General.

Mr. Reid.

Mr. Scott Reid: We do know it hasn't happened here or anywhere else.

The term “advice”, if this becomes the basis of a report, should be adjusted here. The term “advice” in the normal sense is not what we're talking about here; “advice” in the constitutional sense.

We maintain the fiction that the Governor General, or in Britain the Queen, is the absolute monarch and dictator of the country, but receives advice from a variety of ministers. The reality is that when we say “advice”, we mean “instructions”: you will do the following, or I'm telling you to prorogue the House, or I'm telling you to appoint this person to the Senate, etc.

That kind of advice is only given by the Prime Minister. It's the most fundamental of our conventions, dating back to the early 1700s. Before then the King used to have multiple advisers and would call upon one to deal with this issue and one to deal with that issue. But the convention is that one person—who is known as the Prime Minister, and that's in itself a conventional term—offers all the advice and is the only one who actually advises the monarch.

And refusal to accept advice, any advice, effectively means that the Prime Minister has been fired. So if the Prime Minister says, “I advise you to prorogue” and the Governor General says “No”, what the Governor General has also said is, “And you're fired. You're not my Prime Minister anymore”.

So when we say “advice”, I think we should say “advice in the conventional sense”, or find some way of wording it so that it's clear that's what's meant.

The other kind of advice, what we mean when we think of advice in the normal sense, is what's referred to here as “informal advice” and that is so the Governor General has at his or her disposal, at the time, a variety of people. And we don't know who they all are, but we do know that at different times Professor Hogg and Professor Monahan have been used, and others. They actually provide advice in the sense of, “Here's what I think about whether or not you should accept the recommendation of the Prime Minister, understanding that if you do accept it, this happens, and if you don't accept it, you're effectively dismissing the Prime Minister”, and so on.

So there are two clear concepts for which one word has been used, unfortunately.

Ms. Yasmin Ratansi: And I think the word would have been nicer if it had been “recommendation”.

But my second question is, when Mr. Cyr proposed an option he dubbed as a “suspensive condition censorship measure”, what sort of questions did the committee ask him?

Mr. Andre Barnes: This was in his opening testimony.

• (1145)

Ms. Yasmin Ratansi: Oh, okay.

Mr. Scott Reid: What was the French term? That's what he actually used. I don't think it's a good translation.

Mr. Andre Barnes: I wasn't curious enough to check, but I should have.

Voices: Oh, oh!

Mr. Scott Reid: We have French versions of this.

Does anybody have it?

A voice: Yes: “*une mesure de censure à condition suspensive*”.

Mr. Scott Reid: Right. So it's not “censorship”, it's “censuring”, with a “u”.

Ms. Yasmin Ratansi: Okay, thank you. It makes a lot of sense. He made it in his opening statement.

You know, people can come here—politicians make statements—but I think professors make lots of statements, and they come and throw in quite a lot of “oddballs” at us. What are we supposed to do with them? Take them and juggle? So there is some very oddball stuff that they have offered us.

At any rate, that's my two cents' worth.

The Chair: You are talking about constitutional experts and professors.

Ms. Yasmin Ratansi: I know. I am a little scared now.

Voices: Oh, oh!

The Chair: No offence to that genre, but we did get some opinions that differed from each other. That's the hardship on this.

The last category, Andre, is entitled “No Changes”.

Mr. Andre Barnes: It's somewhat self-explanatory.

The Chair: Right.

There are two examples here, but throughout the testimony, if I can give a chair's opinion, by the end of it, many of the experts have kind of said, yes, I know I've suggested a bunch of things, but perhaps just leaving it alone and getting out of minority governments was the real action.

A voice: Wrong.

The Chair: Well, I'm not misquoting when I say that many of them said minority governments are the cause of this issue.

Mr. Lukiwski and then Mr. Albrecht.

Mr. Tom Lukiwski: I have a quick question.

I thank our analysts for putting the briefing note together. I think it's well done, except I don't know if we've captured everything here. I'm just going from memory here, and I recall one example. We talked at reasonable length about the role of the Speaker of the Senate in this whole procedure, and I see no reference to that in the briefing note.

This makes me wonder, are there other pieces of testimony we heard that should be contained in this for our consideration and that perhaps are not?

The Chair: I can answer that. Andre and I have spoken about this.

Yes, this is a pretty good overview of essentially what happened in some of the questioning. Should we ever go to write a report, there'd be an awful lot of conversation about truly talking about, from the blues, what clearly was said. This is more "So and so said this, so and so said that"; it's not everything that was said. That's why we said it would be an opinion piece, not a potential of a report.

I agree with you, Mr. Lukiwski, that there's a lot that some picked up, and some asked questions about, and so on.

I have Mr. Albrecht next.

Mr. Harold Albrecht: Thank you, Mr. Chair.

I was just discussing with the analysts when we sat down here that when I go through a report or a book, I often go to the last page to see what the actual conclusion is. I was just assuming that option G was the conclusion here and that we were probably going to stick with no changes.

Voices: Oh, oh!

Mr. Harold Albrecht: I'm saying that in a lighthearted way, Mr. Chair, but seriously, I agree with your summary that after all of the witnesses were heard, there was a lot of questioning. With all this potential change, maybe what we have isn't as bad as we thought it was when we started out.

The Chair: Mr. Reid.

Mr. Scott Reid: I was just going to say one thing with regard to your comment and Mr. Christopherson's question, and the second thing relates to Professor Heard's testimony.

With regard to that, most of the professors made written presentations, and when they came to us, they had been following previous presentations that other professors had made, and so they would say on occasion—it's all there on the written record—that, you know, I've altered somewhat from what my written presentation said, based on effectively what I've heard from previous presentations.

I don't think they necessarily said the solution is not to have minority governments. It was more that this particular kind of situation only arises in a minority government, because in a majority government, the government can prorogue at will and it's never in conflict with the will of the majority of the House of Commons, for reasons we don't have to explain.

So that is a peculiar aspect of this. We're talking about how to control minority governments, but everybody should understand that when you get a majority government, it'll go back to being an elected dictatorship. It's just the reality of the situation, unless you change something else.

With regard to Professor Heard—it's that paragraph at the end of section F—I think what he was trying to get at, although it doesn't say this here, is how you do certain things that result in the establishment of a new convention. He said that a variety of things could be put to work.

I think what he's getting at is that you can do a series of things, and at the end, all these changes cause the circumstances in which a new convention comes into being. Really, I think he's talking about

that somewhat ambiguous process, as opposed to saying one of these things will lead to a legal change.

• (1150)

The Chair: Mr. Christopherson.

Sorry; I'm in the restaurant business, and I'm used to asking people questions the minute they put something in their mouths.

Voices: Oh, oh!

Mr. David Christopherson: Well, you're very good at it.

I just wanted to give my support to Mr. Paquette's notion of a subcommittee. That might make some sense. Regardless of how complex or whether we need to go through the complexities and arrive at something very simple or by majority conclude there is no further action, the level of work that's required is really difficult with this big a group.

At any rate, I thought that was an excellent suggestion and wanted to just give my support to it in terms of next steps, that maybe that's the way to go, to create a small group that wants to focus on this and report back to the main.

The Chair: Thank you.

Mr. Proulx.

Mr. Marcel Proulx (Hull—Aylmer, Lib.): Thank you. I apologize for not being here from the start, but there's a place upstairs that needs speakers.

The idea of a subcommittee is absolutely not a bad idea. On top of that, I'm not going to discuss my Alzheimer's condition at this point except to say that I tend to remember—partly—that we still had some witnesses that we wanted to be heard.

I don't know if you discussed this earlier in the meeting, but such a subcommittee could maybe try to hear these additional witnesses so that the loop would be complete. Then that subcommittee could certainly work on the preparation of a report.

The Chair: Let me go back a bit, because we seem to be done with that....

Mr. Albrecht.

Mr. Harold Albrecht: Just on the point of a subcommittee, Mr. Chair, I think today is a perfect example of why a subcommittee would not be a good idea on a study of this nature.

I'm in agreement that many times subcommittees are helpful, but we've had examples today with new members coming in and not having heard the full discussion, wanting to be updated. I think a similar occasion could arise with the subcommittee. So you'd have a subcommittee working for four weeks, then they report to the committee and the committee wants to know all of the study that went on.

I'll go with what the committee decides, but I'm not convinced that on this issue a subcommittee is the best way to go.

The Chair: For the benefit of Mr. Proulx, who wasn't here, we did talk at the beginning that we would listen to the options that the analysts put forward today, and in far more of a way of filling in some members—as much as half of the committee was not here during the study—so they could have an idea of how it flowed and what some of the witnesses said. It's in no way comprehensive as to what was said. So we said we'd get to that point.

I also challenged the committee at the start of the meeting to not make a decision until we also hear about the Referendum Act, hear from Mr. Chong, and also start a little bit down the road of the Chief Electoral Officer's recommendations as to priorities for this committee.

Today is a piece of information that we have now in our heads that the committee is still seized with—we still have to finish this work in one way or the other—but I would like the committee to not make a decision until it has heard all three or four of those pieces. Then we can put them on the scale and balance where we need to go.

Suggestions have been made on a subcommittee and on a number of ways we could move forward.

Mr. Proulx, you are correct, there were at least a couple of witnesses. Senator Hogg has been avoiding us about coming, for some reasons—

Mr. Scott Reid: It's Professor Hogg, not Senator Hogg.

A voice: Are you telling us something we don't know?

The Chair: Did I say “Senator”?

Voices: Oh, oh!

The Chair: Excuse me. The president of the Senate in Australia is Senator Hogg. We spent some time together this summer.

I apologize for the slip. I have not promoted Professor Hogg.

Senator Hogg in Australia is a great character, if you get to meet him.

So I'm kind of where I've said that we would go forward with that.

Mr. Lukiwski.

Mr. Tom Lukiwski: I just want to lend my support to your suggestion on how to proceed by talking about getting the referendum discussion going, and Mr. Chong. Correct me if I'm wrong, but I think Mr. Chong's motion that was passed in the House was to have the study completed within six months.

Not that it would take six months, but when you're trying to prioritize what studies or what this committee does in terms of priorities, I think it is a good idea to get all of the stuff we have before us, at least have one meeting under our belts, and then sit down and say, “We've heard prorogation, referendums, Mr. Chong's motion, so what do we want to get into first?”

If it's prorogation, great. If it's Mr. Chong's motion, because we have a time fuse on that, fine. If it's the Referendum Act, fine. But let's hear all of the information first. It should only take one meeting per, so well before our Christmas break we should have a pretty good calendar of what we want to study when we come back.

●(1155)

The Chair: As I look at this, we have four or five meeting slots still open before our Christmas break, and that was the idea, to decide how we're going to fill them.

Mr. Christopherson said a very wise thing earlier, too, that after we've seen all three or four of these presentations, we really need take it to caucuses. Some decisions need to be made other than at this table, too. We could then give it some thought and then come back.

I'm just suggesting as the chair that we make no decision until we've heard all three or four of the pieces, and then make the decision.

Mr. Proulx.

Mr. Marcel Proulx: I have no objection as long as we know that the Prime Minister is not going to pull another prorogation on us while we're discussing it.

Voices: Oh, oh!

Mr. Marcel Proulx: Would you be able to endeavour to get a commitment from him?

The Chair: Well, you see, that would vary the convention of the chair making predictions, and we don't want to start that.

Mr. Marcel Proulx: No, no, I don't want you to make a prediction; I want you to try to get a commitment from the Prime Minister so we can study all of these different facets with peace of mind.

The Chair: I will write out a list of conditions for you also, and we'll see if we can get there.

Mr. Marcel Proulx: Okay, thank you very much. I appreciate that.

The Chair: Is there anything further on this? I really don't want to get into discussing the next steps on it until we can discuss the next steps on all.

I know I'm throwing my opinion at the committee today, but this will work, I think. If we get to the end and I'm wrong, please beat me up on the day that we get to the end and it didn't work. But I think this is a better way of getting information out there.

We have a small amount of committee business to do. We'll just go in camera for it, because we tend to do that.

[Proceedings continue in camera]

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