The Prerogative of Prorogation and its Framework

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The general election in October 2019 resulted in a minority government. That government delivered its Speech from the Throne in December of the same year. The COVID-19 pandemic hit Canada hard beginning in March 2020. As a result, the government had to adopt a series of exceptional measures to deal with the health crisis and the resulting economic crisis. As the Speech from the Throne delivered a few months earlier no longer met the urgency of the moment, the government felt it had to present a comprehensive plan to help Canadians overcome the challenge and that it needed to ensure that it had the continued confidence of the House of Commons to implement that plan. The Prime Minister therefore asked the Governor General to prorogue Parliament on August 18, 2020. A new Speech from the Throne outlining the government's plan to address the pandemic was delivered on September 23, 2020.

We will first present the current state of the law and constitutional conventions regarding the powers of prorogation.(1) We will then propose some ways to strengthen parliamentary control over the exercise of the prerogative of prorogation.(2)

1. Current state of the law and constitutional conventions concerning the powers of prorogation

Under the *Constitution Act, 1867*, the governor general exercises the prerogative of proroguing Parliament on the advice of the Privy Council. In reality, constitutional conventions require that the governor general act in this area on the advice of the prime minister.

There are questions about whether constitutional convention requires that the governor general *always* be bound by the advice of the prime minister in this area. Under the principle of responsible government, the prime minister's advice can be binding on the governor general *if the prime minister has the confidence of the House of Commons*. The governor general is not bound by the advice of a prime minister who no longer has the confidence of the House of Commons. Moreover, when a non-confidence motion has been tabled, many believe that the prime minister is then not able to ask the governor general to grant prorogation to avoid that confidence vote. The events of 2008 and the fact that the request by the prime minister of the day to prorogue Parliament was not immediately granted by Governor General Jean, but only after several hours of reflection, seem to support that position. Some interpret the decision to grant prorogation as the result of the exercise of the governor general's reserve power. In any event, however, if the governor general were to deny the prime minister's advice on the grounds that he was attempting to avoid a confidence vote, the prime minister would then be required to resign, as there can be no breach of trust between the governor general and the prime minister.

The British Supreme Court recently issued an important decision on the framework of the prime minister's prerogative to request prorogation.[1] That decision was issued during the Brexit negotiations. In particular, it was alleged that the prorogation obtained by the prime minister deprived Parliament of the opportunity to adequately deliberate on the conditions for the United Kingdom's withdrawal from the European Union due to the deadline for that withdrawal to take effect. With a view to protecting Parliament's sovereignty, the British Supreme Court stated in particular that:

> the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.[2]

Eminent Professor Paul Craig (Professor of English Law, Oxford) summarized the reasoning behind that decision as follows:

> Prorogation is a mechanism for ending one session of Parliament. The use of prorogation to silence a recalcitrant Parliament is an improper purpose. There is no normative foundation for the conclusion that a power directed towards closure should be able to be used to achieve a very different purpose, more especially when the alternative intended use goes so directly to the heart of parliamentary democracy.[3]

After analyzing the facts of the case, the British Supreme Court came to the striking conclusion that the advice given in the case by the prime minister was illegal and that prorogation was therefore also illegal and of no effect:

> This court is not, therefore, precluded by article 9 or by any wider Parliamentary privilege from considering the validity of the prorogation itself. The logical approach to that question is to start at the beginning, with the advice that led to it. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect: see, if authority were needed …. It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and

[1] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland*, [2019] UKSC 41 [*Miller II*].
[2] Ibid, para 50.
[3] Paul Craig, "The Supreme Court, Prorogation and Constitutional Principles" [2020] Public Law 248, 262.

> of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect.

That decision, if followed by Canadian courts, could introduce a degree of uncertainty in the validity of various opinions submitted to the governor general concerning prorogation.

The fact that Canadian courts can review the legality of such opinions, similar to the British Supreme Court, is certainly not a unanimous view among Canadian publicists. However, it is important to remember what the Supreme Court of Canada has stated about the judicial review of the exercise of the prerogative in foreign affairs:

> In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny …. It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the Charter … or other constitutional norms ….
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> The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged …. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution ….[4]

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[4] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, paras 36–37. References omitted. French version:

> [l]orsqu'il exerce les pouvoirs que lui confère la common law en vertu de la prérogative royale, l'exécutif n'est toutefois pas à l'abri du contrôle constitutionnel […]. Certes, il revient à l'exécutif, et non aux tribunaux, de décider si et comment il exercera ses pouvoirs; mais les tribunaux ont indéniablement compétence pour déterminer si la prérogative invoquée par la Couronne existe véritablement et, dans l'affirmative, pour décider si son exercice contrevient à la Charte […] ou à d'autres normes constitutionnelles […] — ils sont d'ailleurs tenus d'exercer cette compétence.

This is similar to the reasoning used by the British Supreme Court in *Miller II* concerning judicial review of the exercise of executive prerogative.

To reduce the risk of judicial review being initiated to challenge a request for prorogation, it could be useful to establish a mechanism that would allow elected officials to have a say in the decision to prorogue without unduly limiting the powers of the executive. We propose such a suggestion in the next section.

2. Proposal to address possible abuse of prorogation

This proposal is based on the cardinal principles of a Westminster parliamentary system: (1) The executive is accountable to Parliament for its actions, and (2) it must have the confidence of the House of Commons to be able to offer advice that is binding on the governor general.

It is essential to understand that it is up to the House of Commons itself to determine whether it gives and maintains its confidence in the government. There is sometimes confusion in this respect, as prime ministers sometimes state that a vote on a particular bill or issue will be a confidence vote. A majority prime minister, knowing that he commands a majority of Members, can state this with confidence, since he can guarantee that a majority of Members will interpret the vote in that way. However, that is not necessarily the case for a minority government. A majority of Members can still pass a resolution reaffirming their confidence in the government despite a negative vote on a government proposal. As the prime minister can still resign following a failed vote, the practical importance of the matter lies primarily with political perceptions. Who will

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> Le pouvoir restreint dont jouissent les tribunaux pour contrôler la constitutionnalité de l'exercice de la prérogative royale tient au fait que, dans une démocratie constitutionnelle, tout pouvoir gouvernemental doit être exercé en conformité avec la Constitution. Cela dit, le contrôle judiciaire de l'exercice de la prérogative sur le plan de sa constitutionnalité demeure tributaire du fait que la branche exécutive du gouvernement est responsable des décisions relevant de ce pouvoir, et que l'exécutif est mieux placé pour prendre ces décisions dans le cadre des choix constitutionnels possibles. Il faut que le gouvernement dispose d'une certaine marge de manœuvre lorsqu'il décide de quelle manière il doit s'acquitter des obligations relevant de sa prérogative […]. Il appartient cependant aux tribunaux de fixer les limites légales et constitutionnelles à l'intérieur desquelles ces décisions doivent être prises. Ainsi, lorsqu'un gouvernement refuse de se conformer aux contraintes constitutionnelles, les tribunaux ont le pouvoir de rendre des ordonnances qui garantissent que la prérogative du gouvernement en matière d'affaires étrangères est exercée en conformité avec la Constitution […].

be held responsible for the fall of the government: the opposition for voting against the bill in question or the government for resigning?

A prime minister who no longer enjoys the confidence of the lower house cannot dictate the governor general's actions. The prime minister can offer advice, but the governor general is not required to follow it; he can exercise his reserve powers or can name a new prime minister who will advise him on what to do.[5]

Our proposal is therefore based on the need for the prime minister to have the confidence of the House of Commons for his opinions to be binding on the governor general.

Once the first confidence vote is won by the government, it is presumed to have that confidence until certain events call into question the continued confidence of the House of Commons. This is particularly the case when the government tables its budget. However, it is the House itself that determines what events lead it to withdraw its confidence in the government.

It is up to the House of Commons to determine how it will proceed in ascribing or withdrawing its confidence in the government. The choice of deliberative procedures followed by the House is a matter of constitutionally protected parliamentary privilege.

Standing Orders 303.1 to 306.1 of the Quebec National Assembly, for example, set forth the terms for questioning the National Assembly's confidence in the government.

The House of Commons has also recognized in the *Standing Orders of the House of Commons* the authority to state what is or is not an event that questions confidence in the government. Standing Order 6 states the following:

[5] This would be the case in particular when a prime minister loses a confidence vote early after a general election and immediately asks the governor general to dissolve Parliament. The governor general can then invite the leader of another party to try to form a government if that government could likely obtain the confidence of the House. This is apparently consistent with the scenario that took place in British Columbia in 2017. The outgoing government was unable to obtain a majority of seats in the general election. Having lost a confidence vote, Premier Christy Clark then apparently advised the Lieutenant Governor that she felt there was no viable government alternative and that a new election should be called. The Lieutenant Governor did not accept the outgoing premier's arguments. A new minority government was formed and remained in power for approximately 3½ years. That government was re-elected with a majority in the election on October 21, 2020.

6. The election of a Speaker shall not be considered to be a question of confidence in the government.

6. L'élection du Président n'est pas considérée comme une question de confiance envers le gouvernement.

If the House of Commons is able to determine in advance in its Standing Orders that a certain type of event cannot bring into question confidence in the government, the opposite is also true, namely that it is able to determine in advance that a certain type of event would dispel the presumption of confidence.

In this context, we propose amending the *Standing Orders of the House of Commons* to provide that *the government is deemed to have lost the confidence of the House of Commons if it submits an opinion to the governor general that Parliament should be prorogued without first having passed a resolution to that effect in the House of Commons*. That resolution should set out the period for which prorogation would be requested and the date on which a new Speech from the Throne should be delivered.

Such a rule would not limit the ability of a majority government to obtain prorogation when it feels appropriate; its majority would ensure that it would have no trouble adopting such a resolution.

In the case of a minority government, it would need to satisfy a majority of members that it is appropriate in the circumstances to proceed with prorogation. All this with the understanding, of course, that a new Speech from the Throne would gauge the confidence of the House in that government.

If a minority government were to fail to satisfy a majority of members of the appropriateness of prorogation, that would be an indication to the government that it clearly does not have the flexibility needed to deliver a new Speech from the Throne and survive a new confidence vote.

This mechanism would limit the risk of prorogation being used simply to avoid certain embarrassing questions from the opposition. In addition to giving more say to elected officials, it would limit the risk of legal action aimed at reviewing the legality of exercising the prerogative of prorogation.

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