

Section 16 of the *Constitution Act, 1867*: The Queen, the Capital, and Canadian Constitutionalism

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Section 16 of the Constitution Act, 1867 states that “[u]ntil the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.” This is one of the least-studied provisions in the Constitution of Canada. The legal criteria for exercising the section 16 power to move the capital, which could have important consequences for Canadian politics and national identity, are unclear. Our understanding of the content of Canadian constitutional law accordingly remains incomplete. While section 16 appears on its face to mean that the Queen alone can move the capital of Canada, the minimal judicial and academic commentary on the section provides competing interpretations of how to understand it. The section 16 power to move the capital could conceivably be exercised by the Queen herself, the Governor General alone, the Governor General in Council (GGIC), or Parliament — or may even be defunct. This article resolves this issue by determining the meaning of “Seat of Government,” “Ottawa,” and “the Queen” in section 16 and considering the provision’s relationship to other constitutional provisions and texts. It ultimately argues that the power to move the capital of Canada resides in the GGIC, at least by convention, if not by law, and that any remaining royal right to reclaim the power can only be exercised, again at least by convention, in consultation with the GGIC. It also considers and analyzes potential amendments to section 16 and the requirements for such amendments.

L'article 16 de la Loi constitutionnelle de 1867 affirme que « [j]usqu'à ce qu'il plaise à la Reine d'en ordonner autrement, Ottawa sera le siège du gouvernement du Canada. » Il s'agit d'une des dispositions les moins étudiées de la Constitution du Canada. Les critères juridiques liés à l'exercice du pouvoir visé dans l'article 16 de déménager la capitale, qui aurait des conséquences importantes pour la politique et l'identité canadiennes, ne sont pas clairs. Par conséquent, notre compréhension du fond du droit constitutionnel canadien demeure incomplète. Bien que l'article 16 semble à première vue signifier que la Reine seule puisse déménager la capitale du Canada, le commentaire judiciaire et universitaire minimes sur cet article offre des interprétations contradictoires quant à la façon de le comprendre. Le pouvoir de l'article 16 de déménager la capitale pourrait, en théorie, être exercé par la Reine elle-même, le gouverneur général seul, le gouverneur général en conseil (GGC) ou le Parlement, ou encore, peut même être révolu. Ce résumé résout cette question en déterminant le sens de « siège du gouvernement », « Ottawa » et « la Reine » dans l'article 16 et en examinant le rapport de la disposition à d'autres dispositions et textes constitutionnels. Les auteurs de cet article soutiennent en fin de compte que le pouvoir de déménager la capitale du Canada est entre les mains du GGC, du moins selon l'usage, sinon selon la loi, et que tout droit royal restant de reprendre le pouvoir peut uniquement être exercé, encore une fois, du moins selon l'usage, avec l'accord du GGC. Ils examinent et analysent également les modifications éventuelles à l'article 16 ainsi que les conditions liées à de telles modifications.

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Introduction

Section 16 of the *Constitution Act, 1867* is commonly understood as providing the constitutional authority for Ottawa's status as the capital of Canada. It reads:

Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.¹

Yet there is very little in case law or scholarship on section 16. The Supreme Court of Canada (SCC) only made one substantive statement on section 16 to date. That statement in *Munro v National Capital Commission* was obiter and did not contain much reasoning:

The only reference to the National Capital of Canada contained in the *British North America Act* is in s. 16. ... The authority reserved by this section to the Queen to change the location of the Seat of Government of Canada would now be exercisable by Her Majesty in the right of Canada and, while the section contemplates executive action, the change could, doubtless, be made by Act of Parliament in which Her Majesty acts with the advice and consent of the Senate and House of Commons of Canada.²

This passage suggests that the power to move the capital could be used by Parliament. It is decades old, non-binding, and, for reasons discussed below, unpersuasive. Leading textbooks, in turn, only briefly discuss section 16 (if at all).³ A late nineteenth-century casebook interpreted section 16 as stating

1 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

2 *Munro v National Capital Commission*, [1966] SCR 663 at 669-670, 57 DLR (2d) 753 [*Munro*].

3 See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) vol 1; Bernard W Funston & Eugene Meehan, *Canada's Constitutional Law in a Nutshell*, 4th ed (Toronto: Carswell, 2013); Adam Dodek, *The Canadian Constitution*, 2nd ed (Toronto: Dundurn, 2016); Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis, 2017); and Patrick J Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law, 2017). The leading French textbook also does not discuss it: Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6e éd (Cowansville, QC: Yvon Blais, 2014). Historical examples include: JEC Munro, *The Constitution of Canada* (Cambridge: Cambridge University Press, 1889); JR Mallory, *The Structure of Canadian Government* (Toronto: Macmillan, 1971); John D Whyte & William R Lederman, *Canadian Constitutional Law: Cases, Notes and Materials on the Distribution and Limitation of Legislative Powers Under the Constitution of Canada*, 2nd ed (Toronto: Butterworth, 1977); and WH McConnell, *Commentary on the British North America Act* (Toronto: Macmillan of Canada, 1977). Joseph Doutre, *Constitution of Canada* (Montreal: John Lovell & Son, 1880) was one of the earliest analyses of the then-*British North America Act* and included substantial commentary on the terms of that Act, but it provided no commentary on section 16. The section on the Queen's powers in the recent handbook of Canadian constitutional law does not discuss this power: Marcella Firmini & Jennifer Smith, "The Crown in Canada" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford UP, 2017) 129.

that “[t]he seat of the Government can be altered only by the Crown.”⁴ Adam Dodek highlights the provision as a rare case where the “Queen directly exercises power” under the Constitution of Canada.⁵ Nonetheless, J.R. Mallory does not include moving the Seat of Government as a matter “dealt with by the Queen, and not by the Governor General.”⁶ W.H. McConnell suggests that “authority to change the seat of government, according to the section, would fall within the Queen’s authority, but there would seem to be no reason why such authority could not now be assumed by parliament [sic] by a simple statute or even by the Cabinet acting through an order-in-council or an instrument of advice.”⁷

Only one major French textbook treats the issue in detail; Gérald-A. Beaudoin, in collaboration with Pierre Thibault, spends multiple pages on the topic.⁸ Beaudoin initially concludes that the power remains with the Queen but must be exercised, at least per constitutional convention, in consultation with others, including some unspecified number of federal ministers.⁹ But he then suggests that the Governor General may have the power before finally accepting the Court’s obiter in *Munro* as an equally valid legislative means of movement as royal consultation.¹⁰ As we discuss below, however, there is reason to think that the Queen may need to consult with others as a matter of law, rather than convention,¹¹ and the other options that Beaudoin identifies are likely not legal means of moving the capital at present. Moreover, Beaudoin suggests that the Prime Minister is “the first” of the Queen’s advisors (“le premier de ses conseillers”) and that it is thus especially plausible that the Queen must consult with the Prime Minister,¹² but the proposed primacy for this form of consultation may be questioned.¹³

4 *Munro*, *supra* note 3 at 266.

5 Dodek, *supra* note 3 at 43 [italics removed]. Per Dodek, the other sections are sections 10, 15, 26, and 56.

6 Mallory, *supra* note 3 at 37.

7 McConnell, *supra* note 3 at 53.

8 Gérald A Beaudoin with the collaboration of Pierre Thibault, *La Constitution du Canada: institutions, partage des pouvoirs, Charte canadienne des droits et libertés*, 3^e éd, (Montréal: Wilson & Lafleur, 2004) at 61, 788-789.

9 *Ibid* at 61, 788.

10 *Ibid* at 788 citing *Munro*, *supra* note 2.

11 As will become clear below, the *Letters Patent Constituting the Office of Governor General and Commander in Chief of Canada*, 1 October 1947, (1947) C Gaz II, Vol 81, reprinted in RSC 1985, Appendix II, No 31 [*Letters Patent, 1947*] muddy the question of whether the Governor General must, as a matter of law, act only as the Governor General in Council.

12 Beaudoin with Thibault, *supra* note 8 at 61.

13 See our discussion of the Prime Minister in Part II below. Note further that the exact measure of consultation required to move the capital is unclear even in Beaudoin with Thibault: *ibid* at 61, 788-789.

We are not aware of other major legal works discussing the provision in any detail. Non-legal commentary on the provision is also rare and underdeveloped. For instance, David B. Knight suggests that the legal question of how one can move the capital of Canada is simple:

[W]ho would actually make the decision if a new capital is ever needed? ... The British North American Act states that ‘until the Queen otherwise directs, the seat-of-government shall be Ottawa.’ The 1947 Letters Patent and *The Constitution Act, 1982* do not delegate this authority to the Governor-General or any other authority, therefore, the Monarch retains the right to make the all-important decision.¹⁴

Yet the issue is more complicated than Knight or other earlier commentators suggest.

Further analysis of the text of section 16, other parts of the *Constitution Act, 1867*, other foundational legal documents like the *Letters Patent, 1947*,¹⁵ and case law is necessary to determine how, as a matter of constitutional law, the capital of Canada could change. This work provides the necessary legal analysis. Actual movement of the capital would be highly politicized and political requirements may exceed strict legal requirements, or those of constitutional conventions (to the extent they differ), but that is beyond the scope of this work.

Part I explains the project’s scholarly and practical relevance. Parts II-IV address three sub-questions necessary to explain how section 16 could be invoked or changed. Part II examines the meaning of “Seat of Government” and “Ottawa” in section 16, interpreting the provision to understand its scope. We argue that the Seat of Government is the location of the headquarters of the three branches of government in Canada and that Ottawa refers to the 1867 limits of the city. Part III examines who can exercise the power under the best understanding of section 16. We argue that the power belongs to the Governor General in Council (GGIC), at least by convention, but likely not by convention alone. While the Queen may maintain some constitutional authority to move the capital, she can (again *at least* by convention) only exercise it in consultation with the GGIC. This answer may be politically unpalatable. Part IV thus examines how one could amend section 16 to change who holds the constitutional power to move the capital or directly change the capital, concluding that the constitutional amendment procedure under section 38 of

14 David B Knight, *Choosing Canada’s Capital: Conflict Resolution in a Parliamentary System*, 2nd ed (Ottawa: Carleton University Press, 1991) at 346.

15 *Letters Patent, 1947*, supra note 11.

the *Constitution Act, 1982* likely suffices and discussing the merits of different amendment options.¹⁶

I. Why This Matters

Why does analysis of section 16 matter? Barring the unexpected, section 16 is not going to be invoked soon. Critics may charge that our project is untimely at best and irrelevant at worst. We thus begin by explaining why that concern is understandable but non-fatal to our aims.

Analysis of section 16 has theoretical and practical import — though it is admittedly more theoretically important at present. First, analysis of section 16 is important for constitutional law scholarship. Section 16 is one of the most ignored provisions in the written component of the Constitution of Canada. Comprehensive understanding of the content of Canadian constitutional law requires analysis of this provision. Where the Constitution is to be interpreted holistically,¹⁷ the importance of section 16 is further supported by the fact that it provides a classic constitutional interpretation exercise. As the analysis below makes clear, examining the idiosyncratic section 16 raises important questions not only about the often-overlooked issue of how to understand powers explicitly provided to the Queen under the Constitution of Canada, but also, for instance, about reading possibly conflicting statements of constitutional law, how constitutional powers can change over time, and the Queen's ability to reclaim powers that she has granted to other entities.

Second, the capital has an important role in Canadian self-understanding and serious political implications. Ottawa, for better or for worse, has become a symbol of, and shorthand for, the way central Canada is seen to impose its will on, and disparage, not only the West — particularly Alberta — but also the Maritimes and the territories. The presence of Ottawa in Ontario is symbolic of that province's status as the most populous province and, in the past, the unquestioned economic engine of the country. To move the capital to another province would telegraph, intentionally or not, that Ontario has lost its status and power. Our collective ignorance as to who can exercise a power of such symbolic and political importance is glaring.

16 *Constitution Act, 1982*, s 38, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*]

17 See *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385; *Reference Re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21 [*Supreme Court Act Reference*].

Third, there could be reasons to move the capital in the future and there are few principled reasons to keep the capital in Ottawa. Imagine that a Prime Minister with a significant Western power base seeks to move the capital of Canada to Calgary. Or that rivers begin to irreversibly overflow and envelop Ottawa, threatening government infrastructure and providing reasons to move government officials and offices from the city. These scenarios are not wholly without an air of reality. Strong Western political blocs led to many changes in Canadian governance in recent years. Some supporters of such blocs likely retain antipathy towards Ottawa, Ontario, and Quebec that was at least partially contributory to the success of those political entities. It is not difficult to imagine a party with a strong Western base seeking to make a symbolic and practical decision to move the capital (and, by extension, the political centre of Canada) further West. The potential sinking of Jakarta, in turn, prompted recent calls to move the capital of Indonesia.¹⁸ Water concerns in Ottawa are not unprecedented,¹⁹ though the potential sinking of Ottawa is admittedly very remote, with pessimists alone feeling the air of reality. It would be helpful to know what needs to be done before a politician tries to move the capital to Calgary, disasters force us to move the capital inland, or some other scenario leads a government official to want or need to move the capital elsewhere, be it Calgary, Montreal, or another city.

Furthermore, reasons to put the capital in Ottawa in the first place arguably no longer apply, raising questions about why it should remain there. Per the Library of Parliament,

In 1857, there were a few cities competing to be the capital city. ... Queen Victoria chose Ottawa because it was centrally located between the cities of Montreal and Toronto, and was along the border of Ontario and Quebec (the centre of Canada at the time). It was also far from the American border, making it safer from attacks.”²⁰

But Ottawa is no longer equidistant between Canada’s power centers. Canada has not been attacked by the USA for a long time. This is unlikely to change. Modern weaponry means that distance from the American border no longer

18 Michael Kimmelman, “Jakarta Is Sinking So Fast, It Could End Up Underwater” (21 December 2017), online: *The New York Times* <www.nytimes.com/interactive/2017/12/21/world/asia/jakarta-sinking-climate.html>.

19 See e.g., “Our Worst Nightmare is Coming: Water Levels Expected to Rise in Ottawa Region”, *CBC News* (5 May 2017), online: <www.cbc.ca/news/canada/ottawa/flooding-may-5-west-quebec-eastern-ontario-1.4100803>.

20 Canada, Library of Parliament, *Our Country, Our Parliament* (Guide), (Ottawa: Library of Parliament, 2009) at 37.

provides protection from any such attack. The military and social benefits of water access no longer clearly make Ottawa a preferable Canadian capital.

Serious consideration has not been given to moving the capital despite the reasons for choosing Ottawa back in 1867 no longer holding. There was no sustained discussion of section 16 in any post-1982 attempts to amend the Constitution.²¹ Yet quixotic (likely unserious) proposals for moving the capital of provinces occasionally arise in the news.²² If anyone takes a serious stance at the federal level in the future, they should know the burden they will have to meet to realize their proposal. Knowing how to meet the relevant burden requires answers to the questions in Parts II-IV.

II. Question 1: What does section 16 mean by “the Seat of Government of Canada” and “Ottawa”?

In this part, we interpret the terms “the Seat of Government of Canada” and “Ottawa” in section 16. This is necessary to understand the constitutional requirements on the existence of the capital and the content of the power to move the capital, as well as to identify non-constitutional legal procedures that would need to accompany exercise or amendment of section 16. We argue that the terms require that all three branches of government be headquartered in the 1867 boundaries of Ottawa. Moving branches of government outside the 1867 boundaries of Ottawa thus requires exercise of the power to move the capital under section 16 or a constitutional amendment.²³

21 See the discussion surrounding and text of e.g., *1987 Constitutional Accord*, 1987, online: *Government of Canada* <www.canada.ca/en/intergovernmental-affairs/services/federation/1987-constitutional-accord.html>; *Consensus Report on the Constitution: Final Text*, Charlottetown, 1992, online: Secrétariat du Québec aux relations canadiennes <www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document27_en.pdf> [*Charlottetown Accord*]; *The Calgary Declaration*, 1997, online: Newfoundland and Labrador Executive Council <www.exec.gov.nl.ca/currentevents/unity/unityr1.htm>.

22 In 2010, Member of Provincial Parliament Bill Murdoch suggested that people in Toronto do not understand the rest of the province and proposed that Toronto form its own province with London as the capital of Ontario: “Toronto Should Separate From Ontario: MPP”, *CBC News* (16 March 2010), online: <www.cbc.ca/news/canada/toronto/toronto-should-separate-from-ontario-mpp-1.878679>. In 2018, Toronto mayoral candidate Jennifer Keesmaat proposed Torontonians “secession” on self-representation grounds: Tristin Hopper, “How Hard Would It Actually Be for Toronto to Become Its Own Province?”, *The National Post* (3 August 2018), online: <nationalpost.com/news/canada/how-hard-would-it-actually-be-for-toronto-to-become-its-own-province>. Ontario would need a new capital in those circumstances too.

23 We bracket the question of whether one must move all three branches simultaneously.

A. The Seat of Government

Section 16 does not discuss the “capital” of Canada, but only “the Seat of Government of Canada.”²⁴ This phrase has no clear plain meaning. At minimum, it would appear to require that the headquarters of the branches of government that existed in 1867 be headquartered in the capital city of “Ottawa” (as defined below). The “Seat of Government” clearly did not refer to the residence of the Queen in 1867. Her primary residence remained in Westminster and was unlikely to change to London, let alone Ottawa. Yet “Government” must have had some intended referent in section 16. Attending to other parts of the constitutional text helps identify said referent. The *Constitution Act, 1867* established the Governor General (GG), the GGIC, and Parliament as entities with executive and legislative power in Canada.²⁵ These entities were almost certainly considered government in 1867. They should unquestionably be considered government in 2019. The “Seat of Government” most likely always referred to the “Seat” of the GGIC, Parliament, or both. It is implausible to think that either or both could be headquartered in another city if section 16 is going to have any substantive meaning. While the GGIC or Parliament could conceivably fulfill some functions outside city limits while keeping the “Seat” of government in Ottawa, it is hard to see how there can be a “Seat” of government in Ottawa if the only identified government actors in the Constitution are free to organize and exercise their primary government functions outside the city of Ottawa in non-exceptional circumstances.²⁶

There is also reason to believe that the headquarters of the SCC must be in Ottawa under section 16. The *Constitution Act, 1867* admittedly did not create a final appellate court for Canada. It only recognized the inchoate possibility of Parliament creating such a court.²⁷ The drafters could not have intended for the “Seat of Government” in 1867 to include a then-nonexistent branch. But the Constitution of Canada is not frozen in 1867. The “Seat” should be understood as applying to the headquarters and site of the primary exercises of the powers of any branch of the state. This is consistent with both our best understanding

24 *Constitution Act, 1867*, *supra* note 1, s 16.

25 *Ibid*, Parts III, IV.

26 The fact that the non-Royal sovereign government officials in the United Kingdom also sat in the same capital city, London, offers some minimal further support for this interpretation. The Preamble to the *Constitution Act, 1867*, *ibid*, famously states that Canada’s constitution will be “similar in Principle to that of the United Kingdom.” This could be read as suggesting that governments in both countries should be similarly headquartered. But the stronger argument for our position here is that it is the only one that makes sense of the existence of the “Seat of Government” requirement in the context of the “Government” constitutionally operating in Canada in 1867.

27 *Ibid*, s 101.

of the closest synonym, the capital, and the common practices of world governments. Indeed, the fact that the drafters of the *Constitution Act, 1867* acknowledged the possibility of a judicial branch of the Canadian government arguably provides reason to think that they did not intend for the meaning of “Seat of Government” to be static and that they acknowledged that other branches of the Canadian government could develop over time.

We accordingly believe that the “Seat of Government” most likely refers to the location of the headquarters of all three branches of the federal government: the Executive (in Canada meaning the GG and Cabinet), the Legislative (Parliament), and the Judicial (SCC). This approach is consistent with the view that each branch can operate, within limits, outside Ottawa such that, for instance, the SCC can have hearings outside the city.²⁸ But the headquarters and regular exercise of the powers of each must remain in Ottawa under section 16.

Statutes establishing further requirements on the location of the capital do not undermine this reading as such requirements are minimal and not part of the Constitution. The *Supreme Court Act* contains provisions that directly refer to some of its activities occurring in (or at least near) Ottawa.²⁹ If these provisions were constitutionalized and required that the SCC sit in Ottawa, they could limit movement of the capital. However, it is highly unlikely that the SCC in the *Reference Re Supreme Court Act, sections 5 and 6*, which constitutionalized at least some sections of the *Supreme Court Act*, meant to constitutionalize the entire *Act*.³⁰ Section 16 actually helps to explain why the SCC could not have meant to do so. Doing so would have imposed undue restrictions on the exercise of the section 16 power, which would contradict basic norms of constitutional interpretation that require holistic interpretation whereby provisions reinforce, rather than undermine, one another.³¹ Even if the whole *Supreme Court Act* were constitutionalized, moreover, it would not require the SCC to sit in Ottawa. That legislation only requires that “[t]he

28 The Supreme Court of Canada has nascent plans to do so: Sean Fine, “Supreme Court of Canada Considers Holding Hearings Outside of Ottawa”, *The Globe and Mail* (21 June 2018), online: <www.theglobeandmail.com/canada/article-supreme-court-of-canada-considers-holding-hearings-outside-of-ottawa/>. Plans to hold occasional hearings outside of Ottawa would not contradict section 16 on our view. We only require that the headquarters of all three branches be in 1867 Ottawa’s contours. Contrary interpretations that would make occasional travelling sessions illicit face the problem that the Supreme Court of Canada sat elsewhere in the 1800s and should be able to do so now given the Preamble and the fact that, as Fine notes, the UK Supreme Court recently held hearings outside its London headquarters.

29 *Supreme Court Act*, RSC 1985, c S-26, ss 11, 14, 30, 32 (“Ottawa”), 8, 14 (“National Capital Region”) [*Supreme Court Act*].

30 *Supreme Court Act Reference*, *supra* note 17.

31 See note 17.

judges shall reside in the National Capital Region ... or within forty kilometres thereof” and that members’ Oath of Office “be administered to the Chief Justice before the Governor General in Council, and to the puisne judges by the Chief Justice or, in the case of absence or illness of the Chief Justice, by any other judge present at Ottawa.”³²

The *Parliament of Canada Act* does not even explicitly state that Parliament must be *near* Ottawa.³³ Its only references to Ottawa are in relation to eligible expenses for Parliamentary Secretaries³⁴ and to define the term “Parliament Hill” for the purposes of provisions on the Parliamentary Protective Service.³⁵ These too are minimal requirements. No one argues that they are constitutionalized. While one could argue that there is a constitutional convention that Parliament meets in the “Seat of Government,” there is little indication that this must be Ottawa.

The *Supreme Court Act* and *Parliament of Canada Act* thus do not change the fact that the Seat of Government of Canada must be in Ottawa. Those provisions only make moving the capital impracticable. The lack of constitutional status for the potentially problematic statutes means that changing, for instance, the residence requirements of the judges alongside the site of the capital, would not require a constitutional amendment if section 16 were exercised, as such changes would not seem to alter the Court’s essential features.

B. Ottawa

The fact that all three branches of government must be in “Ottawa” under section 16 raises questions about the meaning of “Ottawa” in that section. Neither the *Constitution Act, 1867* nor other components of the Constitution of Canada recognized in the *Constitution Act, 1982* define “Ottawa.”³⁶ As a municipality in Ontario, the legal boundaries of Ottawa are a matter for the government of Ontario.³⁷ For example, in 1999, the Ontario legislature amalgamated the existing City of Ottawa with several

32 *Supreme Court Act*, *supra* note 29, ss 8, 11.

33 *Parliament of Canada Act*, RSC 1985, c P-1.

34 *Ibid*, s 66(a).

35 *Ibid*, s 79.51.

36 *Constitution Act, 1982*, *supra* note 16.

37 See *Constitution Act, 1867*, *supra* note 1, s 92(8); *Public School Boards’ Assn of Alberta v Alberta (AG)*, 2000 SCC 45 at para 33. On municipal reorganization, see *Mississauga (City) v Peel (Municipality)*, [1979] 2 SCR 244 at 253, 97 DLR (3d) 439; *East York (Borough) v Ontario (AG)* (1997), 153 DLR (4th) 299 at paras 11-13, 36 OR (3d) 733 (CA), leave to appeal to SCC refused, [1997] SCCA No 647.

cities/townships (e.g., Cumberland, Gloucester, Kanata, and Nepean) into a new City of Ottawa.³⁸

While we generally interpret terms in a dynamic manner in Canada, we support a static reading of the term “Ottawa” in which it refers to the boundaries of Ottawa as constituted in 1867. On this reading, section 16 precludes the normal spread of the government within the boundaries of Ottawa as the city’s boundaries expanded over time. Federal government branches cannot be headquartered in Nepean, for example. The alternative has more implausible implications. A “dynamic” interpretation of “Ottawa” in section 16 would essentially grant the Ontario legislature the power to amend the Constitution by expanding, contracting, or moving Ottawa. This flatly contradicts Canadian constitutional amendment norms.³⁹ Dynamic interpretation is meant to be “purposive.”⁴⁰ No plausible reading of section 16 lets its purpose give new powers to the province or allows the absurd results that could follow. A dynamic reading can present Ontario with powers to change, shrink, or even eliminate the Seat of Government for Canada. Separation of powers aside, Ontario shrinking the boundaries of “Ottawa” to the area around “Parliament Hill” would allow the Seat of Government to remain in place. Yet changing the boundaries to a small location in another part of town would move the capital in a manner contradictory to the intent of section 16, effectively exercising the section 16 power, and could result in massive federal expenditures.

38 *City of Ottawa Act, 1999*, SO 1999, c 14, Sched E, ss 1(1), 2(1) [*Ottawa Act*], referring to *Regional Municipality of Ottawa-Carleton Act*, RSO 1990, c R.14, s 1 (definition of “area municipality”), as repealed by *Fewer Municipal Politicians Act, 1999*, SO 1999, c 14, ss 5(2), 7(2).

39 As detailed below, *Constitution Act, 1982*, *supra* note 16, Part V establishes the rules of Canadian constitutional amendment. In most cases, per s 43, even when a constitutional amendment only impacts a single province, it requires acceptance by the federal Senate and House of Commons and by the Governor General. The claim in *Ottawa Act*, *supra* note 38, s 5(2) that “[t]he city stands in the place of the old municipalities for all purposes” thus cannot include the purpose of serving as the capital: a province cannot unilaterally change constitutional matters that impact others, which would include the capital, and often cannot even unilaterally impact constitutional measures that do not impact others. Section 45 of the *Constitution Act, 1982*, *supra* note 16, provides that provincial legislatures “may exclusively make laws amending the constitution of the province.” A good faith argument that this may entail a province’s power to make unilateral amendments to parts of the Constitution of Canada is available: See e.g. Hogg, *supra* note 3 at 4.7. However, nothing concerning the capital plausibly fits under “the constitution of the province.”

40 On the necessity of purposive interpretation of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, see *Hunter v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321. These cases provide reason to believe that the Constitution generally must be interpreted purposively. *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at paras 21-23, 154 DLR (4th) 193 requires purposive interpretation of *all* Canadian legal documents. On purposive interpretation generally, see Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton UP, 2005) at 88-92, 288.

Ontario's power to eliminate cities could even eliminate the site for the Seat of Government.

Our static interpretation raises questions about the relationship between 1867 Ottawa and the modern capital region. If the Seat of Government must be in 1867 Ottawa and the Canadian public likely views the capital of Canada as encompassing areas outside of even modern Ottawa — as the establishment of the National Capital Region, which includes parts of Quebec suggests⁴¹ — might this challenge our previous identification of the capital of Canada and its Seat of Government? In a word, “No.” The act establishing the National Capital Region explicitly states that it extends beyond the “Seat of Government.”⁴² It defines the region as follows: “**National Capital Region** means the seat of the Government of Canada and its surrounding area, more particularly described in the schedule.”⁴³ The capital is the Seat of Government. The capital and the area around it form the capital region. Recognizing 1867 Ottawa as the capital and the surrounding area as the greater capital is consistent with the text of the *Constitution Act, 1867* and the *National Capital Region Act*. While scholars discuss attempts to move some government institutions to Gatineau/Hull as attempts to move “the capital”,⁴⁴ they are better understood as the creation of a national capital region in which national identity markers (viz., institutions that help to forge a common identity through e.g., shared history⁴⁵) surround the capital proper.

One passage in *Munro* could challenge our interpretation but does not undermine it. The justification of the federal takings necessary to establish the National Capital Region in both Ontario and Quebec was justified under the Peace, Order and good Government (POGG) power in *Munro*, partly so “the nature and character of the seat of the Government in Canada may be in accordance with its national significance.”⁴⁶ Yet the statement that the National Capital Region as a whole is the seat of the Government in Canada is not directly on point and likely obiter.⁴⁷ It is also a matter of POGG interpretation, not section 16 interpretation. The SCC likely did not mean to make substantive statements on the contours of section 16. It did not need to recognize

41 *Description of National Capital Region*, being Schedule to the *National Capital Act*, RSC 1985, c N-4.

42 *Ibid*, s 2.

43 *Ibid*.

44 E.g., Knight, *supra* note 14 at 338.

45 The Canadian Museum of History in particular is now in Gatineau, partly because of the development of the National Capital Region; online: *Canadian Museum of History* <<https://www.historymuseum.ca/>>.

46 *Munro*, *supra* note 2 at 671.

47 *Ibid* at 669.

Gatineau as part of the capital or grant Gatineau a power to host a branch of government to decide the case. Moreover, the term “Ottawa” in section 16 does not plausibly include other cities on its face. The fact that the relevant act does not simply make the other cities part of Ottawa suggests the *National Capital Act* is not meant to change the constitutional status of Gatineau. The broader point in the *Munro* passage is a good one, but the court should have said and likely meant to say that the takings are necessary “in order that the nature and character of the seat of government *and the surrounding capital region* may be in accordance with its national significance.”

C. Conclusion

For the purposes of section 16, then, “the Seat of Government” refers to the location of the headquarters of all three branches of government and “Ottawa” refers to the 1867 boundaries of Ottawa. The question of whether someone can exercise the power to move the capital implicit in section 16 is thus a question of whether one can move all or part of the headquarters of the three branches of government to a location outside the 1867 boundaries of Ottawa, whether it be as close as Nepean, which is part of contemporary Ottawa under provincial law, or as far away as Iqaluit. We now turn to analyze whether anyone has that power.

III. Question 2: Can the power in section 16 be used and, if so, by whom?

Section 16, in conjunction with modern constitutional convention, suggests three options for the entity that can legally exercise the power to move the capital: (a) the GGIC; (b) the Queen herself⁴⁸; and (c) the GG herself. We argue that (a) is the correct interpretation of section 16 and then explain why (b) and (c) are less plausible interpretations of the relevant law. We then address the less plausible possibilities that (d) the power could be exercised by Parliament and (e) the power is defunct, so no one can move the capital absent constitutional amendment.

The most plausible position is that the power to move the capital belongs to the GGIC, *at least* by convention if not by law, but likely by law.⁴⁹ As we

48 *Constitution Act, 1867*, *supra* note 1, s 16.

49 As noted in note 11 and discussed below, the exact level — whether legal or conventional — and scope of the devolution in the *Letters Patent, 1947*, *supra* note 11, is less clear than is sometimes appreciated. We provide reason to think that the Queen is legally bound to move the capital only in consultation with the GGIC in this work that are grounded not only in texts and practices that are

will now explain, the plain language of section 16 gives the power to move the capital to “the Queen,” but almost all powers of the Queen and GG are understood, again at least by convention if not by law, to be exercised by the GGIC.⁵⁰ *The Letters Patent, 1947* suggests that the section 16 power in particular has legally devolved to, at minimum, the GG and the *Statute of Westminster, 1931* is then understood to require that the GG act on advice on some Canadian entity with few exceptions that are not analogous to the present case, likely requiring consultation with the GGIC.⁵¹ While we do not go as far as some scholars who believe it is “unthinkable” (“impensable”) that the Queen could exercise this power absent consultation with some other entity,⁵² we believe that there is good legal reason to believe that the Queen is actually required to consult the GGIC prior to a move.

The plain language of section 16 admittedly suggests that the Queen alone possesses the power to move the capital of Canada. The provision literally specifies “the Queen.”⁵³ Some context supports the idea that “the Queen” should be interpreted narrowly. Dodek’s brief discussion of section 16, one of the few scholarly discussions thereof, notes that section 16 is “one of only five [provisions] where the Queen directly exercises power under the [*Constitution Act, 1867*].”⁵⁴ The fact that the *Constitution Act, 1867* gives other powers theoretically belonging to the Queen to other entities also suggests that the powers of the GGIC and the Queen are meant to be separate.

Other language is used to refer to the Queen’s representatives acting on her behalf. The GG and GGIC both have specific powers under the *Constitution Act, 1867*. If the founders meant for the power to move the capital under section 16 to belong to the GG or GGIC, they could (and one can argue would) have said so. They explicitly gave other powers to those bodies. Giving this particular power to another entity without amending the original *Constitution Act, 1867* appears prima facie suspect. Knight suggests that this narrow interpretation should continue to govern given that other documents delegating the Queen’s powers do not explicitly delegate this power. He says neither the

arguably conventional, but in clear provisions of documents with constitutional status. If, however, one believes that all our discussions of the devolution of powers and the Queen’s agreement to bind her own authority are conventional, then this weaker claim about de facto power remains true.

50 *Constitution Act, 1867*, *supra* note 1, s 16; Hogg, *supra* note 3 at 9.4(b).

51 *Letters Patent, 1947*, *supra* note 11, art II; *Statute of Westminster, 1931*, 22 Geo V, c 4 (UK), reprinted in RSC 1985, Appendix II, No 27 [*Statute of Westminster*].

52 Beaudoin with Thibault, *supra* note 8 at 788.

53 *Constitution Act, 1867*, *supra* note 1, s 16.

54 Dodek, *supra* note 3 at 43.

Letters Patent, 1947,⁵⁵ which otherwise delegate the Queen's powers in Canada to other entities (e.g., the GG or the GGIC), nor the *Constitution Act, 1982*,⁵⁶ which moves constitutional authority in Canada from the United Kingdom to Canada, explicitly delegates the power to move the capital under section 16 to any other entity, GG or otherwise.⁵⁷ In the absence of explicit delegation, the argument goes, the power must remain with the Queen.

With respect, however, the *Letters Patent, 1947* do delegate the section 16 power and other legal documents further suggest that a literal reading of section 16 errs and the power to move the capital belongs to the GGIC. Again, almost all powers of the Queen and GG are understood to be exercised by the GGIC, by convention if not by law.⁵⁸ The devolution of the section 16 power in particular to either the GG or the GGIC appears in the *Letters Patent, 1947*. Article II states:

II. We do hereby authorize and empower Our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise **all** powers and authorities lawfully belonging to Us in respect of Canada, **and for greater certainty but not so as to restrict the generality of the foregoing** to do and execute, in the manner aforesaid, all things that may belong to his office and to the trust We have reposed in him....⁵⁹

However, the following phrase muddies the waters as to whether the GG's powers are exercisable by the GGIC as a matter of law or only as a matter of convention: "Our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, *as the case requires*."⁶⁰ At minimum, exercise is by the GGIC by convention. But, as discussed below, there is also a reasonable argument for the claim that the Queen is legally required to consult. In either case, the *Letters Patent, 1947* are part of the Constitution of Canada.⁶¹ They are accordingly to be read in concert with other constitutional documents, including section 16, and can qualify the same.

55 *Letters Patent, 1947*, *supra* note 11.

56 *Constitution Act, 1982*, *supra* note 16.

57 Knight, *supra* note 14 at 346.

58 Hogg, *supra* note 3 at 9.4(b).

59 *Letters Patent, 1947*, *supra* note 11, art II [emphasis added].

60 *Ibid* [emphasis added].

61 Analysis of this point is mixed. Contrast Régimbald & Newman, *supra* note 3 at 1.16 and Funston & Meehan, *supra* note 3 at 31, who include them on lists of constitutional documents, with Monahan, Shaw & Ryan, *supra* note 3 at 3-6 and The Constitutional Law Group, *Canadian Constitutional Law*, 5th ed (Toronto: Emond Montgomery, 2017) at 4-8, who do not. Hogg, *supra* note 3 at 1.2, views the *Letters Patent, 1947* as an exercise of the prerogative power, in contrast to powers formally granted in the written constitutional text. He writes that a definition of "constitutional" that relied on section 52(2) alone would not include the *Letters Patent, 1947* or several other documents with

One could argue that the word “all” in Article II is only meant to refer to powers like those in the text of various Letters Patent and powers under the *Constitution Act, 1867* generally or section 16 particularly do not qualify.⁶² Contemporaneous commentary suggests that it was unclear at the time of passage whether the provisions meant to provide the powers “to confer honors” or “declare neutrality, war or peace” and that it did not actually change the office of the GG, leaving him or her subject to British law.⁶³ Everyone still recognizes that the Queen retains the power to appoint the GG.⁶⁴ The same could be true of the capital-moving power. These considerations provide some evidence of a qualified domain restriction on “all.”

However, none of this entails that section 16 should be read literally today or that the Queen alone possesses the power to move the capital. Article II’s reference to “all powers” remains unequivocal.⁶⁵ The listed powers are explicitly not intended to be exhaustive or qualify the “all powers” language, suggesting that the list of powers granted to the GG, with advice, was non-exhaustive. Section 16 is within the ambit of “all” the Queen’s powers. Delegation likely includes that of the section 16 power.

candidate constitutional status: *ibid* at 1.4. Yet scholarship contemporaneous to the issuance of the *Letters Patent, 1947* viewed Letters Patent from Britain as constitutional documents for other British colonies: Martin Wight, *British Colonial Constitutions, 1947* (Oxford: Clarendon, 1952). They do not appear in the list of sources of *British* constitutional law (AW Bradley & KD Ewing, *Constitutional & Administrative Law*, 15th ed [Harlow, UK: Pearson Education, 2011]), but were intended colonial constitutional laws and retain that status. Moreover, Letters Patent were included in Appendix II to RSC 1985, reflecting (at minimum) their general import. Yet leading collections of constitutional documents in both English and French include the 1947 letters as constitutional documents: See Bernard W Funston & Eugene Meehan, eds, *Canadian Constitutional Documents Consolidated 2nd Edition* (Toronto: Thomson Carswell, 2007) at 346; André Tremblay, ed, *Droit constitutionnel canadien et Québécois : documents* (Montreal: Themis, 1999) vol 1 at 563.

62 *Letters Patent, 1947*, *supra* note 11, art II. For an introduction to this phenomenon of implied domain restrictions, which notes the common occurrence thereof, see Wylie Breckenridge, *Visual Experience: A Semantic Approach* (Oxford: Oxford University Press, 2018) at 77-79.

63 WPM Kennedy, “The Office of the Governor-General in Canada” (1948) 7:2 UTLJ 474 at 474. The press release accompanying the *Letters Patent, 1947* stated that the letters were not to be understood as impacting the then-King’s prerogative powers; Mallory, *supra* note 3 at 37 n 8. 1889 commentary on the nineteenth-century versions of the *Letters Patent*, most notably the BNA-contemporaneous 1867 version and the 1878 version highlight that drafters accepted that since “Canada possessed more extensive powers of self-government than had been conceded to any other colony, and consisted not of one province but of seven provinces, the widest possible powers consistent with the British North America Act should be conferred on the Governor-General”: Munro, *supra* note 3 at 162. That same commentary placed the power under section 16 in the Crown, not the GGIC; *ibid* at 266. The list of powers granted by the Letters Patent to the GGIC does not include a power to move the capital; *ibid* at 163-167.

64 See e.g. Firmini & Smith, *supra* note 3 at 136.

65 *Letters Patent, 1947*, *supra* note 11, art II.

An alternative reading of the *Letters Patent, 1947* would keep the power in the hands of the Queen even notwithstanding the residual language. Legally, the effect would be that both the GG and the Queen hold the section 16 power. Nonetheless, GGIC involvement would likely remain necessary. In *Leblanc v Canada*, the Ontario Court of Appeal rejected the argument that the delegation under the *Letters Patent, 1947* meant that the section 26 power — to increase the size of the senate — “could no longer be exercised by [the Queen]” and instead found that “the general rule is that a delegation of power does not imply parting with the authority and the delegating body retains the power to act concurrently within the area of delegated authority.”⁶⁶ This decision is legally persuasive. However, at minimum as a matter of convention, the Queen would not exercise the power absent a recommendation from the GG. As we argue below, the *Statute of Westminster, 1931* and other documents suggest that any remaining section 16 powers belonging to the Queen requires her to exercise these powers in consultation with other entities, effectively requiring the consent of that other entity — whether the GG or GGIC — in any case.

The question is then whether the Queen requires the consent of the GG or GGIC to exercise section 16 powers. To the extent that the *Letters Patents, 1947* devolved the capital-moving power under section 16, for instance, the question is whether devolution was to the GG or GGIC. It is highly unlikely that section 16 is one of the rare powers of the GG exercised by the GG alone. Peter W. Hogg describes the GG-exclusive powers as the GG’s “personal prerogatives” or “reserve powers.”⁶⁷ He argues that these only apply where the government has lost, or may have lost, the confidence of the House of Commons.⁶⁸ These include the power to appoint the Prime Minister,⁶⁹ dismiss the Prime Minister,⁷⁰ or refuse a dissolution of Parliament.⁷¹ The latter two are rarely used (and controversial when used). All other powers of the GG, whether formally ascribed to the GGIC or to the GG herself in law, are exercised by the GG

66 *Leblanc v Canada* (1991), 80 DLR (4th) 641 at paras 25-26, 3 OR (3d) 429 [*Leblanc*]. We note that the British Columbia Court of Appeal was more tentative. See *Reference Re Sections 26, 27 and 28 of Constitution Act, 1867* (1991), 78 DLR (4th) 245 at para 64, 53 BCLR (2d) 335 (BCCA) [*Reference Re Sections 26, 27 and 28*]: “I digress here to note that an argument could be made based on the Letters Patent of 1947 that, as well as the Queen having this authority, so too does the Governor General.” An argument for Beaudoin with Thibault, *supra* note 8 at 788’s claim that both the Queen and the GG could move the capital could appeal to this case law for support (though they better support the Queen and the GGIC both having section 16 powers).

67 Hogg, *supra* note 3 at 9.7(a).

68 *Ibid.*

69 *Ibid* at 9.7(b).

70 *Ibid* at 9.7(c).

71 *Ibid* at 9.7(d).

on the advice of Cabinet or the Prime Minister. For example, Hogg writes of sections 24 and 96 that “[t]he Governor General’s power to appoint senators (Constitution Act, 1867, s. 24) and judges (s. 96) is *of course* exercised on the advice of the cabinet.”⁷² The section 16 power is unlike the aforementioned reserve powers of the GG: the section 16 power has no connection to whether the government has lost the confidence of the House. The powers exercised by the GG on the advice of the Prime Minister alone are also quite narrow and relate to the Cabinet itself and Parliament.⁷³ The GG’s exercise of the section 16 power appears extraordinary and without precedent. Devolution to the GG in section 16 should be understood as devolution to the GGIC.⁷⁴

Further support for the idea that GGIC and not the Queen possesses the power to move the capital under section 16 comes from the *Statute of Westminster, 1931*, which limits the Queen’s ability to make decisions for Canada without consulting some Canadian entity.⁷⁵ The *Statute*, which granted many powers to the Canadian government, is one of the most important sources of Canadian self-governance. Even if the *Letters Patent, 1947* are not part of the Constitution of Canada within the meaning of subsection 52(2), as critics may charge,⁷⁶ the *Statute of Westminster, 1931* would still bind the relevant authorities. It is widely understood to grant “full independence and autonomy to Canada.”⁷⁷ It is unlikely that something as significant to national self-understanding and political functioning as the power to make decisions about the location of the capital is not part of that autonomy. As part of said autonomy, the Queen should only make decisions for Canada in consultation with Canada.⁷⁸ Thus, Hogg writes that the Queen has “delegated all of her powers over Canada to the Canadian Governor General, except of course for the power to appoint or dismiss the Governor General,”⁷⁹ which is exercised

72 *Ibid* at 9.7(e) [emphasis added] [footnotes omitted].

73 *Ibid* at 9.4(c).

74 But see Beaudoin with Thibault, *supra* note 8 at 788 for a somewhat confusing statement on the GG alone.

75 *Statute of Westminster, supra* note 51. The *Statute* is identified as forming part of the Constitution of Canada in the Schedule to the *Constitution Act, 1982, supra* note 16.

76 See note 61.

77 Régimbald & Newman, *supra* note 3 at 1.14. The wide recognition point is ours. A narrow reading of the *Statute* would not devolve the power to move to the capital as the *Statute* does not give the Queen’s powers to Canadian Parliament, but places restrictions on the British Parliament: *Statute of Westminster, supra* note 51, s 4. This reading is highly non-standard.

78 The British Parliament can *only* make laws on the request and with the consent of Canada: *Statute of Westminster, supra* note 51, s 4. As noted in the preceding footnote, the restrictions on Parliament here plausibly also apply to the Queen.

79 Hogg, *supra* note 3 at 9.3. In an omitted note, Hogg qualifies this statement with the possible exception of s. 26 of the *Constitution Act, 1867, supra* note 1.

by the Queen on the advice of the Prime Minister of Canada. Yet again, the GG's powers are then (*at least* conventionally) only rarely exercisable by the GG alone.

The *Statute of Westminster, 1931* thus supports the idea that the section 16 power does not belong to the Queen or GG alone. While the *Statute of Westminster, 1931* does not overrule other constitutional provisions like section 16, it is part of the Constitution of Canada and suggests that the power to move the capital can only be exercised after consultation with some Canadian government entity (even if the *Letters Patent, 1947* contain a residual power to exercise the power or a residual right of reclamation discussed below). The *Statute* may not be able to formally take a power from the Queen, but all constitutional documents must be read together in concert and reading section 16 in tandem with the *Statute of Westminster, 1931* (and, indeed, a plausible interpretation of *Letters Patent, 1947*) suggests that the Queen can no longer exercise her power alone. Given the impact of an exercise of the section 16 power, it is unlikely that advice from the Prime Minister will suffice for moving the capital: other than the appointment of the GG, the main powers of the Prime Minister alone are to advise the GG to appoint and dismiss the members of Cabinet and to dissolve or summon Parliament.⁸⁰ The power to move the capital under section 16 of the *Constitution Act, 1867* likely belongs to the GGIC instead, by convention and likely by law.

Requiring the Queen to consult with other entities to exercise her section 16 powers is also consistent with limitations placed on the exercise of her other constitutional powers. As a matter of conventional and actual practice, other constitutional powers belonging to the Queen are not clearly exercised by the Queen alone anymore. The fact that the *Constitution Act, 1867* explicitly gives other powers to the GG or GGIC while stating “the Queen” here suggests original intent to have the Queen decide the location of the capital. Yet other instances of powers vested in the Queen in the *Constitution Act, 1867* appear either spent or no longer solely within the domain of the Queen alone. Section 3 authorizes “the Queen, by and with the Advice of Her Majesty’s Most Honourable Privy Council,” to unite by proclamation Canada, Nova Scotia, and New Brunswick into the Dominion of Canada.⁸¹ This power is clearly spent. So too is the power to admit other enumerated provinces that are now part of Canada.⁸² The Queen plays no formal role in military affairs despite

80 Hogg, *supra* note 3 at 9.4(c).

81 *Constitution Act, 1867*, *supra* note 1, s 3.

82 This explains why Dodek, *supra* note 3 at 43, only lists five, rather than seven, direct powers.

section 15, which states that “The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.”⁸³ This is best understood as a consequence of another status directly given to the Queen: section 9 vests in the Queen the executive power “of and over” Canada.⁸⁴ That executive power is now exercised through a combination of the GG and the Prime Minister, though whether this is legally required is open for interpretation. The specific numerical limitations in the section 26 power to add seats to the Senate raises questions about its continuing significance, but it requires the Queen to act in concert with the GG in any case: “If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), **representing equally the Four Divisions of Canada**, add to the Senate accordingly.”⁸⁵ Nearly all other mentions of the Queen appear to be with respect to powers that the GG specifically possesses under the text of the *Constitution Act, 1867*, such as the right to use the Great Seal. The only possible exception is the “power of disallowance” allowing the Queen to annul laws that were otherwise valid passed, and even that power is understood to have “disappeared” by convention such that its limitation on colonial authority no longer operates.⁸⁶

Retaining the section 16 power in the Queen alone, then, does not appear to be consistent with the operation of other direct powers belonging to the Queen in the *Constitution Act, 1867*. As a matter of convention, the Queen retains few (if any) powers that she will exercise on her own. An exception whereby she alone retains the section 16 power would be unwarranted.

As a matter of formal law, the Queen likely retains a residual power to move the capital, but this power is now legitimately exercised by the GGIC

83 *Constitution Act, 1867*, *supra* note 1, s 15.

84 *Ibid*, s 9.

85 *Ibid*, s 26 [emphasis added]. On one reading, its most compelling recent use was made by the Prime Minister with the assent of the Queen, rather than the other way around. See “Mulroney Stacks Senate to Pass the GST” (27 September 1990), online (video): *CBC Digital Archives* < www.cbc.ca/archives/entry/1990-mulroney-stacks-senate-to-pass-the-gst >. This reading is admittedly controversial.

86 Hogg, *supra* note 3 at 3.1, discussing the power in *Constitution Act 1867*, *supra* note 1, s 56. Hogg says it has been “nullified by convention” at 9.3 n 11. Yet *Reference Re The Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province*, [1938] SCR 71 at 79, [1938] 2 DLR 8, states that the power remained effective due to its formal status in the constitutional text and so could not be annulled when Alberta sought a formal declaration of its nullification. *Charlottetown Accord*, *supra* note 21, s 38 thus says that formal repeal of the provision remains constitutionally desirable.

and the Queen has bound herself to exercise this power only on advice of a Canadian entity so the Queen alone likely cannot actually exercise a power to move the capital. The argument for the GGIC above relies on the aforementioned devolution of Article II of the *Letters Patent, 1947* and a constitutional understanding that the powers devolved there — which include the power to move the capital — are exercised by the GGIC (in accordance with norms also recognized in the *Statute of Westminster, 1931*). It must contend with the full text of the *Letters Patent, 1947*, including:

XV. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem fit.

The Queen, then, can “revoke, alter, or amend” the *Letters Patent, 1947*, including devolution of the section 16 power. One could build on this to argue that even if the section 16 power now lies with the GGIC due to the *Letters Patent, 1947*, it is incorrect to call the claim that the GGIC has the power to move the capital correct from a constitutional law perspective.

We think the better way to approach this is to say that a constitutional power has been constitutionally delegated to another entity. All the relevant documents form part of the Constitution. Moreover, the Queen likely cannot exercise any claimed residual power in any case. Discussion of the *Statute of Westminster, 1931* above suggests the power needs to be exercised through some entity other than the Queen. Given the stakes, the GGIC is, again, the most plausible candidate. The Prime Minister will not suffice. The GGIC thus remains the de facto and de jure holder of the section 16 power. While the Queen may still hold an on-paper constitutional power to move the capital, the GGIC retains the power to move the capital for current practical purposes and consultation with the GGIC remains necessary if the Queen can and does exercise her residuary right to reclaim and exercise the section 16 power.

In making our case for the GGIC, we have explained why neither the Queen nor the GG could exercise the section 16 power alone even if they formally possessed it as a matter of law. We should also address the even less plausible possibilities that Parliament could exercise the power in section 16 or that the power is defunct. The Supreme Court of Canada proposed the first possibility in *Munro*,⁸⁷ but, respectfully, it is unclear what (if any) support exists for it. Action by Parliament is action by the Queen, in that Parliament is more properly referred to as the Queen-in-Parliament and consists of the

⁸⁷ See note 2 and accompanying text.

House of Commons, the Senate, and the Queen.⁸⁸ Beaudoin thus suggests that federal legislation that is not subjected to a royal veto is like royal action on advice of the House of Commons.⁸⁹ One could, of course, extend this to apply to advice from the Senate. However, the *Constitution Act, 1867* refers repeatedly to Parliament, which suggests that the term “Parliament” was used when Parliament was intended.⁹⁰ We are aware of no legislation in which “the Queen” has been used to mean the Queen-in-Parliament. As a matter of public legitimacy, Parliament may be better suited than the GGIC to make the decision to move the capital. Parliament would provide transparency, clearer accountability, and public attention to a matter that the GGIC could otherwise deal with arbitrarily and in secret. Our primary concern, however, is the *legal* requirements to move the capital. There is virtually no legal support for the proposition that the section 16 power is exercisable by Parliament, one unsupported line of obiter notwithstanding.

The last argument we must consider, that the section 16 powers are defunct, takes two unpersuasive forms. The first form states that the power is, like other powers of the Queen under *the Constitution Act, 1867*, no longer operative. Yet the power is clearly not spent like the powers to create the Dominion or admit enumerated provinces. One could raise a good faith argument that it has “disappeared” through convention like the power of disallowance and so cannot be used. Still, it is unlikely that disappearance through convention can eliminate formal constitutional powers.⁹¹ Moreover, even if we granted the contentious claim that constitutional powers can so-disappear, the power to move the capital is not a limitation on colonial authority like the power of disallowance, so the grounds for disappearance are not the same. Indeed, the Courts of Appeal of British Columbia and Ontario in 1991 rejected similar arguments that the Queen’s power to add senators under section 26 of the *Constitution Act, 1867* “had been repealed by implication or had been rendered constitutionally obsolete.”⁹² There is little reason to think that section 16 has been rendered obsolete where section 26 has not.

The second form states that Ottawa is now the capital by constitutional convention and so no one can move it. This is false if meant to be a limitation

88 *Constitution Act, 1867*, *supra* note 1, s 17.

89 Beaudoin with Thibault, *supra* note 8 at 788.

90 *Constitution Act, 1867*, *supra* note 1, ss 18, 19, 23(2), 31, 35, 40, 41, 51, 52, 59, 60, 90, 91, 92(10). Section 92A also used the term “Parliament” when added.

91 See note 86 and accompanying text.

92 *Leblanc*, *supra* note 66 at para 24; *Reference Re Sections 26, 27 and 28*, *supra* note 66 at paras 46-56. While some of the arguments for obsolescence were specific to the framing of section 26, the overall point remains.

on the possibility of amending the Constitution to move the capital. An explicit change in the text of the Constitution should be able to supersede a constitutional convention. Likewise, an amended provision of a clear constitutional document that clarifies where the capital will be will no doubt help limit claims that the location of the SCC is constitutionalized in federal legislation. It is also false if meant as a challenge to the possibility of exercising existing section 16 powers. Section 16 surely trumps convention. Indeed, this also undermines the first line of argument for the defunct status of section 16 since a non-binding convention of non-use also cannot eliminate a binding grant of formal power. (None of this undermines our case for the GGIC, which is not sourced in convention alone but linked to clear binding textual requirements under multiple documents that require current practices some will describe as “conventional.”)

Ultimately, then, the power to move the capital most likely resides in the GGIC. The Queen retains a residual right to reclaim the power but has agreed not to exercise it without consulting Canada first, effectively placing the power back in the GGIC. While this result conflicts with the plain text of the *Constitution Act, 1867*, an amendment to better reflect the present state of the law is unlikely. Were constitutional amendment possible, moreover, there are more important amendments to make than an amendment to section 16; and if section 16 is to be amended, more meaningful and effective amendments are available than changing “the Queen” to “the GGIC.”

IV. Question 3: What amendment formula would apply to prospective section 16 amendments?

The result of our analysis — that the GGIC holds the power to move the capital — may be unacceptable (or at least unpalatable) from a political perspective. Arguably, such an important change should require at least the consent of Parliament and perhaps the consent of most, if not all, of the provinces. If the federal government, Parliament, or both, decided that leaving the power to change the location of Canada’s capital city in the hands of the executive branch is inconsistent with democratic values and the role that Parliament plays and should play in making decisions of great importance to the country, and therefore wanted to amend section 16, the question becomes: Which of the rules governing the amendment of the Constitution would apply to such an amendment?

The amendment procedures for the Constitution of Canada appear in Part V of the *Constitution Act, 1982*.⁹³ The general rule, outlined in section 38, is that amendments to the Constitution of Canada are only possible by agreement of the GG, both houses of Parliament, and 2/3 of the Canadian provinces representing at least 50% of the population of Canada.⁹⁴ Section 42 specifies particular powers that can only be amended under these general rules. Nothing concerning the Queen or the capital is specified there.⁹⁵ References to “the Supreme Court of Canada,” “the powers of the Senate and the method of selecting Senators,” and “the extension of existing provinces into the territories” in section 42⁹⁶ could, however, be relevant to analysis of “the Queen,” “Ottawa,” and “the Seat of Government.”

There are also stricter and less stringent variations on the general rule. More strictly, under section 41, the GG, both houses of Parliament, and all provinces must agree to amendments concerning “the office of the Queen, the Governor General and the Lieutenant Governor of a province,” the ratio between each province’s representation in the different houses of Parliament, use of English and French, “the composition of the Supreme Court of Canada,” and section 41 itself.⁹⁷ Less strictly, under section 43, only the aforementioned national entities and provinces impacted need consent to “in relation to any provision that applies to one or more, but not all, provinces” but all affected provinces must agree,⁹⁸ and, under section 44, Parliament has exclusive authority over changes “in relation to the executive government of Canada or the Senate and House of Commons” (subject to qualifications in sections 41 and 42).⁹⁹

The general amendment procedure under section 38 most likely applies to section 16. There is little indication that any phrase in section 16 or interpretation of those phrases trigger any of the special amendment procedures. Whether one attempts to amend “Ottawa,”¹⁰⁰ directly amending the Constitution to recognize a different city as the capital (or expanding or contracting the contours of same) or to amend “Until the Queen otherwise directs”¹⁰¹ to provide a different entity with the constitutional power to change the capital or even to eliminate the power to move it, the general amending formula under section

93 *Constitution Act, 1982*, *supra* note 16, ss 38-49.

94 *Ibid*, s 38.

95 *Ibid*, s 42.

96 *Ibid*.

97 *Ibid*, s 41.

98 *Ibid*, s 43.

99 *Ibid*, s 44.

100 *Constitution Act, 1867*, *supra* note 1, s 16.

101 *Ibid*.

38 of the *Constitution Act, 1982* most likely applies. While one could argue that the capital is of such great significance that it should be analogous to the composition of the SCC and only be changed with the stronger amending formula, the case for the composition of the SCC has textual support missing in the case of section 16.¹⁰²

We find the argument that the “the Queen” can only be changed with a stronger amending formula unpersuasive. It is unlikely that “the office of the Queen” in section 41¹⁰³ should be understood as including each individual power belonging to the Queen. Stripping the Queen of all, or almost all, of her powers would be to change the office of the Queen. But removing one narrow power likely should not be understood as changing the office of the Queen. We see the force of the argument that amending section 16 constitutes a change to the office of the Queen. Politically, moreover, section 41 amending procedures would likely be required to move the capital. We simply find the argument that section 16 amendments only need to conform to the requirements in section 38 more persuasive. Removal of powers that go to the core of the Queen’s powers constitutes changes to her office and so those powers can only be amended in accordance with section 41, but not all of the Queen’s powers are sufficiently central so as to constitute her office and the section 16 power is peripheral. The correct answer is ultimately uncertain, but we think section 38 likely applies.

In any case, unilateral movement of the capital remains outside the powers of Parliament or any other branch of government. Amendments would require action by other entities — i.e., at least some provincial legislatures — and so Parliament would remain unable to change the capital unilaterally through constitutional amendment. This is clearly not an example where unilateral amendment is possible. The capital appears to be a matter for the union as a whole and is not merely “in relation to” a small subset of provinces. Additionally, or alternatively, many provinces have an interest in and are impacted by the site of the capital, financially, politically, and culturally. Recall the discussion in Part I of the status of Ontario and national identity markers. An argument that moving the capital is a matter “in relation to” the executive, Senate, or House would be weak, as such a move would not change the powers of any of those bodies. Moreover, the unilateral amendment powers under section 44 do not refer to the SCC at all, making it highly unlikely that they allow unilateral amendments that would move the SCC headquarters.

102 *Supreme Court Act Reference*, *supra* note 17.

103 *Constitution Act, 1867*, *supra* note 1, s 41.

Amending the Constitution is unlikely. The federal government and (at least) most provinces need to agree on a constitutional amendment. Political support for a measure thus needs to be very strong in multiple areas of Canada for amendment to occur. We grant that scenarios that could create sufficient support for an amendment — like the sinking of Ottawa above — could plausibly also produce support for the GGIC's exercising of the capital-moving power absent amendment. There is likely good democratic reason to prefer amendment even in these circumstances. Regardless, we argue that if amendment took place, the general amending formula would apply.

Conclusion

Legally, the capital of Canada is the location where all three branches of government are headquartered. This must be within the boundaries of 1867 Ottawa. The power to move the capital of Canada currently resides in the GGIC. Though the Queen retains (at least) a residual right to reclaim the power in the *Letters Patent, 1947*, she could only exercise even that power in consultation with the GGIC. Moving the capital absent GGIC involvement or changing the person who holds the power to move the capital requires constitutional amendment through regular amendment procedures under section 38 of the *Constitution Act, 1982*.

We focused our analysis on the constitutional requirements to move the capital under section 16 (or amend section 16 itself). The political requirements would likely be greater. Any leader who proposed moving the capital would face pressure to also consult with the leaders of other federal political parties, the Premiers, and the public. This consultation might take the form of a national plebiscite or perhaps a national election in which the proposal to move the capital was a party's key campaign commitment. Some could argue that such consultation would be required by constitutional convention on a decision of this magnitude, although that argument would likely be unsuccessful. Similarly, any proposed amendment to section 16 that would, in itself, move the capital would prompt pressure for unanimous consent of the provinces even if we are correct that the general amending formula would be the legal requirement. The legal requirements would thus, in practice, be only part of the effective requirements before such a move was implemented.

If we are correct that section 16 is exercisable by the GGIC, an amendment to section 16 is advisable. Four kinds of amendments could be made. The first and most mild would substitute “the Governor General in Council” for “the Queen”, to clarify that the power is exercisable by the GGIC. The second kind

of amendment would move the power to another actor, most likely Parliament. The third kind would truncate the text of section 16 so that it merely stated that “the Seat of Government of Canada shall be Ottawa.” This would require a subsequent constitutional amendment to move the capital. A fourth kind of amendment would itself move the capital.

We recommend the third option, which would remove the inherent power to move the capital and recognize that any such move would be so consequential as to appropriately require a constitutional amendment. The level of legal stringency would then match more closely the expected political stringency. Even if the result would make moving the capital practically impossible, it is the most honest option. If there is insufficient public support to meet the legal requirements of the general amending formula in section 38 to move the capital, there is unlikely to be sufficient public support to meet the practical political requirements to move it.

