

## CHAPTER 8

### THE CROWN AND CONSTITUTIONAL AMENDMENT IN CANADA

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Paragraph 41(a) of the *Constitution Act, 1982* provides that amendments to “the office of the Queen, the Governor General and the Lieutenant Governor of a province” require the consent of “the Senate and House of Commons and of the legislative assembly of each province”. Although the decision to place the Crown under the most stringent amending procedure, alongside matters as important as the “use of the English or the French language” and “the composition of the Supreme Court of Canada”, suggests an intent to protect the place of the monarchy in the Canadian constitution, the scope of paragraph 41(a) is far from clear.<sup>1</sup>

The explanatory notes to the April Accord, which served as the basis for the amending procedures in the *Constitution Act, 1982*, note that paragraph 41(a) is “self-explanatory”.<sup>2</sup> An ongoing challenge to the *Succession to the Throne Act, 2013* demonstrates that this is far from the case.<sup>3</sup> At issue in the challenge is whether the rules of royal succession form part of Canadian law, and if so, whether changes to the law governing royal succession should be understood to affect the “office of the Queen”. If they do, then making such changes requires the use of the unanimity procedure.<sup>4</sup>

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1. *Constitution Act, 1982*, s 41, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

2. Government of Canada, “Proposed Constitutional Accord of April 16, 1981” in James Ross Hurley, *Amending Canada’s Constitution: History, Processes, Problems and Prospects* (Ottawa: Minister of Supply and Services Canada, 1996) 221 at 228.

3. Michel Bédard, *Legislative Summary of Bill C-53: Succession to the Throne Act, 2013* (Ottawa: Library of Parliament, 2013) at 9.

4. See Philippe Lagassé & James WJ Bowden, “Royal Succession and the Canadian Crown as Corporation Sole: A Critique of Canada’s *Succession to the Throne Act*,

The same sorts of questions would be raised by other proposals to alter the place of the Crown in the Canadian constitution. It is clear that the outright abolition of the monarchy would require the use of paragraph 41(a) as would the elimination of the offices of Governor General and Lieutenant Governor. It is possible that proposals to reform the vice-regal powers to dissolve and prorogue Parliament and the provincial legislative assemblies could engage paragraph 41(a) as might efforts to resolve long-standing concerns about the Crown's legal personality, immunities and privileges.<sup>5</sup>

Even reforms to key legal instruments that define and shape the role and status of the Crown in Canada, such as the Letters Patent, 1947 and several federal statutes, including the *Seals Act*, *Royal Style and Titles Act*, *Governor General's Act* and *Oath of Allegiance Act*, might require the use of paragraph 41(a).<sup>6</sup> It is also possible that efforts to reform core prerogatives exercised by the prime minister and cabinet on behalf of the Crown, including foreign relations and war powers, could also engage paragraph 41(a).<sup>7</sup>

Political support for these sorts of reforms is growing. In 2012, the federal Liberal convention debated a motion that would have committed the party to end Canada's relationship with the "British monarchy".<sup>8</sup> Several prominent Liberal and New Democratic MPs, including Nathan Cullen and Marc Garneau, favour Canada becom-

2013" 23 Constitutional Forum 17; Peter W Hogg, "Succession to the Throne" (2014) 33 National Journal of Constitutional Law 83.

5. See e.g. Peter Aucoin, Mark D Jarvis & Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery, 2011) at 217-227; Law Commission of Canada, *The Legal Status of the Federal Administration* (Ottawa: Law Reform Commission of Canada, 1985).
6. *Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada*, RSC 1985, App II, No 31 [Letters Patent, 1947]; *Seals Act*, RSC 1985, c S-6 [Seals Act]; *Royal Style and Titles Act*, RSC 1985, c R-12 [Royal Style and Titles Act]; *Governor General's Act*, RSC 1985, c G-9 [Governor General's Act]; *Oaths of Allegiance Act*, RSC 1985, c O-1. For the idea that section 41(a) extends to these sorts of instruments, see Patrick J Monahan & Byron Shaw, *Constitutional Law*, 4th ed (Toronto: Irwin Law) at 208. *Contra* Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2014) at 4.13-4.14, 4.26 [Hogg, *Constitutional Law of Canada*].
7. Philippe Lagassé, "Parliamentary and Judicial Ambivalence Toward Executive Prerogative Powers in Canada" (2012) 55 Canadian Public Administration 157 [Lagassé, "Parliamentary and Judicial Ambivalence"]; Irvin Studin, *The Strategic Constitution: Understanding Canadian Power in the World* (Vancouver: University of British Columbia Press, 2014).
8. Jane Taber, "Liberals vote to keep monarchy, legalize pot at convention", *The Globe and Mail* (15 January 2012).

ing a republic.<sup>9</sup> Controversy over the use of prorogation at the federal and provincial level in recent years has prompted proposals for reform.<sup>10</sup> In the past decade, successive British governments have undertaken significant constitutional reforms aimed at curtailing executive prerogatives; future Canadian governments may follow a similar course.<sup>11</sup>

Beyond its significance for the fate of these sorts of reform proposals, paragraph 41(a) is also important because of its close relationship to the rest of the amending procedures in Part V of the *Constitution Act, 1982*. Paragraph 41(a) functions as a structural limit on the sorts of amendments that can be undertaken using the other amending procedures.<sup>12</sup> A broader interpretation of paragraph 41(a) means that the scope of the general procedure and by extension, the unilateral federal and provincial procedures is necessarily narrower. Likewise, a narrower interpretation of paragraph 41(a) means that Parliament and the provincial legislatures have broader scope to undertake structural reforms.

The meaning of paragraph 41(a) as whole has not yet been directly treated by the courts. The Quebec Superior Court will get the opportunity to do so as a result of the challenge to the *Succession to the Throne Act, 2013*. If the Supreme Court ends up hearing the case, it will have an opportunity to build on its past treatment of the unanimity procedure and apply it to paragraph 41(a).<sup>13</sup> A more definitive way to get the Supreme Court to do so would be for a future government interested in pursuing reforms that might affect the Crown to ask a reference question on the matter as the Harper government recently did on both the Senate and the Supreme Court.

In anticipation of these possibilities, this chapter aims to analyze how the meaning and scope of “the office of the Queen, the Gov-

9. *Ibid*; Jane Taber, “Put monarchy to a vote, NDP leadership hopeful says”, *The Globe and Mail* (30 November 2011).

10. See e.g. Aaron Wherry, “A Liberal agenda for parliamentary reform? A to-do list for fixing this place”, *Macleans* (19 September 2014); Bill 24, *Legislative Assembly Amendment Act, 2013*, 2nd Sess, 40th Leg, Ontario, 2013 (referred to committee 7 March 2013).

11. James Strong, “Why Parliament Now Decides on War: Tracing the Growth of Parliamentary Prerogative Through Syria, Libya and Iraq” 16 *British Journal of Politics & International Relations* [forthcoming in 2014]

12. Benoît Pelletier, *La modification constitutionnelle au Canada* (Toronto: Carswell, 1996) at 146-149, 190-191, 211-217.

13. *Reference re Senate Reform*, 2014 SCC 32 at paras 40-41 [*Senate Reference*]; *Reference re Supreme Court Act*, ss 5 and 6, 2014 SCC 21 at para 74 [*Supreme Court Reference*].

ernor General and the Lieutenant Governor of a province” might be interpreted. For the sake of simplicity, the chapter focuses on potential changes to the Crown at the federal level, but the way in which paragraph 41(a) is interpreted could have significant consequences for provinces’ ability to reform their constitutions under section 45 of the *Constitution Act, 1982*. In doing so, this chapter seeks to understand which changes to the Crown would require a constitutional amendment under paragraph 41(a) and which changes could be made by regular statute, under the general amending procedure in section 38 of the *Constitution Act, 1982* or under the federal or provincial unilateral procedures in section 44 and 45 of the *Constitution Act, 1982*.

This chapter argues that paragraph 41(a) is open to three possible interpretations. The first and narrowest interpretation — the textualist perspective — holds that paragraph 41(a) applies only to the Queen, Governor General and Lieutenant Governors as they appear in the written texts of the *Constitution Acts, 1867 to 1982* and the statutes listed in the Schedule to the *Constitution Act, 1982*. The second — the functionalist perspective — holds that paragraph 41(a) applies to the textual provisions concerning the regal and vice-regal offices *and* the other essential features that are necessary for three offices to fulfill their current constitutional roles. The third and broadest interpretation — the formalist perspective — incorporates both the written and unwritten aspects of the Crown’s essential features and also includes the essential features of the legal and political architecture that supports the monarchy’s position in Canada’s constitutional order.

To illustrate the three interpretations and draw out their implications, this chapter considers how these perspectives might affect approaches to three types of changes to the Crown: 1) changes to the powers, privileges and immunities of the Crown; 2) changes to the status of and constitutional relationship between the Queen and Governor General; and 3) reforms to the Crown’s status in law, particularly its place as both the concept and legal personality of the state and particularly, the executive.

The chapter concludes with a discussion of which of the three perspectives on paragraph 41(a) is the most plausible. Whether through the current challenge to the *Succession to the Throne Act, 2013* or in the course of a future government’s reform efforts, it is likely that the Supreme Court will have to interpret paragraph 41(a). It is unlikely that it would adopt a textualist perspective. It seems most likely that it will take the functionalist perspective. However,

this chapter will argue that it is not only possible that it will adopt the formalist perspective, but that it may be desirable to do so.

## I. TEXTUALIST PERSPECTIVE

Section 41 of the *Constitution Act, 1982* outlines which matters in the “Constitution of Canada” can only be amended by the unanimous consent of the federal government and the provinces. The “Constitution of Canada”, which is defined by section 52 of the *Constitution Act, 1982*, “includes (a) the *Canada Act 1982*, including [the *Constitution Act, 1982* itself]; (b) the Acts and orders referred to in the schedule [including, most importantly, the *Constitution Act, 1867*, as amended]; and (c) any amendment” to anything in either category.<sup>14</sup> From a textualist perspective, “includes” should be read narrowly to mean that the “Constitution of Canada” is limited to these written constitutional texts.

On such a literal reading, the amending procedures provided in Part V of the *Constitution Act, 1982* apply only to those matters specifically mentioned in the constitutional texts. Under this interpretation, matters not explicitly listed in these texts are not part of the “Constitution of Canada” and should not be subject to any of the amending procedures. Although such an interpretation was favoured by lower courts in the first decade or so after the adoption of the *Constitution Act, 1982*, it has been largely discredited in favour of a broader interpretation by the Supreme Court that extends constitutional protection to unwritten constitutional principles and arguably, to some of the most fundamental constitutional conventions.<sup>15</sup>

Despite the trend towards the adoption of a broader definition of the “Constitution of Canada”, there remains significant ambiguity about its scope, even in the wake of the *Senate* and *Supreme Court References*. It is likely that the Department of Justice’s lawyers arguing on behalf of a reform-minded government would take advantage of this ambiguity. Following some commentators, they might argue that a textualist approach is a prudent one for the Supreme Court to take when it comes to reforms to the Crown so as to preserve the

14. *Constitution Act, 1982*, *supra* note 1 s 52 [emphasis added].

15. Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel* (Cowansville, Québec: Éditions Yvon Blais, 2014) at 235-236; Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, 2nd ed (Oxford: Oxford University Press, 2014) at 229-230.

ability of the federal government and the provinces to make reforms to the functioning of their respective executives.<sup>16</sup>

Such a textualist perspective would suggest that paragraph 41(a) applies only to those aspects of the constitutional texts, especially the *Constitution Acts 1867 to 1982*, that mention the Queen, Governor General and Lieutenant Governors. Since these provisions are not given nearly as much attention in constitutional litigation and scholarship as those concerning the division of powers between the federal government and the provinces, the separation of powers between the judiciary and the political branches and the limitation of powers through individual and group rights guarantees, it is worth examining them in detail.<sup>17</sup>

Part III of the *Constitution Act, 1867* includes a number of provisions concerning the Queen and Governor General's executive role and powers that would require unanimous consent to alter according to a textualist perspective. Chief among those are: section 9, which holds that "The Executive Government and Authority of and over Canada is hereby to continue and be vested in the Queen"; section 10, which identifies the Governor General and specifies that he or she acts in the Queen's name; section 11, which provides that the Governor General chooses, summons and removes members of the Queen's Privy Council for Canada; section 12, which ensures that the Governor General acts on the advice of the Queen's Privy Council for Canada; section 13, which identifies the "Governor General in Council" as the Governor General acting on the Queen's Privy Council for Canada's advice; section 14, which allows the Governor General to appoint Deputy Governors General; and section 15, which vests the "Command-in-Chief...of all Navy and Military Forces, of and in Canada...in the Queen".

Part IV of the *Constitution Act, 1867* includes several provisions concerning the Queen and Governor General's legislative role and powers, which would also require unanimous consent to amend. Section 17 provides that the Queen is part of Parliament alongside the House of Commons and Senate. With respect to the Senate, section 24 provides that the Governor General summons senators in the Queen's name; section 26 provides that the Queen can summon an additional four

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16. Monahan & Shaw, *supra* note 6 at 208-209.

17. This tendency is the subject of an eloquent and persuasive lament in David E. Smith, "Bagehot, the Crown and the Canadian Constitution" (1995) 28 *Canadian Journal of Political Science* 619.

to eight senators upon the recommendation of the Governor General; section 32 notes that the Governor General can summon senators to fill Senate vacancies; and under section 34, the Governor General appoints a senator to serve as Speaker of the Senate.<sup>18</sup> (It should be noted, however, the Supreme Court did not place section 24 under the unanimous procedure as part of the *Senate Reference*.)

With respect to the House of Commons, section 38 provides that the Governor General summons and calls together the Commons in the Queen's name, and section 50 adds that the Governor General can dissolve the Commons. Section 54 requires that the recommendation of the Governor General be secured to "adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of the Public Revenue, or of any Tax or Impost". Section 55 further provides that the Governor General grants royal assent in the Queen's name to bills passed by the House of Commons and Senate. Sections 56 and 57, which are widely considered spent, allow for the Queen, acting on the advice of her imperial Council, to disallow or reserve a statute passed by the Commons and Senate and assented to by the Governor General.

Unanimous consent would also be required to amend the role and powers of the Governor General and the provincial Lieutenant Governors found in Part V of the *Constitution Act, 1867*, which provides the broad strokes of provincial constitutions. Part V provides that each province will have a Lieutenant Governor appointed by the Governor General, that the Lieutenant Governor appoints members of the provincial executive council and acts on their advice and that the Governor General can appoint an administrator to act on behalf of Lieutenant Governor "during his Absence, Illness or other Inability". Part V, read alongside province-specific statutes listed in the Schedule to the *Constitution Act, 1982*, such as the *Alberta Act* and *Manitoba Act, 1870*, further provides that the Lieutenant Governor is part of the legislative assemblies and will be responsible for providing the royal recommendation in the provincial legislatures.

Paragraph 41(a) would also seem to apply to the Governor General's power to appoint superior court judges under section 96. Unanimity would also be required to alter the Governor General's and Lieuten-

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18. A bill currently before the Senate would remove the Governor General's power to appoint the Speaker of the Senate under section 54 of the *Constitution Act, 1867* through a unilateral constitutional amendment under section 44 of the *Constitution Act, 1982*. See Bill S-223, *An Act to amend the Constitution Act, 1867 and the Parliament of Canada Act (Speakership of the Senate)*, 2nd Sess, 41st Parl, 2014 (first reading 17 June 2014).



ant Governors' authority to oversee the oath of allegiance under section 128. The oath of allegiance itself might be considered part of the "office of the Queen" according to the textualist perspective since the oath itself appears in the Fifth Schedule to the *Constitution Act, 1867*. Likewise, alterations to the constitutionally-specified use of Canada's great seals could also be seen to affect the regal and vice-regal offices.<sup>19</sup>

Finally, the textualist perspective might consider how the wording of the preambles to the *Constitution Act, 1867* and the *Statute of Westminster, 1931* help define the "office of the Queen" for the purposes of section 41(a). The preamble to the *Constitution Act, 1867* provides that Canada is federated under "the Crown of the United Kingdom of Great Britain and Ireland", which suggests that Canada's status as a constitutional monarchy is intimately linked with the "office of the Queen". This might suggest that in addition to abolition, at least some essential features of Canada's constitutional monarchy might enjoy protection under paragraph 41(a).

The *Statute of Westminster, 1931*, which is an imperial statute included in the Schedule to the *Constitution Act, 1982*, states in its preamble that Canada's "common allegiance to the Crown" requires that its assent be given to "any alteration in the law touching the Succession to the Throne or the Royal Style and Titles".<sup>20</sup> This might be taken to mean that the British law of royal succession applies in Canada, but that any change to the way in which that law applies requires a unanimous constitutional amendment.<sup>21</sup> Similarly, the preamble could mean that a change to the Queen's Canadian style and title as Queen "of the United Kingdom, Canada and Her other Realms and Territories...Head of the Commonwealth, Defender of the Faith" requires unanimous consent.<sup>22</sup>

Considering the prominence of the Queen, Governor General and the Lieutenant Governors in the constitutional texts, even a

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19. The use of the great seals is required in several places in the *Constitution Acts, 1867 to 1982*, such as for the appointment of senators and Lieutenant Governors, the summoning of the House of Commons and legislative assemblies and the proclamation of constitutional amendments. They are also used to signify that state documents are invested with the authority of the Queen as source of legitimate authority in Canada.

20. *Statute of Westminster 1931* (UK), 22 Geo V, c 4.

21. Robert Hawkins, "The Monarch is Dead, Long Live the Monarch': Canada's Assent to Amending the Rules of Succession", (2013) 7 *Journal of Parliamentary and Political Law* 593.

22. *Royal Style and Titles Act*, *supra* note 6 s 2.



narrow construction of paragraph 41(a) proposed by the textualist perspective would extend constitutional protection to a wide range of constitutional matters. However, because it focuses on the letter rather than the spirit of the constitutional texts, this perspective would allow significant reforms to essential features of the regal and vice-regal offices that are not explicitly provided in the texts. The textualist perspective could thus permit profound reforms being made to the Crown by regular statute, the general procedure under section 38 or the federal or provincial unilateral procedures under sections 44 and 45, respectively.

### A) Powers, privileges and immunities

Peter Aucoin, Mark Jarvis and Lori Turnbull propose that the Governor General's powers to prorogue and dissolve Parliament should be transferred to the House of Commons.<sup>23</sup> Under a textualist reading, however, legally transferring the authority to prorogue and dissolve Parliament would require a constitutional amendment under paragraph 41(a). But reforms that constrained the Governor General's powers by giving parliamentarians a veto over prorogation and dissolution would not engage paragraph 41(a). It might be possible to require that the Governor General only accept the prime minister's advice to prorogue or dissolve Parliament after the House of Commons passed a motion approving the advice.<sup>24</sup>

A similar textual logic could be used to grant the legislature a binding advisory role in the exercise of vice-regal powers with respect to government formation. While paragraph 41(a) would prevent these powers from being transferred from vice-regal offices to the legislature, the procedure surrounding the way in which the Governor General exercises these authorities could be altered by regular statute, the general procedure or the unilateral federal or provincial procedures. For instance, it might be possible to establish an institutional mechanism by which the Governor General would appoint a government only once the House of Commons had met and expressed support for a particular group of parliamentarians.<sup>25</sup>

23. Aucoin, Jarvis & Turnbull, *supra* note 5.

24. See e.g. B Thomas Hall & WT Stanbury, "Can the Prime Minister's Power Over Prorogation Be Restricted Without Amending the Constitution?", *The Hill Times* (15 February 2010). For the sake of simplicity, federal terminology is used here, but such reforms could also be pursued at the provincial level.

25. Aucoin, Jarvis & Turnbull, *supra* note 5. This would mirror the procedure followed in the nonpartisan legislative assemblies in the Northwest Territories and Nuna-

Likewise, it might also be possible to undertake significant reforms to the manner in which judges and senators are appointed. It might be feasible to require that the Governor General only accept the prime minister's advice as to which senators or judges to appoint after the House of Commons passed a motion approving the advice. The responsibility for approving judicial and senatorial nominees might also be given to an independent appointments commission modelled on Britain's House of Lords Appointments Commission.<sup>26</sup> Such a move would likely require the use of paragraphs 42(1)(b) and 42(1)(d) of the *Constitution Act, 1982* for senators and Supreme Court justices, respectively, given the broad interpretation of those sections given by the Supreme Court in the *Senate* and *Supreme Court References*.<sup>27</sup> It may be that Parliament has greater latitude to reform appointments for superior court judges appointed under section 96 and Federal Court and Federal Court of Appeal judges appointed under section 101 of the *Constitution Act, 1867*.

Owing to section 9 of the *Constitution Act, 1867*, Canada's executive power cannot be removed from the Queen, except through a paragraph 41(a) amendment. Under a textualist interpretation, however, section 9 only enshrines the Queen's status as the fount of executive authority and would not place any particular executive prerogatives within the "office of the Queen".<sup>28</sup> Thus, paragraph 41(a) would not protect the Crown's core executive prerogatives, such as the foreign affairs prerogatives.<sup>29</sup> Any of the Crown's executive prerogatives could be limited, displaced or abolished by regular statute, or through a unilateral federal or provincial constitutional amendment.<sup>30</sup>

Likewise, a textualist interpretation of section 15 of the *Constitution Act, 1867* ensures that the removal of the Queen's power of command-in-chief would require a unanimous constitutional amendment. But if section 15 does not incorporate any of the Crown's national defence prerogatives, such as the authority to deploy the

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vut, see e.g. Graham White, "Traditional Aboriginal Values in a Westminster Parliament: The Legislative Assembly of Nunavut" (2006) 12 *Journal of Legislative Studies* 8; Graham White, "Westminster in the Arctic: The Adaptation of British Parliamentaryism in the Northwest Territories" (1991) 24 *Canadian Journal of Political Science* 499.

26. See Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (Oxford: Oxford University Press, 2013).

27. *Senate Reference*, *supra* note 13; *Supreme Court Reference*, *supra* note 13.

28. For a discussion of the Crown's executive prerogatives, see Noel Cox, "The Gradual Curtailment of the Royal Prerogative" (2012) 25 *Denning Law Journal* 65.

29. For a discussion of the significance of these prerogatives, see Studin, *supra* note 7.

30. Lagassé, "Parliamentary and Judicial Ambivalence", *supra* note 7 at 164-170.

armed forces overseas or send them into hostilities, into the “office of the Queen”, these prerogatives can be limited, displaced or abolished by regular statute or unilateral federal amendment, if necessary.<sup>31</sup>

Although the Queen’s common law privileges and immunities have largely been swept away by statute and case law, the Crown retains privileges that are important to the conduct of government and the Crown’s relationship with the law.<sup>32</sup> Since the constitutional texts make no mention of the Queen’s common law privileges and immunities, a textualist interpretation would hold that they do not enjoy protection under paragraph 41(a).

One privilege that could be targeted is the Crown’s general immunity from statute, which is found at common law and codified in federal and provincial interpretation acts.<sup>33</sup> This immunity means that the Crown is not bound by statute unless it is specified by the statute.<sup>34</sup> The effect of this immunity has been to insulate the executive from a variety of statutes that bind other persons.<sup>35</sup> It has also shielded Crown prerogatives from statute that were apparently intended to bind the executive.<sup>36</sup> A reform effort that sought to subject the executive and the state generally to a greater degree of equality before the law could therefore seek to end or restrict the Crown’s general immunity from statute.<sup>37</sup> From a textualist perspective, both of these reforms could be brought about by regular statute or if the Crown’s immunities were given constitutional weight, either the general amending procedure or federal or provincial unilateral amending procedures.

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31. *Ibid.*

32. For a discussion in the British context, see Maurice Sunkin, “Crown Immunity From Criminal Liability in English Law” (2003) Public Law 716; Joseph M Jacob, “From Privileged Crown to Interested Public” (1993) Public Law 121.

33. See e.g. *Interpretation Act*, RSC 1985, c I-21, s 17 [*Interpretation Act (Canada)*]; *Interpretation Act*, RSO 1990, c I.11, s 11 [*Interpretation Act (Ontario)*].

34. However, statutes may also bind the Crown by necessary implication, see Lagassé, “Parliamentary and Judicial Ambivalence”, *supra* note 7.

35. See e.g. *R v Eldorado Nuclear Ltd*; *R v Uranium Canada Ltd*, [1983] 2 SCR 551 (holding that the federal *Combines Investigation Act* does not apply to the Crown and its agents as the Crown is immune from statute unless the statute expressly binds the Crown).

36. See *Turp v Canada (AG)*, 2012 FC 893 (CanLII). The now repealed *Kyoto Protocol Implementation Act, 2007*, SO 2007, c 30, which made itself out to be binding on the Crown, obliged the government to implement the Kyoto Protocol. When the government withdrew from the Kyoto Protocol in 2011, its decision was challenged on the grounds that it violated the Act, but the Federal Court rejected the challenge on the ground that the Act did not, explicitly or by necessary implication, alter the royal prerogative over foreign affairs.

37. Law Commission of Canada, *supra* note 5.

Symbolically, the Queen's sovereign immunity from prosecution remains a potent symbol of the Crown's privileges before the law. Although this immunity extends only to the Queen herself rather than those acting in her name and despite the fact that it is hard to imagine a situation where it would be invoked, the notion that the Queen cannot be tried before one of her own courts speaks to the continued deference the law shows to the Crown.<sup>38</sup> A textualist reading of section 41(a) would not incorporate sovereign immunity into "the office of the Queen", which would allow Parliament and the provincial legislatures to bring it to an end in Canada.

### **B) Status of the sovereign and vice-regal representatives**

According to a textualist reading of the constitution, democratizing and republican-inspired reforms could be made to the roles and appointment procedures for the Governor General and Lieutenant Governors without engaging paragraph 41(a). Since there is no provision in the constitutional texts which explicitly prevents it, unanimity would not be required to put in place popular elections to select a Governor General, provided that the Queen formally continued to appoint the Governor General on the advice of the prime minister. Likewise, the responsibility for selecting a Governor General could be vested in Parliament or an independent body.<sup>39</sup> Similar procedures could be established for the nomination of provincial Lieutenant Governors, provided that the Governor-in-Council formally continued to appoint them.

If there were a desire to eliminate the pensions and other benefits granted to former Governors General and Lieutenant Governors, this could be done by Parliament through an amendment to the *Governor General's Act* and the *Lieutenant Governor's Superannuation Act*.<sup>40</sup>

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38. Sunkin, *supra* note 32. For a recent Canadian example, see *Trudel Thibault c La Reine*, 2012 QCCA 2212 (CanLII) at para 1, leave to appeal to SCC refused, 35223 (23 April 2013).

39. A private member's bill to this effect is currently before the House of Commons. It would require the prime minister to request that the Queen appoint as Governor General only someone nominated by the Advisory Committee on Vice-Regal Appointments. See Bill C-569, *An Act respecting the procedure for the appointment and removal of the Governor General*, 2nd Sess, 41st Parl, 2014 (first reading 29 January 2014) [Bill C-569].

40. *Governor General's Act*, *supra* note 6; *Lieutenant Governors Superannuation Act*, RSC 1985, c L-8.

Paragraph 41(a) would not protect the benefits that the former holder of either vice-regal office enjoy.<sup>41</sup>

The relationship between the Queen and the Governor General could also be altered with a view to distancing Canada from the monarchy. An amendment to the *Governor General's Act* or the issuing of new letters patent, could serve to make the Governor General a permanent regent in Canada. Since neither the *Governor's General Act* or the Letters Patent, 1947 are considered part of the "Constitution of Canada" from a textualist perspective, this could be done without modifying the "office of the Queen [and] Governor General" for the purposes of paragraph 41(a). Although the Letters Patent, 1947 already allow the Governor General to act in a manner akin to a regent in the event the Queen cannot fulfill her constitutional functions, an amended *Governor General's Act* or new letters patent could declare that all of the Queen's Canadian constitutional functions will be performed by the Governor General in the future.<sup>42</sup>

Indeed, the law could be changed such that the Governor General would serve as the regent of the monarch in their natural capacity.<sup>43</sup> In effect, this would allow the Governor General to replace the monarch in a natural capacity as the embodiment of the sovereign in a legal capacity. (The distinction between the legal and natural capacities is discussed below.) Coupled with an alteration to the *Formal Documents Regulations* to replace the Queen's signature on the Governor General's commission with the Governor General's own signature, making the Governor General a permanent regent would push the Queen to the farthest margins of the Canadian constitution, all without engaging paragraph 41(a).<sup>44</sup> If this were done alongside the introduction of popular election of the Governor General, this would

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41. Section 105 of the *Constitution Act, 1867* allows Parliament to set the Governor General's salary, which would arguably allow Parliament to adjust the office's pension as well.

42. Letters Patent, 1947, *supra* note 6 art 2.

43. The Governor General is a "corporation sole", which means that it has both a perpetual, legal capacity and a natural capacity, the latter being the person who is serving as Governor General at any given time. See *Governor General's Act*, *supra* note 6 s 2.

44. *Formal Documents Regulations*, CRC, c 1331, s 4. This resembles the relationship between the Queen and Governor General proposed by the Trudeau government as part of its 1978 constitutional amendment proposals. See Bill C-60, *An Act to amend the Constitution of Canada with respect to matters coming with the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain matters*, 3rd Sess, 30th Parl, 1978 (first reading 20 June 1978).

bring Canada as close to becoming a republic as possible without triggering paragraph 41(a)'s requirements.<sup>45</sup>

### C) Crown's status in law

The Queen has a particular status in Canadian law. As in the United Kingdom, legally the Queen most closely resembles a corporation sole.<sup>46</sup> Like a corporation sole, the Queen is a corporate personality with both a perpetual legal personality and a mortal natural capacity. The principal purpose of the corporation sole is to allow an office-holder (the natural capacity) and an office (the legal capacity) to be treated as one in law when required to ensure automatic succession and continuity.<sup>47</sup> Another purpose is to allow the holder of an office to hold property in their natural capacity separately from the property they hold in their legal capacity.<sup>48</sup> Recent rulings on Canada's citizenship oath have used the distinction between the Queen's two capacities to uphold the requirement to swear the oath.<sup>49</sup>

The perpetuity provided by the Queen's legal capacity has several advantages. As a perpetual corporation, all the Queen's powers, properties and attributes transfer automatically to each successive monarch who holds the office of sovereign.<sup>50</sup> There is no need to reiterate that laws affecting a particular monarch apply to her successors when a new monarch ascends to the throne, since the law assumes that the new monarch is legally the same person as the late King or Queen. The Queen referred to in Canada's *Constitution Acts, 1867 to 1982* has been the same legal person, as the role of monarch has passed from Queen Victoria to King Edward VII to George V to Edward VIII to George VI to Elizabeth II in a natural capacity.<sup>51</sup>

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45. Such a move would raise significant federalism concerns since provincial Lieutenant Governors are considered representatives of the Queen in their own right. See *Liquidators of the Maritime Bank of Canada v Receiver General of New Brunswick*, [1892] AC 437 (PC).

46. *Canadian Broadcasting Corporation v Ontario (AG)*, [1958] OR 55, 27 CR 165 (CA) at paras 60-61; Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991).

47. William Blackstone, *Commentaries on the Laws of England*, vol 1 (Philadelphia: JB Lippincott, 1891) at 469.

48. *Ibid* at 475.

49. See e.g. *McAteer v Canada (AG)*, 2014 ONCA 578 (CanLII) at paras 52-54 [McAteer].

50. Lagassé & Bowden, *supra* note 4.

51. The original section 2 of the *British North America Act, 1867* (now the *Constitution Act, 1867*) reflected this principle, but it was repealed in 1893 because it was considered redundant and unnecessary. This principle is reflected in federal and

Furthermore, because the executive government of Canada is vested in the Queen by Part III of the *Constitution Act, 1867*, the Queen's status as corporation sole allows the federal or provincial government to act as a person under the law.<sup>52</sup> Among other things, this allows the federal and provincial governments to hold property, enter into contracts and undertake more other legal transactions in the same manner as natural and other legal persons can.<sup>53</sup>

In Canada, moreover, the Queen arguably serves as the concept of the state.<sup>54</sup> Although the *Constitution Act, 1982* refers to an entity called "Canada", this can be read as a reference to the federation established under the sovereign authority of the Crown described in the preamble of the *Constitution Act, 1867*.<sup>55</sup> According to this interpretation, the Canadian state remains the Crown's sovereign authority flowing through the executive, legislative and judicial branches at the federal level and in the provinces.<sup>56</sup>

At law, however, the Crown is synonymous with the Queen; they are treated as equivalent. This means that the Crown refers to the Queen in both her legal and natural capacities and that the Queen acts as both the personification and legal concept of the state.<sup>57</sup> It is for this reason, according to this interpretation, that all acts of state are done in the Queen's name, that the Queen is considered Canada's head of state and that all oaths of allegiance and citizenship are sworn to the Queen.<sup>58</sup>

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provincial interpretation acts, see *Interpretation Act (Canada)*, *supra* note 33, s 46; *Interpretation Act (Ontario)*, *supra* note 33, s 20.

52. *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651 at paras 354-402.

53. Lordon, *supra* note 46.

54. For a general discussion of the Crown's as the concept of state, see Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge: Cambridge University Press, 2012); Noel Cox, "The Theory of Sovereignty and the Importance of the Crown in the Realms of the Queen" (2002) 2 *Oxford University Commonwealth Law Journal* 237.

55. Using the two schools of thought described by McLean this idea of the Crown as the state belongs with a Hobbesian-Blackstonian perspective which conceives of the state as "a persona ficta with a distinct moral personality which is in turn represented by the sovereign which is itself an artificial person." See McLean, *supra* note 54 at 3.

56. Philippe Lagassé, "The Contentious Canadian Crown" in D Michael Jackson & Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Kingston and Montreal: McGill-Queen's University Press, 2013) 271 [Lagassé, "Contentious Canadian Crown"].

57. Ernest H Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1957) at 316; Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003).

58. *McAteer*, *supra* note 49 at paras 16-18, 20, 60, 62, 65.



Neither the Queen's status as corporation sole, nor the Crown's equivalence with the Queen at law, are mentioned in the constitutional texts. Accordingly, from a textualist perspective, these legal concepts could be altered without pursuing a constitutional amendment under paragraph 41(a). Such changes might be undertaken to ensure that Parliament is able to exert greater control over the executive by requiring that any action the executive undertakes find its source in a statutory provision.<sup>59</sup> They might also be motivated by a desire to reduce the Crown's prominence in Canada's constitutional framework.

The fact that the Queen's status as corporation sole allows governments to act as a person under the law has been a source of controversy. Because natural persons can legally do that which the law does not specifically forbid, treating the executive as a person under the law suggests that the government, too, can do whatever the law does not proscribe. This grants the executive significant source of non-statutory power and could invite reform efforts that would redefine the Queen's status as corporation sole either by statute or unilateral federal or provincial amendment.

As part of an effort to bring the Canadian constitution in line with republican ideals, the fusion of the Queen's legal and natural capacities could be broken without recourse to paragraph 41(a). In principle, the succession of a designated office-holder to the office of sovereign could be contingent on a proclamation by cabinet or parliamentary resolution. Without such a proclamation or resolution, the legal capacity of the Queen could be deemed effective without being personified. In effect, the law could allow for the office of the Queen to remain operational yet vacant.<sup>60</sup> Alternatively, as noted above, owing to the physical absence of the monarch from Canada, the *Governor General's Act* could be amended to allow the Governor General to fulfill the functions of the office of the Queen as a permanent regent.

In either case, the application of the British law of succession to Canada supposed by a textualist interpretation would not be disturbed, since the successor to the office would be known but not confirmed as the office-holder or acknowledged and instead replaced by the Governor General as the holder of the office of the Queen. By dis-

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59. For such a proposal, albeit in the British context and so without the need to consider the application of complex amending procedures, see Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005).

60. For such a proposal, see Edward McWhinney, *The Governor General and the Prime Ministers: The Making and Unmaking of Governments* (Vancouver: Ronsdale Press, 2005).

mantling the fusion of the office and office-holder, successors to the throne could be kept in a sort of constitutional limbo with the Governor General making the “office of the Queen” operational in accordance to the Letters Patent, 1947 or as a formal regent.

The monarch’s place in the Canadian constitution could be further diminished by ending the equivalence between the Crown and the Queen. Rather than treating the Crown as synonymous with the Queen as a corporation sole, the Crown could be recast as a “corporation aggregate” with the Queen as the head of the Crown’s corporate structure — in effect, the chair of the corporation’s board of directors.<sup>61</sup> Proceeding with this reform would preserve the Crown as concept of state for the purposes of the preamble to the *Constitution Act, 1867*, but it would make the Queen only one part of the Crown. Simply put, this alteration to the concept of the Crown would make the Queen a component of the state, rather than the state itself.

Once this was done, the Queen would be reduced to an office of state that stands at the apex of the executive and the armed forces and is a part of Parliament and indirectly, the provincial legislative assemblies. The Queen would no longer be head of state, at least according to the current Canadian definition, since her office would no longer be equivalent to the state. Indeed, under this reconstituted definition of the Crown, the *Governor General’s Act* could be amended to make the Governor General Canada’s head of state in law, while formally preserving his role as the Queen’s agent in the executive and legislative branches of government.

To give further effect to this change, the *Seals Act* could be amended to allow for the removal of the Queen’s name from Canada’s great seals and to vest the Governor General with the formal authority to approve orders and regulations regarding the seals and royal instruments. If these changes were carried alongside reform that would allow the Queen’s office to remain vacant or making the Governor General a permanent regent, the Queen’s status in the constitution would be diminished to that of a cipher.<sup>62</sup>

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61. The House of Lords described the British Crown as a corporation aggregate in *Town Investments Ltd v Department of the Environment*, [1978] AC 359 (HL). For an argument in favour of this view and an analysis of the consequences for the Queen’s relationship with the Crown, see Martin Loughlin, “The State, the Crown and the Law” in Maurice Sunkin & Sebastian Payne, eds, *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999).

62. As mentioned above, this would have in effect been the consequence of implementing the Trudeau government’s 1978 constitutional reform bill. See Bill C-60, *supra* note 44.

## II. FUNCTIONALIST PERSPECTIVE

According to a functionalist interpretation of section 41(a), the “office of the Queen, the Governor General and the Lieutenant Governor of a province” includes, as it does for the textualist perspective, all references to these offices in the constitutional texts. However, a functionalist interpretation supplements the provisions relating to these offices in the constitutional texts with the principles and practices that allow the Queen and her representatives to fulfill their existing constitutional roles and responsibilities. In addition, a functionalist perspective allows for the principles reflected in statutes not listed in the Schedule to the *Constitution Act, 1982*, but closely related to the constitutional roles and responsibilities of these offices, to enjoy protection under paragraph 41(a).<sup>63</sup> From a functionalist perspective, then, unanimity is not only required to amend the letter of the constitution when it comes to the Crown, but also to alter its spirit by changing the constitutional roles and responsibilities of the Queen, Governor General and Lieutenant Governors.

From a functionalist perspective, the authority that the Governor General and Lieutenant Governors exercise when proroguing or dissolving the legislature cannot be limited by a legislative veto absent a paragraph 41(a) amendment. Nor can the exercise of this authority be made contingent upon the approval of the legislature without such an amendment. In keeping with the *Constitution Act, 1867* and the conventions of responsible government, the role and responsibility of the vice-regal offices is to act on the advice of the Crown’s first minister when proroguing and dissolving the legislature. In exceptional circumstances, the vice-regal officers can refuse a first minister’s advice to prorogue or dissolve the legislature, which would lead to the resignation or dismissal of the first minister.<sup>64</sup> Yet this would be followed by the immediate appointment of a new first minister to advise the Governor General or Lieutenant Governor.<sup>65</sup>

Since the power to prorogue and dissolve the legislature is a fundamental authority of the vice-regal officers as representatives of the Queen and insofar as the requirement to act on the advice of the first minister when exercising Crown authorities is a central

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63. *Supreme Court Reference*, *supra* note 13 at para 91.

64. For an exhaustive discussion of the Governor General and Lieutenant Governors’ powers, see Heard, *supra* note 15 at 35-83.

65. Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford: Oxford University Press, 1997).

constitutional convention, any effort to impose a binding statutory constraint on the exercise of these powers by the vice-regal officers on the advice of the first minister would constitute a significant change to the constitutional role and responsibilities of the Governor General and Lieutenant Governors. Such a change could only be made through a paragraph 41(a) amendment.<sup>66</sup>

A similar logic would ensure that vice-regal powers for government formation could not be altered or limited without triggering paragraph 41(a). The appointment of a first minister is a principal discretionary authority of the Governor General and Lieutenant Governor and it is one of their primary duties to ensure that there is a first minister to advise them on the exercise of Crown powers.<sup>67</sup> Hence, from a functionalist perspective, this discretionary authority and the associated duty would be considered part of their offices. Furthermore, while it may be possible to establish a committee to make binding recommendations to the prime minister on judicial and senatorial appointments, these recommendations cannot be made binding on the Governor General without an amendment under paragraph 41(a).

A functionalist interpretation would prevent the Governor General and Lieutenant Governor from being elected without a paragraph 41(a) amendment. As with senatorial and judicial appointments, the recommendations of the existing Advisory Committee on Vice-Regal Appointments could be strengthened to be binding on the prime minister, but the appointed nature of the vice-regal offices would be considered an essential feature of their offices.<sup>68</sup> Granting the vice-regal officer a popular mandate could significantly alter how their roles and responsibilities are performed. Bringing about this reform would thus constitute a change that touches on the existing understanding and performance of their duties.<sup>69</sup>

In the same vein, reforms that could be seen to undermine the independence and neutrality of the vice-regal offices would require a paragraph 41(a) amendment to carry out. For instance, the annuity

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66. See Warren J Newman, "Of Dissolution, Prorogation and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis" (2009) 27 *National Journal of Constitutional Law* 217.

67. Hugo Cyr, "De la formation du gouvernement" (2013) 43 *Revue générale de droit* 381.

68. For a proposal to this effect currently before the House of Commons, see Bill C-569, *supra* note 39.

69. For a similar discussion of the effects of a transition from an appointed to an elected Senate, see *Senate Reference*, *supra* note 13 at paras 54-63.

provided by the *Governor General's Act* and the pensions provided by the *Lieutenant Governors Superannuation Act* could be protected by paragraph 41(a) since the guarantee of an annuity or pension upon retirement is meant to guard vice-regal officers against financial intimidation or the risk that their actions while in office will be perceived as an attempt to secure employment following their departure from office.<sup>70</sup> While the amount of the annuity or pension would remain amenable to being altered by statute, the principle that vice-regal officers should be shielded from financial risk or coercion might well be interested as falling under their offices from a functionalist perspective.

The Queen's existing relationship with the Governor General would also fall under their respective offices under a functionalist perspective. While the Governor General might be able to appoint his or her successor if necessary, the Governor General could not be made a permanent regent without a paragraph 41(a) amendment. Nor could the Governor General be made to occupy the office of the Queen. A functionalist interpretation would hold that the Governor General's position as the Queen's representative is a paramount part of their respective roles and responsibilities in the constitution.

In fact, from a functionalist viewpoint, the relationship between the Queen and Governor General outlined in the Letters Patent, 1947 would be protected by paragraph 41(a) and the letters patent themselves might be accorded constitutional status.<sup>71</sup> Similarly, because Canada's great seals represent markers of the Queen's place in the Canadian constitution, those portions of the *Seals Act* that define Canada's great seals and the Queen's authority to approve the use of seals over them could be considered part of the Queen's office.<sup>72</sup>

A functionalist interpretation would further argue that the "office of the Queen" cannot be made vacant with a paragraph 41(a) amendment. Since the Queen's roles and responsibilities are fulfilled by successive monarchs under the current constitutional arrange-

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70. For a similar discussion of the importance of financial security for judges, see *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 [*Provincial Judges Reference*].

71. For a review of arguments surrounding whether the Letters Patent, 1947 are susceptible to constitutional amendment, see Malaika Bacon-Dussault, "Amending the Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada" (2011) 5 *Journal of Parliamentary and Political Law* 177.

72. *Seals Act*, *supra* note 6.

ment, a functionalist perspective would hold that the succession to the Queen's office cannot depend on a cabinet proclamation or parliamentary resolution. The principle of automatic succession would therefore form part of the "office of the Queen".

However, there could be more than one functionalist interpretation of what law of succession applies to the Queen's office. According to one functionalist view, the law of succession in Canada is determined by the British Parliament. Building on the textualist perspective, this view holds that there is no Canadian law governing royal succession. Instead, the Canadian constitution operates according to a "rule of recognition" or a "principle of symmetry" which states that whoever is the Queen of the United Kingdom is the Queen of Canada.<sup>73</sup> There are several possible constitutional sources for such a rule or principle. It may be that Canada remains connected to the British Crown despite the *Canada Act 1982*, that the preamble to the *Statute of Westminster, 1931* has legal force or that Canada simply follows British law of succession by convention. But no matter the source, the result is the same: matters of royal succession are determined by the United Kingdom and any change to this practice requires a paragraph 41(a) amendment.

Another view holds that the royal succession was incorporated into Canadian law during the crisis triggered by Edward VIII's abdication in favour of his brother George VI. In December 1936, the Canadian cabinet requested and consented that the British *His Majesty's Declaration of Abdication Act, 1936* apply to Canada under section 4 of the *Statute of Westminster, 1931*.<sup>74</sup> From that point forward, the law of succession in Canada was determined by the provisions of the *Abdication Act*, which refers to the *Act of Settlement, 1701*, arguably thereby incorporating it into Canadian law as well.<sup>75</sup> Reinforcing this argument is the idea that the Queen of Canada is separate and distinct from the Queen of the United Kingdom in matters of law and government, and the passage of the *Canada Act 1982*, which ended the British Parliament's ability to legislate for Canada.<sup>76</sup> If the Queen of Canada is legally separate and distinct from the Queen of the United Kingdom and the British Parliament can no longer legislate

73. Hogg, "Succession to the Throne", *supra* note 4; *O'Donohue v Canada*, 2003 CanLII 41404 (ONSC).

74. *His Majesty's Declaration of Abdication Act, 1936* (UK), 1 Edw V & 1 Geo VI, c 3.

75. Garry Toffoli & Paul Benoit, "More is Needed to Change the Rules of Succession for Canada" (2013) 36 Canadian Parliamentary Review 10.

76. *Canada Act 1982* (UK), 1982, c 11, s 2; *R v Secretary of State for Foreign and Commonwealth Affairs Ex parte Indian Association of Alberta*, [1982] QB 892 (CA).

for Canada, then legislative authority over royal succession to the office of the Canadian Queen must reside in Canada alone.<sup>77</sup> Changes to the Canadian law of succession therefore relate to the office of the Queen and engage paragraph 41(a).

Sovereign immunity would also qualify for paragraph 41(a) protection from a functionalist perspective. The principle that the Queen can do no wrong stems from her constitutional position as the fount of justice and from the convention that the Crown only acts through its servants and agents.<sup>78</sup> Since justice is done in the Queen's name, she is understood to act justly at all times. When the Crown acts contrary to the law in a justiciable area, it is assumed that one of the Queen's servants or agents is liable.<sup>79</sup> Hence, the liability of the Crown extends to those who act in the Queen's name, such as government departments, ministers, crown corporations, or the armed forces, rather than the Queen herself.

Were sovereign immunity to be removed, it is possible there would be little practical effect on the Queen's role and responsibilities, which would suggest that immunity should not be considered part of her office. Yet it is not difficult to imagine scenarios where, in the absence of immunity, plaintiffs might argue that the Queen should be held personally liable for government actions done in her name. Should this occur, the Queen's basic role and responsibility under sections 9 and 15 of the *Constitution Act, 1867*, namely to act as the personification of the executive, would leave her open to liabilities in her natural capacity. To forestall against this possibility, however remote, sovereign immunity would likely be considered a critical attribute of the Queen's office from a functionalist perspective.

A functionalist interpretation of paragraph 41(a), therefore, broadens the scope of the offices to protect the Queen and her representatives' existing role, responsibilities and their relations with first ministers and one another. In that sense, the functionalist perspective focuses on preserving the status quo with respect to these offices and the way in which they interact. However, the functionalist perspective's understanding focuses on their "head of state" duties. This implies that aspects of the Crown that go beyond the roles and responsibilities of the Queen, Governor General and Lieutenant Gov-

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77. Anne Twomey, "Changing the Rules of Succession to the Throne" (2011) Public Law 378.

78. *M v Home Office*, [1993] UKHL 5, [1994] 1 AC 377.

79. Hogg, *Constitutional Law of Canada*, *supra* note 4 at 10.2-10.3.



ernors as head of state do not enjoy protection under section 41(a). These broader aspects of the Crown could be reformed by regular statute, the general amending procedure or the federal or provincial unilateral amending procedures.

### **A) Powers, privileges and immunities**

Because the Crown's core executive prerogatives are not tied to the Queen's head of state functions, they would not fall under paragraph 41(a) from a functionalist point of view. In line with the textualist view, a functionalist interpretation would hold that the Crown's executive prerogatives are susceptible to abolition, displacement or limitation by regular statute, or by a unilateral federal or provincial amendment under sections 44 and 45 of the *Constitution Act, 1982*, should any of these prerogatives be given constitutional status by the courts. Crown privileges and immunities that are not related to the regal or vice-regal head of state functions would be excluded from paragraph 41(a)'s ambit as well. For instance, the Crown's general immunity from statute discussed above would not enjoy paragraph 41(a) protection.

### **B) Status of the Queen and her representatives**

Under a functionalist interpretation, nearly all changes to the existing roles and relationships among the Queen, Governor General and Lieutenant Governors would require a paragraph 41(a) amendment. However, there is one circumstance in which a functionalist approach might admit a narrower interpretation of paragraph 41(a). If the Queen were incapacitated and the United Kingdom invokes the *Regency Act* to make the Prince of Wales regent, the Governor General would be able to exercise nearly all the Queen's powers in Canada under the Letters Patent, 1947. Indeed, the Governor-in-Council would only need to amend the *Formal Documents Regulations* to allow a Governor General to appoint his or her successor in the Queen's name.

However, the Governor General might not be able to exercise the Queen's power to name up to eight additional senators on recommendation of the Governor General under section 26 of the *Constitution Act, 1867*. When read alongside section 24, which grants the Governor General the power to summon persons to the Senate, the wording of section 26 suggests an intent to involve the Queen in the

extraordinary step of naming additional senators. The language suggests that the Governor General should not be able to appoint additional senators alone; the power of appointment seems to have been left with the Queen to serve as a constitutional safeguard.<sup>80</sup> Allowing the Governor General to both recommend and carry out the appointment of additional senators would violate the spirit if not the letter of the *Constitution Act, 1867*.

If a government sought to appoint additional senators during a regency in the United Kingdom, this question would arise. It could either be resolved by applying the Letters Patent, 1947 and allowing the Governor General to appoint the additional senators in the Queen's name in spite of the apparent structural constraint posed by the *Constitution Act, 1867* or having the British regent act perform this Canadian constitutional function on the Queen's behalf. A functionalist interpretation could allow for either approach to be followed without a paragraph 41(a) amendment.

### **C) Crown's status in law**

A functionalist perspective would not accord paragraph 41(a) protection to the executive's power to act as a legal person due to the Queen's legal capacity. Because it does not affect the Queen's role as head of state, the person-like characteristics that governments enjoy thanks to the Queen's legal capacity could be revoked by regular statute or unilateral constitutional amendment.

Likewise, ending the legal equivalence between the Crown and the Queen would not require a paragraph 41(a) amendment according to this perspective. The Crown could thus be made a corporation aggregate, with the Queen as the head of the Crown as a corporation of more than one person. Under such an approach, the Crown would remain the concept of the state in Canada and the Queen would remain head of state by virtue of her position at the apex of the corporate structure of the Crown. But the Crown and Queen would no longer be equivalent and thus the state would no longer be the Queen in law.

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80. See Mollie Dunsmuir, *The Senate: Appointments Under Section 26 of the Constitution Act, 1867* (Ottawa: Library of Parliament, 1990). See also *Singh v Canada*; *Leblanc v Canada*, [1991] 3 OR (3d) 429 (CA); *Reference re ss 26, 27, 28 of the Constitution Act, 1867*, [199] 78 DLR (4th) 245 (BCCA).

Unlike the textualist view, however, a functionalist perspective would not suggest that this decoupling of the Crown and Queen could be used to remove the Queen from her position as head of state. Although the Queen would no longer be synonymous with the state, her role as head of state would fall under the protection of paragraph 41(a). According to a functionalist reading, a separation of Crown and Queen in law would need to preserve the Queen's standing as head of state in order to avoid engaging the use of the unanimity procedure.

### III. FORMALIST PERSPECTIVE

A third interpretation of paragraph 41(a), the formalist perspective, builds upon the textualist and functionalist approaches and incorporates them into its interpretation. However, the formalist perspective expands the scope of the regal and vice-regal offices to include core executive and administrative powers. Because executive power is vested in the Queen under section 9 of the *Constitution Act, 1867*, a formalist perspective holds that the "office of the Queen" should be interpreted to include the authorities that are required for the Queen to fulfill the executive's constitutional responsibilities in Canada. Similarly, insofar as the modern administrative state relies on the legal personality of the Queen to operate, a formalist perspective views the Queen's legal personality and certain of the Queen's privileges as a fundamental part of the regal office.

The Queen's personification of the Crown as the concept of state, moreover, would fall under the "office of the Queen" since the legal personality of the state remains an important feature of the constitutional relationships between the state, on the one hand, and the civil service, armed forces and Aboriginal peoples, on the other. Lastly, that which allows the Queen and Crown to grant the executive and the state more broadly a legal personality, namely the Queen's status as corporation sole, falls under paragraph 41(a) as well. From a formalist perspective, preserving the Queen's status as corporation sole is vital for ensuring automatic and seamless succession and allows for a concrete definition of the Crown, and thus the state, in the Canadian context.

To serve as an effective fount of executive power and authority, a formalist interpretation holds that the Queen must possess the core prerogatives that allow the government to fulfill its constitutional responsibilities. Accordingly, these core prerogatives should be con-

sidered part of the “office of the Queen”.<sup>81</sup> Among the core prerogative that would enjoy protection under paragraph 41(a) are the foreign affairs power and the powers required to ensure the “defence of the realm”. In more concrete terms, these powers include the authority to conduct diplomacy, negotiate treaties, conduct intelligence gathering and counterintelligence efforts, guard secret information, command and deploy armed forces and act decisively for reasons of state.<sup>82</sup>

While Parliament can regulate just how the executive administers these authorities and impose certain conditions on the way in which they are used, governments must retain a degree of discretion as to how they use these powers, which they ultimately exercise in the Queen’s name since the Queen is vested with executive power.<sup>83</sup> Other aspects of the “executive government of Canada”, such as those that relate to the appointment, responsibility and accountability of ministers and civil servants, are subject to unilateral federal amendment. But the close connection between core prerogative powers and the Queen’s executive role means these powers enjoy the highest degree of constitutional protection under paragraph 41(a), given their importance for the survival of Canada.<sup>84</sup>

The executive’s ability to exercise the powers of a person owing to the Queen’s legal personality would also fall under paragraph 41(a) from a formalist perspective. Government’s power to contract and own property flows from the Queen’s legal personality and the executive’s ability to adapt to new and changing circumstances is greatly enhanced by the fact that the government enjoys the legal freedom accorded to persons. Given the administrative importance of the Queen’s personality for the executive and public administration, a formalist perspective holds that alterations to this aspect of the Queen’s role would not be incidental or minor. Reforms to the relationship between the Queen and the executive would alter the nature of government in law and might even involve a reconceptualization of the legal nature of government in Canada.<sup>85</sup> As a result, a formalist perspective would suggest that this degree of change should only be undertaken with the unanimous consent of the provinces.

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81. Warren J Newman, “Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada” (2007) 37 SCLR (2d) 383.

82. Studin, *supra* note 7.

83. Philippe Lagassé, “The Crown’s Powers of Command-in-Chief: Interpreting Section 15 of the *Constitution Act, 1867*” (2013) 18 *Review of Constitutional Studies* 189 [Lagassé, “The Crown’s Powers”].

84. Pelletier, *supra* note 12 at 208.

85. See Law Reform Commission, *supra* note 5.

The equivalence of the Crown and Queen is not explicitly mentioned in the constitution. Yet, from a formalist perspective, treating the Queen and Crown as synonymous is an axiom of Canada's constitutional order and thus deserves the protection of paragraph 41(a). The fact that the Crown and Queen are equivalent ensures that the Canadian state is personified, which makes it possible to maintain quasi-personal relationships with the state. A number of constitutionally significant relationships depend on the existence of a personified state. Ministers serve at the pleasure of the Queen, as represented by vice-regal officers acting on the advice of their first minister. Ministers legally serve a particular person, which is meant to remind them that the powers they exercise, however potent, are not their own, but only held in trust.<sup>86</sup> Civil servants are ultimately meant to be loyal to the Queen to remind them that while they work for the government of the day, their fealty belong to the Crown and Queen as the state.<sup>87</sup> This relationship in turn serves as the foundation of both their independence from *and* service towards the ministers of the Crown. Similarly, military officers are commissioned in the Queen's name and the legal basis of their service to the state is based on this personal obligation towards the Queen.<sup>88</sup> Likewise, the honour of the Crown towards First Nations peoples flows from treaties and agreements entered into by past sovereigns and indigenous communities.<sup>89</sup> First Nations communities continue to stress the importance of the personal nature of these agreements.

Altering any of these relationships to one with a particular state official, as opposed to the personification of the state, would represent a significant shift in both purpose and meaning. Simply put, separating the Crown from the Queen in law would transform the sovereign from the personification of the state into a mere office of state. From a formalist perspective, the significance of this change would therefore justify placing the legal equivalence between the Crown and Queen under the "office of the Queen" for the purposes of paragraph 41(a).<sup>90</sup>

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86. Frank MacKinnon, *The Crown in Canada* (Calgary: Glenbow-Alberta Institute, 1976) at 72.

87. Lagassé, "The Contentious Canadian Crown", *supra* note 56.

88. *Chainnigh v Canada (AG)*, 2008 FC 69 at para 36.

89. JR Miller, "The Aboriginal Peoples and the Crown" in D Michael Jackson & Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Kingston & Montreal: McGill-Queen's University Press, 2013) 255.

90. For an overview of how this change has already occurred in fact, see John Whyte, "A Case for the Republican Option" in D. Michael Jackson & Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Kingston: McGill-Queen's University Press, 2014).

The Queen's personification of the executive and the state is connected to her nature as corporation sole. While it may be more appropriate to say that the Queen is merely *akin* to a corporation sole or that she exhibits the characteristics of a corporation sole, there is no concept that better captures the Queen's legal attributes. Using this concept allows most of the Crown's features and attributes to become intelligible and understandable.

For instance, appreciating that the Queen is a corporation sole allows us to speak to the difference between the legal and natural capacities of the sovereign. It also allows us to grasp the logic behind the view that the notion that "Her Majesty in right of Canada", the Queen in her legal capacity at the federal level, is equivalent to the Crown and the state, and is able to hold property, contract and be liable before the courts as the executive. Moreover, the concept provides a definitive answer as to why references to the Queen or Her Majesty in the constitution and statute law apply automatically to her successors: they have the same legal capacity despite having distinct natural capacities. The principles of automatic succession and perpetuity of the sovereign's legal capacity are a vital part of the Canadian constitution and depend on the Queen being conceived of as a corporation sole. Hence, from a formalist perspective, it follows that the Queen's status as a corporation sole forms a necessary part of the "office of the Queen".

Indeed, given that automatic succession and the perpetuity of the Queen's legal capacity is the product of her being a corporation sole, matters of royal succession are necessarily part of the "office of the Queen". Like the functionalist perspective, however, formalist interpretations can differ as to source of the law of succession to the Queen's office. If the Queen of Canada shares the legal capacity of the Queen of the United Kingdom and by extension, the Crown of Canada and the Crown of the United Kingdom are equivalent, then the law of succession in Canada can be determined by the United Kingdom. If the Queen of Canada and Queen of the United Kingdom are legally distinct, even if embodied by the same natural person, and by extension, the Crowns of Canada and the United Kingdom are distinct, then the law of succession in Canada can be determined by Canada alone.

The former approach holds that the British law of succession applies to Canada, while the latter would hold that royal succession is strictly a matter of Canadian law or that Canada has implicitly decided to mirror British law. If British law of succession applies in Canada in its own right or Canada has implicitly decided to mirror

British laws, then any change to this state of affairs requires a paragraph 41(a) amendment. However, if royal succession is a matter of Canadian law, then any alteration to that law would involve a paragraph 41(a) amendment.<sup>91</sup> No matter the approach to royal succession, it is clear that from a formalist perspective succession forms part of the “office of the Queen” due to the Queen’s nature as corporation sole.

A formalist perspective would also extend the understanding of the “office of the Queen” to include the principles reflected in key statutes that define the Queen’s constitutional position. The *Royal Style and Titles Act* and the *Seals Act* would enjoy paragraph 41(a) protection. Likewise, formalist perspectives holding that royal succession is a matter of Canadian law would also place the British *His Majesty’s Abdication Act, 1936* and the Canadian *Succession to the Throne Act, 1937* under the “office of the Queen”, though formalist perspectives that accept that succession is a matter of British law would not.

This perspective would also suggest that section 2 of the *Governor General’s Act*, which designates the Governor General as a corporation sole, would also fall under paragraph 41(a). As with the Queen, the corporate character of the Governor General is a fundamental part of this office’s definition in law and has great significance for the way in which the Governor General’s vice-regal constitutional role is defined and understood.

The formalist perspective, therefore, sees little room to alter the existing role, responsibilities and legal status of the Crown, Queen, Governor General and Lieutenant Governors by ordinary statute or constitutional amendment under the general or federal or provincial unilateral procedures. The Crown’s prerogatives might be displaced and regulated, but those deemed critical for the executive to fulfill its constitutional responsibilities could not be entirely abolished by the general amending procedure or Parliament under section 44 of the *Constitution Act, 1982*. Relations among the Queen and her representatives would be entirely protected by paragraph 41(a) as would the legal characteristics of the Crown, Queen and her representatives.

Given the expansive view that the formalist perspective takes of section 41(a), it would not be necessary to ascribe constitutional protection to the Queen’s general immunity from statute. Since the

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91. Lagassé & Bowden, *supra* note 4.



Queen's statutory immunity would not be needed to protect the Crown's essential attributes, powers and functions since these would already be protected under paragraph 41(a). The scope of regal and vice-regal offices would be so large under a formalist perspective that section 41(a) would offer the Queen, Governor General and Lieutenant Governors all the protection and immunity they might need.

#### IV. DISCUSSION AND CONCLUSION

This chapter suggests that paragraph 41(a) of the *Constitution Act, 1982* lends itself to three broad interpretations. The narrowest interpretation — the textualist perspective — limits paragraph 41(a)'s application to the textual provisions concerning the Crown, the Queen, the Governor General and the Lieutenant Governors. The functionalist perspective broadens the paragraph's application to include other written and unwritten elements of Canada's constitutional order that allow the offices that constitute the formal executive to fulfill their "head of state" functions. The broadest interpretation — the formalist perspective — would extend paragraph 41(a) to include unwritten elements that support the full range of these offices' functions, including those performed in their name by ministers and civil servants.

As was illustrated by reference to current and potential future reform proposals, adopting one of these interpretations over the others would have significant consequences for the possibility of constitutional reform in Canada. The textualist perspective would offer the greatest latitude for change to the structure of the executive branch, but could still serve as a fairly significant barrier for reform depending on how much meaning is given to the Part III of the *Constitution Act, 1867*, which has been little treated in doctrine or jurisprudence. By contrast, the functionalist perspective and especially the formalist perspective would place much more significant restraints on future attempts to reform the executive by subjecting them to the stringent unanimity procedure.

Given the range of possible interpretations of paragraph 41(a) and the wide-ranging consequences they might have, it seems likely that the Supreme Court will eventually have to resolve these issues. The Court may be called upon to do so within the next few years as the challenge to the *Succession to the Throne Act, 2013* winds its way through the Quebec courts. It would almost certainly have to do in the event of a broader reform effort that touched the formal executive, whether through a constitutional challenge or in response to a refer-

ence put to it by a reform-minded federal government or indirectly, by a provincial government.<sup>92</sup>

If the question of how to interpret paragraph 41(a) reaches the Supreme Court as part of a challenge to an actual reform, it may be possible for the Court to resolve the challenge without laying out a general approach to paragraph 41(a). For instance, the challenge to the *Succession to the Throne Act, 2013* might be resolved without the courts having to substantially engage with paragraph 41(a) if they adopt the view that Canada has a “rule of recognition” that whoever is the British sovereign is also the Canadian sovereign.<sup>93</sup>

However, if the interpretation of paragraph 41(a) comes before the Court as part of a reference, whether put to it by the federal government or as an appeal from a provincial reference decision, the Court will be more likely to set out a general approach as it did in the recent *Senate* and *Supreme Court References*.<sup>94</sup> But even if the Court provides a general interpretation of paragraph 41(a), such an interpretation is likely to leave many open questions about just how far one can go without engaging the unanimity procedure as the Court’s judgments did in both the *Senate* and *Supreme Court References*.<sup>95</sup>

No matter which path the interpretation of paragraph 41(a) takes to the Supreme Court, it is worth considering which interpretation they would be most likely to adopt. Setting aside factors arising from the particular reform under consideration, there are three factors likely to influence the way in which the Court approaches the interpretation of section 41(a). The first factor is the Court’s approach to interpreting section 52 of the *Constitution Act, 1982*, which defines the term “Constitution of Canada” and subjects to the amending pro-

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92. Several important Supreme Court references, notably *Re Resolution to amend the Constitution*, [1981] 1 SCR 753 and the *Provincial Judges Reference*, *supra* note 68, did not start at the federal level, but were appealed as of right from provincial courts of appeal.

93. Hogg, “Succession to the Throne”, *supra* note 4.

94. *Senate Reference*, *supra* note 13 at paras 23-48; *Supreme Court Reference*, *supra* note 13 at paras 88-95.

95. In the case of the Senate, it is not clear whether an advisory body on senatorial appointments could be established without the use of the general amending procedure, which extends to the “method of selecting Senators” under subsection 42(1)(b) of the *Constitution Act, 1982*. Likewise, the constitutional status of elections for “Senate nominee[s]” held under Alberta’s *Senatorial Selection Act*, RSA 2000, c S-5 is unclear. In the case of the Supreme Court, it is not clear which of its characteristics beyond its “jurisdiction as the final general court of appeal for Canada...and its independence” enjoy protection under subsection 42(1)(d) of the *Constitution Act, 1982*.

cedures in Part V of the Act, as well as its approach to interpreting the amending procedures themselves.

The second is the Supreme Court's (and the Judicial Committee of the Privy Council's) approach to interpreting subsection 92(1) of the *British North America Act, 1867*, which allowed provincial legislatures to amend their constitutions with the exception of "the office of Lieutenant Governor". Subsection 92(1) was incorporated into the *Constitution Act, 1982* as section 45, but its exclusion of the "office of Lieutenant Governor" provided the courts an opportunity to speak to the scope of that office, which can be analogized to the offices of the Queen and Governor General for the purposes of paragraph 41(a). The third factor is the judicial, both Supreme and otherwise, understanding of the nature of the Crown and its relationship with the ministers.

#### **(a) Textualist perspective**

The Supreme Court is very unlikely to adopt a textualist approach to interpreting paragraph 41(a). Following the Judicial Committee of the Privy Council's famous decision in *Edwards v Canada*, better known as the Persons case, Canadian courts have decisively come to use a purposive, living tree doctrine to guide constitutional interpretation.<sup>96</sup> This has manifested itself not only in the way that constitutional texts, including relatively modern ones like the *Constitution Act, 1982*, are interpreted, but also in what is considered to be part of the "Constitution of Canada" and thus subject to the amending procedures, including potentially paragraph 41(a).<sup>97</sup>

Likewise, before the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, the Supreme Court showed itself to be willing to find that rights supporting Canada's system of government not reflected in the constitutional text are nevertheless implied in the constitution. Much was made, for instance, of the recital in the Preamble that Canada was to have a "Constitution similar in Principle to that of the United Kingdom", which was taken to imply that certain fundamental rights and indeed, fundamental aspects of Canada's system of government enjoyed a degree of protection that might have kept Parliament and the provincial legislatures from legislating them away.<sup>98</sup>

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96. *Edwards v Canada (AG)*, 1929 UKPC 86, [1930] AC 124.

97. Hogg, *Constitutional Law of Canada*, *supra* note 4 at 4.13-4.14, 15.47-15.56.

98. *Ibid* at 34.10-34.13. See also Mark D Walters, "The Law Behind the Conventions of the Constitution: Reassessing the Prorogation Debate" (2011) 5 JPPL 131 at 136-137.

Although early post-patriation decisions held the definition of “Constitution of Canada” provided in subsection 52(2) to be limited to the constitutional texts, the Supreme Court has decisively rejected such an understanding.<sup>99</sup> The “Constitution of Canada” is now understood to include both written and unwritten elements that together form what the Court described in the *Senate Reference* as the constitution’s “architecture [or]...basic structure”.<sup>100</sup> Among the unwritten elements are fundamental constitutional principles recognized by the Court, including democracy, federalism and the rule of law.<sup>101</sup> It remains an open question as to whether and to what degree constitutional conventions or the Crown prerogative also form part of the constitutional architecture.<sup>102</sup> Broadening the definition of the “Constitution of Canada” to include unwritten elements decisively undermines the textualist approach to understanding paragraph 41(a).

The textualist approach is also undermined by the interpretation given to the now repealed section 92(1) of the *Constitution Act, 1867*. In *Ontario v OPSEU*, Beetz J. suggested in *obiter* that “it is uncertain, to say the least, that a province could touch upon the power of the Lieutenant-Governor to dissolve the legislature, or his power to appoint and dismiss ministers, without unconstitutionally touching the office itself”.<sup>103</sup> Beetz J. added that “[i]t may very well be that the *principle of responsible government* could, to the extent that it depends on those important royal powers, be entrenched to a substantial extent”.<sup>104</sup> If the Supreme Court were to take a similar approach to paragraph 41(a), it would seem that far more than the bare textual provisions concerning the Crown would enjoy the paragraph’s protection.

Finally, the textualist approach is further weakened by the emphasis placed by the Court on the intent of the drafters of the *British North America Act, 1867*. In its description of the architecture of Canada’s constitution in the *Senate Reference*, the Court noted that it was the drafter’s intent to have “the Crown as head of state”, as is reflected in the preamble to what is now the *Constitution Act, 1867*.<sup>105</sup> The Queen’s role as head of state as well as that of her vice-regal representatives goes

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99. Brun, Tremblay & Brouillet, *supra* note 15 at 235.

100. *Senate Reference*, *supra* note 13 at paras 26-27.

101. Brun, Tremblay & Brouillet, *supra* note 15 at 235-236.

102. For the view that “the most important categories of convention” should be seen as “practical manifestations of...unwritten principles already endorsed by the Supreme Court”, see Heard, *supra* note 15 at 229-230.

103. *Ontario (AG) v OPSEU*, [1987] 2 SCR 2 at para 108 [*OPSEU*].

104. *Ibid* [*emphasis added*].

105. *Senate Reference*, *supra* note 13 at para 14.

beyond the provisions in constitutional texts. Among other things, this implies that, contrary to the textualist perspective, the transformation of the office of Governor General and Lieutenant Governors into elected positions would require the use of the unanimity procedure.

### **(b) Functionalist perspective**

The Supreme Court is most likely to adopt a functionalist approach to interpreting paragraph 41(a). Such an approach would be consistent with its understanding of the “Constitution of Canada” under subsection 52(2) of the *Constitution Act, 1982* and would apply paragraph 41(a) to the abolition of the offices of the Queen, the Governor General and Lieutenant Governor and changes to those offices that would fundamentally transform their constitutional roles and responsibilities. Distinguishing those changes from those that could be made under the general amending procedure or the federal unilateral procedure would be the most challenging aspect of following such an approach.

In considering changes to other national institutions, including itself, the Senate, and implicitly, the House of Commons, the Court has sought to give full meaning of Part V of the *Constitution Act, 1982*.<sup>106</sup> Abolishing any of these institutions requires the use of the unanimity procedure. Altering what could be called their “fundamental features” — the composition of the Supreme Court, the rule that a province will never have fewer seats in the House of Commons as it does in the Senate and the use of English and French in all three institutions — also requires recourse to the unanimity procedure under section 41 as these features are singled out for a special degree of protection.<sup>107</sup>

Changing these institutions’ “essential features” — “the principle of proportionate representation in the House of Commons”, “the powers of the Senate and the method of selecting Senators”, “the number of members by which a province is...represented in the Senate and the residence qualifications of Senators” and “the Supreme Court of Canada” — requires the general amending procedure under section 42. Reforms to these institutions’ other or “nonessential features” can be carried out using the federal unilateral procedure in section 44, which applies to “the executive government of Canada or the Senate and House of Commons”.<sup>108</sup>

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106. *Senate Reference*, *supra* note 13 at para 48.

107. Pelletier, *supra* note 12 at 208.

108. *Supreme Court Reference*, *supra* note 13 did not clarify whether changes to non-essential features of the Supreme Court can be carried out by the federal govern-

Applying such an understanding of Part V of the *Constitution Act, 1982* suggests that the “fundamental features” of the offices of the Queen, Governor General and Lieutenant Governor and by extension, the Crown, would enjoy protection under paragraph 41(a). Their “essential features” might enjoy protection under section 38 and the remainder would be susceptible to amendment either by ordinary statute or constitutional amendment using the federal unilateral procedure. The challenge then is to identify any fundamental features of these offices and distinguish them from other features, whether essential or nonessential.

The interpretation given to the now defunct subsection 92(1) offers some guidance in this regard. The Judicial Committee’s 1919 decision in *Re Referendum and Initiative Act* held that a province could not use its power to amend its constitution under subsection 92(1) to “seriously...affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important to the legal theory of that position”.<sup>109</sup> Among other things, this meant that the province could not eliminate the requirement that the Lieutenant Governor provide royal assent. Citing the Judicial Committee, the Supreme Court reached a similar conclusion in *Manitoba Language Rights Reference* in 1985.<sup>110</sup>

The “office of Lieutenant Governor” seems also to include the power to dissolve the legislature and to appoint and dismiss ministers according to *Ontario v OPSEU*.<sup>111</sup> However, it does not seem to include the power to make appointments to provincial legislative councils as Manitoba, New Brunswick, Nova Scotia and Quebec managed to abolish the legislative councils under section 92(1) without encountering great constitutional trouble. Manitoba and Quebec’s abolition of their legislative councils even withstood rather late constitutional challenges in twin 1997 decisions.<sup>112</sup>

Extrapolating from the provincial context to the federal level, the interpretation of section 92(1) seems to suggest that the offices

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ment by ordinary statute under sections 91 or 101 of the *Constitution Act, 1867* or using the federal unilateral formula. The distinction is significant because unilateral amendments must be made explicitly to be valid: *Eurig Estate (Re)*, [1998] 2 SCR 565 at para 35.

109. *In the matter of The Initiative and Referendum Act being Chapter 59 of the Acts of the Legislative Assembly of Manitoba 6 George V*, 1919 UKPC 60, [1919] AC 935.

110. *Re Manitoba Language Rights*, [1985] 1 SCR 721 at para 135.

111. *OPSEU*, *supra* note 103 at para 102.

112. *Montplaisir c Quebec (PG)*, [1997] RJQ 109 (CS); *R v Somers*, [1997] MJ No 57 (QB).

of Queen, Governor General and Lieutenant Governor for the purposes of paragraph 41(a) include the powers over which the Crown retains constitutional discretion, such as whether to grant dissolution or dismiss a first minister, or those over which no one has meaningful discretion, such as royal assent.<sup>113</sup> However, they do not seem to extend to the powers which fall under the constitutional discretion of ministers by convention, such as the appointment of judges or senators or the exercise of the foreign affairs and war prerogatives.

Drawing a distinction between the constitutional responsibilities exercised by the Crown and those exercised by ministers seems consistent with the Supreme Court's tendency to focus on the Queen's position as "head of state", rather than as embodiment of the state. That tendency is perhaps clearest in the repeated holding, by the both the Supreme Court and provincial courts of appeal, that Crown prerogatives can be abolished, displaced or limited by ordinary statute.<sup>114</sup> It also finds support in the intent of paragraph 41(a), which according to a recent reading of the historical record, seems limited to "the status of Canada as a constitutional monarchy and the symbolic role of the Queen as head of state".<sup>115</sup>

### (c) Formalist perspective

The Supreme Court could also adopt a formalist approach to paragraph 41(a). Such an approach is a logical extension of its understanding of section 52(2) of the *Constitution Act, 1982*. If the "Constitution of Canada" includes both written and unwritten elements, among the latter could be both fundamental constitutional conventions and core Crown prerogatives. Incorporating both probably undermines the formalist position as a reading of constitutional conventions would give further support to the need to distinguish those powers that *could* be exercised by Crown from those that *are* exercised in their

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113. *Projet de loi fédéral relatif au Sénat (Re)*, 2013 QCCA 1807 at paras 57-61. The Supreme Court itself, albeit in different contexts, also seems willing to differentiate between the powers of the formal and political executives: *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 546-547 (Sopinka J); *New Brunswick Broadcasting Co v Nova Scotia (House of Assembly)*, [1993] 1 SCR 319 at 389 (McLachlin J, as she then was).

114. For a discussion of a wide range of Canadian decisions on Crown prerogative, see Lagassé, "Parliamentary and Judicial Ambivalence", *supra* note 7.

115. Barbara Cameron, "The Office and Powers of the Governor General: Political Intention and Legal Interpretation" (2012) 6 *Journal of Parliamentary and Political Law* 88 at 92.



name by ministers and civil servants, many of which are sourced in the prerogative.

However, unlike constitutional conventions, Crown prerogatives are simpler for the courts to deal with because they generally do not conflict with the constitutional text.<sup>116</sup> Instead, they can be read alongside the constitutional text to give meaning to the executive power vested in the Queen by sections 9 and 15 of the *Constitution Act, 1867*, and exercised in her name by ministers and civil servants.<sup>117</sup> Doing so aligns with the way in which textual provisions related to parliamentary privilege and judicial independence have been enriched by unwritten constitutional principles that fill out their meaning.<sup>118</sup>

There are some indications that the Supreme Court is moving in this direction. In *Operation Dismantle v The Queen*, Wilson J. discusses the federal government's argument that the source for the executive's national defence powers is *both* in section 15 *and* in Crown prerogative and did not reject it, holding that the source of the defence powers did not matter for the purposes of establishing its susceptibility to judicial review.<sup>119</sup> The Court arguably went further on some interpretations of the *Patriation Reference* in which it suggested that sections 9 and 15 were examples of how unwritten elements of the British constitutional order were transformed into written provisions of what is now the *Constitution Act, 1867*.<sup>120</sup>

Perhaps the strongest indication of the Court's shift towards recognizing the constitutional link between executive power and Crown prerogative came in *Canada v Khadr*. The Court emphasized that "the executive branch of government is responsible for decisions made under [prerogative] power, and...the executive is better placed to make such decisions within a range of constitutional options".<sup>121</sup> It also noted that it is the "*constitutional responsibility* of the executive to make decisions on matters of foreign affairs".<sup>122</sup> These passages suggest that at least some aspects of Crown prerogative are required for the executive to fulfill its constitutional responsibilities.

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116. Heard, *supra* note 15 at 229-230.

117. For an example of how this might be done, see Lagassé, "The Crown's Powers", *supra* note 83.

118. For a discussion of how this took place and how it might be analogized for the executive branch, see *ibid*.

119. *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 50.

120. See e.g. Studin, *supra* note 7 at 17.

121. *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 37

122. *Ibid* at para 39 [*emphasis added*].

This would suggest that those aspects of Crown prerogative are protected from being altered by ordinary statute. If they cannot be altered by ordinary statute, then they must be subject to either the unanimity procedure as a change to the offices that constitute the Crown as the formal executive power, the general amending procedure or the federal unilateral procedure as an amendment to the “executive government of Canada”. Whether paragraph 41(a) applies to core executive prerogatives depends on how closely the Court sees the prerogatives as linked to the Queen as the formal executive.

There is so far little evidence that the Supreme Court is prepared to do so, with one notable exception. In the *Senate Reference*, the Court approvingly cited Benoît Pelletier’s view that “the unanimity rule provided for in section 41 of the 1982 Act is justified by the need...to give each of the partners of Canada’s federal compromise a veto on those topics that are considered the *most essential to the survival of the state*”.<sup>123</sup> It is hard to examine powers more central to the survival of the state than the foreign affairs and war prerogatives, which are closely tied to the concept of the Crown as the state. The Court might be prepared to see these authorities as part of the office of the Queen and thus enjoying protection under paragraph 41(a).

At this juncture, however, this analysis remains speculative. Until or unless the Supreme Court accepts to hear a case that involves a consideration of paragraph 41(a), the ambiguity and debate will continue to surround the meaning and scope of the “office of the Queen, the Governor General and the Lieutenant Governor of a province”.

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123. *Senate Reference*, *supra* note 13 at para 41 [*emphasis added*].