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

[Note: This is an author's accepted manuscript for a piece by Michael Da Silva and Andrew Flavelle Martin in the Review of Constitutional Studies.]

Abstract: Section 16 of the *Constitution Act, 1867* states that "Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa." This is one of the least-studied provisions in the written components of 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 constitutional status of the *Letters Patent, 1947*. It argues that, legally, the power to move the capital of Canada resides in the GGIC and any residual royal right to reclaim the power can only be exercised in consultation with the GGIC. It also considers potential amendments to section 16 and the requirements for such amendments.

Introduction

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 raise a question at the edge of one of the last frontiers of Canadian constitutional analysis: What would it take in law to move the capital of Canada, and who has the power to do so? As a matter of constitutional law, can the federal government move the capital of Canada to Calgary, Montreal, London, or Iqaluit? Could some combination of federal and provincial governments agree to move the capital? Can the Queen alone move it?

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

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

> 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 that "[t]he seat of 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] Yet 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] 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 a simple one:

> [W]ho would 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.[8]

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

---

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

[3] Peter W Hogg, *Constitutional Law of Canada*, 5th ed, (Toronto: Carswell, 2007); Bernard W Funston & Eugene Meehan, *Canada's Constitutional Law in a Nutshell*, 4th ed, (Toronto: Carswell, 2013); Adam Dodek, *The Canadian Constitution*, 2d ed (Toronto: Dundurn, 2016); Guy Regimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2d ed (Toronto: LexisNexis, 2017); and Patrick J Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law, 2017). Historical examples include JEC Munro, *The Constitution of Canada* (Cambridge: Cambridge UP, 1889); JR Mallory, *The Structure of Canadian Government* (Toronto: Macmillan, 1971); John D Whyte & William R Lederman, *Canadian Constitutional Law*, 2d ed (Toronto: Buttersworth, 1977); and WH McConnell, *Commentary on the British North America Act* (Toronto: Macmillan of Canada, 1977). Joseph Doutre's *Constitution of Canada* 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; *Constitution of Canada* (Montreal: John Lovell & Son, 1880) at 66. 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* (Oxford: Oxford UP, 2017) 129.

[4] Munro, *ibid* 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] David B Knight, *Choosing Canada's Capital: Conflict Resolution in a Parliamentary System* (Ottawa: Carleton UP, 1991) at 346.

Further analysis of the text of section 16, other parts of the *Constitution Act, 1867*, other foundational legal documents like the *Letters Patent, 1947*,[9] and case law is necessary to answer the question of 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, but that is beyond the scope of this paper. 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 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). While the Queen may maintain a residual constitutional authority to move the capital, she can only exercise it in consultation with the GGIC. This answer may be politically unacceptable or 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 regular constitutional amendment procedures likely suffice and discussing the merits of different amendment options.

I. Why This Matters

The nature of the examples above and the minimal commentary on section 16 could lead readers to ask: Why does analysis of section 16 matter? 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, though understandable, is non-fatal to our aims.

Analysis of section 16 has theoretical and practical import. 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. It is a 'final frontier' of constitutional law. Comprehensive understanding of the content of Canadian constitutional law requires analysis of this provision. Where the constitution is to be interpreted holistically,[10] section 16's provision of a classic constitutional interpretation exercise further supports its importance. 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 and past status as the economic engine of the country. To move the capital to another province would telegraph,

[9] *Letters Patent constituting the office of Governor General of Canada (1947)*, Canada Gazette, Part 1, Vol 81, 3104, reprinted in RSC 1985, Appendix II, No 31 [*Letters Patent, 1947*].

[10] *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, [2014] 1 SCR 433 [*Senate Reference*].

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.

Third, there could be reasons to move the capital in the future and there are few principled reasons to keep the capital in Ottawa. The case examples at the beginning of this work have a clear air of reality. Strong Western political blocs led to many changes in Canadian governance in recent years. Distaste for Ottawa, Ontario, and Quebec in the West continues. 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.[11] Water concerns in Ottawa are not unprecedented.[12] It would be helpful to know what needs to be done before such a scenario arises.

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."[13]

Ottawa is no longer equidistant between Canada's power centers. Modern weaponry means that distance from the American border no longer provides protection from 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 fact that the reasons for choosing Ottawa back in 1867 no longer hold. There was no sustained discussion of section 16 in any post-1984 attempts to amend the constitution.[14] Inertia is likely the best explanation for keeping the capital in Ottawa and may justify doing so where moving the capital will be difficult and potentially require expending considerable public funds. Inertia is not, however, a principle. We cannot assume that it will overcome good reasons to move the capital in the future. Quixotic (likely unserious) proposals for moving the capital of provinces occasionally arise in the news.[15] 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 three questions in Parts II-IV.

---

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

[12] E.g., "'Our worst nightmare is coming': Water levels expected to rise in Ottawa region", *CBC News* (5 May 2017), online: CBC News <http://www.cbc.ca/news/canada/ottawa/flooding-may-5-west-quebec-eastern-ontario-1.4100803>.

[13] Library of Parliament, *Our Country, Our Parliament* (Ottawa: Library of Parliament, 2009) at 37.

[14] See the discussion surrounding and text of e.g., *1987 Constitutional Accord*, 1987, Chelsea, Quebec; *The Consensus Report on the Constitution: Charlottetown, August 28, 1992*, 1992, Charlottetown, Prince Edward Island [*Charlottetown Accord*]; and *Framework for Discussion on Canadian Unity*, 1997, Calgary, Alberta.

[15] E.g., 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; QMI Agency, "MPP says Toronto should separate from Ontario" *Sault Star* (16 March 2010). In 2018, Toronto mayoral candidate Jennifer Keesmaat proposed Torontonian '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). Ontario would need a new capital in those circumstances too.

II. Question 1: What does s 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 and 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.[16]

A. The Seat of Government

Section 16 does not discuss the "capital" of Canada, but only "the Seat of Government of Canada". Plain readings of both terms seem to indicate the same thing: the location of the headquarters of all three branches of the federal government – the Executive (in Canada meaning the Governor General (GG) and Cabinet), the Legislative (Parliament), and the Judicial (SCC). The text of the *Constitution Act, 1867* provides reason to adopt this plain reading of the provision in the constitutional context. The Preamble famously states that Canada's constitution will be "similar in Principle to that of the United Kingdom".[17] In the United Kingdom, the capital and location of all three branches are the same. Application of the principle implicit in the Preamble under which Canadian constitutional entities should (all-else-being-equal) be understood as similar to British ones to section 16 suggests that each branch of government must have its headquarters in the capital city of "Ottawa" (defined below). This 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.[18] But the headquarters 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.[19] If these provisions were constitutionalized and required that the SCC sit in Ottawa, they could limit movement of the capital. Yet it is highly unlikely that the SCC in the *Reference re Supreme Court Act, ss. 5 and 6*, which constitutionalized at least some sections of the *Supreme Court Act*, meant to constitutionalize the entire *Act*.[20] 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.[21] 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 judges shall reside in the National Capital Region … or within forty

[16] We bracket the question of whether one must move all three branches simultaneously.
[17] *Constitution Act, 1867*, *supra* note 1, preamble.
[18] The SCC 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). 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 SCC sat elsewhere in the 1800s and should be able to do so now given the Preamble and the fact that, as Fine notes, the British Supreme Court recently held hearings outside its London headquarters.
[19] *Supreme Court Act*, RSC 1985, c S-26, ss 11, 14, 30, 32 ("Ottawa"), 8, 14 ("National Capital Region") [*SCA*].
[20] *Senate Reference*, *supra* note 10.
[21] See note 10.

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."[22]

The *Parliament of Canada Act* does not even explicitly state that Parliament must be *near* Ottawa.[23] Its only references to Ottawa are in relation to eligible expenses for Parliamentary Secretaries[24] and to define the term "Parliament Hill" for the purposes of provisions on the Parliamentary Protective Service.[25] 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.

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".[26] As a municipality in Ontario, the legal boundaries of Ottawa are a matter for the government of Ontario.[27] For example, in 1999, the Ontario legislature amalgamated the existing City of Ottawa with several cities/townships (e.g., Cumberland, Gloucester, Kanata, and Nepean) into a new City of Ottawa.[28]

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 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 Ottawa. This flatly contradicts Canadian constitutional amendment norms.[29] While we generally interpret

---

[22] *SCA*, *supra* note 19, ss 8, 11.
[23] *Parliament of Canada Act*, RSC 1985, c P-1 [*PCA*].
[24] *Ibid*, s 66(a).
[25] *Ibid*, s 79.51.
[26] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].
[27] *Constitution Act, 1867*, *supra* note 1, s 92(8); *Public School Boards' Assn. of Alberta v Alberta (Attorney General)*, [2000] 2 SCR 409 at para 33, 191 DLR (4th) 513. On municipal reorganization, see *Mississauga (City) v Peel (Regional Municipality)*, [1979] 2 SCR 244 at 253, 97 DLR (3d) 439; *East York (Borough) v Ontario* (1997), 36 OR (3d) 733 at paras 11-13, 153 DLR (4th) 299 (CA), leave to appeal to SCC denied, [1997] SCCA No 647.
[28] *City of Ottawa Act, 1999*, SO 1999, c 14, Sched E, s 1(1) and 2(1), referring to *Regional Municipality of Ottawa-Carleton Act*, RSO 1990, c R.14, s 1 (definition of "area municipality") [*Ottawa Act*].
[29] As detailed below, *Constitution Act, 1867*, *supra* note 1, Part V establishes the rules of Canadian constitutional amendment. No power allows for unilateral changes of the constitution by a province. 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 33, 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 unilateral change constitutional matters that impact them alone, let alone others.

terms in a dynamic manner in Canada, dynamic interpretation is meant to be "purposive".[30] 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. 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 suggests[31] – 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'. 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".[32] 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",[33] 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 history[34]) 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 Government (POGG) power in *Munro* partly so "the nature and character of the seat of Canada may be in accordance with its national significance".[35] Yet the statement that the National Capital Region as a whole is the 'seat' of 'Canada' is not directly on point and likely obiter. 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 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*

---

[30] On the necessity of purposive interpretation of the *Canadian Charter of Rights and Freedoms*, 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 texts provide reason to believe that the Constitution generally must be interpreted purposively. *Rizzo* & *Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 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), especially at 88-92, 288.

[31] *Description of National Capital Region*, Sch to *National Capital Act*, RSC 1985, c N-4 [*NCA*].

[32] *NCA*, *ibid*, s 2.

[33] Knight, *supra* note 8 at 338.

[34] The Canadian Museum of History in particular is now in Gatineau (<https://www.historymuseum.ca/>.), partly because of the development of the National Capital Region.

[35] *Munro*, supra note 2 at 759.

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 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 s 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" herself; 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. As we 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 to be exercised by the GGIC.[36] *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.[37]

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". 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*.[38] 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 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

[36] Hogg, *supra* note 3 at 9.4(b).
[37] *Letters Patent, 1947*, *supra* note 9, Art II; *Statute of Westminster, 1931*, 22 Geo V, c 4 (UK), reprinted in RSC 1985, Appendix II, No 27 [*Statute of Westminster*].
[38] Dodek, *supra* note 3 at 43.

this power. He says neither the *Letters Patent, 1947*,[39] which otherwise delegate the Queen's powers in Canada to other entities (e.g., the GG), nor the *Constitution Act, 1982*,[40] 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.[41] 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 that 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.[42] 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 … .[43]

The *Letters Patent, 1947* are likely constitutional.[44] They are accordingly to be read in concert with other constitutional documents, including section 16, and can qualify same. One could argue that "all" is only meant to refer to powers like those in the text of various Letters Patent and that the powers under the *Constitution Act, 1867* generally or section 16 particularly do not qualify.[45] 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

[39] *Letters Patent, 1947*, *supra* note 9.
[40] *Constitution Act, 1982*, *supra* note 29.
[41] Knight, *supra* note 8 at 346.
[42] Hogg, *supra* note 3 at 9.4(b).
[43] *Letters Patent, 1947*, *supra* note 9, art II [emphasis added].
[44] Analysis of this point is mixed. Contrast Regimbald & Newman, *supra* note 3 at 8 and Funston & Meehan, *supra* note 3 at 31, who include them on lists of constitutional documents, with Monahan, Shaw & Ryan, *supra* note 3 at 1-6 and Constitutional Law Group, *Canadian Constitutional Law*, 5th ed, (Toronto: Emond Montgomery, 2017) at 4-8, who do not. Hogg, *supra* note 3 at e.g., 1-5 views the *Letters Patent, 1947* as an exercise of the prerogative power, in contrast to powers formally granted in the written constitutional text. At 1-10–1-11, 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 candidate constitutional status. Yet scholarship contemporaneous to the issuance of the *Letters Patent, 1947* viewed Letters Patent from Britain as constitutional documents for other British colonies; Martin Wright, ed, *British Colonial Constitutions, 1947* (Oxford: Clarendon, 1952). They do not appear in the list of sources of *British* constitutional law in e.g., AW Bradley & KD Ewing, *Constitutional & Administrative Law*, 15th ed (Edinburgh: Pearson Education Ltd, 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.
[45] 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 UP, 2018) at 77-79.

to British law.[46] Everyone still recognizes that the Queen retains the power to appoint the GG.[47] The same could be true of the capital-moving power. These considerations provide some evidence of a qualified domain restriction on "all". Yet 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.[48] The listed powers are explicitly not intended to be exhaustive or to 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, and so the delegation likely includes that of the section 16 power.

The question is then whether the devolution was to the GG or GGIC. It is highly unlikely that that section 16 is one of the rare powers of the GG that is exercised by the GG herself. Hogg describes the GG-exclusive powers as the GG's "personal prerogatives" or "reserve powers".[49] He argues that these only apply where the government has lost, or may have lost, the confidence of the House of Commons.[50] These include the power to appoint the Prime Minister,[51] dismiss the Prime Minister,[52] or refuse a dissolution of Parliament.[53] The latter two are only rarely used (and controversial when used). All other powers of the GG, whether formally ascribed to the GGIC or to the GG herself, are exercised by the GG 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."[54] The section 16 power is unlike the GG aforementioned reserve powers, as 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.[55] The GG's exercise of the section 16 power appears to be extraordinary and without precedent. Devolution to the GG in the section 16 should thus be understood as devolution to the GGIC.

Further support for this 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 clearly limits the Queen's ability to make decisions for Canada without consulting some Canadian entity.[56] 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

---

[46] WPMK, "The Office of the Governor-General of 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 37n8. 1889 commentary on the nineteenth century versions of the *Letters Patent*, most notably the BNA contemporaneous 1867 version and the post-constitutional 1878 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 (at 266) placed the power under section 16 in the Crown, not the GGIC. Its list of powers granted by the Letters Patent (at 163-167) does not include a power to move the capital.

[47] Firmini & Smith, *supra* note 3 at 136.

[48] *Letters Patent, 1947*, *supra* note 9, art II [emphasis added].

[49] Hogg, *supra* note 3 at 9.7(a).

[50] *Ibid*.

[51] *Ibid* at 9.7(b).

[52] *Ibid* at 9.7(c).

[53] *Ibid* at 9.7(d).

[54] *Ibid* at 9.7(e) [emphasis added].

[55] *Ibid* at 9.4(c).

[56] *Statute of Westminster*, *supra* note 37. The *Statute* is identified as forming part of the Constitution of Canada in the Schedule to the *Constitution Act, 1982*, *supra* note 26.

constitutional, as critics may implausibly charge, the *Statute of Westminster, 1931* would still bind the relevant authorities. It is widely understood to "grant full independence and autonomy to Canada."[57] 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.[58] Thus, Peter W. Hogg writes that the Queen has "delegated all her powers over Canada to the Canadian Governor General, except of course for the power to appoint or dismiss the Governor General"[59] – a power that is exercised by the Queen on the advice of the Prime Minister. Yet, again, the GG's powers are then only rarely exercisable by the GG alone. So, the *Statute of Westminster, 1931* too supports the idea that the section 16 power does not belongs to the Queen or GG alone. While the *Statute of Westminster, 1931*, does not overrule other constitutional provisions like section 16, it is explicitly constitutional 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 right of reclamation discussed below). 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.[60] The power to move the capital under section 16 of the *Constitution Act, 1867* instead likely belongs to the GGIC.

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.[61] This power is clearly spent. So too is the power to admit other enumerated provinces that are now part of Canada.[62] The Queen plays no formal role in military affairs despite section 15, which states "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."[63] This is best understood as a consequence of another status directly given to the Queen – section 9 makes the Queen the executive of Canada.[64] That executive power is now best understood as belonging to the Queen and Prime Minister in

---

[57] Regimbald & Newman, *supra* note 3 at 8. 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, ibid*, s 4. This reading is highly non-standard.

[58] The British Parliament can *only* make laws on the request and with the consent of Canada; *Statute of Westminster, ibid*, s 4. As noted in *ibid*, the restrictions on Parliament here plausibly also apply to the Queen.

[59] Hogg, *supra* note 3 at 9.3. In an omitted note, Hogg qualifies this statement with the possible exception of s. 26.

[60] *Ibid* at 9.4(c).

[61] *Constitution Act 1867*, *supra* note 1, s 146.

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

[63] *Constitution Act 1867*, *supra* note 1, s 15.

[64] *Ibid*, s 9.

concert. It is exercised through a combination of the GG and the Prime Minister. 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."[65] Its most compelling recent use was actually made by the Prime Minister with the assent of the Queen, rather than the other way around.[66] 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 validly passed and even that powers is understood to have "disappeared" by convention such that its limitation on "colonial authority" no longer operates.[67]

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 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.[68]

This article states that the Queen can "revoke, alter, or amend" Letters Patent, including devolution of the section 16 power. One could build on this to argue that even if the section 16 power lies with the GGIC due to the *Letters Patent, 1947* today, 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 are constitutional. Moreover, the Queen likely cannot exercise any claimed residual power in any case. Discussion

---

[65] *Ibid*, s 26 [emphasis added].
[66] E.g., CBC News, "Mulroney Stacks Senate to Pass GST" (27 September 1990), online: CBC Digital Archives <https://www.cbc.ca/archives/entry/1990-mulroney-stacks-senate-to-pass-the-gst>.
[67] Hogg, *supra* note 3 at 3-2-3-3, discussing the power in *Constitution Act 1867*, *supra* note 1, s 56. Hogg says it has been "nullified by convention" at 9-7n11. 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, 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 14, s 38 thus says that formal repeal of the provision remains constitutionally desirable.
[68] *Letters Patent, 1947*, *supra* note 9, art XV.

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 all current practical purposes and consultation with the GGIC remains necessary even if the Queen can and does exercises 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. We should also address the even less plausibly possibilities that Parliament could exercise the power in section 16 or that the power is defunct. The SCC proposed the first possibility in *Munro*,[69] but, respectfully, it is unclear what (if any) support exists 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 House of Commons, the Senate, and the Queen.[70] However, the *Constitution Act, 1867* refers repeatedly to Parliament, which suggests that the term "Parliament" was used when Parliament was intended.[71] 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. Yet our concern 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 is 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. Yet it is unlikely that 'disappearance' through convention can eliminate formal constitutional powers.[72] 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.

The second forms 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 on the possibility of amending the constitution to move the capital. Conventions fill gaps in the written text rather than replacing them. 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. Constitutional conventions are not binding law. Constitutional text like section 16 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

[69] See note 2 and accompanying text.
[70] *Constitution Act, 1867*, *supra* note 1, s 17.
[71] E.g. *ibid*, 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.
[72] See note 67 and surrounding text.

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 her powers 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*, amendment to remedy the text to better reflect the present state of the law is unlikely.[73] Were constitutional amendment possible, moreover, better amendments are likely available than changing "the Queen" to "the GGIC".

IV. Question 3: What amendment formula would apply to prospective s 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 and/or Parliament 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*.[74] 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 the federal Parliament, and 2/3 of the Canadian provinces representing at least 50% of the population of Canada.[75] Section 42 specifies particular powers that can only be amended under these general rules.[76] Nothing concerning the Queen or the capital is specified there. References to "the Supreme Court of Canada", "the powers of the Senate and the method of selecting Senators", and/or "the extension of existing provinces into the territories" in section 42 could, however, be relevant to analysis of "the Queen", "Ottawa", and "the Seat of Government".

There are then stricter and less stringent variations on the general rule. More strictly, under section 41, the GG, both houses of the federal 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 provinces' representation in the different houses of Parliament, use of English and French, "the composition of the Supreme Court of Canada", and section 41 itself.[77] Less strictly, under sections 43-44, (i) 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 and (ii) 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).[78]

---

[73] E.g., Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53(1) Alberta LR 85.
[74] *Procedure for Amending Constitution of Canada*, ss 38-49, Part V of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[75] *Ibid*, s 38.
[76] *Ibid*, s 42.
[77] *Ibid*, s 41.
[78] *Ibid*, ss 43-44.

The general amendment procedure most likely applies to section 16. There is very little indication that any phrase within the text of section 16 or interpretation of those phrases triggers any of the special amendment procedures. Whether one attempts to amend "Ottawa", 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" to provide a different entity with the constitutional power to change the capital or even to eliminate the power to move, the general amending formula under section 38 of the constitution 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.[79]

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 41 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 by setting its powers to zero. 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, consistency with section 41 amending procedures would likely be required to move the capital. We simply find the argument that section 16 amendments only need to consistent with section 38 requirements more persuasive. Removal of powers that go to the core of the Queen's powers constitute changes to her office and so 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. We acknowledge here that the correct answer is uncertain.

In either case, unilateral movement of the capital remains outside the powers of Parliament or any other branch of government. Amendments would require the assistance of other entities 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 it not merely "in relation to" a small subset of provinces. Additionally/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 43-44 do not refer to the SCC at all, making it highly unlikely that they allow unilateral amendments that would move the SCC headquarters.

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.[80] Emergency scenarios like the flooding above may engender such support. Yet the same scenarios could create sufficient support for the GGIC's exercising 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

[79] *Senate Reference*, *supra* note 10.
[80] On the difficulty of securing an amendment, recall e.g., Albert, *supra* note 73.

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 a residual right to reclaim the power in the text of the *Letters Patent, 1947*, she could only exercise it in consultation with the GGIC. Moving the capital absent GGIC involvement or changing the person who holds the power to the move the capital requires constitutional amendment through regular amendment procedures under section 38 of the *Constitution Act, 1982*.

We restricted our analysis to the *legal* 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 consultation on a decision of this magnitude would be required by constitutional convention – 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 indeed 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", requiring 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.