# *Reforming Royal Assent Procedure*

**by Senator Sharon Carstairs, Senator Jerahmiel Grafstein, John Aimers, and Professor David Smith**

*When a Bill has been adopted by the House of Commons and the Senate it receives Royal Assent in a ceremony conducted in the Senate chamber. Dissatisfaction with the current process of granting Royal Assent has been smouldering for nearly twenty years. Attendance at the formal ceremony is sparse and the timing is often inconvenient for parliamentarians, the Governor General and Justices of the Supreme Court. Since 1983 a number of motions, reports and Bills have proposed changes. Senator John Lynch Staunton, Leader of the Opposition in the Senate introduced several bills which generated debate but all of them died on the order paper. His latest Bill, introduced at the start of the present Parliament, once again proposed to reform the Royal Assent ceremony. Following discussion with the Government an agreement was reached whereby Senator Lynch Staunton's Bill would be withdrawn and a Government Bill with a similar objective, S-34 the Royal Assent Act, was introduced in the Senate on October 2, 2001. It was supported by the Leader of the Government in the Senate and referred to the Senate Standing Committee on Rules, Procedures and the Rights of Parliament. The following article is based on testimony in that committee on October 17, and November 7, 2001. For the full transcript of proceedings see http://www.parl.gc.ca/.*

**Senator Sharon Carstairs (Leader of the Government):** On October 4, I advised the Senate that the Governor General had given her consent to our consideration of this bill. The Canadian government does not believe that Bill S-34 will have any repercussions on the royal prerogative or interest. The provisions of the bill are procedural in nature and will not change Royal Assent as such in any way.

The Bill stipulates that Royal Assent granted by the Governor General to a bill passed by the Senate and House could be signified either with a Royal Assent ceremony in the Senate chamber or by a written declaration, but Royal Assent would take place during a parliamentary session in which both houses passed the bill.

The first appropriation bill presented for assent in any session would require the formal customary ceremony, given the important and symbolic nature of supply bills.

In clause 3 there is a provision for a declaration of Royal Assent in the traditional way that would take place on at least one occasion in each calendar year. (See Editor's note).

Each House of Parliament shall be notified of a written declaration of Royal Assent by its respective Speaker or person acting as Speaker. When Royal Assent is given by means of a written declaration the act is deemed to be assented on the day on which the two houses have been notified of the declaration.

A written declaration of Royal Assent would not be a statutory instrument within the meaning of the *Statutory Instruments Act*. The definition of statutory instruments is intentionally broad. Anything that falls within it is subject to parliamentary review. Royal Assent in the form of a written declaration is not obviously intended to be subject to such a review.

Finally, the Bill provides that no Royal Assent is invalid simply because clause 3 has not been complied with. This provision responds to concerns about the validity of any bills or Royal Assent declared during a year in which for some reason no ceremony was held. For example, if there was a prorogation prior to any Royal Assent ceremony happening and then Parliament was not recalled during that period of time, it would question the validity of the legislation.

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**Senator Jerahmiel Grafstein:** I have not been in favour of streamlining Royal Assent because of a very serious problem that I think inflicts the Senate, and that is its invisibility, its lack of credibility, its lack of public legitimacy and its lack of self-esteem. Whatever symbolic steps one can take to correct this deficit, are, to my mind, important. I think that we suffer from this deficit among ourselves in terms of our responsibilities as senators, but we are collaborators with the executive and with the Commons who wish that the Senate would disappear. We know that voices on the other side have called for the abolition of the Senate and that others have called for reform of the Senate.

I see this as a means of taking a ceremony that has fallen into a decrepit state because of its timing and turning it into a positive, not only for the Senate but for the public and those who do not understand the role of the Senate. In her speech in the Senate on October 4, 2001, Senator Carstairs said in part "a written declaration will reduce the burden that the ceremony places on the Governor General and the Supreme Court justices who act as her deputy."

> ***If you believe that the Royal Assent ceremony is a burden to the Governor General to fulfil one of her constitutional responsibilities, then I am whistling in the wind. The Governor General has only three constitutional responsibilities, and one of them is Royal Assent.***
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> *Senator Grafstein*

The history and the nature of Royal Assent in Australia is different because they do not have a problem of credibility in respect of their second institution, for many reasons. In England, they do not have a problem of credibility in respect of the House of Lords, for many different reasons. However, we have a severe problem of credibility in respect of the Senate and the invisibility of the Senate.

I agree with the point about the inconvenient timing for the Governor General, for her representatives and for the Senate. However, rather than have the ceremony on a Thursday afternoon when people are preparing to return to their home ridings, there is no reason why it could not be held, say, on a Wednesday at one o'clock for 15 minutes immediately following the national caucus, when all the leaders and all the caucus members are here. It is an easy walk down the street before they go to lunch. In that way, the Governor General could more often than not attend.

That would do what is implicit to the nature of Royal Assent. It is not only meant to be a constitutional affirmation of the two Houses of Parliament – putting their work into law - but it is also meant to show the public that there are parliamentarians at work.

People do not even know how the law is made. Any element or symbol that we can take to demonstrate to the public, via television, that this is the rule of law, this is how it is made and this is the content of that particular rule of law, to my mind, is an important vacuum to be filled to reduce public ignorance.

This ceremony is a tremendous way to show the public our "commander in-chief" coming across Parliament Hill to the Senate building, three or four times each year, for 15 minutes. I do not think that is a burden. It is an opportunity to present herself, as she does so gracefully and magnificently, to the chamber. This would attract the appropriate public attention.

You could use that example to educate the public on television about the bills that we pass. One would hope that it might even draw attention to some of the senators about the content of the bills that we have voted for.

It is not a question of inconvenience; rather, it is a question of how to take an important historical and constitutional practice and modernize it to create a positive image as opposed to a negative image.

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**John Aimers, (Dominion Chairman, Monarchist League of Canada):** We see some fundamental problems with Bill S-34. Above all, we see it as an unimaginative proposal that prejudices a very distinctly Canadian procedure that has evolved in respect of Royal Assent. Its only improvement is to efficiency. By the same logic, I suppose, diplomats' letters of credence, which Her Excellency spends countless hours receiving from each ambassador and each high commissioner personally at Rideau Hall, could be sent to her by post and responded to similarly. Extensions of that logic would lead us to say

that we could present honours in Canada through the post or we could have members of Parliament and other officials take oaths in private or subscribe to them in documents that would be sent to the clerk's office.

It relegates the role of the Queen in Parliament to the secretary at Rideau Hall. It hides a procedure that has evolved in Canada. It dismisses the potent importance of symbols and manual acts in our Constitution and our understanding of who we are as Canadians. Above all, it misses an enormous opportunity for creative minds in Parliament, at Government House and elsewhere to rekindle pride, education, shared celebration, achievement, reconciliation and dignity.

Perhaps even more important than all or any of those it is a reminder to us all that there are other sources of authority in Canada, in both a legal and moral sense, than one might believe from the steady accretion of power we have seen in the political executive, particularly centred in the office of the Prime Minister, which has been evolving over decades.

> ***This bill seeks to fix by statute what imagination and a lively respect for a knowledge of our institutions could better amend and improve.***
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> *John Aimers*

At a time when, thanks to the work of organizations as varied as the CBC, Historica and the Dominion Institute, the pendulum is swinging and we are all developing a greater consciousness of Canadian history and Canadian traditions, a knowledge of Canada based not on emotion and flag waving – as satisfying as those practices are from time to time – but on history, facts, information and a greater understanding of our Constitution and our institutions.

This bill flies in the face of the considerable progress that is being made in that dimension. It is more important that we retain some elements of the current Royal Assent ceremony and build on them in imaginative and creative ways, as we have evolved so many distinctly Canadian institutions out of those inherited from our British parliamentary forebears, because so seldom is the Queen seen performing constitutional acts in Canada.

We have recommended in our brief several improvements to existing practice. Giving Royal Assent on a regular basis should be a priority for the Governor General. The ceremony should be visible to the public, both represented in person and through the media. Indeed, one could meet the convenience of Parliament by having Royal Assent ceremonies regularly scheduled immediately after the national caucus meetings of the parties as suggested by Senator Grafstein. There would be wonderful symbolism in that. You would see occurring the division, partisanship and ferocity of feeling that is a natural and right part of parliamentary life, followed by all parties coming together in a ceremony that represents unity - the things that do not change, the things that are not subject to partisanship and rancour but, rather, represent the things upon which all Canadians agree - happening in the heart of Parliament. That would be the more important rather than the less important, convenience aside, as the physical premises of the House and the Senate are dispersed, come the reconstruction projects ahead.

Bill S-34 promotes the welfare of only the political elite, not of the realm, not of its institutions, not of our ability to adjust and refresh those institutions, not of the people of Canada, and not of our undoubted ability to reflect on the institutions that make us Canadian and that go to the heart of the legislative process, the culmination of that process guaranteeing that no majority could ever abuse its power in a constitutional sense.

It is ironic that we have this discussion yet again as we head into Jubilee Year, 2002 when we will all join in celebrating 50 years of a remarkable woman's reign. Whether you are a monarchist, a republican or indifferent, we can all agree that, in 50 years and more of public life, the Queen has never put her convenience first, second or anywhere on the agenda. She is a creature of and a slave to duty. The Queen has never sought convenience. I would argue that this bill seeks convenience but, in so doing, it threatens the many positive initiatives that this body and others who hold the levers of power in Ottawa which could cause Royal Assent to be improved, without accomplishing anything positive but, rather, prejudicing, threatening the public's visible appreciation and our own daily recollection that all political power in Canada is lent, that it does not exist by right in anyone's hands.

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**Professor David Smith, (University of Saskatchewan):** Even someone like myself, who had a reason to investigate the procedure of Royal Assent, experienced difficulty in collecting information at the time I was doing my research. Students of Canadian government would be hard pressed to find a textbook that discusses the subject in anything but a passing way.

Is this lacuna an argument for change in the procedure currently used in the Canadian Parliament? It probably is, but in what direction? Is it to make it more or less visible as an essential part of the making of law?

Proponents of change advocate an alternative method for declaring Royal Assent. The essential element of traditional procedure is that it is personal. Assent is granted by a Justice of the Supreme Court of Canada acting as Deputy Governor General. The essential element of the alternative procedure proposed in Bill S-34 is that it is impersonal; assent may be signified by a written declaration.

The arguments for change have been rehearsed many times and need no repetition here. For simplicity's sake, they fall into one of two categories. First, there are those arguments associated with the promotion of efficiency, broadly defined, that is, the timing of the traditional ceremony of Royal Assent is said to be inconvenient, the attendance sparse, and that it imposes an extra burden on the judges. Generally, it is said that the declaration of Royal Assent needs to be both more expeditious and more practical.

The second set of arguments are those that might be described as flowing from some theoretical conclusions about the status quo, that is, the present ceremony of Royal Assent is described as perfunctory, routine, a formality empty of meaning and the attitude it engenders is one of indifference.

There is a third category of argument that might be called the influence of comparative example. No one else with a political system like Canada's provides for Royal Assent in this way. Britain ceased in 1967, although the sovereign had not given Royal Assent in person for over a century. Assent had been communicated to Parliament by Royal Commission. While the practice of Royal Commission is still possible, the common procedure is for the Queen to sign Letters Patent giving Royal Assent, and this Royal Assent being notified to each House of Parliament.

> ***What purpose is being served by change? One person's technicality can be another's principle. Inefficiency lies in the eye of the beholder.***
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> *Professor Smith*

In Australia, Royal Assent has always been granted by a written declaration. As an observation, the influence of compara tive example is debatable. Long ago, in another context, Sir Joseph Pope, the biographer of John A. Macdonald, said that the Australian example is no example at all. Certainly, if precedent is to be entertained, then another Australian constitutional provision, section 62, might be cited. It provides that there shall be a federal executive council, equivalent to our Privy Council, to advise the Governor General. Australian custom is that the council usually comprises the Governor General and two or three ministers or parliamentary secretaries. That has not been the case in this country for well over a century. If you are to argue by example, you cannot be too selective.

Perhaps because of our colonial background, Canadians have long been disposed to measure themselves politically against others, such as France, Britain and the United States. Whatever the reason and whatever the subject, Senate reform or an entrenched Bill of Rights, there is a disinclination to see the Canadian Constitution and institutions as distinctively Canadian. Yet, the Canadian Crown and the Canadian practice in regard to the Crown should be determinative in the matter of Royal Assent.

In the matter of Royal Assent, the committee has before it three alternatives. The first is to retain the status quo, that is, the Deputy Governor General in the presence of senators and members of Parliament periodically, but not regularly, signifying assent.

The second is to opt for the change set out in Bill S-34. That change provides for an alternative signification of assent by written declaration, along with a guaranteed minimum number of occasions when Royal Assent would be declared in the manner in which it now occurs.

The third is to support Senator Grafstein's amendments. These provide, *inter alia*, for the presence of the Prime Minister or Deputy Prime Minister at the ceremony of Royal Assent in the Senate, for the presence of the Governor General in person, except in exceptional circumstances, for a scheduled Royal Assent ceremony when both Houses are sitting, and for provision of a written declaration of Royal Assent, but only in exceptional circumstances and not more than twice in a calendar year.

Let me comment on these alternatives. First, the status quo is viewed as unsuitable by proponents of the other alternatives either because it is deemed a formality and, therefore, dispensable; or because, in its current guise, it depreciates the significance of the occasion, which is the coming together literally of the three branches of government. As W.P.M. Kennedy, the great constitutional scholar, once described it, it is the conclusion of "the building up of law through various readings and detailed discussion in committee."

Second, Bill S-34 is viewed by critics as unsuitable because, despite retaining the personal ceremony of Royal Assent, the alternative procedure of written declaration will, they believe, become the norm. When people say, as some have in this debate, that the requirement for a minimal number of personal Royal Assent ceremonies in Bill S-34 will "make that ceremony into something even more special than it currently is," they put the reference

in the wrong place. The point about personal Royal Assent, say the critics of Bill S-34, is not that it is special, but that it is not special. It is the routine rather than the rarity of personal Royal Assent that needs to be emphasized.

The Crown is not an ornament but the core of Canada's parliamentary democracy. In and through Parliament, it embodies the values that unite Canadians.

The time of Royal Assent is when the Queen-in-Parliament makes law. Then the representative of the Crown personifies the nation; the Senate embodies the federal principle; and the Commons represents the people through their representatives. One may dispute the description of the parts, but not the parts themselves, nor their inclusion in a manner visible to all.

Senator Grafstein's proposed amendment speaks to these multiple dimensions of the Royal Assent ceremony. I said earlier that comparative examples should be treated with caution. Nevertheless, they cannot be ignored. If Britain and Australia, with whom Canada shares so much politically, do not feel the need for personal Royal Assent, why is Canada different?

The answer, I believe, has to do with the place of Parliament in each political system. In Australia, Parliament is subordinate to the constituent power of the people revealed in the elected Senate and in an amending formula in which the people are the determinative power. In Britain, popular sovereignty, or as the Royal Commission on the Reform of the House of Lords described it, "the ultimate repository of democratic authority" is the House of Commons.

Monarchy is immensely important in the British Constitution, but its importance is different from that in Canada. Canada is a federation composed of provinces but possessing two official languages, official multicultural and an emerging Aboriginal dimension. Parliament functioning, in all its parts, reminds Canadians of the fundamental structure of their Constitution.

One of the recurrent criticisms heard about the operation of the Canadian government is that the general public interest fails to be expressed. The Royal Assent ceremony affirms that it is expressed more completely than Bill S-34 would allow, for that proposal would submerge both the Governor General and the Senate.

While ceremony will not change perception if it conflicts with political reality, at least it does not confirm, as Bill S-34 would, the marginalization of both the national and the federal component of the Constitution in favour of the party political.

**Editor's Note:** The Standing Committee on Rules, Procedures and the Rights of Parliament chaired by Senator Jack Austin studied Bill S-34 and reported it back to the Senate on March 5, 2002 with amendments and observations. A preamble was added and the Bill was amended to provide that the present form of Royal Assent be carried out at least **twice** in each calendar year, including the first appropriation bill. At third reading an amendment was introduced by Senator Graftstein providing that when Royal Assent is granted by written declaration it may be witnessed by more than one member from each House of Parliament. With these changes the Bill was adopted by the Senate on March 19 and sent to the House of Commons the following day.