The Crown's Powers of Command-in-Chief: Interpreting Section 15 of Canada's *Constitution Act, 1867*

Philippe Lagassé*

Studies of Canadian constitutional law have tended to overlook section 15 of the Constitution Act, 1867*, which vests the command-in-chief of Canada's armed forces in the Crown as the executive power. This article argues that, despite being largely ignored, section 15 is a significant constitutional provision, one that grants the executive constitutionally-protected powers over the armed forces. Specifically, the article demonstrates that this section provides the executive with an entrenched constitutional authority to raise, govern, command, and use Canada's armed forces. While parliamentary statutes could limit how this authority is exercised, these powers of the executive cannot be abolished or displaced by an Act of Parliament owing to their being sourced in section 15.*

The article begins with an overview of the nature of executive power in Canada, in order to establish that the Crown is vested with constitutionally-entrenched authorities that cannot be abolished or entirely displaced by statute. Next, the article argues that section 15 of the Constitution Act, 1867 *provides the executive with a constitutionally-protected authority to raise, govern, command, and use Canada's armed forces. Drawing on comparisons with Australian and New Zealand laws, the article then demonstrates that these section 15 powers are assumed to exist by Canada's* National Defence Act*, the parliamentary statute that is often presented as the source of the executive's authority over the armed forces.*

En général, les études portant sur le droit constitutionnel canadien ont ignoré l'article 15 de la Loi constitutionnelle de 1867*, qui assigne le commandement en chef des forces armées canadiennes à la Couronne en tant que pouvoir exécutif. L'auteur de cet article soutient que, en dépit du fait qu'il a été pratiquement ignoré, l'article 15 est une disposition constitutionnelle significative qui accorde à l'exécutif des pouvoirs garantis par la constitution sur les forces armées. L'auteur démontre notamment que cet article donne à l'exécutif une autorité constitutionnelle bien établie pour lever, diriger, commander et se servir des forces armées canadiennes. Bien que des actes parlementaires puissent limiter la manière dont cette autorité est exercée, ces pouvoirs de l'exécutif ne peuvent pas être abolis ou remplacés par une loi du Parlement en raison du fait qu'ils ont comme source l'article 15.*

L'auteur donne d'abord un aperçu de la nature du pouvoir exécutif au Canada afin d'établir que la Couronne est investie d'autorités garanties par la constitution qui ne peuvent pas être abolies ou remplacées tout à fait par un acte. Ensuite il soutient que l'article 15 de la Loi constitutionnelle de 1867 *donne à l'exécutif une autorité garantie par la constitution pour lever, diriger, commander et se servir des forces armées canadiennes. S'appuyant sur des comparaisons avec des lois australiennes et néo-zélandaises, l'auteur démontre ensuite que la* Loi sur la défense nationale*, l'acte parlementaire canadien qui est le plus souvent présenté comme la source de l'autorité de l'exécutif sur les forces armées, suppose l'existence de ces pouvoirs liés à l'article 15.*

* Associate Professor Graduate School of Public and International Affairs, University of Ottawa The author thanks the many colleagues from government and academia who read drafts of this article, as well as those who offered comments when the paper was presented at various events in Ottawa and at the 2013 Canadian Political Science Association convention. The author is equally grateful toward the article's anonymous reviewers for their constructive critiques and invaluable suggestions.

"The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen."

-Section 15, *Constitution Act, 1867*

Section 15 of the Canadian *Constitution Act, 1867* vests the command-in-chief of the Canada's armed forces in the Crown.[1] Although this is a significant constitutional provision, little has been said about its contemporary relevance. When discussing how the Canadian military is commanded and controlled, governmental, legal, and academic studies have focused on acts of Parliament.[2] This focus on parliamentary statutes is understandable. According to section 91(7) of the *Constitution Act, 1867*, Parliament may legislate for "Militia, Military and Naval Service, and Defence"; furthermore, Westminster parliaments exercise a degree of control over their state's armed forces through statutes and the granting of supply. As a result, when examining the legal foundations of how the military is governed in Canada, there has been a tendency to overlook section 15 and to concentrate on section 91(7).[3] While the former is often understood to be a colonial vestige or a merely symbolic provision, the latter is taken to be the effective source of the authorities granted to ministers, civilian defence offices, and members of the Canadian Forces (CF).

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

2 See Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair*, 5 vols (Ottawa: Public Works and Government Services Canada, 1997); Douglas L Bland, *Chiefs of Defence: Government and the Unified Command of the Canadian Armed Forces* (Toronto: Canadian Institute of Strategic Studies, 1995); Douglas L Bland, *National Defence Headquarters: Centre for Decision* (Ottawa: Public Works and Government Services Canada, 1995), a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia; Douglas L Bland, "Parliament's Duty to Defend Canada" 1:4 Canadian Military Journal 35, online: Canadian Military Journal < http://www.journal.forces.gc.ca/vo1/no4/doc/35-43-eng.pdf>; Ross Graham, "Civil Control of the Canadian Forces: National Direction and National Command" 3:1 Canadian Military Journal 23, online: Canadian Military Journal <http://www.journal.forces.gc.ca/vo3/no1/doc/23-30-eng.pdf>; Gilles Létourneau & Michel W Drapeau, *Military Justice in Action: Annotated National Defence Legislation* (Toronto: Carswell, 2011) [Létourneau & Drapeau]; Chris Madsen, *Military Law and Operations* (Aurora, ON: Canada Law Book, 2010) [Madsen]; Kim Richard Nossal, Stéphane Roussel, and Stéphane Paquin, *International Policy and Politics in Canada* (Don Mills, ON: Pearson Higher Education Canada, 2010) at ch 10.

3 *Supra* note 1, s 91(7). Section 91(7), it must be noted, is itself vague and its scope unclear. On this point see, Irvin Studin, "Constitution and strategy: Understanding Canadian power in the world" (2010) 28 NJCL 1 [Studin].

This article aims to show that section 15 of the *Constitution Act, 1867* is not a colonial vestige or mere symbolism; rather, it vests the executive with constitutional powers over Canada's armed forces. Section 15, the article posits, vests powers in the executive that have a constitutional status.[4] Unlike the Crown's prerogative powers,[5] it will be argued, the authority vested in the executive by section 15 cannot be abolished or completely supplanted by statute.[6] The article further demonstrates that the statute which currently regulates how the CF are governed, the *National Defence Act*, can only be properly understood with reference to section 15 and the constitutional powers it vests in the executive.[7] Stated plainly, section 15 serves as the constitutional foundation upon which critical portions of the *National Defence Act* are built. The language employed in key provisions of the *National Defence Act* must be read in light of section 15 to grasp its actual meaning, and the gaps and silences that are found in the legislation are necessarily filled by the Crown's constitutional powers of command-in-chief. Under a system of responsible government, this in turn means that section 15 vests the prime minister and Cabinet with more power over the armed forces than a simple reading of the *National Defence Act* might suggest. This interpretation is informed by the nature of the executive power in Canada, the Crown's historic powers over the armed forces, and a comparison of Canadian, Australian, and New Zealand statutes.

The value of engaging with section 15 is fourfold. First, demonstrating that section 15 vests the executive with constitutionally entrenched powers over the armed forces lends credence to the idea that the Canadian Constitution has placed certain historic Crown powers on a constitutional footing, insulat-

4 *Supra* note 1, s 15.

5 AV Dicey defines prerogative powers as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown." Peter Hogg defines them as the "powers and privileges accorded by the common law to the Crown." See, respectively, AV Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1889) at 348 and Peter W Hogg, *Constitutional Law of Canada*, Student Edition (Scarborough, ON: Thomson Canada, 2003) at 15 [Hogg].

6 Anne Twomey has outlined the constitutionally entrenched and protected nature of these powers in an Australian context. Given the similarities between the Canadian and Australian constitutions, this paper will argue that Twomey's argument applies to Canada as well. See Anne Twomey, "Pushing the Boundaries of Executive Power: Pape, the Prerogative and Nationhood Powers" (2010) 34:1 Melbourne UL Rev [Twomey]. Twomey, in turn, draws on JE Richardson, "The Executive Power of the Commonwealth" in Leslie Zines, ed, *Commentaries on the Australian Constitution: A Tribute to Geoffery Sawer* (Sydney: Butterworths, 1977) and George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne: Melbourne University Press, 1983) at 98.

7 RSC 1985, c N-5.

ing them from a degree of parliamentary interference.[8] Second, appreciating the relevance of section 15 clarifies the relationship between the executive and Parliament with respect to matters of national defence and the armed forces. Given the imprecision and debate that surrounds their respective roles and responsibilities in this area, greater precision regarding their relative powers and authorities is required. Third, save for a few notable exceptions,[9] the scholarship on Canadian military law has largely ignored the Constitution and section 15, and, thus, an explanation of the relevance of section 15 adds a constitutional dimension to the study of Canadian military law.[10] Fourth, addressing the contemporary meaning of, and powers associated with, the Crown's military authorities brings a constitutional perspective to bear on the study of how the armed forces are governed and controlled in Canada. Studies of Canadian national defence and military affairs have all but overlooked this constitutional dimension, which has led to misconceptions about where certain authorities lie and what powers belong to ministers and the chief of the defence staff.

The article begins with an overview of the relationship between the executive and Parliament in Canada, with an emphasis on the Crown as the locus of executive power and the constitutional powers of the Canadian executive. Next, it outlines the Crown's powers of command-in-chief and explains why they are arguably constitutional authorities of the executive today. Thirdly, the article demonstrates that the *National Defence Act* presupposes the existence and operation of these section 15 powers. The article concludes with a discussion of the importance of recognizing the powers inherent in section 15 of the *Constitution Act, 1867*.

I. Executive authority in Canada

Canada is governed according to a Westminster system of responsible government. Under this system, executive authority resides with the Crown — which is personified by the Sovereign and represented in Canada by the governor general — but is normally exercised on the advice of the Crown's Cabinet ministers who, by constitutional convention, are responsible and accountable

8 Dennis Baker outlines the idea that the Canadian executive has constitutionally protected powers in *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal and Kingston, ON: McGill-Queen's University Press, 2010), at ch 3-4 [Baker] and Dale Gibson, "Monitoring arbitrary government authority: Charter scrutiny of legislative, executive, and judicial privilege" (1998) 61 Sask L Rev 297.

9 The scholar who has addressed this issue with the greatest depth is Studin, *supra* note 3.

10 Section 15 is not analyzed in Létourneau & Drapeau, *supra* note 2 or Madsen, *supra* note 2.

for the affairs of government.[11] Depending on convention and the provisions of statutes, ministers may advise the Crown individually, as a Cabinet committee, or as the Governor-in-Council, defined as the governor general acting on the advice of ministers.[12] Cabinet ministers gain the right to advise the Crown and exercise executive power when the governing ministry headed by the prime minister holds the confidence of the democratically elected House of Commons.

The centrality of the Crown in this arrangement cannot be overemphasized.[13] When they govern, ministers wield authorities that reside with the Crown as the executive power, not with Parliament.[14] The same holds for civil servants and military and police officers, all of who formally serve the Crown, and whose authorities either descend directly from the Crown or from the Crown's ministers.[15] All executive power ultimately flows from the Crown and only those who exercise its authority govern or are involved in governing.[16] Thus, when the prime minister and Cabinet govern,[17] they do so in their capacities as ministers of the Crown, not as members of Parliament.

11 Both the Sovereign and the governor general retain certain discretionary powers. Notably, in exceptional circumstances, governors general can refuse a prime minister's advice to prorogue and dissolve Parliament. Governors general can also exercise discretion in naming and dismissing prime ministers. The Sovereign, meanwhile, appoints the governor general on the advice of the prime minister and delegates powers to the vice-regal officer via letters patent. See Robert MacGregor Dawson, *The Government of Canada*, 6th ed, edited by Norman Ward (Toronto: University of Toronto Press, 1987) at 189 [Dawson].

12 It is further understood that prime ministers have a special right to advise the Crown on all matters of state and government. Hence, rightly or wrongly, it is increasingly acknowledged that prime ministers can advise the Crown in the name of individual ministers or Cabinet. See Major Alexander Bolt, *The Crown Prerogative as Applied to Military Operations* (Ottawa: Office of the Judge Advocate General, Strategic Legal Paper Series, 2008) at 8 [Bolt].

13 On the importance of the Crown in Canadian government, see Dawson, *supra* note 11 at ch 9 and David E Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995) [Smith].

14 According to Peter Hogg, the notion of separation of powers does not fit well with in a Canadian context. Dennis Baker has effectively challenged this idea. See Hogg, *supra* note 5 at 269 and Baker, *supra* note 8. It might also be argued that since the Crown is one part of Parliament alongside the Senate and House of Commons, there is no way to distinguish the executive and legislative. This is equally false. The Crown-in-Parliament refers to the Crown in its legislative capacity. The Crown and Crown-in-Council refer to the Crown in its executive capacity. On this question, see Smith, *supra* note 13 at ch 6.

15 Even when that authority is granted by statute, the authority is granted to them as agents of the executive, of the Crown. See Dawson, *supra* note 11 at 177-179.

16 Dawson, *ibid* at ch 9-10.

17 For a critique of the prime minister's increased monopolization of the Crown's powers in Canada, see Peter Aucoin, Mark Jarvis & Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery Publications, 2011).

This reality is veiled by the practices of parliamentary democracy and the conventions of responsible government that have evolved to ensure that ministers are parliamentarians.[18] Nevertheless, parliamentary democracy and responsible government should not blur the distinction between the Crown and Parliament, the executive and legislature. Although it is commonplace to speak of a fusion of the executive and legislative in the Westminster tradition, this does not mean that the Crown's authorities are Parliament's, or that Parliament governs or exercises executive power.[19] As codified in the Canadian *Constitution Act, 1867*, and reinforced by the Supreme Court of Canada (SCC),[20] the executive and legislative powers are distinct, despite being linked by the fact that ministers are drawn from Parliament and that the Crown-in-Parliament, the Crown in its legislative function, assents to legislation.

Parliament is vital for the functioning of the executive, however. Besides expressing confidence in a ministry in the House of Commons, parliamentarians allow the Crown to tax and spend, and they pass legislation that can expand or limit the scope of the executive's authority. Legislation can also be used to create executive offices and define the powers and responsibilities of the Crown's ministers, civil servants, and military and police officers. When Parliament uses legislation in this way, it is not supplanting the Crown as the executive power. The legislation is either granting and defining a new executive authority for the Crown, or regulating the extent and use of an existing one.

Although the supremacy of Parliament has been heralded as a fundamental feature of the Westminster system,[21] it is important to note that Westminster parliaments differ in their authority to affect the powers of their respective Crowns. This must be appreciated to grasp the particularities of the executive authority in Canada. Whereas the British Parliament can abolish any power of the Crown by statute alone, the Canadian Parliament arguably

18 This confusion stems from a conflation of the informal or conventional aspect of the Constitution with the formal and codified. On this point, see Harvey C Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (Baltimore: Johns Hopkins University Press, 1993) at 5.

19 Dawson, *supra* note 11 at 177-179 and Smith, *supra* note 13 at ch 2-5.

20 The Supreme Court of Canada outlined Canada's functional separation of powers in the majority ruling written by Justice McLachlin in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 85, 100 DLR (4th) 212 [*New Brunswick Broadcasting*]; in a unanimous ruling presented by Justice Binnie in *Canada (House of Commons) v Vaid,* 2005 SCC 30 at para 21, [2005] 1 SCR 667 [*Vaid*]; and in a unanimous ruling presented by the Court in *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 at paras 37-41 [*Khadr*].

21 Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Oxford University Press, 2001).

cannot.[22] This represents a significant difference with respect to the nature and source of executive authority in the United Kingdom and Canada.

In the United Kingdom, the Crown's powers are statutory, prerogative, or personal in nature. Statutory powers are those granted to the Crown by act of Parliament. Prerogative powers are discretionary authorities that belong to the Crown in its own right, as recognized by the common law. Prerogatives are not statutory in origin, but are rather historic authorities that monarchs once used to govern their kingdoms and households. Today, they imbue the Crown with authority over various affairs of state and government.[23] Because the Sovereign is a fictional legal person, and the Sovereign and Crown are a corporation sole and treated as one by the law,[24] the Crown can also do anything that a natural person can do under the common law, such as enter into contracts. This source of Crown power has generated a notable degree of debate, yet the judiciary has upheld it.[25]

Since the Glorious Revolution of 1688, British parliamentary statutes have had the ability to abolish, supplant, or regulate prerogative powers. When a statute is used to abolish a prerogative, the Crown's authority is erased altogether. When an act of Parliament supplants a prerogative, the Crown's authority is then granted to it by the statute, while the prerogative is put in abeyance. Furthermore, when a statute regulates a prerogative, the legislation defines how the Crown's prerogative authority can and cannot be used, including by whom and how. In all three situations, statutes must be explicit and binding, otherwise the Crown's prerogatives remain, either in whole or in part.[26] As important, unless it chooses to abolish or merely regulate a prerogative, a statute that aims to supplant a prerogative must provide the Crown with an authority of equal scope; otherwise parts of the prerogative will remain to allow the executive to effectively fulfill its functions. Provided that Parliament wishes the government to have certain powers and authorities, it must either grant them to the executive by statute or allow ministers to rely on

22 This argument draws on the work of Baker, *supra* note 8 at ch 3-4.

23 UK, Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (London, Her Majesty's Stationery Office, 2009).

24 Ernst H Kantorowitz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, NJ: Princeton University Press, 1997); William Wade, "The Crown, Ministers and Officials," in Maurice Sunkin & Sebastien Payne, eds, *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999).

25 Anthony Lester & Matthew Weait, "The use of ministerial powers without parliamentary authority: the Ram Doctrine" (2003) Autumn 2003 PL 415.

26 Sebastien Payne, "The royal prerogative," in Maurice Sunkin & Sebastien Payne, eds, *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999).

Crown prerogatives. Because a statute can also abolish Crown prerogatives in the United Kingdom, the scope of executive authority is entirely determined by Parliament.[27]

The British Crown's powers as a legal person are particularly vulnerable to parliamentary infringement. As with all other persons, the Crown's ability to act as a legal person are subject to the limitations that Parliament has imposed on the liberties and actions of individuals. In addition, the Crown's powers as a legal person are subject to common law restrictions that surround the rights of all persons. While the personal powers of the British Crown can be quite expansive, they are subject to the provisions of parliamentary statute and do not require any particular language or intent to be circumscribed by Parliament.[28] This reinforces the fact that, in the United Kingdom, the Crown's powers can be wholly circumscribed by Parliament.

Parliament's supremacy over the Crown's authorities is different in Canada, where a codified Constitution adds another dimension of executive power, one that is arguably constitutionally entrenched and thereby resistant to full-scale parliamentary intrusion. Writing on the nature of executive power in Australia, Anne Twomey notes that the Australian Crown possesses four types of power: i) statutory; ii) prerogative; iii) personal; iv) constitutional. The first three of these powers mirror those of the British Crown. The fourth, the Australian Crown's constitutional powers, marks a significant departure from the United Kingdom. According to Twomey, the constitutional nature of these powers means that "While the exercise of such a power might be regulated to some extent by legislation, the power can neither be removed from the Governor General nor have its exercise substantively restricted, as this would be contrary to the *Constitution*."[29] Australia's codified Constitution, therefore, prevents Parliament from having complete supremacy over the constitutional powers of the Australian Crown. Given that Canada has a codified Constitution similar to Australia's, it follows that Twomey's four categories apply to the Canadian Crown as well. As stated in Paul Lordon's *Crown Law*, written by lawyers from Canada's Department of Justice, "The executive may act pursuant to specific constitutional or statutory authority, pursuant to common law or prerogative authority, or in ways purely incidental to the Crown's

27 For a discussion of the particular dynamics surrounding Crown prerogatives in Canada, see Philippe Lagassé, "Parliamentary and judicial ambivalence toward executive prerogative powers in Canada" (2012) 55 Can Pub Adm 157 [Lagassé].

28 Twomey, *supra* note 6 at 325-326.

29 *Ibid* at 324.

status as a person or corporation sole."[30] Hence, the Canadian Crown's powers can also be divided and described as statutory, prerogative, personal, and constitutional in nature. What remains unclear is the exact scope of these constitutional powers of the Canadian Crown, and whether they enjoy the degree of protection from statutory infringement ascribed to the constitutional powers of the Australian Crown. To answer these questions, it is necessary to examine the wording of Canada's *Constitution Act, 1867* and what the judiciary has said about constitutional authority in Canada.

Part III (sections 9-16) of the *Constitution Act, 1867* describes certain executive powers of the Canadian Crown.[31] The most significant of these provisions, section 9, states that "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen." Beyond establishing that the Crown is the sole source of executive authority, it is possible that this section vests significant powers in the Canadian executive. The SCC has ruled that section 9 preserved the Crown's prerogative powers in Canada.[32] This alone implies that section 9 is more than a mere descriptive provision: it suggests that the section grants powers to the executive. Indeed, in the recent case of *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44, the Court noted that the executive has constitutional responsibilities and that certain authorities necessarily belong with the "executive branch of government," implicitly linking them to section 9.[33] A plausible interpretation of this finding is that the executive is imbued with constitutionally protected powers by virtue of section 9. In other words, it may be that certain historic Crown prerogatives are more properly understood as constitutionally entrenched authorities of the executive in Canada.[34] In *Khadr* particularly, the SCC appeared to state that the foreign affairs prerogative was a constitutional

30 Paul Lordon, ed, *Crown Law* (Toronto: Butterworths, 1991) at 17.

31 *Constitution Act, 1867, supra* note 1, ss 9-16. Section 10 preserves the office of governor general as the Sovereign's representative, constitutionally entrenching the office. Section 11 establishes the Canadian privy council and vests the power to appoint privy councillors in the governor general. Section 16, meanwhile, makes the determination of the location of Canada's seat of government an authority of the Crown.

32 The Supreme Court noted that sections 9 and 15 of the *Constitution Act, 1867*, *supra* note 1, s 9 preserved the Crown's prerogative powers in Canada. Yet the Court further noted that the scope of these powers must be determined by the precedents of common law. See *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 876 and *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 63, 18 DLR (4th) 481 [*Dismantle*].

33 *Khadr*, *supra* note 16 at para 37. In noting that the foreign affairs power belongs with the executive branch, the Court necessarily made a link with section 9 of the *Constitution Act, 1867*, since this section provides the constitutional basis of the executive branch in Canada.

34 The fact that Canada's political institutions have evolved differently than the United Kingdom's was acknowledged in *New Brunswick Broadcasting, supra* note 20 at 44-45.

power of the executive owing to the government's constitutional responsibilities and functions. In line with this reasoning, historic Crown prerogatives that are necessary for governments to fulfill their constitutional functions and responsibilities may have evolved into constitutionally protected powers of the executive in Canada.

This reading of the Canadian Constitution is reinforced by the SCC's rulings in *New Brunswick Broadcasting* and *Vaid*[35] . As part of these cases, the SCC addressed the constitutional status of parliamentary privileges, historic powers that belong to the houses of Parliament and the provincial legislatures. In *New Brunswick Broadcasting*, a majority of the Court found that the inherent privileges of Canada's legislatures are constitutionally entrenched. They are, in effect, constitutional powers of the legislative houses. The majority put forth two arguments to support this ruling. First, the justices accepted that certain historic privileges of the British Parliament are part of the fundamental law of Canada and were entrenched in Canada's codified Constitution. As a result, these privileges now have a "constitutional status."[36] Second, the justices found that these privileges were necessary for the proper functioning of the legislatures, making them constitutional powers.

The SCC applied the doctrine of necessity to build on these arguments in *Vaid*. In that ruling, the Court detailed how necessity applied in the context of the constitutional privileges of legislatures. The SCC held that legislative privileges attain a constitutional status not only when they are necessary for the legislative body to function autonomously but also if legislative bodies could not function with dignity and efficiency without them.[37] Dignity was understood to mean the right of legislatures to control their own procedures, while efficiency referred to their ability to fulfill their functions without the delays and uncertainties that "would inevitably accompany external interventions."[38]

Although the SCC has not yet done so, each of these arguments could be applied to the Crown's executive powers. Certain Crown powers may be part of Canada's fundamental law and were arguably entrenched in sections 9-16 when the Constitution was codified. When Canada's Constitution is not explicit about the nature of these powers, one must ask what authorities are necessary for the executive to fulfill its functions and responsibilities with dignity and efficiency. Executive powers that meet these criteria may have a con-

35 *New Brunswick Broadcasting, supra* note 20; *Vaid, supra* note 20..
36 *Ibid* at 62.
37 *Vaid*, *supra* note 20 at paras 4, 6-7.
38 *Ibid* at para 7.

stitutional status. This interpretation would accord with what the SCC found with respect to the foreign affairs power in *Khadr*. The language used by the Court in *Khadr* is telling. In its ruling, the Court found that the executive has a "constitutional responsibility to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests," and that "the government must have flexibility in deciding how its duties under the [foreign affairs] power are to be discharged."[39] The ruling implies that that the executive requires a constitutionally protected foreign affairs power to be able to conduct diplomacy and safeguard Canada's national interests in an autonomous, dignified, and efficient manner. If this is true of the foreign affairs power, it could hold for other exclusive authorities of the executive, especially those that can be linked to the sections found in part III of the *Constitution Act, 1867*.

Supposing that this interpretation is correct, Parliament's ability to affect the powers of the Canadian Crown must also vary depending on what kind of power the legislature is seeking to affect. Section 91 of the *Constitution Act, 1867* lists those subjects that the federal Parliament is permitted to affect through legislation.[40] Most of these subjects fall outside of the Crown's historic prerogatives: hence the executive must rely on parliamentary statutes or the Sovereign's powers as a legal person to determine the scope of its authorities in these fields. Other subjects included in this section do touch on Crown prerogatives and section 91 allows Parliament to abolish, supplant, and regulate these historic powers.[41] As in the United Kingdom, moreover, the Canadian Parliament can restrict the Canadian Crown's powers as a legal person through statute, without any special provisions or need to explicitly bind the Crown.

Parliament's ability to affect the constitutionally entrenched powers of the Crown is arguably more limited, however. As Twomey has noted with respect to the Australian Constitution, powers explicitly ascribed to the Crown in the *Constitution Act, 1867* are arguably protected from statutory displacement.[42] A like degree of constitutional protect arguably extends to the implied constitutional powers of the Canadian executive found in section 9. Under Canada's

39 *Khadr, supra* note 20 at para 39.

40 *Constitution Act, 1867, supra* note 1, s 91. The "peace, order, and good government" clause included in this section further ensures that the federal government retains the authority to legislate in areas that were not assigned to provincial legislatures.

41 Parliament's ability under section 91(11) to supplant the Crown's prerogative to enforce quarantines is one example here.

42 Twomey, *supra* note 6.

functional separation of powers, the legislature is arguably bound to respect the responsibilities and competencies of the executive and cannot subsume the executive's constitutional authorities.[43] Consequently, a statute aiming to abolish or completely displace a constitutionally entrenched power of the executive could be ruled *ultra vires*. Although Parliament can impose stringent limits or conditions on how governments manage Canada's international affairs, for example, it is possible that a statute could not entirely abolish the Crown's power to conduct foreign affairs or transfer that authority to a non-executive body or actor.[44]

Indeed, were Parliament able to abolish or completely displace the executive's constitutional authorities, Canada's functional separation of powers would be called into question, since it would mean that the legislature could wholly intrude on the affairs of the executive. Justice McLachlin noted by in *New Brunswick Broadcasting* that "Our democratic government consists of several branches…It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other."[45] As the SCC further noted in *Vaid*, "Each of the branches of the State is vouchsafed a measure of autonomy from the others."[46] As was further found in *Khadr*, this deference and autonomy is required for each branch to fulfill its particular duties. Hence, while Parliament does have the authority to circumscribe how the executive fulfills its essential responsibilities and functions, it might be contrary to Canada's separation of powers if a statute could prevent the executive from effectively meeting these responsibilities and functions.

As provided by section 41(a) of the *Constitution Act, 1982,* furthermore, any amendment to the offices of the Queen, governor general, or provisional

43 Baker, *supra* note 8 at ch 3.

44 It should be noted that this four-part division is not entirely foreign to British constitutional law. A seventeenth century distinction between the 'ordinary' and 'absolute' prerogatives of the monarch, between those that Parliament could take away and those it could not, was erased by the Glorious Revolution. Nevertheless, the idea that the executive must retain some 'absolute' prerogatives to fulfill its functions persists. The argument here is that the idea of 'absolute' executive prerogatives has been revived by Canada's codified Constitution and separation of powers doctrine. For a discussion of the continuing relevance of 'absolute' prerogatives, see Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010) at ch 13 [Loughlin, *Foundations*]. The argument has also been made that William Blackstone subscribed to this interpretation of the Crown's powers even after the Glorious Revolution, see John Yoo, *The Powers of War and Peace* (Chicago: University of Chicago Press, 2005) at 43-45.

45 *New Brunswick Broadcasting, supra* note 20 at 389.

46 *Vaid, supra* note 16 at para 21.

lieutenant governors, and hence the Crown, requires a constitutional amendment having the unanimous consent of Parliament and the provincial legislatures. This arguably applies to those sections of the *Constitution Act, 1867* that vest powers in the executive, not simply those authorities that involve the personal discretion of the Sovereign or vice-regal officers.[47] If this interpretation is correct, it would further highlight that legislation alone might not be able to erase or completely displace these powers: a constitutional amendment garnering the unanimous support of the federal government and the provinces would be required to alter the Crown's constitutional authorities. In line with Twomey's finding, Parliament may only be able regulate how these constitutional powers are exercised by the executive.

Section 15, the rest of this article will now argue, vests the Crown with constitutionally entrenched powers that fulfill specific executive functions.[48] In the case of section 15, these constitutionally entrenched powers relate to fundamental responsibilities and functions of the executive: the raising, command, and use of the armed forces. These are historic responsibilities of the Crown that have been vested in the executive by Canada's codified constitution; they are matters that require executive discretion,[49] and are well-established executive competencies.[50] In line with the test suggested in *New Brunswick Broadcasting*, they are powers that are necessary for the proper functioning of the executive in Canada, insofar as governments must have the capacity to defend Canada and Canadians, as well as engage in armed conflict when vital national interests are threatened. In keeping with the broader prin-

47 For an overview of how section 41(a) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11[*Constitution Act, 1982*] entrenches and protects the discretionary powers of the Governor General, see James WJ Bowden, "Reining in the Crown's Powers of Dissolution: The Fixed-Term Parliaments Acts of the United Kingdom versus the Fixed-Election Laws in Canada" (paper delivered at the 2013 Canadian Political Science Association convention, 4 June 2013), [unpublished].

48 The Supreme Court of Canada noted that section 15 of the *Constitution Act, 1867* vested constitutional powers in the Crown as part of *Dismantle, supra* note 32 at para 50. See also Studin, *supra* note 3 at 21.

49 Studin, *ibid* at 21-34.

50 Canadian statute law recognizes that military command is necessarily an executive domain, as a reading of the *National Defence Act*, RSC 1985, c N-5 [*NDA*] and *Emergencies Act*, RSC 1985, c 22 (4th Supp) [*Emergencies Act*] shows. Canadian courts have further recognized that military deployment and armament decisions are matters of 'high policy' that belong within the executive's exclusive sphere of competence. In fact, when a matter that is brought before the courts is a question of 'high policy' and it does not involve a possible infringement of fundamental rights, it is liable to be dismissed as non-justiciable. See *Dismantle, supra* note 32 at para 63; *Vancouver Island Peace Society v Canada (TD)*, [1994] 1 FC 102, 64 FTR 127; *Aleksic v Canada (Attorney General)* (2002), 215 DLR (4th) 720, 165 OAC 253 (Ont Div Ct); *Blanco v Canada*, 2003 FCT 263,231 FTR 3; *Turp v Chrétien*, 2003 FCT 301, 237 FTR 248.

ciples outlined in *Vaid*, they may be insulated from unwarranted interventions by the courts and Parliament if the executive is to fulfill its functions and responsibilities with dignity and efficiency.

It follows that Parliament can regulate how the executive exercises the Crown's section 15 powers, but statute may not be able to abolish or completely displace them, notwithstanding section 91(7).[51] As per section 41(a) of the *Constitution Act, 1982*, any attempt to erase these powers by constitutional amendment may require the unanimous consent of Parliament and the provincial legislatures.[52] There is also no question that the Crown's section 15 powers are meaningful and important. Parliament's current defence legislation, the *National Defence Act*, rests on the assumption that Crown's constitutional powers under section 15 are operative and effective. Neither this statute nor the government of the armed forces in Canada can be properly understood without reference to the powers provided by section 15.

II. Constitutional powers of command-in-chief

"The Defence of the Realm," Charles Clode noted in 1869, "the Constitution has wisely intrusted in the Crown."[53] A responsibility of the monarch since the early Middle Ages, the defence of the realm vested the Crown with significant military prerogatives.[54] As feudal relations of suzerainty and vassalage eroded during the modern era, the Crown's military prerogatives became better defined. The authority to raise and maintain an army and fortifications was recognized as belonging with the Crown, as was the power and the duty to respond to threats and emergencies with armed force.[55] This articulation of the Crown's powers coincided with the introduction of the concept of command-in-chief. Created by Charles I in 1639, the commander-in-chief was delegated the Crown's powers of command-in-chief over its military forces.[56] These included the powers to rule, govern, command, and employ the army,

51 Interestingly, Twomey notes that section 68 of the Australian Constitution, which states that "The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative," provides the executive with a constitutionally protected authority to command the Australian military. See Twomey, *supra* note 6 at 324.

52 *Constiuttion Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Constitution Act, 1982*].

53 Charles M Clode, *The Military Forces of the Crown; their Administration and Government*, vol 1 (London: John Murray, 1869) at 1. [Clode Vol 1].

54 Joseph Chitty, *A Treatise on the Law of the Prerogative Powers of the Crown* (London: Butterworth, 1820) at ch 4 [Chitty].

55 Clode Vol 1, *supra* note 53 at ch 1.

56 *Ibid* at 425-428.

as well as the right to enforce discipline.[57] Under the English Commonwealth, these powers were transferred to the Lord Protector and captain-general of the army. Following the Restoration, Charles II reaffirmed them as uniquely monarchical authorities. He ensured that Parliament explicitly recognized the Crown's military prerogatives in a statute that stated:

> Forasmuch as within all his Majesty's realms and dominions the sole supreme government, command, and disposition of the militia, and of all forces by sea and land, and of all forts and places of strength is, and by the laws of England ever was, the undoubted right of his Majesty and his Royal predecessors, Kings and Queens of England, and that both or either of the Houses of Parliament cannot nor ought to pretend to the same.[58]

This still describes the broad contours of the Crown's powers of command-in-chief in Westminster states.[59] However, it is important to acknowledge the constraints that the English, and later British, Parliament imposed on how these authorities can be exercised.

During the Glorious Revolution, Parliament submitted a bill of rights to England's new monarchs, William and Mary. Included in the bill was a provision such that "the raising or keeping a standing Army within the Kingdom in time of Peace unless it be with the Consent of Parliament is against the Law."[60] Henceforth, Parliament's approbation was required if the Crown chose to raise and maintain a standing army in peacetime.[61] In the years that followed, Parliament also asserted a right to define the maximum size of the army and the conditions of military service and discipline through legislation.[62] All military expenditures, moreover, were contingent on the granting of supply.[63] These constitutional conventions are still in place today in the Westminster tradition.

These limits on the Crown's powers have informed the idea that Parliament has controlled the army since the Glorious Revolution.[64] This notion must be

57 *Ibid* at ch 1-2.

58 Cited in Chitty, *supra* note 54 at 45.

59 See, for instance, the Crown's powers over the armed forces listed on page 32 of the Ministry of Justice report, *supra* note 20 and in New Zealand's *Defence Act 1990* (NZ), 1990/28, sections 5 and 6. These powers are also outlined in William Blackstone, *Commentaries on the Laws of England*, 12th ed, vol 1 (London: Strahan & Woodfall, 1793) 261 [Blackstone].

60 *Bill of Rights*, 1688 (UK), c 2, 1 Will and Mar Sess 2.

61 Clode Vol 1, *supra* note 53 at ch 5.

62 *Ibid*

63 *Ibid* at ch 6-7.

64 John Childs, "The Restoration Army: 1660-1702" in David G Chandler & Ian Beckett, eds, *The Oxford History of the British Army* (Oxford: Oxford University Press, 2003); Peter Rowe, "The

carefully scrutinized, for it has complicated understandings of the respective powers of the Crown and Parliament over the military ever since. If parliamentary control is understood in the negative sense, as checking and restraining, then the ascription is correct. However, the control of the military in the positive sense, as commanding and employing, still belongs to the Crown.[65]

Although Parliament regulated how they were exercised, the Crown retained its fundamental prerogatives over the armed forces.[66] The authority to raise and maintain a wartime army remained with the Crown.[67] This authority remained in peacetime, too, only with the proviso that Parliament should express its consent. The power to raise and maintain an army was not transferred to Parliament;[68] instead, parliamentarians were given a veto over exercises of that prerogative in peacetime.[69] The Crown retained the power to call out militia as well, reflecting their underlying service to the Sovereign.[70] Likewise, although Parliament determined the terms of military service and how discipline was administered within the armed forces and militia, the power of military command continued to flow from the Crown[71] and, when the Sovereign deemed to maintain the office, through the powers delegated to a commander-in-chief or captain general of the armed forces.[72] All orders to, and within, the military ultimately depended on an exercise of the Crown's supreme command authority. The service of military personnel to the Sovereign, the Crown's granting of commissions, and the issuance of military regulations in the Crown's name highlighted these realities.[73] Lastly,

Crown and Accountability for the Armed Forces," in Maurice Sunkin & Sebastien Payne, eds, *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) at 267 [Rowe].

65 Rowe, *ibid* at 267.

66 The fact that the Crown retained these powers following the Glorious Revolution is established by Blackstone, *supra* note 59 at 261-262.

67 Clode Vol 1, *supra* note 53 at 85.

68 *Ibid* at 88.

69 The power to raise and maintain naval forces in both peacetime and wartime was left entirely with the Crown. In Canada, however, parliamentary consent has customarily been sought to raise naval and air forces in peacetime. Accordingly, parliamentary consent to maintain a navy and air force in peacetime is now arguably required by convention in Canada.

70 Clode Vol 1, *supra* note 53 at ch 3.

71 *Ibid* at ch 5. This still holds today in the United Kingdom. According to the British ministry of justice, "the government and command of the armed forces is vested in Her Majesty" and the "Control, organisation and disposition of armed forces" are powers of the Crown. See Ministry of Justice report, *supra* note 23 at 32.

72 For an overview of the office of commander-in-chief in the United Kingdom over time, see Charles M Clode, *The Military Forces of the Crown; their Administration and Government*, vol 2 (London: John Murray, 1869) at ch 26. [Clode Vol 2].

73 *Ibid* at 439-445.

while parliamentary supply funded the armed forces and their fortifications, anchoring Parliament's ability to set the size and organization of the military, the power to use of these assets to defend the Sovereign's realms and colonies remained with the Crown.[74]

Such was the state of the Crown's military prerogatives, and of the relationship between the Crown and Parliament regarding the armed forces, when the *British North America Act, 1867* came into effect.[75] The inclusion of both sections 15 and 91(7) suggest that the drafters intended to preserve this arrangement, as does the preamble's provision that Canada would have a "Constitution similar in Principle to that of the United Kingdom."[76] Indeed, as the 1868 *Militia Act* makes clear,[77] this was logical at a time when the Canadian dominion was under the aegis of the British Crown and Canada's military affairs were interwoven with imperial defence concerns. In peacetime, the Canadian executive required parliamentary consent and supply to raise and maintain armed forces. Yet the supreme command of these forces flowed from, and remained with, the British Crown. The British Crown's power to raise and command Canadian forces in wartime necessitated the retention of its military powers in the Canadian dominion, but the Canadian Parliament could regulate terms of military service and discipline in Canada and influence the size and organization of Canada's armed forces with statutes and supply. Thus, when Canada entered the First World War alongside Britain through a declaration of war by their common Crown on 4 August 1914, the Canadian Cabinet issued an order-in-council exercising the Crown's powers to deploy Canada's two naval vessels to serve as part of the Royal Navy,[78] and could raise, organize, and mobilize the Canadian Expeditionary Force with an order-in-council using the Crown's authority.[79] At the same time, militia members who were called out by the Crown were placed on 'active service' in accordance with the *Militia Act*.[80]

74 Clode's entire two volume history is useful on this point.

75 The original name of Canada's *Constitution Act, 1867* was the *British North America Act, 1867*.

76 *Constitution Act, 1867, supra* note 1, Preamble.

77 Act respecting the Militia and defence of the Dominion of Canada, SC 1867-68, c 40ss 38, 60-68.

78 Privy Council Office, Series A-1-a, Order-in-Council PC 2049 (4 August 1914), Ottawa, Library and Archives Canada (RG 2). ,

79 Privy Council Office, Series A-1-a, Order-in-Council PC 2067 (10 August 1914), Ottawa, Library and Archives Canada (RG 2); Privy Council Office, Series A-1-a, Order-in-Council PC 2080 (10 August 1914), Ottawa, Library and Archives Canada (RG 2).

80 Privy Council Office, Series A-1-a, Order-in-Council PC 2068 (10 August 1914), Ottawa, Library and Archives Canada (RG 2).

The transition toward a unique Canadian Crown, one separate and distinct from its British counterpart, occurred gradually over the next century. The Canadian governor general, who was assigned the office of commander-in-chief of Canadian military forces as of 1905, ceased being an intermediary between Ottawa and the British government after the First World War.[81] Canada developed a separate and distinct chain of command thereafter. In the decades that the followed the *Statute of Westminster* in 1931, the *British North America Act*'s section 15 powers of command-in-chief became constitutional authorities of the Canadian Crown. The powers to raise, command, govern, and deploy armed forces were concentrated in a uniquely Canadian executive. The Canadianization of the Crown reinforced this core responsibility of the executive, since the British Crown was no longer constitutionally responsible for the defence of Canada. Since 1931, this constitutional responsibility has belonged with Canada's executive, as do the powers that are necessary for the execution of this duty.[82]

A broader application of the standards set by the SCC in *New Brunswick Broadcasting* and *Vaid,* it shall now be argued, suggests that these powers of command-in-chief have attained a constitutional status. The *Constitution Act, 1867* ensures that these powers are part of Canada's fundamental law, and the executive requires these powers to perform its duties and fulfill its responsibilities and functions with dignity and efficiency.

Under a Westminster system of government, the power to raise armed forces and call out militia necessarily belongs with the Crown.[83] This authority resides with the Crown for two reasons. First, the Crown has endurance. Unlike Parliament, the Crown's ability to perform its duties is unaffected by recesses, prorogations, dissolutions, or the legislative process.[84] Accordingly, only the Crown is properly placed to promptly raise and organize an armed force, or call out militia, in the event that Canada is at war, under an evident threat of military attack, or when public order is threatened. Although the existence of a permanent Canadian military now makes this a moot point, it does not detract from the underlying logic of vesting this authority in the

81 Canada, *Letters Patent constituting the office of the Governor General and Commander-in-Chief*, 1905.

82 Smith, *supra* note 13 at 4, 41-62.

83 Blackstone, *supra* note 59 at 254-262.

84 For an elaboration of the parliamentary cycle and legislative process, see Audrey O'Brien & Marc Bosc, eds, *House of Commons Procedure and Practice*, 2d ed (Québec: Éditions Yvon Blais, 2009) ch 8, 16.

executive power.[85] Second, were Parliament able to raise permanent armed forces or call out permanently active militia through legislation, it could theoretically impose a permanent military, and all the costs surrounding it, on the Crown. This would be inconsistent with the constitutional requirement that the Crown must recommend all bills involving the expenditure of money.[86] Since section 15 of the *Constitution Act, 1867* states that all military forces "of and in Canada" are under the command of the Crown, any armed force raised by Parliament would fall under the executive's authority. In turn, all expenses related to that armed force would need to be borne by the Crown, since Parliament would have no means of funding the force on its own. Given this constitutional constraint, the power to raise armed forces cannot belong to Parliament — it must reside with the Crown.

Supreme command authority necessarily belongs with the Crown as well. The logic of military command relies on having a high-ranking state official or officer as commander-in-chief or the head of the armed forces. In most countries, the position is occupied by the head of state, who either has the authority to exercise power over the armed forces or whose office empowers members of the executive to exercise such authority.[87] Placing supreme military command in this individual provides an undivided focal point for the military's lawful service and loyalty. Given that military command exists to ensure strict and timely obedience to lawful orders, there can be no question of the authority of a command. This demands that command be exercised within a clear, hierarchical structure.[88] Having heads of state at the pinnacle of the military command structure provides the highest level of this hierarchy, and the legal foundation of all command authority exercised by those who are commissioned by the office. Legitimate orders are only those that ultimately flow down from the fount of supreme military command authority. For this

85 On this point, see Loughlin, *Foundations*, *supra* note 38 at 383-391; Blackstone, *supra* note 59 at 257-259; and Alexander Hamilton, "Federalist #70" in *The Federalist Papers* (Washington, DC: Library of Congress, 1787-1788).

86 *Constitution Act, 1867*, s 54.

87 Nearly all states follow one of these two models, save for certain notable exceptions, such as the People's Republic of China.

88 As the respondent noted in the case of *Chainnigh v Attorney General of Canada*, 2008 FC 69 at para 36, 322 FTR 302 [*Chainnigh*]:

> The required displays of loyalty to the Commander in Chief serve the objective of symbolically saluting her, as well as expressing the CF's loyalty generally in following orders made in her name. The required displays of loyalty are but instances of the general duty to salute one's superiors, which maintains order and discipline in the CF so as to ensure the prompt carrying out of lawful commands and orders. Such routine acknowledgement of the chain of command starting at the very top with the Queen helps maintain an effective military, which is a pressing and substantial objective.

system to function efficiently, the command structure must be insulated from external interventions. Only those vested with the right to command, or those who can exercise powers of command, can issue orders along the chain of command, otherwise the command structure loses its coherence. Similarly, the dignity of the command structure must be maintained.[89] Commissions must be issued through the supreme command authority and this authority should be used to establish relations of rank and superiority.

The Crown's powers of command-in-chief are also necessary for the governing of the armed forces. Alongside democratic norms of civilian control of the armed forces,[90] the constitutional authority of the prime minister, minister of national defence or Governor-in-Council to issue directives to the military stems from their right to advise the Crown. This must be the case for two reasons. First, Parliament is not vested with any powers of military command in the constitution; hence, parliamentary statute cannot be the source of a minister's authority to direct or control the military. In fact, it is worth stressing that section 91(7) of the *Constitution Act, 1867* makes no reference to command, which belies any claim Parliament might make to having such authority. Second, were Parliament able to claim command authority over the military, the CF might find itself in a situation where the legislature and the executive are issuing contradictory directives. This could easily happen under a minority government where the House of Commons could pass a motion demanding the end of a military deployment.[91]

Were such a motion to pass, the dignity of the military's command structure and service to the Crown would be called into question, as would the government's efficiency in managing Canada's national defence and foreign affairs.[92] Members of Parliament, in effect, would be able to disrupt the CF's command hierarchy and intervene in a sphere of executive competence. Rather

89 Sebastian Payne, (Testimony delivered at the House of Lords, Select Committee on the Constitution Committee, 7 December 2005) [unpublished].

90 For an overview of these norms, see Peter D Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Cambridge, MA: Harvard University Press, 2003) ch 1; Eliot A Cohen, *Supreme Command: Soldiers, Statesmen, and Leadership in Wartime* (New York: Anchor Books, 2003) ch 1, appendix.

91 Philippe Lagassé, "Accountability for National Defence: Ministerial Responsibility, Military Command, and Parliamentary Oversight" (2010) 4 *IRPP Study* 1 at 14-18, online: Institute for Research on Public Policy <http://www.irpp.org/en/research/security-and-democracy/accountability-for-national-defence>.

92 The argument might be made that parliamentarians could collectively issue orders to the armed forces via statute since the Crown is one part of Parliament alongside the House of Commons and the Senate. This notion is problematic. The Crown-in-Parliament refers to the Crown in its legislative capacity. The Crown's powers of command-in-chief belong to the Crown alone in its execu-

than interfering with the CF command structure, the House of Commons must rely on its own constitutional powers to resolve a dispute with the executive over a military deployment. That is to say, the House of Commons can defeat the government with a vote of non-confidence, which would lead to a general election or the appointment of a new prime minister by the governor general.

Canadian national security further necessitates that the executive must have a constitutional power to employ the military during emergencies. The Crown's prerogative power to deploy the military in all circumstances is already well established.[93] However, the power to employ the military to address major crises and emergencies is better understood as a constitutionally entrenched power of the executive, not simply a prerogative that can be abolished or overtly constrained by statute.[94] As noted above, the executive's ability to act is not complicated by the parliamentary cycle. Thanks to the Crown's permanence, the executive remains permanently ready act and address contingencies.[95] It follows that the power to govern the armed forces and employ them for the defence of Canada, the protection of Canadians, or the safeguarding of constituted authorities should be seen as a constitutionally protected executive authority. Although Parliament might impose limits and constraints on how the armed forces are deployed in non-emergency situations, necessity and efficiency dictate that the executive must have a constitutionally enshrined power to rely on the armed forces in extreme situations.[96]

The executive's constitutional responsibility for Canadian foreign affairs, moreover, depends on the government being able to authorize emergency expeditionary military deployments that serve Canada's national interests. Again, if a majority of MPs were to believe that the executive is abusing this

tive capacity. The fact that section 15 belongs to part III of the *Constitution Act, 1867* makes this evident.

93 Bolt, *supra* note 12.

94 It should be noted that Canada's *Emergencies Act* allows the executive to claim exceptional authorities during four types of crises. Interestingly, however, these exceptional powers are not military in nature. They are meant to complement and facilitate the exercise of the Crown's pre-existing military powers during states of emergency. As a result, it would be incorrect to assert that the *Emergencies Act*, rather than the Constitution, provides the executive with these military authorities.

95 On the necessity of preserving the executive's ability to act in cases of emergency, see John Bell, (Testimony delivered at the House of Lords, Select Committee on the Constitution, 7 December 2005) [unpublished].

96 The *Emergencies Act* is telling here. The only limit it imposes on the executive regarding the armed forces is to prevent a government from using emergency powers to conscript individuals into the Canadian Forces. The *Emergencies Act* does not provide the powers that the government would exercise to employ the armed forces during an emergency.

power, the House of Commons could withdraw its confidence in the government. In the interim, however, efficiency demands that, at a minimum, the executive be allowed to lawfully use the armed forces to address domestic and international crises and emergencies.

Canada's Parliament, it is worth appreciating, has never laid claim to these powers. On the contrary, statutes operate on the assumption that these powers belong with Crown and are exercised by ministers. Although Parliament has regulated how some of these powers are exercised, legislation has not intruded on them or sought to supplant them. Instead, Parliament's national defence legislation has been built around these foundational powers of the Crown.

III. Section 15 and the *National Defence Act*

Several statutes address national defence and military affairs in Canada. The act that most directly engages with the Crown's section 15 powers is the *National Defence Act* (NDA). A close reading of this law reveals that the power to raise and maintain armed forces resides with the Crown, with Parliament providing its consent in the statute. The Crown's constitutional authority to govern, command, and deploy the military is also recognized and subject to varying degrees of statutory regulation, but not displacement, in the NDA. To properly understand the statute, therefore, it must be read through a lens that brings together the Crown's section 15 powers and Parliament's section 91(7) authority.[97]

a) Constituting the military

"The Canadian Forces," section 14 of the *NDA* states, "are the armed forces of Her Majesty raised by Canada and consist of one Service called the Canadian Armed Forces." The raising of a Canadian military is acknowledged as a fact by the NDA. That this armed force serves the Crown is evident as well. However, the NDA avoids any use of the imperative 'shall' or the permissive 'may' when referencing the constitution of the Canadian military. The Canadian Forces (CF) simply "are." The Act refers to the forces being raised by Canada. Given that the people of Canada are not sovereign, in a constitutional sense, the word must refer to the Canadian state.[98] Strictly speaking, the state in Canada

97 This is equally true in the United Kingdom, Australia, and New Zealand. The command and control of the armed forces involves an interplay of statute law and Crown powers.

98 The Canadian Forces note that "armed forces are the creation of the state," which in a Canadian context means that the military is created by the Crown. See *Duty With Honour: The Profession*

is the Crown, the locus of Canadian sovereignty.[99] It follows that the forces raised by Canada have been raised by the Crown. This reading is reinforced when the sentence is read from a different angle. Insofar as Her Majesty can act in right of the Canadian provinces, the reference to Canada could be meant to specify that the armed forces are raised by Her Majesty in right of Canada. Here again, the Act would be acknowledging that the to power to constitute the military resides with the Canadian Crown. If, furthermore, the legislation was purposefully drafted to be ambiguous about how the armed forces were raised, then the Crown's authority must be in effect, too, since the silence of statutes is filled by Crown powers.[100]

Had the Act served to create the CF, the language used would have been markedly different. Section 3 of the NDA states that "There is hereby established a department…called the Department of National Defence." In this instance, there is no doubt that Parliament is creating the department via the legislation. The fact that the NDA does not employ comparable terms or a similar tone when referencing the raising of the CF indicates that Parliament does not have the power to constitute armed forces for Canada. Rather, by stating that the CF "are," the NDA is providing Parliament's consent for the Crown's maintenance of a peacetime military. The existence of the military is being recognized by Parliament and approved through the statute.

Past Canadian statutes were clearer about what the NDA is expressing, as is the defence legislation of other core Commonwealth states. Canada's *Naval Service Act* of 1910, for instance, noted that "The Governor in Council may organize and maintain a permanent naval force."[101] The use of a permissive, rather than imperative clause, is significant. It demonstrates that the authority to maintain the force is the Crown's, whereas Parliament's power lies in consenting.[102] Australia's *Naval Defence Act* of 1910 was still clearer about the nature of the Crown's powers. It stated that "The Governor-General may raise,

of Arms in Canada (Kingston, ON: Canadian Defence Academy-Canadian Forces Leadership Institute, 2003) at 9.

99 The Crown's standing as the state is specified in the *Crown Liability and Proceedings Act*, RSC 1985, c C-50. For an elaboration of this principle, 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).

100 Lagassé, *supra* note 27 at 164-170.

101 *An Act Respecting the Naval Service of Canada* (UK), 9-10 Edward VII, c 43, s 11.

102 The meaning of imperative and permissive clauses in Canadian legislation are often opaque. While the permissive clause may be seen as empowering, it can also be used to consent to the exercise of an existing authority. The French version of Canada's *Interpretation Act*, RSC 1985, c I-21 highlights the various ways in which the permissive clause can be used. As noted in section 11 of the French version of the law, the permissive clause can grant powers, rights, authorizations, and abilities. The

maintain, and organize such Permanent and Citizen Naval Forces as he deems necessary for the defence and protection of the Commonwealth and of the several States."[103]

Further evidence that this is the meaning of the NDA's provision today and that this Crown remains effective in Westminster democracies is found in New Zealand's *Defence Act 1990*. Under Part 1 of this act, titled "Constitutional position of armed forces," section 5 relating to the "Power to raise armed forces" states: "The Governor-General may from time to time, in the name and on behalf of the Sovereign, continue to raise and maintain armed forces, either in New Zealand or elsewhere."[104] Section 11 of the same act, titled "Constitution of Defence Force," further specifies that "There is hereby constituted the New Zealand Defence Force, which shall comprise — (a) the Armed Forces of New Zealand, being the armed forces raised and maintained under section 5." Section 14 of the NDA should be read as conveying a similar meaning.

Parliament retains its own constitutional powers to limit the size of the armed forces through the granting of supply. As well, the NDA details how the CF will be comprised of regular and reserve forces, reflecting Parliament's authority to define the terms of military service. However, the constitutional authority to actually raise the military rests with the Crown.

b) Governing the armed forces

The NDA regulates the Crown's constitutional power to govern the armed forces, dividing governing authority between the defence minister, Governor-in-Council, and military officers. The Act does not attempt to supplant this power, however.[105] While the Act outlines who can do what and under what conditions, it is the Crown's powers that the minister, Governor-in-Council, and officers exercise when governing the CF. This is seen in the wording of the NDA and related documents, and must be so considering the logic of the military's command structure.

granting of an authorization is arguably an expression of consent when it touches on an existing Crown power.

103 *Naval Defence Act 1910* (Cth), s 22.

104 *Defence Act 1990* (NZ) 1990/28, s 5.

105 Indeed, it is worth noting that the *National Defence Act* does not explicitly bind the Crown. As a result, the statute was not drafted with an explicit intent to limit the Crown's powers. A clause that explicitly binds the Crown provides the clearest indicator of Parliament's desire to restrict the exercise of Crown powers by the executive.

The NDA states that the minister of national defence "has the management and direction" of the CF. Military units are also organized under the minister's authority. As well, both the minister and Governor-in-Council may "make regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces."[106] The minister must be exercising the Crown's powers of command-in-chief when performing these duties. This is evidenced by the fact that the CF are, as the NDA repeatedly acknowledges, "Her Majesty's Forces." No directive to the CF could be consistent with the Crown's supreme military authority unless it is understood that the individual issuing the directive has the authority to advise the Crown. The same holds for the organizing of CF units. Directives to organize units within Her Majesty's Forces must be derived from the powers of command-in-chief, otherwise the source of the directive's authority, and more importantly CF's obligation to follow it, would be unclear.

Regulations issued to the military from the minister or Governor-in-Council reinforce this interpretation. The regulations governing the CF are titled the *Queen's Regulations and Orders*.[107] Reference to the Sovereign in the title is not merely ceremonial: it signifies that the Crown remains at the pinnacle of the military's command structure, that all regulations and orders are issued in the name of the Crown, and that the duty of CF officers to follow these regulations and orders stems from the fact that they are emanating from the fount of Canada's supreme military command authority.[108] Hence, when the CF follow the directives or regulations issued by the defence minister or Governor-in-Council, the legal basis of that obedience lies in the minister's or Governor-in-Council's exercise of the Crown's powers of command-in-chief. Although the NDA determines that the minister and Governor-in-Council have the authorities to exercise these powers, the statute is not the source of this authority.

The authorities of two officers are regulated by the NDA, as well. Sections 9 and 10 outline the responsibilities of the judge advocate general. This officer advises the governor general, defence minister, defence department, and CF on matters of military law, and "has the superintendence of the administration of military justice in the Canadian Forces."[109] As a commissioned officer,

106 *National Defence Act*, RSC 1985, c N-5 ss 4, 12(2), 17 [*NDA*].

107 Canada, Assistant Deputy Minister (Finance and Corporate Services), *Queen's Regulations and Orders for the Canadian Forces (QR&Os)*, (Ottawa: National Defence and the Canadian Forces, 2006).

108 *Chainnigh, supra* note 88 at paras 35- 36.

109 *National Defence Act*, *supra* note 106, s 9.2.

the judge advocate general's authority to superintend the administration of military justice within the CF necessarily flows from the Crown. Section 18(1) states that Cabinet may appoint a chief of the defence staff (CDS) who shall be "charged with the control and administration" of the CF.[110] The CDS's authority to control and administer the armed forces necessarily flows from this position's commission and rank, both of which are issued under the authority of the Crown. Again, this must be the case given the nature of officers' commissions, the constitutional foundation of command authority, and the military chain of command.

c) Command authority

According to the CDS's webpage, "As defined in the *National Defence Act*, the Chief of the Defence Staff (CDS) has direct responsibility for the command, control and administration of the Canadian Forces."[111] This is imprecise. Returning to section 18(1) of the NDA, it states that:

> The Governor in Council may appoint an officer to be the Chief of the Defence Staff, who shall hold such rank as the Governor in Council may prescribe and who shall, subject to the regulations and under the direction of the Minister, be charged with the control and administration of the Canadian Forces.

No mention is made of the CDS being vested with direct responsibility for the command of the CF. Instead, section 9 of the NDA specifies that "The authority and powers of command of officers and non-commissioned members shall be prescribed in regulations." Accordingly, the command authority that the CDS possesses is not defined or vested by the NDA. It is granted to the CDS by his or her commission and by the Governor-in-Council via regulations. The authority to appoint and vest command authorities in the CDS does not belong with Parliament, but with the Crown, acting with the advice and under the regulations put forth by the Governor-in-Council. Hence, Parliament does not establish the CDS' command authority in legislation — the Crown does through a commission and regulations that determine the operation of command authority within the armed forces.

Australia's *Defence Act 1903* clarifies that command authority must descend from the governor general, who is vested with the powers of command-

110 *Ibid,* s 18(1).

111 Department of National Defence and Canadian Forces, *Office of the Chief of the Defence Staff (18 July 2012)*, online: <http://www.forces.gc.ca/site/ocds-bcemd/index-eng.asp>.

in-chief in the Australian constitution.[112] Unlike the NDA, Australia's *Defence Act 1903* does ordain that the Crown's command authority be delegated to this country's defence chief. Section 9(1) of this act states that the governor general may appoint a chief of the defence force (CDF). Section 9(2) states that the CDF shall have the command of the Australian Defence Force (ADF), subject to any directions of the defence minister. Section 9(5), however, specifies that the CDF's command authority under section 9(2) "has effect subject to section 68 of the Constitution," which provides that "The command in chief of the naval and military forces of the [Australian] Commonwealth is vested in the Governor General as the Queen's representative." The power to commission a commander of the ADF is the Australian Crown's, but Parliament has regulated that the governor general will vest it in the CDF. The Australian Parliament thereby recognizes that the constitutional power resides with the Crown, while asserting the authority of statute to regulate how the executive exercises that power.

Returning to the NDA, the significance of the statute's silence about the CDS command authority merits particular attention. The fact that the NDA does not state that the Governor-in-Council shall vest command of the CF in the CDS means that Cabinet does not need this officer to issue direct orders to the military. The Governor-in-Council and the defence minister, and possibly the prime minister or a Cabinet committee, can issue orders to the CF through advice to the Crown. Hence, whereas the Australian *Defence Act 1903* ensures that the CDF's command authority is always subject to ministerial direction, the NDA allows the government to exercise the Crown's supreme command authority to keep the CF fully subservient to ministers. The wording of the NDA is telling here. Section 18(1) uses a permissive clause when providing for the appointment of a CDS: the Governor-in-Council "may" name a CDS, not 'shall'. The permissive clause suggests that, however awkward and impractical, the CF could find itself without a CDS.[113] In that event, section 15 of the *Constitution Act, 1867* would allow ministers to issue orders to the military nonetheless. The introductory clause to section 18(2) of the NDA is clear about this point: "Unless the Governor-in-Council otherwise directs, all orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister shall be issued by or through the Chief of the Defence Staff."

112 *Defence Act 1903* (Cth).

113 Had Parliament intended to make the naming of a CDS mandatory, the imperative clause would surely have been used, as it is in section 7 of the *National Defence Act*, where the Governor-in-Council is required to name a deputy minister of national defence.

Once again, since ministers are not in the military chain of command, the powers they exercise when circumventing the CDS must be the Crown's.

d) Military deployments

Military deployments are addressed in three parts of the NDA. Section 31(1) provides that the Governor-in-Council can place the CF on "active service" to address emergencies, defend Canada, take part in United Nations operations, or fulfill Canada's obligations under the North Atlantic Treaty or North American Aerospace Defence Command Agreement. Section 32 goes on to state that Parliament should be sitting within ten days after the CF has been placed on active service. These sections do not affect the Crown's power to deploy the armed forces, let alone the executive's constitutional authority to make use of the military during international crises. On the contrary, section 31(1) implicitly recognizes that these are Crown powers, while section 32 merely seeks to ensure that Parliament can hold the government to account when the CF is on active service. The reference to active service, meanwhile, reflects Parliament's constitutional authority to set the conditions of military service. Sections 31(1) and 32 presuppose that the Crown has both the authority and responsibility to deploy the armed forces.[114] The NDA is not vesting the executive with that power or duty.

Part 1, section 5, of the New Zealand *Defence Act 1990* reinforces this interpretation of the NDA.[115] The New Zealand legislation acknowledges that the Crown has the constitutional authority to use armed forces to defend New Zealand and its interests, as well as take part in collective security operations overseas. This section of the *Defence Act 1990* also recognizes that the New Zealand Crown has the constitutional authority to use the military to perform public service and aid the civil power. The NDA recognizes these powers of the Canadian Crown, too. Section 273.6(1) of the NDA states that "the Governor in Council or the Minister may authorize the Canadian Forces to perform any duty involving public service." However, the next sub-sections go on to specify that:

> (2) The Governor in Council, or the Minister on the request of the Minister of Public Safety and Emergency Preparedness or any other Minister, may issue directions authorizing the Canadian Forces to provide assistance in respect of any law enforcement matter if the Governor in Council or the Minister, as the case may be, considers

114 Bolt, *supra* note 12.

115 *New Zealand Defence Act supra* note 59.

> that (a) the assistance is in the national interest; and (b) the matter cannot be effectively dealt with except with the assistance of the Canadian Forces.[116]
>
> (3) Subsection (2) does not apply in respect of assistance that is of a minor nature and limited to logistical, technical or administrative support. [117]

The purpose of these provisions is to place restrictions on the Crown's existing power, not vest such an authority in the executive. Coupled with the provisions of Canada's *Emergencies Act*, which regulates the Crown's powers during four types of emergencies (public welfare, public order, international, and war), this section of the NDA serves to limit the executive's use of the military to assist law enforcement to exceptional cases. Both the NDA and the *Emergencies Act* accept that this power is the Crown's, however.[118]

Part VI of the NDA allows provincial attorneys general to make requests for military aid of the civil power. This part ensures provinces have access to military assistance when faced with public order emergencies that threaten to overwhelm local law enforcement, or natural disasters that overwhelm provincial resources. As outlined in the act, provincial attorneys general issue a requisition to the CDS in such cases. Once the requisition is received, the CDS determines which elements of the CF will be deployed, subject to the directions of the federal defence minister. Importantly, however, the authority exercised by provincial attorneys general to requisition the CF resides with the Crown, which explains why the CDS is obligated to answer. Parliament is not granting attorneys general a direct power over the military. Rather, the NDA allows them to exercise the Crown's powers. Evidence for this interpretation is found in the history of military aid of the civil power and in Australia's *Defence Act 1903*.

Under Charles II, the responsibility to call out the militia in aid of civil authorities was vested in the Crown's lords lieutenant, the Sovereign's representatives in English counties. The monarch delegated this authority to lords lieutenant via letters patent. The logic behind this delegation was that local militia could best respond to breaches of the public peace in their counties, under the command of the resident lord lieutenant.[119] In the 18th century, civil magistrates were granted the authority to request military assistance for

116 This section is meant to recognize and delimit the Crown's power to use the armed forces to assist law enforcement. The authority to do so is a long-established prerogative of the Crown. See Ministry of Justice report, *supra* note 23 at 32.

117 *NDA supra* note 106.

118 *Emergencies Act*, *supra* note 50.

119 Clode Vol 2, *supra* note 72 at 127-128.

aid of the civil power, with the understanding that the armed forces were acting under the authority of the Crown when they answered such requests.[120] Indeed, it was necessary to clarify that the armed forces were acting under the authority of the Crown to guarantee that military discipline applied when they acted as peace officers.[121]

This reasoning continued well into the 19th century, when the 1868 Canadian *Militia Act* was drafted.[122] Under this statute, a municipal official could request aid of the civil power from the commander of the local active militia, who would then call out the force. After the First World War, the power to requisition the militia was vested in provincial attorneys general, while the authority to call out the force remained with the nearest commanding officer. The NDA, therefore, adheres to a historical practice adapted to the particular circumstances of Canada and the Canadian federation. The Crown remains the underlying source of the authority to requisition the military for aid of the civil power, though in Canada this Crown power was delegated to municipal, and later provincial officials, by parliamentary statute. This in turn accounts for the obligation of military commanders to answer an aid of the civil power requisition.

Evidence of the Crown's role in this arrangement is seen in section 51 of Australia's *Defence Act 1903*. This section outlines the various ways in which the military can be called out to quell domestic violence in the Australian Commonwealth. In each instance, whether at the federal or state level, the request for military assistance is made to the Australian governor general, who then calls out the ADF under the direction of the CDF. Although this is a formal arrangement, it highlights that the authority to requisition the military flows from the governor general, who has been vested with the powers of command-in-chief in the Australian constitution. Given that there is no section of the Canadian NDA that suggests otherwise, this must be the constitutional underpinning of aid of the civil power in Canada as well.

Most of the NDA is composed of provisions that reflect Parliament's powers to shape the terms of military service and discipline, as well as the legislature's authority to create executive offices and determine how the authority of the executive is exercised within government. However, this does not detract from the importance of the Crown's command-in-chief powers, upon which the NDA builds. To make sense of this statute, and the legal foundations

120 *Ibid* at 144-145.
121 *Ibid* at 145-155.
122 *Militia Act*, RSC 1868.

of national defence in Canada, it must be seen as a law that incorporates Parliament's authorities under section 91(7) and those of the Crown under section 15 of the *Constitution Act, 1867*.

IV. Conclusion

Constitutions are permeated by gaps and silences.[123] These omissions speak to unresolved debates and undefined authorities. The Canadian executive power and the Crown's authority over the military are good examples of still unresolved constitutional puzzles. To clarify the nature and scope of Canada's executive power, and the authorities governments can exercise by virtue of section 15 of the *Constitution Act, 1867*, this article has investigated the relevance of the Canadian Crown and Canada's functional separation of powers with respect to military matters.

The Crown, as David E. Smith astutely observed, is the 'invisible' first principle of Canadian government. Its powers and authorities serve as the foundation of the executive in Canada, yet this fact is clouded by the British doctrine of parliamentary supremacy, the conventions of responsible government that emphasize the centrality of parliamentarians in government, and the ascription of purely ceremonial importance to the monarchy in the constitution. The source of the executive's power, and the full scope of governmental authority, are concealed as a result.[124]

An understanding of the executive's powers under section 15 of the *Constitution Act, 1867* have suffered from this veiling. Jurists have largely ignored this section and the assumption has been that parliamentary statute provides the government and the armed forces with their actual authorities. Consequently, the full breadth of the Canadian executive's national defence powers and authority over the armed forces has been under-appreciated. When the evolution of the Crown's military powers is laid out and read alongside the *National Defence Act*, it is apparent that section 15 vests significant authorities in the executive. Section 15, not parliamentary statute, is the source of the Canadian executive's powers to raise, govern, command, and use the armed forces to address crises and emergencies.

123 Michael Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (London: Routledge, 1989); Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003) ch 3.

124 Smith, *supra* note 13 at introduction.

Canada's functional separation of powers insulates these powers from undue legislative interference. The interpretation of SCC jurisprudence presented here suggests that Parliament may not be able to wholly intrude on the executive's unique competencies and powers.[125] The legislature must respect those executive powers that are necessary for governments to fulfill their constitutional responsibilities and functions with dignity and efficiency. Unlike in the United Kingdom, therefore, the Canadian Crown's executive powers are fourfold: statutory, prerogative, personal, and constitutional. While Parliament is supreme with respect to the first three, it cannot abolish or inappropriately intrude on the fourth.

The authorities included in section 15 of the *Constitution Act, 1867* are necessarily constitutionally protected powers of the executive. It is more than the fact that section 15 entrenches them. The Canadian government must be able to rely on the Crown's authorities to raise, govern, command, and employ the armed forces in order to complete their constitutional responsibilities and functions — namely, to defend Canada, protect Canadians, maintain a proper military command structure, and meet crises and emergencies with due autonomy and efficiency. While Parliament retains an equally significant constitutional right to regulate exercises of these authorities, their origin, logic, and application make them inherent in the Crown as the executive power and fount of supreme military authority.

In concluding this article, the question of what other constitutional powers the executive might possess arises as an avenue for future research. While the content of section 15 can be narrowed by examining the historical relationship between the Crown, Parliament, and the armed forces, those powers that might be read into section 9 of the *Constitution Act, 1867* could be quite numerous. The SCC, however, has tended to refer to the Crown's historic prerogative powers for guidance, as the justices did when they discussed the executive's constitutional responsibility for foreign affairs in *Khadr*. As was argued here, it is likely that other historic prerogative powers of the Crown are in fact constitutional powers of the executive in Canada and that the standards set out by the SCC in *New Brunswick Broadcasting* and *Vaid* should be used to determine which prerogatives have undergone this evolution. It is not unlikely that a number of apparently vestigial Crown powers would gain a constitutional status if this method of evaluation was applied.

125 *New Brunswick Broadcasting, supra* note 20 at 389; *Vaid*, *supra* note 20 at para 21.