

A Minimalistic Approach to Severing the British Royal Family from Canada's Constitution

Tim Sheaff*

I. Introduction

On September 8, 2022, Queen Elizabeth II passed away, resulting in the succession of Charles III and the first change to Canada's head of state in 70 years.

In a survey conducted prior to the Queen's passing, 51 percent of respondents affirmed that the country "should not remain a part of the monarchy in coming generations."¹ While 55 percent of those surveyed supported the country continuing as a constitutional monarchy so long as the Queen reigned, only 34 percent expressed the same once Charles was to become King. Time will tell whether this general apprehension about Charles III will continue, but given the negative public standing of the new King and the monarchy in general, the question is bound to arise: how can the British royal family be removed from Canada's constitutional architecture?

In 2021, Barbados successfully removed its attachment from the British royal family and a monarchical structure by transforming itself into a republic — an effortful task spanning the course of over 20 years.² The constitutional amendments needed to achieve this were not

* Ministry of Attorney General in the Government of British Columbia. The views expressed in this article are my own and should not be attributed to the Ministry of Attorney General or the Government of British Columbia. I am grateful to Richard Mailey for his contribution to this article as editor.

1 Stephanie Thomas, "As Queen marks milestone birthday, survey shows Canadian support for monarchy dwindling", *CTV News* (21 April 2022), online: <calgary.ctvnews.ca/as-queen-marks-milestone-birthday-survey-shows-canadian-support-for-monarchy-dwindling-1.5870438> [perma.cc/U2AH-GCMH].

2 David Torrance, "Barbados becomes a republic" (29 November 2021), online: *UK House of Commons Library* <commonslibrary.parliament.uk/barbados-becomes-a-republic> [perma.cc/VQ7D-A2DG].

simple, requiring the country to, among other things, transfer the powers of the Queen to the “state” and establish an office of President (whose role is similar to their former Governor General).³ The country’s amended Constitution sets out considerable details about the new office of President, notably, the procedure by which they are elected by Barbados’ Parliament and the circumstances in which they can be removed from office, including for misbehavior or violating Barbados’ Constitution.⁴

If Barbados’ experience is anything to go by, Canada could expect a related initiative to spawn constitutional negotiations that would last for years — maybe even decades. This is compounded by the complexity of the formulas for amending Canada’s Constitution, which would make this type of radical change an even more insurmountable task. The *Constitution Act, 1982* states that amendments “in relation to ... the office of the Queen” (or King) require unanimous assent by all provinces and Parliament.⁵ Since the enactment of the *Constitution Act, 1982*, no proposed amendments to the Constitution have met this high threshold. Also of interest is that not even the *Constitution Act, 1982* itself received assent from all provinces, with Quebec choosing not to ratify it.

Since the option of transitioning Canada to a republic is practically unlikely, the question arises as to what other options may be available to separate Canada from the British royals. Ideally, any form of change would retain our existing institutions and legal traditions to the greatest extent possible. Why discard our constitutional monarchy in its entirety if it is serving the country well?

With this in mind, this article offers a minimalistic approach to achieving the constitutional amendments necessary to remove the United Kingdom’s monarch as Canada’s head of state. A minimalistic approach is one that will result in the fewest changes to the Constitution necessary to give effect to the stated goal and which collectively have the least impact on the constitutional status quo (including the existing structure of Canada’s Constitution and its institutions, the roles and responsibilities of constitutional actors, and how the constitution operates in practice). The minimalistic approach devised in this article is not meant as a mere academic curiosity; rather, it is intended to support future consideration of pragmatic amendments that cause minimal disturbance and, consequently, have greater potential to avoid triggering the need for unanimous assent.

To present this minimalistic approach, this article is framed as follows. First, it describes the relevant amending formulas set out in the *Constitution Act, 1982*, as well as some of the jurisprudence on these formulas. Next, it proposes a formulation for divorcing Canada from the British royal family — establishing a notional Sovereign by installing an artificial individual in the office of the King.⁶ As the lack of a warm body holding the King’s office would impact

3 *Constitution (Amendment) (No. 2) Act, 2021*, Act 2021-22, ss 6, 28, online: <www.barbadosparliament.com/uploads/bill_resolution/56f53e308108b4b315d1b367c2914f7a.pdf> [perma.cc/S8NW-7APM].

4 *Ibid*, ss 32, 34C.

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

6 The author notes that this article contains themes similar to a blog post by Phillip Lagassé about the office of the Queen being left vacant. See Phillip Lagassé, “Can Canada go without a Queen? Probably” (25 November 2021), online (blog): Phillip Lagassé <lagassep.com/2021/11/25/can-canada-go-without-a-queen-probably> [perma.cc/7SSW-5K3L].

how the Governor General (“GG”) is appointed, I suggest a substitution for this appointment process. Lastly, included within the above analysis, I give consideration to whether these amendments could be achieved by using the *Constitution Act, 1982*’s 7/50 formula or by an Act of Parliament alone.

II. The Constitution’s Amending Formulas

The *Constitution Act, 1982* sets out how amendments to the Constitution may be made. The *Act* includes several amending formulas, each of which applies to different types of amendments.

The least onerous of these rules are located in sections 44 and 45 of the *Act*. Under section 44, Parliament may make unilateral amendments that apply only to the executive government of Canada or Parliament.⁷ Similarly, under section 45, the legislature of a province may make amendments to its provincial constitution, subject to certain exceptions.⁸

At the other end of the difficulty spectrum, certain amendments to the Constitution require assent by all the provinces and Parliament (the “unanimous assent” formula).⁹ Notably, section 41(a) of the *Constitution Act, 1982* states that unanimous assent is required for amendments “in relation to ... the office of the [King], the Governor General, or the Lieutenant Governor of a province.”¹⁰

Other amendments may be made only with the general amending formula, which requires assent by Parliament and the legislative assemblies of two-thirds of the provinces that have, in the aggregate, at least 50 percent of the population of all the provinces.¹¹ This amending formula, which is set out in section 38 of the *Act*, is commonly referred to as the “7/50 formula.”

Several cases have considered the proper application of the amending formulas.¹² In *Reference re Senate Reform*,¹³ the federal government asked the Supreme Court of Canada if it could unilaterally make various constitutional changes relating to the Senate, including setting fixed term lengths for Senators and establishing a consultative voting process for the public to select Senate nominees. In its response to these questions, the Court set out general principles for how the amending formulas should be construed. Per the Court, one must look beyond the plain words of the text of each amending formula; instead, the proper interpretation is informed by the nature of the Constitution and its rules of interpretation, which requires reviewing the Constitution in a broad and purposive manner, placing it in its linguistic, phil-

7 *Constitution Act, 1982*, *Supra* note 5, s 44.

8 *Ibid*, s 45.

9 *Ibid*, s 41.

10 *Ibid*, s 41(a).

11 *Ibid*, s 38.

12 Note that in *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, the Supreme Court of Canada considered whether a proposed amendment to the federal *Supreme Court Act*, relating to the number of judges appointed from Quebec to the Supreme Court of Canada, required unanimous assent under section 41(d) of the *Constitution Act, 1982* since the amendments were made in relation to “the composition of the Supreme Court of Canada.” A discussion of this case was omitted for brevity as it has limited application to the matters in this paper.

13 2014 SCC 32 [*Senate Reform*].

osophical, and historical context, and giving consideration to the principles on which it is founded (including federalism, democracy, protection of minorities, and the rule of law).¹⁴

With respect to the historical context of the amending formulas, the Court explained the developments that led to the inclusion of the amending formulas in the *Constitution Act, 1982*. As the Court wrote:

In October 1980, amid efforts to achieve broad constitutional reform, the federal government tabled a new proposed amending formula in the House of Commons and the Senate ... In response, the provincial premiers developed a counter-proposal that became the template for Part V of the *Constitution Act, 1982* — the “April Accord” of 1981.¹⁵

As the Court further discussed: “The April Accord and amending formulas reflect the political consensus that the provinces must have a say in the constitutional changes that engage their interests,”¹⁶ with the purpose of these formulas being to limit the authority of the federal government to make unilateral amendments to the Constitution. In addition, the Court said, the amending formulas are intended to “foster dialogue between the federal government and the provinces on matters of constitutional change, and to protect Canada’s constitutional status quo.”¹⁷

With respect to the 7/50 formula in particular, the Court explained that it is the general rule for constitutional amendments, representing the balance considered appropriate by the framers of the *Constitution Act, 1982* for most constitutional amendments.¹⁸ By requiring most, but not all, of the provinces’ consent to a constitutional change, the 7/50 formula “achieves a compromise between the demands of legitimacy and flexibility.”¹⁹ The other amending formulas should be considered exceptions to this general method.²⁰

In answering the federal government’s questions about Senate reform, the Court found that the fixing of Senators’ terms could not be achieved by an Act of Parliament alone and would instead be subject to the 7/50 formula.²¹ According to the court, fixing the terms of Senate appointments would change the Senate’s fundamental nature by providing a weaker tenure, and would engage the provinces’ interest insofar as the Senate constitutes an integral part of the federal system. The Court reached the same conclusion with respect to the proposal of consultative Senate elections.²² Such elections, it said, would fundamentally alter the constitutional structure by subjecting Senators to the political pressures of the electoral process and endowing them with a popular mandate. The amendments would thereby “weaken the Senate’s role of sober second thought and ... give it the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design.”²³

14 *Ibid* at para 25.

15 *Ibid* at para 30.

16 *Ibid* at para 31, citing Patrick J Monahan & Byron Shaw, *Constitutional Law* (Toronto: Irwin Law, 2013).

17 *Ibid* at para 31.

18 *Ibid* at para 36.

19 *Ibid* at para 35, citing Jamie Cameron, “To Amend the Process of Amendment” in Gérald A Beaudoin, ed, *Federalism for the Future: Essential Reforms* (Montreal: Wilson & Lafleur, 1998).

20 *Ibid* at para 36.

21 *Ibid* at para 70.

22 *Ibid*.

23 *Ibid* at 60.

In the Quebec case of *Motard v Attorney General of Canada*,²⁴ the Quebec Court of Appeal considered the amending formulas as they apply to the office of the King (then the Queen). The Court found that Parliament's passing of the *Succession to the Throne Act, 2013*,²⁵ which affirmed a United Kingdom law that altered rules about succession, did not require unanimous assent but instead could be made by the federal government alone. The Court of Appeal confirmed the lower court's decision that the unanimous assent formula as it relates to the office of the Queen or King is designed to protect the institution of the monarchy and the "powers, status and role" conferred upon the monarch. In this case, the United Kingdom Parliament's amendment to the rules of royal succession and Canada's assent to those amendments did not have any impact on the office of the King in Canada, as it did not alter the powers, status, or constitutional role devolved upon the King.²⁶

The application of section 41(a) of the *Constitution Act, 1982* was more recently considered in *Democracy Watch v British Columbia (Lieutenant Governor)*.²⁷ In 2001, British Columbia enacted a law that set a fixed date for elections in the province. In 2020, the Lieutenant Governor, on the advice of the Premier, dissolved the legislature for the purpose of holding an election approximately one year before the date set for the next election. The petitioners argued that the enactment of the fixed election law had the effect of constraining the Lieutenant Governor's prerogative power to dissolve the legislature before the fixed election date unless the government had lost the confidence of the house. The British Columbia Supreme Court considered whether, if the petitioner's argument was correct, the enactment of the fixed election law required the use of the unanimous assent formula.

In analyzing section 41(a), the Court determined that the unanimous assent formula is only engaged in the case of legislation that would "undermine the legal theory underlying the office or institution" of the Lieutenant Governor.²⁸ Legislation that "constrains or curtails prerogative powers of the Lieutenant Governor is not necessarily legislation in relation to [that] office" for the purposes of section 41(a).²⁹ Although the Court did not give definition to what was meant by "undermin[ing] the legal theory" of the office, its application of the test gave consideration to the purpose and function of the Lieutenant Governor within Canada's broader constitutional framework. While in this case, the Court found that the petitioner's interpretation of the fixed election law was incorrect, it nevertheless concluded that the Lieutenant Governor's power of dissolution "is not so fundamental to the vice-regal role that the constraint or curtailment hypothesized by the petitioners will undermine the legal theory underlying the office."³⁰

A review of *Senate Reference*, *Motard*, and *Democracy Watch* helps us to form a picture of which amending formula will apply to a constitutional change concerning the office of the King or the GG. As can be surmised from *Motard* and *Democracy Watch*, amendments that do not "undermine the legal theory" of these offices will not require unanimous assent. In

24 2019 QCCA 1826 [*Motard*], aff'g 2016 QCCS 588, leave to appeal to SCC refused, 38986 (23 April 2020).

25 SC 2013, c 6.

26 *Motard*, *supra* note 24 at para 92.

27 2022 BCSC 1037 [*Democracy Watch*].

28 *Ibid* at para 22.

29 *Ibid* at para 37.

30 *Ibid* at para 41.

considering whether either office's underlying legal theory has been undermined, attention must be given to the purposes and functions of the office within the broader constitutional context, which may be informed by consideration of the powers, role, and status of the office. In some cases, amendments relating to succession or the constraint of prerogative powers will not require unanimous assent.

That is not the end of the story, however. If unanimous assent is not needed, this does not mean that Parliament can act alone. According to the *Senate Reference*, the 7/50 formula is the “procedure of general application for amendments to the Constitution of Canada” and reflects the principle that “substantial provincial consent must be obtained for constitutional change that engages provincial interest.”³¹

III. Minimalistic Approaches to Amending the Constitution

Removing the British Royal Monarch

While there is much to say about the office of the King, I've condensed a description into this single paragraph, setting out only what is necessary for understanding this paper. The King is Canada's formal head of state and the personal embodiment of the Crown in Canada.³² At common law, the King is a non-statutory corporation sole.³³ A corporation sole is a corporate entity with legal personality, but one without shareholders or directors. Rather, a corporation sole consists of an office occupied by an individual who exercises its powers and holds its rights and liabilities; the office and the individual who holds it fuse to form the corporate entity.³⁴ Although Charles III is a natural person, in Canadian law, references to the “King” or the “Sovereign” refer to the King in his official capacity as a corporation sole.³⁵ The office of King being a corporation sole “means that this legal person personifies the Canadian state,” and as such, “[t]he Canadian state is legally a person and all state and governing authority is said to flow from this legal personality.”³⁶ The office of the King “cannot be disembodied from a natural person” since the Crown, as a corporation sole, can never be vacant.³⁷ When a person occupying an office of corporation sole is succeeded by another, it is not necessary to formally convey any rights or liabilities of the office to the successor; instead, the rights and liabilities of the corporation sole remain attached to the office and are acquired by the successor upon their accession.³⁸

In order to achieve a minimalistic approach to detaching the British royal family from Canada's Constitution, this article proposes that the current monarch could be relieved from the office of the King and replaced by a fictitious entity that for all intents and purposes would

31 *Senate Reform*, *supra* note 13 at paras 34 and 36.

32 “About the Crown” (last modified 24 October 2018), online: *Canada.ca* <<https://www.canada.ca/en/canadian-heritage/services/crown-canada/about.html>> [perma.cc/HYX9-ZAW7].

33 Philippe Lagassé & James WJ Bowden, “Royal Succession and the Canadian Crown as a Corporation Sole: A Critique of Canada's Succession to the Throne Act, 2013” (2014) 23:1 Constitutional Forum.

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

37 *Ibid.*

38 *Penney v Lahey*, 2002 NFCA 47 at para 108, citing Kevin McGuinness, *The Law and Practice of Canadian Business Corporations* (Toronto: Butterworths, 1997).

be treated at law as though it were an individual — an “artificial individual.”³⁹ Even though such an artificial individual would have no physical body, if Parliament and the legislatures say that such entity is an individual, it must legally be so. The amendments would therefore create a legal fiction, but one that, at law, must be accepted as true. As a result of this fictitious monarch, in Canada, there would be a notional Sovereign personifying the state as a vessel for the state’s powers, rights, and liabilities — an ideal and imaginary supreme legal being that sits on the throne.

If you find the concept of a notional Sovereign described above to be too bold, a notional Sovereign can also be explained by a novel (and more subdued) legal concept of leaving a corporation sole “dormant.” This concept is best understood by comparing it to a corporation sole being vacant. A vacant corporation sole is one that has no holder. In the context of the King, it would not be enough to simply remove Charles III and leave the office vacant, as there would be no person occupying the corporation sole who would hold the rights and liabilities of the state. However, a corporation sole that is dormant would remain occupied by an artificial individual. As such, the Crown’s rights and liabilities would remain held by a person at law, albeit since the artificial individual by its nature could not exercise the office’s powers, the corporation sole would be inactive (hence, the term “dormant” is an apt description of this arrangement, or in a more colloquial sense, the office could be said as being in slumber). From this perspective, were the office of the King left dormant, Canada wouldn’t necessarily be appointing a notional Sovereign *per se*, but rather Canada would have a notional Sovereign in effect. Although there is no precedent for such a legal scheme, there is also no barrier to the legislatures and Parliament enacting it (aside from using the appropriate amending formula), and if they can upend the Constitution by transforming Canada into a republic, then they can certainly put an artificial individual in the King’s office to cause it to become dormant.

In my view, discarding the natural person holding the King’s office in favor of an artificial one would actually not fundamentally impact the office *per se*. The existing rights, liabilities, and powers attached to the office would remain with the corporation sole and be unaffected by the change. As with other corporation soles, these rights, liabilities, and powers would be transferred from Charles III to the artificial individual upon the latter succeeding him. While the law anticipates that corporation soles will be occupied by natural persons, the deviation in jurisprudence of allowing an artificial individual to hold one would arguably not be so impactful as to undermine its foundational legal concept. Indeed, the corporation sole allows for an office to exist in perpetuity, and consistent with this, a legal entity has perpetual existence.

Moreover, in accordance with other instances in which the King’s office is held by a natural person, occupying the office with an artificial individual would not dissolve the delineation between the office and its holder. The office would be preserved and, if it were ever deemed appropriate, could still be held by another natural person in the future. To this extent, one could argue that an artificial individual occupying the office is akin to a placeholder, such that the office would not need to be reconstituted if Canada ever desired to appoint the United Kingdom’s monarch (or its own domestic monarch) as its King or Queen again.

39 I have opted to use the expression “artificial individual” rather than “artificial person.” Though the latter term is often used to refer to juridical persons, notably traditional corporations, I believe the unique term of artificial individual is more apropos in this circumstance given the bespoke nature of the proposed legal entity and purpose for which it will be put to use.

Having an artificial individual fill the role of monarch is also consistent with how Canada's Constitution operates in practice and with the monarch's current status within the broader constitutional power dynamic. Given the monarch's lack of presence in Canada and lack of participation in national affairs (aside from occasionally consenting to a GG's appointment), the office already carries on in Canada as though the monarch is a non-physical entity. Although not a legal matter, because of the monarch's perpetual absence, the Sovereign is arguably perceived in the Canadian zeitgeist as an imaginary authority and ethereal apparition.

The artificial individual can also be conceived of as a person who is perpetually incapacitated. England has a *Regency Act*⁴⁰ which allows a regent to act on behalf of an incapacitated monarch, and in the Canadian context, the GG would continue in their vice-regal role to act on behalf of one. To this end, the law already anticipates that someone else may act on behalf of a Sovereign who cannot exercise the powers of the office themselves.

In concluding that establishing a notional Sovereign would not change the "office" of the King and would therefore not require unanimous assent, the question becomes whether the amendment would require the use of the 7/50 formula or could be made by Parliament alone. In this case, the 7/50 formula is the likely candidate, for two reasons. First, since the provinces share the same Sovereign as the federal government, provincial interests would be engaged, triggering the need for intergovernmental dialogue. Second, the amendments would change the Constitution's architecture by disturbing the constitutional principle of symmetry, which provides that whoever is the monarch of the United Kingdom is the monarch of Canada. As stated in *Motard*, "the principle of symmetry between the [King] of the United Kingdom and the [King] of Canada is firmly rooted in the Canadian Constitution ... The preamble to the *Constitution Act, 1867* clearly states that Canada's founding provinces are uniting federally into one dominion under the crown of the United Kingdom of Great Britain and Ireland."⁴¹

Appointing and Removing the Governor General

Everything you need to know about the GG for the purposes of this paper is set out in this paragraph. The GG is appointed by the King, but by convention the King will appoint whomever the Prime Minister ("PM") requests.⁴² The GG has the legal power to summon, suspend, prorogue, or dissolve the House of Commons, although these powers are exercised in accordance with convention. Under the 1947 *Letters Patent Constituting the Office of Governor General of Canada* ("*Letters Patent, 1947*"),⁴³ the GG has been delegated "all powers and authorities law-

40 *Regency Act 1937* (UK), 1 Edw VIII & 1 Geo VI, c 16, ss 1 & 2.

41 *Motard*, *supra* note 24 at paras 42 and 44.

42 Marc Bosc & André Gagnon, eds, *House of Commons Procedure and Practice*, 3rd ed (Montreal, QC: Thomson Reuters, 2017) at 18. There are exceptional circumstances in which the King may refuse to follow the PM's advice, including cases in which a PM is seeking to replace a GG who is getting ready to dismiss the PM for "engaging in criminality" or for "acting unconstitutionally," or in which the PM is seeking to remove the GG for other "dubious reasons" (for example, if the PM has lost confidence of the house and the GG intends to let another person form government rather than dissolve Parliament); see Phillip Lagassé, "Disciplining and Dismissing Governors General" (21 July 2020), online (blog): Phillip Lagassé <<https://lagassep.com/2020/07/21/disciplining-and-dismissing-governors-general>> [perma.cc/JZ2D-RE6J].

43 Reprinted in RSC 1985, App II, No. 31, online: <<https://primarydocuments.ca/letters-patent-constituting-the-office-of-the-governor-general-of-canada-1947>> [perma.cc/LW8K-2YLD].

fully belonging to [the Sovereign] in respect of Canada,” and as such, the GG can exercise the King’s reserve powers, among them being the power to appoint or dismiss a PM. In the event a GG is removed, the *Letters Patent, 1947* also provides that the Chief Justice of the Supreme Court of Canada may act as “Administrator” and exercise the powers and authorities granted to the GG.⁴⁴ More generally, the GG has duties to uphold the conventions of responsible government, being the principle that the executive branch must continue to hold the confidence of the House of Commons.⁴⁵ In fulfilling these duties, following elections and votes of non-confidence the GG must decide whether a person (e.g. the leader of the political party with the most seats in the House) can hold the House’s confidence and should be given a chance to govern or whether Parliament should be dissolved and an election called.⁴⁶ This decision is also made according to convention.⁴⁷

As a result of the creation of a fictitious monarch, there would be no individual to exercise the Sovereign’s power to appoint or remove a GG. To address this gap, this article makes suggestions to mimic the current practical exercise of appointing the GG and maintaining the chain of hierarchy within the constitutional order. It suggests that the combination of these elements would retain the GG’s status and role as *de facto* head of state, guarantor of responsible government, and representative of the Crown in Canada, and to this extent, the legal theory of the office would not be undermined.

First, the PM could be given the authority to appoint or remove a GG through the promulgation of some type of legal instrument — a “proclamation,” say. However, the PM’s proclamation should not take effect, for reasons that will soon be explained, until some minimum period of time elapsed.

Although the legal authority to appoint the GG rests with the King, the GG’s appointment is effectively at the discretion of the PM, since the King, by convention, will make such appointments on the PM’s advice. As such, a *prima facie* solution as to who could appoint the GG could be to allow the PM to simply appoint them directly.

That said, having the GG serve at the whims of the PM could affect the balance of power between the two, which is crucial when the GG is tasked with fulfilling their constitutional responsibilities as the guarantor of responsible government. For example, as a consequence of creating such an imbalance, if, in engaging with the GG on a matter relating to the confidence of the House, the PM were to receive an unwanted answer or was anticipating one, they could leverage their power for political gain and immediately appoint a new GG waiting in the wings whom they know would provide a more favorable response. Moreover, even the possibility of this threat to the GG’s security of tenure could affect their impartiality (or at least the public perception of their impartiality).⁴⁸

44 *Ibid.*

45 Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2021) at 9:1.

46 *Ibid.* at 9:17

47 *Ibid.*

48 Consider the following event as an example: in late 2008, Prime Minister Stephen Harper made a request to Governor General Michaëlle Jean to prorogue Parliament, which had been in session just two weeks. The Liberals and NDP had established a coalition (supported by the Bloc Québécois) for the purpose of forming government, and at the time of the Prime Minister’s request, it was seemingly evident that a non-confidence vote was set to occur. After some deliberation, the Governor General acceded to the Prime

To address these issues, suffice it to note that the GG's security of tenure at present is far from absolute. Indeed, the only practical impediment to the GG's removal is the PM securing a time in the King's calendar to meet at his earliest convenience. Consequently, as a minimalistic approach to maintaining the constitutional status quo, my suggestion is to allow the PM to appoint or remove a GG but to impose a temporal impediment to replicate the current procedural barrier of obtaining the King's consent. To achieve this, the PM's proclamation appointing or removing a GG should not take effect until some minimum period of time has elapsed (e.g. 4 weeks or whatever other waiting period is determined to be appropriate). The GG would, therefore, effectively have the same security of tenure as they have currently, and as such, their status and role would remain relatively the same.

In formal terms, the waiting period attached to the PM's decision can be described as the PM suffering a "disadvantage" vis-à-vis the GG; while each could appoint and remove the other, the GG could still appoint or dismiss a PM immediately, whereas the PM would be disadvantaged in that the GG's appointment or removal would not take effect until after the delay.

As a hypothetical example of how this temporal limitation could operate in practice, if following an election or vote of non-confidence, an incumbent and soon-to-be dismissed PM chose to make a proclamation for the purposes of appointing a new GG with stronger allegiances to the PM, the incumbent GG could, during the interval before the proclamation's effective date, appoint a new PM who held the confidence of the House of Commons. The new PM could then, if they decided, rescind that proclamation before the expiry of that interval to retain the incumbent GG. It is also worth noting that having an intermediate period prior to when a GG's appointment is effective is consistent with historical practice. In the majority of cases since Canada's conception, the interval between the GG's appointment date and installation date has been at least a month.⁴⁹

As a caveat to the above, my view is that the PM's authority should be restricted such that when Parliament is dissolved the PM may only remove a GG (subject to the same temporal impediment). Not only does this minimize the PM's authority further, but it would also remove any temptations to appoint a new GG if polling during the election period is not in the PM's favour. Additionally, if it were ever necessary to remove a GG during the election period, restraining the PM from being able to appoint a new one is more consistent with the caretaker convention.⁵⁰

Minister's request. While the Governor General ultimately followed convention in accepting the Prime Minister's advice to prorogue Parliament, had the Governor General been serving directly under the Prime Minister without having any intermediate protections, the public could have perceived the Governor General to be exhibiting bias in favour of the Prime Minister. See Louise Elliott, "PM gave Jean pledges in prorogation crisis", *CBC News* (2 October 2010), online: <www.cbc.ca/news/politics/pm-gave-jean-pledges-in-prorogation-crisis-1.969491> [perma.cc/DDK3-EXBV]; Michael Valpy, "Leaders forcing Jean into uncharted territory", *The Globe and Mail* (1 December 2008), online: <www.theglobeandmail.com/news/politics/leaders-forcing-jean-into-uncharted-territory/article1066743> [perma.cc/UF2K-UZFL].

49 *Supra* note 42 at Appendix 1.

50 "Guidelines on the conduct of Ministers, Ministers of State, exempt staff and public servants during an election" (last modified 15 August 2021), online: *Canada.ca* <<https://www.canada.ca/en/privy-council/services/publications/guidelines-conduct-ministers-state-exempt-staff-public-servants-election.html>> [perma.cc/A99G-YP2T].

Amendments that replace the current GG appointment process must also consider the exceptional case of the emergence of a rogue GG who does not act in accordance with convention. There are several scenarios in which a rogue GG might engage in such mischief, two of which are dismissing a PM without a legitimate purpose and allowing an incumbent government to stay in power following a vote of non-confidence. In the former case, there would be no PM to remove the rogue GG, and in the latter case, the incumbent PM who continued to reign might not want to disrupt the GG's tenure. In my view, the House of Commons should have the authority to remove (but not appoint) a GG by resolution to address these scenarios. Allowing the House to remove the GG when there is no PM would provide legitimacy to the decision, and who better than the House to address a rogue GG who does not ensure that government has the House's confidence. Providing the House with the authority to only remove a GG rather than appoint a new one is also more consistent with this paper's minimalistic approach and with the status quo of the PM being the (*de facto*) sole appointer. It's also my view that the House's resolution should be allowed to take effect right away, given that any extraordinary circumstance for which this authority would be used would likely need to be resolved with immediacy. While it is theoretically possible that Members of Parliament could, at the time a non-confidence vote is passed, capriciously remove a GG who shows no indication of deviating from constitutional norms, I think the political ramifications of such a move at a time of governmental uncertainty would make this event unlikely.

Note that if a rogue GG sought to avoid an action against them by the House of Commons, the GG could refuse to summon Parliament or, if Parliament was in session, suspend, prorogue, or dissolve it. Therefore, the oversight power afforded to the House must include an independent authority for the House to meet. In the very exceptional case that the House would need to meet to address a rogue GG, I expect political parties could coordinate amongst themselves to determine a suitable process. Note further that, when Parliament is dissolved, Members of Parliament cease to be as such,⁵¹ so there would be no House of Commons to remove the GG during that time.

The judiciary would also have a role to play in the GG's appointment process. In accordance with the *Letters Patent, 1947*, if the GG is removed the Chief Justice would step in as Administrator and could steer things back to normality as appropriate (by appointing a new PM or doing whatever else might be necessary).⁵² Courts might also be able to address two other sources of mischief, those being a rogue GG who dissolves Parliament, or dismisses a PM when Parliament is dissolved, against convention and without a legitimate purpose. For example, the court might find that a GG's failure to follow convention is so egregious that the GG has acted outside their oath of office and, therefore, the exercise of their powers was not an official act.

Finally, in order not to upset the powers, statuses and roles of the King and GG vis-à-vis each other, the formal legal nexus between the King and the King's vice-regal must not be

51 JWJ Bowden, "Recalling a Parliament Already Dissolved? Not in Canada: the 43rd Parliament Is Dead" (19 August 2019), online (blog): *Parliamentum* <<https://parliamentum.org/2021/08/19/recalling-a-parliament-already-dissolved-not-in-canada-the-43rd-parliament-is-dead>> [perma.cc/FCE8-4CXM].

52 As an example of the Chief Justice's occasional role as Administrator, the Chief Justice acted as such in 2021 for a period of about 6 months between Governor General Julie Payette's resignation and Marie Simon's appointment.

disturbed. The office of the King would therefore need to formally retain the supreme legal authority to appoint or remove a GG and, to this extent, override a decision of the PM or House. Although, if a notional Sovereign is established, this legal authority would be inoperative.

As this paper has suggested that the above scheme wouldn't undermine the legal theory underpinning the relevant offices, it follows that the amendments for the GG's appointment could be made with the 7/50 formula. However, given the limited scope of the amendments as focused on the executive government of Canada and Parliament, this paper does not preclude the possibility that the amendments could be made by Parliament alone. Were that the case, broader constitutional talks between the federal government and the provinces would only need to focus on the discrete task of reaching a consensus on replacing the current monarch with a fictitious one, or putting the office into dormancy if that is your preferred narrative. In fact, it might even be seeking agreement on only one provision — "The office of the Sovereign shall be held by an entity that is to be treated as though it were a natural person."

As a caveat, sections 55 and 57 of the *Constitution Act, 1867* provide that when a Bill is enacted by Parliament, the GG may withhold royal assent and reserve the Bill for assent by the King. If Parliament were to make the amendments alone, using the process set out in those sections and receiving the King's specific approval would add legitimacy to the new appointment process. That being said, because there would be new legal powers given to the PM and House of Commons for the GG's appointment when there are currently none, the need for the 7/50 formula should be assumed.

IV. Conclusion

This article advanced a minimalistic approach for removing the United Kingdom's monarch as Canada's head of state and for appointing and replacing a GG. First, the amendments would install an artificial individual in the King's office, accordingly giving effect to Canada having a notional Sovereign. The country would thereby continue in formal structure as a constitutional monarchy, but one that perhaps could best be described as a post-colonial constitutional monarchy. Second, the amendments would establish a new process for appointing the GG, which would include roles for the executive, legislative, and judicial branches of government.

Lastly, I recognize that this paper did not examine the potential effects of establishing a notional Sovereign on the Crown's legal relations with Indigenous peoples. This topic requires further analysis. For example, what impact would establishing a notional Sovereign have on Aboriginal rights jurisprudence under section 35 of the *Constitution Act, 1982* (e.g. the honour of the Crown) and on the Crown's status as a party to treaties? Might there be no impact at all, since the office of the King would remain in existence and the obligations tied to the office would follow it when it's passed to the artificial individual? These are important questions, but they are questions that must be addressed elsewhere.