SPEAKER'S RULING

BILL C-232 AND THE ROYAL CONSENT

Honourable senators,

I am prepared to rule on the point of order that was raised by Senator Cools on February 9, and which was also discussed the following day. The point of order asks questions about Bill C-232, An Act to amend the Supreme Court Act, and the possible need for Royal Consent and also what procedure should be followed if Royal Consent is required.

Our Parliament and our federal system of government have existed for almost 144 years. The basis of our governance structure is the *British North America Act, 1867*, a statute adopted by the Parliament of Westminster, now the *Constitution Act, 1867*. Before and since Confederation, a key component of our government has been the Crown, which forms the third constituent element of our bicameral Parliament. While the heritage which we share here in the Senate is rooted in the traditions of Westminster, over the course of time, as Canada has matured, it has become thoroughly our own in practice. With this perspective in mind, I have reviewed the point of order on the complex issue of Royal Consent.

At the outset, I wish to thank all honourable senators for their contributions to the discussion on this point of order. In particular, I wish to express my sincere appreciation to Senator Cools for raising this subject. It is not the first time that the senator has focused the attention of the Senate on the importance of Royal Consent. The senator has applied her formidable research talents and diligence to present a well documented position that underlines the importance of Royal Consent. We have all benefited from her knowledge of the history of parliamentary practice.

In making the argument for the need for Royal Consent, Senator Cools explained that the Sovereign, the Queen herself or the Governor General acting on her behalf, retains to this day certain prerogative powers. Among these prerogative powers, according to Senator Cools, is the appointment of judges. It is her contention that Bill C-232 would constrain the Queen's power of appointment by disabling individuals who would otherwise be qualified for a place on the bench of the Supreme Court. As this is the basic purpose of the bill, Senator Cools suggested that the Senate might have no right to debate let alone adopt this bill absent Royal Consent. Senator Cools argued that the third reading question on the bill could not properly be put and, were this to happen, proceedings on the bill would be rendered null and void. For this reason, Senator Cools asked the second question of her point of order, what procedure should be followed if Royal Consent is required, and was there a requirement to signify Royal Consent early in the proceedings? The position of Senator Cools was subsequently supported by the interventions

made by Senator Comeau, the Deputy Leader of the Government, and Senators Carignan and Segal.

Senator Fraser and Senator Tardif, the Deputy Leader of the Opposition, had a contrary view on the need for Royal Consent with respect to Bill C-232. Speaking on February 10, Senator Fraser took note of the fact that prerogative powers can be abolished or limited by statute law. With respect to the Supreme Court, the senator noted that it came into existence by ordinary federal statute in 1875. So far as the senator could determine, there was no indication that Royal Consent was sought, let alone obtained, for the *Supreme Court Act*. On this basis, Senator Fraser concluded that there is strong precedent that Bill C-232 does not require Royal Consent. Senator Tardif focussed the first part of her arguments on previous rulings in the Senate which suggest that debate should be allowed to continue even if it is determined that Royal Consent is required, particularly as the bill is far from reaching the final stage of the legislative process. The senator then reiterated the arguments of Senator Fraser, pointing out that the *Supreme Court Act* was a law passed by Parliament and that it is the right of Parliament to modify this law, including the criteria by which nominees might be qualified for appointment. As this is within the power of Parliament, Senator Tardif concluded that Bill C-232 does not require Royal Consent.

In reviewing the issues raised by these questions, I will first deal with the procedure to be followed with respect to obtaining Royal Consent, and will then examine Royal Consent itself. In attempting to provide the Senate with guidance on these issues, I have taken the initiative to go more deeply into the subject. The end result, I believe, is a clearer picture of what Royal Consent is and the role it plays today in our Canadian parliamentary system.

Beginning with the question of when Royal Consent should be sought or signified, there is certainly no prohibition to providing Royal Consent at the outset of deliberations on a bill. However, accepted Canadian practice suggests that Royal Consent need only be given prior to the third reading. There are several recent rulings by Speakers of the Senate that are consistent with this view. The intent of these rulings is to allow debate to the greatest extent possible. Debate should not be constrained by a procedural requirement, despite its constitutional importance, which can be signified at any stage. To do otherwise would undermine a fundamental purpose of Parliament. Accordingly, I confirm that Royal Consent, when it is required, can be postponed to the last stage.

Canadian practice also indicates that Royal Consent needs to be signified in only one house. More often than not, this has been in the House of Commons, where most government bills originate. However, Bill C-232 is a private members bill which originated in the House of Commons, and I note that no objection was raised in that chamber on the grounds of Royal Consent. In cases where a bill originates in the Senate and Royal Consent is determined to be required, it should be provided in the Senate prior to third reading. To ensure that this happens, it

would be appropriate for a Speaker of the Senate to refuse to put the third reading question in the Senate until Royal Consent is signified.

One other point needs to be clarified. It has been stated that the absence of Royal Consent, when needed, could nullify the proceedings with respect to the related bill. This is true, but only within limits. To nullify proceedings in the Senate, the bill would still have to be in its possession. The authority of the Senate over bills applies only during the time bills are actually in the Senate, either in the chamber for second or third reading or in committee. If the bill has been sent to the other place for its consideration, or has been passed and is now ready for Royal Assent, it is too late for the Senate on its own authority to undo its decisions. Moreover, if the bill subsequently receives Royal Assent, which is the approval of the Crown, and becomes law, the question of Royal Consent becomes moot.

Turning to the more substantive question, it is clear that Royal Consent remains important and relevant. It provides an insight into the nature of our Parliament composed as it is of the Crown, Senate, and the House of Commons. In looking into this point of order, it is also evident that Royal Consent is sometimes confused with Royal Recommendation and Royal Assent, two other features of our parliamentary practice which highlight the importance of the Crown. A Royal Recommendation signals an authorization for the expenditure of public funds. It is provided by a minister in the House of Commons as a message of the Governor General approving the spending of public monies as proposed in a bill. Royal Assent, on the other hand, is the final stage in the legislative process when a bill passed by both Houses of Parliament is enacted into law by the approval of the Governor General or a deputy, either here in person in the Senate or through a written declaration. Royal Consent is neither of these. It is instead a procedural requirement whenever a bill is considered by Parliament that touches the interests of the Sovereign, either the Queen herself or the Governor General acting on her behalf. According to *House of Commons Procedure and Practice*, the precedents in Canada indicate that Royal Consent is needed "when the property rights of the Crown are postponed, compromised or abandoned, or for any waiver of a prerogative of the Crown."

The origins of Royal Consent date back many centuries to a time when the King actually ruled; when the Sovereign exercised personal authority and power, well before Parliament established its ultimate supremacy. A noted 19th century British constitutionalist, Lord Brougham, explained during debate in the House of Lords in 1844 that, in an earlier age, Royal Consent was used as a veto of the Crown expressed within Parliament to avoid any collision between the Sovereign and Parliament that might subsequently become overt with the refusal of the Crown to actually grant Royal Assent. However, with the recognition of parliamentary supremacy and the subsequent development of responsible government, the use of Royal Consent became not so much a veto as an acknowledgement that a prerogative power was involved in proposed legislation. While the lack of Royal Consent can ultimately block the passage of a bill, it should not be used to override the right of Parliament to free debate, the

absolute right of Parliament to discuss any topic, to exercise its fundamental right to free speech guaranteed in the *Bill of Rights* of 1689.

Today, many of the powers of the Crown are exercised through the executive, the government of the day headed by the Prime Minister. These are the powers performed through the Governor-in-Council and virtually all are statutory authorities sanctioned by Parliament. At the same time, there remains a range of discretionary powers available to the Crown, its ancient customary powers. The range of these prerogative powers has contracted over time, yet what remains is certainly not insignificant. They are exercised by convention and by historical precedent, without the sanction of Parliament. The most notable and recognizable of these powers perhaps is the right of the Queen or the Governor General to dissolve Parliament and to appoint the Prime Minister. Others include the right to declare war or peace, the making of treaties, the issuing of passports, and the creation of Indian reserves.

Peter Hogg has explained in his work, the *Constitutional Law of Canada*, "the royal prerogative consists of the powers and privileges accorded by common law to the Crown." He went on to state that "The prerogative is a branch of the common law because it is the decisions of the courts which have determined its existence and extent." This relationship to the common law is in fact an essential characteristic of the prerogative powers of the Crown not yet framed in statute law by Parliament. When any of these prerogative powers do become defined by statute law, strictly speaking they cease to be a prerogative power. Professor Hogg makes this point very clearly when he writes "the prerogative could be abolished or limited by statute and once a statute had occupied the ground formerly occupied by the prerogative, the Crown had to comply with the terms of the statute." Royal Consent is part of that process of putting the prerogative power within the framework of statute law. It is an internal parliamentary procedure that acknowledges that a common law power of the Crown is coming within the scope of Parliament.

In 1951, for example, Parliament considered Bill 192, to have the Governor General surrender the authority to grant permission previously required to allow a citizen under the Petition of Right to institute proceedings against the Crown in the Exchequer Court. This power existed in common law and its origins are traceable to the petitions received by the King from subjects seeking legal claims against the Crown in the courts. When the petition was accepted favourably, the King issued an order or fiat addressed to the court directing in effect: Let justice be done. Immediately prior to third reading of Bill 192, the Minister of Justice informed the House of Commons that the Governor General had given his consent to have this bill put before Parliament for its determination.

Two years later, Royal Consent was signified again when Parliament debated and passed the *Crown Liability Act*, which made the federal Crown liable in tort for damages in much the same way as if it were a natural person. Previously, in common law, the Crown was almost entirely immune from any suit. On this occasion, Royal Consent was signified early in the process. Under the old financial procedure the bill had been preceded by a resolution stage before first reading.

When the bill was read a first time, the Minister of Justice announced to the House, in the Royal Consent formula used in Canada, that the Governor General, having been acquainted with the purport of the measure to be introduced, had given consent, so far as Her Majesty's prerogatives were affected, to the consideration of the bill.

These examples, honourable senators, have been cited to demonstrate an essential criterion by which it is possible to determine whether Royal Consent is needed in a particular case, namely whether the prerogative in question exists through common law or through statute law. Where the power is related to common law, Royal Consent may be necessary; when related to an exercise of authority under the statute law, Royal Consent is not required.

A review of the precedents of the Canadian Parliament reveals that Royal Consent has been invoked only about two dozen times over the course of almost 144 years and many, many bills. More than a third of them occurred in the nineteenth century and some of these related to railways. The construction of railways was a large undertaking that involved liens with the Crown and the use of its land. Other bills that prompted the need for Royal Consent over the years dealt with the establishment of national parks and Indian reserves. There is no evidence that any legislation relating to the Supreme Court was ever the object of Royal Consent.

The Supreme Court was established under the authority of section 101 of the *British North America Act, 1867*. This constitutional provision states that: "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada." The creation of the Supreme Court was achieved by the enactment of a bill in 1875. This court has its origins in statute law; there is nothing of its existence based on any antecedent history; it has no basis in common law. The appointment of judges to the bench of the Supreme Court is pursuant to this 1875 Act. There is no common law prerogative power of appointment involved in this case.

It is important to add that the *Letters Patent of 1947* are not, and were not, affected by the statutory creation of the Supreme Court. As provided in paragraph IV, the Governor General is authorized and empowered to constitute and appoint on behalf of the Sovereign, all such judges as may be lawfully constituted or appointed. The Supreme Court is a lawfully constituted court and the authority of the Governor General to exercise the power of appointment was, and remains, on the advice of the appropriate minister. It is not a power that can be exercised by the Governor General independently on his own authority. Indeed, paragraph II of the *Letters Patent of 1947* makes this clear. It stipulates that the Governor General, on the advice of the Privy Council for Canada, is to act on the basis of, among other authorities, "such laws as are or may hereinafter be in force in Canada."

Bill C-232, if adopted, would be one more amendment to the *Supreme Court Act*. It would establish certain qualifications for appointment to the Supreme Court in addition to the ones that already exist. In addition to being a judge of a superior court or a member of a provincial bar with a minimum number of years of experience, this bill would require that candidates have a certain level of understanding in both official languages such that they would not need the assistance of interpretation. In accordance with the explanation already provided, this is an exercise of authority under statute law and there is no need to seek Royal Consent as part of the consideration of Bill C-232.

Honourable senators, this has been a lengthy ruling on an interesting issue. This point of order has provided an opportunity to outline the nature and scope of Royal Consent and to recognize its continuing relevance. A particular benefit brought out through the point of order was the recognition of the distinction to be made between the prerogative powers of the Crown based on common law and those exercised through statute law. Again, I wish to express my appreciation to Senator Cools and to all senators for their very helpful contribution to this discussion.

In conclusion, it is my ruling that, when required, Royal Consent can be delayed to the last stage of a bill's consideration and, with respect to Bill C-232, Royal Consent is not needed.