

Court of King's Bench of Alberta

Citation: Chief Electoral Officer of Alberta v Sylvestre, 2025 ABKB 712



Date:
Docket: 2503 15116
Registry: Edmonton

Between:

Chief Electoral Officer of Alberta

Applicant

- and -

Mitch Sylvestre and Minister of Justice of Alberta

Respondents

**Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby**

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I. Introduction

[1] Mitch Sylvestre (the “Referendum Proponent”) commenced the process pursuant to the *Citizen Initiative Act*, SA 2021, c C-13.2 (“*CIA*”) for Alberta to hold a referendum that proposes that Alberta become a sovereign and independent country. The Chief Electoral Officer of Alberta (“CEO”) asked the Court, pursuant to his referral power in *CIA* s 2.1(1), to determine if the Referendum Proponent’s proposal meets the requirements of *CIA* s 2(4), which demands that a referendum proposal not contravene sections 1 to 35.1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (the “*Constitution Act, 1982*”). Those sections of the *Constitution Act, 1982* are comprised of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) and Aboriginal and Treaty rights.¹ The essence of the question that the CEO asks me to answer is:

Does the proposal that “Alberta shall become a sovereign country and cease to be a province in Canada” contravene the *Charter* or Treaty rights?

[2] The question that must be decided is not whether holding a referendum on Alberta independence is *constitutional*. The question prescribed by *CIA* s 2(4) and asked by the CEO engages with the constitution but is not in a proper sense a question of constitutionality. Accordingly, this case does not conclude that the constitution prohibits anything; this decision is only about whether the Referendum Proponent’s constitutional referendum proposal is allowed by the *CIA*.

[3] The *CIA* permits all kinds of referendum proposals to be made if they do not contravene the *Charter* or Treaty rights. The *CIA* allows citizens to propose changes to the parts of the constitution that provide the structure for government institutions and the division of powers between the provincial and federal levels of government. The *CIA* also enables citizens to propose changes that will add rights to the constitution or enhance existing constitutional rights. But the *CIA* does not allow citizens to propose to remove rights from the constitution or limit those rights. The *CIA* prevents the citizen-initiated referendum procedure from being used to diminish constitutionally protected rights or oppress minorities by specifying that it cannot be used to contravene *Charter* or Treaty rights.

[4] The Referendum Proponent and Alberta submit that the constitutional referendum proposal seeks only to have voters express an opinion on Alberta independence and that anything that follows from that is contingent on decisions by Alberta and negotiations with Canada. The Referendum Proponent and Alberta emphasize that a successful referendum result, on its own, has no legal effect and cannot contravene *Charter* and Treaty rights. The Referendum Proponent and Alberta further contend that because what is proposed is a constitutional amendment it cannot contravene *Constitution Act, 1982* ss 1-35.1 because lawful use of the amendment provisions of the constitution does not contravene the constitution.

[5] A critical weakness of the Referendum Proponent’s argument that his proposal has no legal effect because it is just about consulting with Albertans is that his constitutional referendum proposal uses language that he expects will trigger separation negotiations with Canada pursuant

¹ The question of Alberta independence mainly engages Treaty rights, not Aboriginal rights. For convenience, then, these reasons refer only to Treaty rights unless a specific Aboriginal rights issue is relevant.

to the *Clarity Act*, SC 2000, c 26.² The *Clarity Act* demands that before there are separation negotiations with a province there must be a clear question about independence approved by a clear majority of voters in the province. The Referendum Proponent cannot take the position in this case that his constitutional referendum proposal is just a legally inconsequential consultation with Albertans or that the substance of his constitutional referendum proposal is something other than Alberta independence when his question is intended to secure a popular mandate from Albertans for separation that will trigger obligations under the *Clarity Act*.

[6] The *Amici Curiae* submit that the Referendum Proponent and Alberta's approach is wrong because *CIA* s 2(4) requires the Court to ask if proposed constitutional amendments contravene existing constitutional rights. This, they submit, demands that the Court take the proposed constitutional amendment as a fact instead of assuming that it is contingent or will only be accomplished in a constitutional manner. They assert that the reason why the question must be approached this way is that if the Referendum Proponent's argument is accepted, *CIA* s 2(4) would have no function in respect of constitutional referendum proposals. What must be done, according to the *Amici Curiae*, is to measure the realized proposal – Alberta independence – against the existing rights in *Constitution Act, 1982*, ss 1-35.1.

[7] The *Amici Curiae* argue that *Charter* and Treaty rights are guaranteed and that anything that puts those rights in jeopardy contravenes *Constitution Act, 1982* ss 1-35.1. From this starting point, they assert that because any rights protections in an independent Alberta would be found in new constitutional instruments, they would be different even if they replicate the rights protections found in the existing Canadian constitution. The substitution of new rights in place of existing guaranteed rights, according to this view, contravenes the *Charter* and Treaty rights because the new rights are not *guaranteed* – they are hypothetical at this point – and would be found in a different constitutional instrument, in a different country, and enforced in the courts of the new country.

[8] The *Amici Curiae* and the First Nations intervenors further argue that for the purposes of this case it must be assumed that an independent Alberta would have the normal attributes of an independent sovereign country including the power to determine who is a citizen and the rights that attach to citizenship, and control of its territory and borders. This means that *Charter* rights tied to citizenship – democratic rights and mobility rights – and rights affected by borders – also mobility rights – would be contravened. In addition, the First Nations intervenors submit that if an independent Alberta is assumed to have the normal attributes of an independent sovereign state, that would necessarily contravene the Numbered Treaties (as defined below) which contemplate free movement, not international borders, and continuity of treaty parties in perpetuity.

II. Short Answers to Key Questions

[9] The following plain language short answers to the key questions in this case are offered to make this decision accessible to all interested readers. The paragraph references in brackets indicate where in the reasons for decision more detailed discussion of the point may be found.

- **What is the Citizen Initiative Act?**

² The full title of the *Clarity Act* is *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*.

The *Citizen Initiative Act* or *CIA* is provincial legislation that permits citizens to make policy proposals, legislative proposals, and constitutional referendum proposals. The *CIA* was enacted in 2021 and amended in 2025. (paras 1, 15-17, 31)

- **Are there any limits on what can be proposed under the *CIA*?**

Yes, the *CIA* does not let a citizen propose anything that would subtract from the rights protected by the *Constitution Act, 1982* ss 1-35.1. (paras 3, 64-77)

- **What is the *Constitution Act, 1982* ss 1-35.1?**

The *Constitution Act, 1982* is comprised of two things. Sections 1-34 of the *Constitution Act, 1982* form the *Canadian Charter of Rights and Freedoms* which is typically referred to as the “*Charter*.” Sections 35 and 35.1 concern Aboriginal and Treaty rights. Together, these are the main parts of the constitution that give rights that people can assert against governments. (paras 1, 110, 144)

- **What is the proposed referendum question?**

The proposed referendum question asks if citizens agree that “Alberta shall become a sovereign country and cease to be a province in Canada?” (para 1)

- **Is it constitutional for a province to hold a referendum on independence?**

Yes, it is constitutional for a province to hold a referendum on independence from Canada. But the question in this case is different. The question is whether the *CIA* allows the proposed *citizen-initiated* referendum to be held. (paras 2, 33)

- **May the Court decline to answer the question posed by the CEO?**

Yes, courts may decline to answer hypothetical questions and questions that are mostly political in nature. When deciding whether to answer a hypothetical or political question, a Court must consider whether the question is a legal one and if giving an answer to the question would have practical value. Through the *CIA*, the CEO was given the power to ask the Court if a referendum proposal contravenes *Constitution Act, 1982* ss 1-35.1 before a referendum is authorized by the CEO. The practical value in answering the CEO’s question now is that it may help to avoid court battles at a later stage of the process after significant expenditures have been made. (paras 18-24)

- **How can a citizen-initiated referendum question be unconstitutional?**

That is not what the Court must decide. The *CIA* says that a citizen-initiated referendum cannot propose anything that contravenes *Charter*, Aboriginal, and Treaty rights. The question is not whether it is constitutional for a question to be asked, it is whether what is proposed contravenes *Constitution Act, 1982* ss 1-35.1. What is proposed in the question is Alberta independence. So, the court must determine if Alberta independence contravenes *Charter* or Treaty rights. (paras 55, 78-112)

- **Didn’t the Supreme Court already decide the issues in this case in the *Secession Reference*?**

No, the *Secession Reference* did not consider the *CIA* nor whether an independence referendum contravened *Charter* or Treaty rights. The *Secession Reference* decided that the federal government must negotiate the terms of separation of a province where a clear question concerning independence is asked in a referendum and a clear majority votes for independence. (paras 35-46)

- **The Government of Alberta says that the *CIA* permits a referendum on Alberta independence. How can a court disagree with what the Government of Alberta says its own law means?**

Citizens and governments often disagree over what laws mean and it is the job of courts to decide who is right. Courts decide what laws mean. The government's interpretation of its own laws may or may not be legally correct. (para 52)

- **Is it anti-democratic for a court to consider if a citizen-initiated referendum on Alberta independence may be held?**

No, there is no inherent or constitutional right to have a citizen-initiated referendum on Alberta independence or anything else. The ability of citizens to initiate a referendum process and the limits on the availability of citizen-initiated referendums, including the process for referring questions to the Court, were provided for in the *CIA* by the democratically elected government of Alberta. (paras 29-34, 108)

- **Would Alberta independence contravene *Charter* rights?**

Alberta independence would contravene *Charter* rights because *Charter* rights are guaranteed, and it is impossible to say what constitutional rights might exist in an independent Alberta. What is known is that any constitutional rights that would exist in an independent Alberta would be found in a different constitutional document, if at all. To be clear, the finding that Alberta independence contravenes the *Charter* is not a finding that rights protections in a future Alberta constitution will be inferior to the *Charter*, just that existing *Charter* rights would not apply in an independent Alberta and what, if anything, would replace them is unknown. (paras 125-129)

- **Are there other ways that Alberta independence would contravene *Constitution Act, 1982*, ss 1-35.1 if the terms of independence and the features of the new constitutional order are unknown?**

Yes. Taking the Referendum Proponent's proposal at face value, it may be assumed that an independent Alberta would have the normal attributes of an independent sovereign country. These attributes include the power to determine who is a citizen and the power to control who crosses borders. After Alberta becomes independent, Canada has the exclusive power to determine if Albertans retain Canadian citizenship, whether they can vote in Canadian elections, and whether they can enter, reside, work, or engage in other activities in Canada. For this reason, Alberta independence contravenes *Charter* s 3 (right to vote) and *Charter* s 6 (mobility rights). For different reasons, Alberta independence contravenes *Charter* protected minority language rights. (paras 130-142)

- **What are the treaties between Canada and First Nations and why are they significant?**

Treaties 6, 7, and 8 (the “Numbered Treaties”) between Canada and First Nations cover most of the territory of Alberta. The Numbered Treaties are part of the Canadian constitution, made the creation of Alberta possible, remain part of the legal foundation for the complex society that now exists in Alberta, and govern the ongoing relationship between Canada, Alberta, and First Nations. The Numbered Treaties are legally binding on First Nations, Canada, and Alberta. (paras 156-175)

- **Do the Numbered Treaties say anything about Alberta independence?**

No, because the Numbered Treaties were signed by Canada and First Nations before Alberta was created. (para 175)

- **Would Alberta independence contravene the Numbered Treaties?**

Yes, because Alberta, as an independent sovereign country, would not be a party to the Numbered Treaties nor must First Nations accept an independent Alberta as a party to the Numbered Treaties or enter a replacement arrangement with an independent Alberta. (paras 179-214)

- **Are there other ways that Alberta independence contravenes the Numbered Treaties?**

Yes. The Numbered Treaties guarantee First Nations the right to move around the Treaty tracts and their traditional lands for hunting and other purposes connected with their traditional ways of living. The traditional territories of some First Nations located in Alberta extend into Saskatchewan, British Columbia, and the Northwest Territories. Alberta independence would create an international border that would divide the territories of the Numbered Treaties and sever the traditional lands of some First Nations. This would create a significant obstacle for First Nations located in Alberta to exercise their Treaty rights in those parts of the Treaty tracts and their traditional lands outside Alberta and for First Nations located outside Alberta exercising their Treaty rights in those parts of the Treaty tracts and their traditional lands in Alberta. (paras 215-233)

- **Does Alberta have a duty to consult with First Nations? And when must such consultations take place?**

Alberta and Canada have duties pursuant to *Constitution Act, 1982* s 35.1, the *Clarity Act*, and the *Secession Reference* to meet with First Nations if there is a referendum vote in favour of Alberta independence. Whether Alberta also has a duty to consult with First Nations prior to holding a referendum on independence was raised by some First Nations intervenors but is beyond the scope of the question that the CEO asked the Court and is not decided in this case. (paras 237-242)

- **If Alberta independence contravenes the *Charter* and Treaty rights, would such contraventions be justified by a majority of Albertans voting in favour of independence or the negotiated terms of Alberta independence?**

Those questions are not before the Court. What happens after a vote in favour of independence is set out in the *Secession Reference* and the *Clarity Act*. The *CIA* prescribes only the limited question of whether an initiative petition proposal contravenes *Constitution Act, 1982* ss 1-35.1. Whether those contraventions could be justified by a vote in favour of independence or the negotiations following such a vote are questions for another case. (paras 66-77, 214, 247-249)

[10] These short answers to key questions are provided to assist readers but also form an integral part of these reasons for decision.

III. Additional Intervenors

[11] On the morning of the first day of the hearing, counsel for the three Blackfoot First Nations – Siksika Nation (sometimes called the Northern Blackfoot), Kainai Nation (sometimes known as the Blood Tribe), and the Piikani Nation (sometimes known as the North Peigan Nation) – appeared and requested leave to intervene. The Blackfoot First Nations are three of the four members of the Siksikaitsitapi (Blackfoot Confederacy). They explained that they did not receive notice of the proceedings because they have ceased to be members of the Treaty 7 Chiefs Association to whom notice of this proceeding was directed pursuant to the order issued following *Chief Electoral Officer v Sylvestre*, 2025 ABKB 476 (“*Sylvestre I*”). Though they could have and should have known about this proceeding through other publicity measures directed in *Sylvestre I* at para 93 and through media coverage of this case, I accept their assertion that they were not aware of the proceeding.

[12] The three Blackfoot First Nations asked to intervene separately on the same terms as the other First Nations intervenors. *Chief Electoral Officer of Alberta v Sylvestre*, 2025 ABKB 552 (“*Sylvestre II*”) at paras 43-44 noted that there were no intervenors from Treaty 7 and how that could impoverish the evidential record before the Court:

There are five numbered treaties that intersect with the territory of Alberta; however, most of Alberta is covered by Treaties 6, 7, and 8. No Treaty 7 First Nation applied to participate as an intervenor. There is certainly no obligation on any individual or organization to participate in this proceeding, but it leaves the Court without any party with an interest in the question of how Mr. Sylvestre’s proposal affects Treaty 7 First Nations.

The text of Treaty 7 may be different than the other numbered treaties in ways that the Court does not appreciate and the circumstances surrounding the negotiation and signing of Treaty 7 may be different than the other numbered treaties in ways that are relevant and important. Further, the experience of Treaty 7 First Nations may be significant because the southern limit of Treaty 7 is the Canada-US border. Treaty 7 First Nations, unlike the proposed First Nations intervenors, may have direct experience of the challenges posed by an international border to the exercise of their rights. For example, three of the First Nations of the Blackfoot Confederacy (Siksika, Apatosi Piikani, and Kainaiwa) are in Alberta and the fourth (Aamskapi Pikuni) is in Montana.

[13] There is no question that if the Blackfoot First Nations had applied for leave to intervene within the timeframe provided in the *Sylvestre I* procedural order, they would have been allowed to participate. The question raised by their late arrival is whether the parties will be prejudiced

by their participation. Neither the Referendum Proponent nor Alberta took a position on the intervention of the Blackfoot First Nations, nor did they assert any prejudice. The other First Nations intervenors submitted that it was appropriate for the Blackfoot First Nations to participate despite their late application.

[14] The Blackfoot First Nations were allowed to participate as intervenors in this proceeding on the condition that their materials be delivered by December 3, 2025, and that oral submissions would take place on December 5, 2025. The Referendum Proponent and Alberta were permitted to respond to the Blackfoot First Nations intervenor submissions on December 5, 2025. Given the late arrival of the Blackfoot First Nations intervenors and the tight timeline for delivering evidence and argument, they were precluded from addressing the interpretation of *CIA* s 2(4). The evidence and argument of the Blackfoot First Nations intervenors was limited to matters relating to how Alberta independence may affect Treaty 7 rights, including the matters set out in *Sylvestre II* at para 44. Though it would have been better if the Blackfoot First Nations had intervened together for the sake of efficiency, given the short timeline and their assurances that they would minimize duplication, it was determined that it was unrealistic to impose such a requirement.

IV. The Key *CIA* Provisions and the Special Case Stated by the CEO

[15] *CIA* s 2(4) states that “[a]n initiative petition proposal must not contravene sections 1 to 35.1 of the *Constitution Act, 1982*.” The CEO may determine whether an initiative petition proposal contravenes sections 1 to 35.1 of the *Constitution Act, 1982* or he may refer the question to the Court for determination pursuant to *CIA* s 2.1(1). *CIA* s 2.1(1) provides that “[t]he Chief Electoral Officer may, with respect to a legislative proposal, a policy proposal or constitutional referendum proposal, state a question in the form of a special case to the Court seeking the opinion of the Court as to whether the proposal conforms with the requirements of section 2(3) and (4), as applicable.”

[16] The CEO stated the following special case for the Court pursuant to *CIA* s 2.1:

Does the following proposal contravene section 2(4) of the Citizen Initiative Act, in that it contravenes any or all of sections 1 through 35.1 of the Constitution Act, 1982:

“Do you agree that the Province of Alberta shall become a sovereign country and cease to be a province in Canada?”

Without limiting the scope of the question posed, does the proposal contravene any of the following sections?:

- Section 1 – The guarantee of rights contained in the Charter
- Section 3 – Democratic rights of citizens
- Section 6 – Mobility rights
- Section 7 – Right to life, liberty, and security of the person
- Section 15 – Equality before and under law and equal protection and benefit of the law
- Section 24 – Enforcement of guaranteed rights and freedoms

- Section 35 – Recognition of existing aboriginal and treaty rights

[17] The task at hand is not just to answer the question in the special case stated by the CEO because there is disagreement over what the *CIA* requires and what the Court must decide. So the task, in significant part, is to determine what the real question is that must be answered. For now, it may be said in a broad sense that the CEO’s question asks whether the referendum proposal contravenes the enumerated constitutional rights.

V. Preliminary Considerations

a. May the Court Decline to Answer the Question Posed by the CEO?

[18] Courts are reticent to answer political questions: *Reference re Secession of Quebec*, [1998] 2 SCR 217 (“*Secession Reference*”) at para 27; see also, *Baker v Carr*, 369 US 186 (1962). Canada does not have an explicit political question doctrine; rather, the relevant concept is justiciability which asks whether a question has a sufficient legal component such that it is appropriate for the Court to answer the question: *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 34. The justiciability concept demands that courts stick to deciding questions of law and avoid purely political questions.

[19] The CEO’s power under the *CIA* to refer the question of whether a constitutional referendum proposal contravenes the *Constitution Act, 1982* indicates that the Legislative Assembly thought it appropriate and useful for the Court to offer its opinion at an early stage of the citizen initiative process, including for constitutional referendum proposals.

[20] The special case stated by the CEO is both political and hypothetical. The CEO’s questions are political because they concern a sensitive political subject – Alberta independence – and the democratic process. The questions are at least partly hypothetical because the terms of Alberta independence cannot be known at the stage at which *CIA* s 2(4) demands the CEO or Court assess whether the constitutional referendum proposal contravenes *Constitution Act, 1982* ss 1-35.1. Alberta cannot become independent without first negotiating the terms of separation with Canada. If the CEO’s questions were posed in normal adversarial litigation, a court might decline to hear the case.

[21] The Supreme Court of Canada considered the appropriateness of answering a hypothetical and politically sensitive question in the *Secession Reference*. The Court observed that where a question is referred to a court by Parliament or a provincial legislature – which is the closest analogue to the present case – a court may consider “issues that might otherwise be considered not yet ‘ripe’ for decision”: *Secession Reference* at para 25.

[22] The *Secession Reference* explains at para 26 that a court may decline to answer a reference question if:

- (i) to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or
- (ii) the Court could not give an answer that lies within its area of expertise: the interpretation of law.

[23] Answering the question must have practical value: *Secession Reference* at para 29. Answering the questions posed in the *Secession Reference* was appropriate and had practical value because the legal uncertainty surrounding the ground rules for Quebec separation was a

festering source of political dispute. As the Court put it at para 31, the “questions raise issues of fundamental public importance.”

[24] The question in the present case is a legal question because it concerns the interpretation of a statute. Though the question is partly hypothetical because it requires the Court to assume the substance of the constitutional referendum proposal as an accomplished fact, the Legislative Assembly clearly intended constitutional referendum proposals to be assessed in this way. Answering the question has practical value because it will assist the CEO in determining if the Referendum Proponent’s constitutional referendum proposal should be approved and it mitigates the risk of litigation over the constitutional referendum proposal at a later stage after both the Referendum Proponent and Elections Alberta have made significant expenditures.

b. What Are the Limits on What the Court May Decide?

[25] Alberta raises a concern about the scope of what may be decided in this case. Alberta emphasizes that the Court’s authority to answer the special case posed by the CEO is derivative of the authority that the CEO has under the *CIA*. Alberta submits that “[t]he CEO does not have the statutory authority to provide further advice on subsequent steps to implement a proposal or comment about the implications of a proposal. The CEO’s role is limited to a bare determination that a proposal [does or] does not contravene ss 1 to 35.1 of the *Constitution Act, 1982*.” Alberta goes on to submit that “[t]he Court is exercising a statutorily prescribed role and should not go beyond this ‘just because there is an interesting and significant issue to be considered’”: quoting *Purolator Inc v Canadian Union of Postal Workers*, 2025 ONCA 565 at para 57.

[26] There is a tension between Alberta’s demand for a narrow approach and the CEO’s specific request in oral submissions for guidance from the Court with respect to the operation of the *CIA*. Another practical difficulty with Alberta’s admonition to decide this case narrowly is that the Court’s responsibility to the parties, intervenors, and the public is to give reasons that address the arguments made by all the participants. Striving to narrow the reasons for decision risks not addressing arguments properly before the Court. Addressing all the arguments before the Court also provides a broad base for appellate review. As I put it many years ago, “[i]n a court of first instance, a judge should not limit the opportunity of an appellate court to evaluate all possible reasons for a decision.”: Colin Feasby, “Failing Students by Taking a Pass on the Charter in *Pridgen v University of Calgary*” (2013) 22(1) *Constitutional Forum* constitutionnel 19 at 27, cited with approval in *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 at para 26.

[27] The arguments made by the different parties and intervenors do not conform to Alberta’s narrow view of the question the Court must answer. Even if Alberta’s framing of the question was accepted, the Court’s analysis could not be confined as Alberta demands. It would still be necessary to give the positions of the other parties and intervenors due consideration and demonstrate such analysis in the reasons for decision.

[28] Moreover, as these reasons explain, Alberta’s framing of the question is not accepted. To decide this case, it is necessary to venture beyond where Alberta would like to go but these reasons extend only so far as required to explain what has been decided. To the extent that these reasons touch on things that are peripheral to essential conclusions, those parts of the reasons are what judges and lawyers call *obiter dicta*, which is Latin for “things said in passing.” *Obiter dicta* are not binding as a matter of law. To put this in context, much of what the Supreme Court

said in the *Secession Reference* was *obiter dicta*. Though these reasons address the arguments of all participants, nothing beyond what the CEO asked in the special case is decided.

c. Is this Proceeding Anti-Democratic?

[29] The Referendum Proponent says that this proceeding is anti-democratic and submits that “[i]t is not the Court’s role to pre-empt or suppress democratic dialogue.” He asserts that “[t]his referral is directly contrary to the Legislature’s intent.” He goes on to say that,

Section 2(4) of the *CIA* was not meant to give a Justice of the Court of King’s Bench more say than any other citizen in the process of initiating a lawful constitutional amendment proposal. Nor was it intended to give a Justice a platform to express their personal views on the independence of Alberta.

[30] The Referendum Proponent cites a post on X.com (formerly Twitter) by Justice Minister Mickey Amery earlier this year following amendments to the *CIA* to support his position. Minister Amery wrote “[t]he recently passed amendments to the *Citizen Initiative Act* are intended to be broadly permissive and to allow Albertans the opportunity to launch a referendum petition without needless bureaucratic red tape or court applications slowing the process” [Emphasis in Referendum Proponent’s Written Submissions]: Mickey Amery, “Statement: Response to Citizen Initiative process...” (29 July 2025), online: <x.com/mickeyamery/status/1950209422321672374>.

[31] The Referendum Proponent’s position is grounded in a lack of understanding of the judicial role. *CIA* s 2.1(1) empowers the CEO to refer the question of compliance with *CIA* s 2(4) to the Court. *CIA* s 2.1(1) was not put in the *CIA* by accident. When the *CIA* first came into force in 2021, the CEO had authority to refer the question of a proposal’s compliance with s 2(4) under s 2(10). The government’s own legislative drafters, presumed to be working at the direction of the executive branch, put s 2(10) in the *CIA*. In debates in the Legislative Assembly then Justice Minister Kaycee Madu highlighted the section in response to opposition fears that *Charter* and Treaty rights would not be protected. *CIA* s 2(10) was repealed earlier this year by the *Election Statutes Amendment Act, 2025*, SA 2025, c 7 (“*ESAA 2025*”) and replaced with the almost identically worded *CIA* s 2.1(1). This is an affirmation by the current Government of the CEO’s power to refer matters to the Court. What is going on in this proceeding is exactly what the *CIA* contemplates and what the government minister responsible for the *CIA* told the opposition and the public in the Legislative Assembly would happen. For that reason, it is a paradigm example of democracy. Just because the Referendum Proponent or Alberta now wishes that *CIA* s 2.1(1) said something different does not make it so.

[32] The government’s provision for the Court to play a role in the screening of initiative petition proposals for conformity with existing rights of Albertans is not only democratic, but in keeping with the proper role of courts as independent arbiters of the law. Courts play an essential role in interpreting the laws passed by Parliament and the provincial legislatures. Attacking courts as anti-democratic may be politically convenient but it is corrosive of the rule of law and, indeed, of democracy. Justice Major observed in *Ell v Alberta*, 2003 SCC 35 at para 22 that, “[t]he judiciary occupies an indispensable role in upholding the integrity of our constitutional structure.”

[33] If the Referendum Proponent or Alberta does not like judicial screening of constitutional referendum proposals, they cannot blame the Court. This reality was aptly expressed by

Professor Bruce Pardy who recently wrote the following about the *CIA* s 2(4) screening process in the *Western Standard* (29 October 2025), online: <westernstandard.news/opinion/pardy-the-referendum-goose-is-cooked/68605>:

This is a made-in-Alberta obstacle. The federal government is not involved in the case. No federal laws are relevant. The Court is not considering whether Alberta has a route to leave Canada, legally and constitutionally. It does. The Alberta Court is not examining whether the proposed referendum question meets the requirements laid out by the Supreme Court of Canada or in the federal *Clarity Act*. The cause of this little circus is not even the Charter itself. Alberta's own statute is the problem.

[34] *CIA* s 2.1(1) imposes on the Court the obligation to determine if a constitutional referendum proposal contravenes *Constitution Act, 1982* ss 1-35.1 when asked by the CEO. Subject to the question of justiciability addressed earlier, the Court's job is to do what it is asked and to provide a reasoned answer no matter how inconvenient some may now find that.

VI. The *Secession Reference* and the *Clarity Act*

[35] The Referendum Proponent and Alberta refer to the *Secession Reference* and *An Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 26 ("*Clarity Act*") to ground their arguments that the question before this Court has already been answered. A brief overview of the *Secession Reference* and the *Clarity Act* gives helpful context for the rest of this decision.

a. The *Secession Reference*

[36] On September 7, 1995, the Premier of Quebec tabled Bill 1, *An Act respecting the future of Québec*, which authorized the Quebec National Assembly to proclaim Quebec a sovereign country. The plan was for Bill 1 to become law following a successful referendum on independence.

[37] A referendum was held on October 30, 1995, on the question:

Do you agree that Québec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Québec and of the agreement signed on June 12, 1995?

[38] The result was 50.58% answering "No", with 49.42% answering "Yes". A remarkable 93.52% of registered electors participated. Following the defeat of independence by this razor-thin margin, Bill 1 was not passed.³

[39] On September 30, 1996, the Attorney General of Canada submitted three reference questions to the Supreme Court of Canada:

³ For a more complete history of the judicial proceedings in Quebec surrounding the Referendum and sovereignty movement, see *Henderson v Procureur general du Québec*, 2021 QCCA 565.

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? ...
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

[40] The Supreme Court of Canada released its decision on August 20, 1998. The Court began with a review of the history and theory of the Canadian constitution. The Court determined that the evolution of constitutional arrangements has been characterized by four principles: federalism, democracy, constitutionalism and the rule of law, and protection of minorities. These principles undergird the constitutional framework of Canada and any attempt to change the constitution. The *Secession Reference* held at para 150 that secession is permissible, and that the constitution is “not a straitjacket” and can be changed. However, secession cannot be achieved unilaterally.

[41] The Court held at a para 149 that democracy “means more than simple majority rule.” Democracy, according to the Court, “exists in the larger context of other constitutional values” including the rule of law and the protection of minorities. The Court concluded that, “[t]he Constitution vouchsafes order and stability, and accordingly secession of a province ‘under the Constitution’ could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.”

[42] Though the will of the majority is tempered by other constitutional principles, the Court recognized that, where there had been a “clear majority vote” on a “clear question in favour of secession”, secession would have democratic legitimacy which “all of the other participants in Confederation would have to recognize”: *Secession Reference* at para 150. That meant that the other provinces and the federal government would have no basis to deny the right of a province to pursue secession, and therefore all parties would have an obligation to engage in good faith negotiations: *Secession Reference* at para 151. The conduct of the parties would be informed by the four constitutional principles the Court had recognized: *Secession Reference* at para 94. The Court also noted that the content of these negotiations would be political and, to that extent, the courts would have no supervisory role: *Secession Reference* at para 153.

[43] The Court recognized that the matters at issue during secession negotiations would be difficult as negotiators would have to balance many different and conflicting interests. Further, although secession would have to be contemplated, it would not be guaranteed. The negotiations could still reach an impasse: *Secession Reference* at para 97. The Court refused to speculate on what would happen in such a situation, instead reiterating that secession would require that an amendment be negotiated: *Secession Reference* at para 97.

[44] The Court did not address how secession could be achieved in a constitutional manner but instead held that unilateral secession – secession without principled negotiations – was unconstitutional and contrary to international law: *Secession Reference* at paras 104 and 111.

The Court refrained from pronouncing the applicability of any particular constitutional procedure to effect secession without having more facts.

[45] Although unilateral secession was found to be contrary to the constitutional order, the Court did not address if this would be contrary to *Charter* or Treaty rights. Indeed, the Court referred to the *Charter* only to bolster its explanation of constitutional principles. The Court also gave little attention to Aboriginal and Treaty rights in the *Secession Reference*. The Court recognized these rights in its discussion of the constitutional principle of protection of minorities and held that such rights would have to be addressed during negotiations: *Secession Reference* at paras 82 and 139.

[46] Though the *Secession Reference* is an important decision, it does not provide answers to the question before me: see also *Sylvestre I* at paras 63-67. The Supreme Court of Canada was not required by its reference questions to address the issues that this Court is required to decide by the special case posed by the CEO pursuant to the *CIA*.

b. The Clarity Act

[47] Parliament enacted the *Clarity Act* on June 29, 2000 to respond to the political questions identified in the *Secession Reference*. The *Clarity Act* notes in its preamble:

WHEREAS, in light of the finding by the Supreme Court of Canada that it would be for elected representatives to determine what constitutes a clear question and what constitutes a clear majority in a referendum held in a province on secession, the House of Commons, as the only political institution elected to represent all Canadians, has an important role in identifying what constitutes a clear question and a clear majority sufficient for the Government of Canada to enter into negotiations in relation to the secession of a province from Canada⁴ [Emphasis added].

[48] The *Clarity Act* s 1(1) establishes that, within thirty days of a provincial government tabling or otherwise officially releasing the question it intends to submit to its voters in a secession referendum, the House of Commons shall consider the question and set out its determination on whether the question is clear. The *Clarity Act* s 1(3) sets out those considerations which it would use to determine the clarity of the question; namely, “whether the question would result in a clear expression of the will of the population of a province on whether the province should cease to be part of Canada and become an independent state.” Further, to help determine if the question is clear, other views that will be considered include those of the representatives of the Aboriginal peoples of Canada, “especially those in the province whose government is proposing the referendum on secession.”

[49] The *Clarity Act* s 1(4)(a) provides that a referendum question that “merely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population of that province on whether the province should cease to be part of Canada” would not be considered a clear expression of will and therefore Canada would have no obligation to negotiate. As is

⁴ The *Clarity Act* was poorly received in Quebec and the National Assembly responded with *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, SQ 2000, c 46.

explained later in these reasons, this point is important for determining what the subject matter of the Referendum Proponent's constitutional referendum proposal is. The *Clarity Act* s 1(6) also states that there shall be no negotiations if the question is not clear.

[50] Following a referendum on secession, if the provincial government seeks to enter negotiations to secede from Canada, the House of Commons, if it had determined that the question was clear, would then determine whether there has been a "clear expression of a will by a clear majority of the population": *Clarity Act*, s 2(1). Factors that will be considered include the size of the majority of valid votes cast in favour of secession; the percentage of eligible voters voting in the referendum and any other matters the House of Commons considers relevant: *Clarity Act*, s 2(2). The House of Commons will also consider the views of representatives of the Aboriginal peoples of Canada to determine if there has been a clear expression of will by a clear majority. If the House of Commons determines that there was not a clear majority of the population that had expressed a clear will, then there shall be no negotiations on the part of Canada: *Clarity Act*, s 2(4).

[51] The *Clarity Act* sets out the framework for the House of Commons to consider the clarity of a referendum question once it has been tabled or otherwise officially released and confirms the obligation to negotiate following a vote by a clear majority in favour of secession of a province. The *Clarity Act* is relevant to the present case because it provides the process that the Referendum Proponent hopes to engage. The Referendum Proponent's constitutional referendum proposal must be understood contextually including by taking account of what the *Clarity Act* requires.

VII. What is the Question that the Court Must Answer?

a. Introduction

[52] The current Minister of Justice says that the *CIA* permits a citizen-initiated referendum on the question of Alberta independence. But just because a Minister representing the Alberta Government says a law means something does not make it so. The meaning of laws is often contested. Sometimes a dispute over the meaning of a law is caused by poor drafting; other times it is because the law must be applied to circumstances that were not anticipated when the law was written. Either way, once a bill is passed by elected representatives and proclaimed into law, it is the job of courts to decide what it means.

[53] The *CIA* is an unusual law because it requires the Court to consider a constitutional referendum proposal on an anticipatory basis, and it is written in a way that is an awkward fit with the usual way that courts evaluate constitutional questions. *CIA* s 2(4) is also peculiar in that it applies to *Constitution Act, 1982* ss 1-35.1 which includes interpretive provisions and sections that apply exclusively to New Brunswick. These challenges are accentuated in the present case by the matter of the referendum – Alberta independence – which is not the everyday type of initiative petition proposal for which the *CIA* appears to have been written. Despite these challenges, the meaning of the *CIA* and what it requires in the present case must be ascertained using the standard tools of statutory interpretation.

[54] The first thing that must be resolved is what the *CIA* means when it uses the word "contravene." Normally, *Charter* and Treaty rights analysis begins with asking if there has been a limitation of rights followed by the question of whether the limit is justified which for *Charter*

rights is determined using the analytical framework set out in *R v Oakes*, [1986] 1 SCR 103 and for Treaty rights is considered using the rubric in *R v Sparrow*, [1990] 1 SCR 1075. Where a limitation is found, the state has an opportunity to justify the limitation under both *Oakes* and *Sparrow*. Does *CIA* s 2(4), specifically the use of the word “contravene”, require a different analytical framework?

[55] The second thing that must be decided is what question to answer. The Referendum Proponent and the CEO disagree over what the question is. The Referendum Proponent says that I must decide whether asking a referendum question about Alberta independence contravenes *Charter* and Treaty rights. The CEO says that the Court must decide if the substance of the proposal – Alberta independence – contravenes *Charter* and Treaty rights. These questions lead down different analytical paths, so it is important at the outset to choose the correct one.

b. Principles of Statutory Interpretation

[56] Interpreting statutes is a core function of courts. The goal is to find the meaning that best reflects legislative intent: *British Columbia v Philip Morris International, Inc*, 2018 SCC 36 at para 17. To do this, a court must consider the text, context, and purpose of a statute: *R v IM*, 2025 SCC 23 at para 82. A court must start its analysis by looking to the words that the Legislative Assembly used: *R v Wolfe*, 2024 SCC 34 at para 32. Where the words are precise and communicate a clear meaning, they must be the court’s dominant consideration: *Dow Chemical Canada ULC v Canada*, 2024 SCC 23 at para 101. Even if the words in the statute have a clear meaning, the court must still consider the context and purpose of a statute before settling upon the meaning: *Piekut v Canada (National Revenue)*, 2025 SCC 13 at para 45.

[57] The context of a statute is not just anything related to a statute. A contextual inquiry must start by looking at the structure of the statute, where the specific provisions fit in the statutory scheme, and the meaning of adjacent provisions: *R v (O) v Secretary of State for the Home Department*, [2022] UKSC 3 at paras 29-30. This may be called the internal context: *Clearview AI Inc v Alberta (Information and Privacy Commissioner)*, 2025 ABKB 287 at paras 64-68. Later in this section it is explained that the Supreme Court of Canada has said that a court interpreting a statute may have resort to secondary interpretive principles where text, context, and purpose do not provide an answer. I agree with that but respectfully suggest that some secondary interpretive principles should not be subordinated and should instead be understood to provide ways of navigating and understanding internal context. For example, the presumption of consistent usage and the avoidance of interpretations that nullify statutory provisions are just ways that courts use a statute’s structure and the meaning of adjacent provisions as part of their analysis of internal context.

[58] Relevant context external to a statute includes prior versions of a statute, legislative history, and the circumstances or factual matrix surrounding its enactment: *Chieu v Canada (Minister of Citizenship and Immigration)* 2002 SCC 3 at para 34; *Canada (Attorney General) v Thouin*, 2017 SCC 46 at para 34. Most of the time, internal context should carry more weight than external context in statutory interpretation: *R v (O) v Secretary of State for the Home Department* at para 30. An important reason for this is that legislatures are made up of many representatives who do not think alike and may have different understandings of the same legislative provisions and different motives for supporting the legislation: *R v Morgentaler*, [1993] 3 SCR 463 at 484. Statements made in legislative debates should not be given too much weight: *R v Khill*, 2021 SCC 37 at para 111. Statements made in the legislature by the Minister

responsible for introducing a statute are considered the most reliable evidence of this kind: *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 36. However, statements made by politicians outside the Legislative Assembly or after an enactment has been passed should carry no weight in statutory interpretation: *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297 at 319. What has been referred to here as external context may also assist a court in determining the purpose of a statute: Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) at §23.03[3][a].

[59] The purpose of a statute is its objective or *raison d'être*. However, purpose must not be defined at too high a level of abstraction: *MediaQMI inc v Kamel*, 2021 SCC 23 at para 39. Courts must be careful when considering purposes because a statute may have an overriding purpose and yet specific provisions in the same statute may operate to limit how the statute can realize that overriding purpose: *R v Rafilovich*, 2019 SCC 51 at para 30. A statute's general purpose cannot be allowed to overwhelm the clear text of a provision that puts constraints on the achievement of a statute's general purpose: *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at para 21.

[60] When the text, context, and purpose of a statute do not reveal a definitive meaning, a court may have resort to secondary principles of interpretation which are sometimes called canons of construction: *La Presse inc v Quebec*, 2023 SCC 22 at para 24. One of these secondary principles of interpretation is the use of *Charter* values. Where there is persistent ambiguity, a court should opt for an interpretation that respects *Charter* values: *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories*, 2023 SCC 31 at para 76. Another secondary interpretive principle that is relevant to the present case is that an interpretation that nullifies a statutory provision should be avoided where there is a reasonable interpretation available that gives the provision meaning or purpose: *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20 at para 45. A final secondary interpretive principle relevant to the present case is the presumption of consistent usage which holds that a word should be given the same meaning wherever it is used in a statute unless there is a clear indication that a different meaning is intended: *Thomson v Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385 at 400.

[61] The *Interpretation Act*, RSA 2000, c I-8, s 10 provides that “[a]n enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.” This provision still requires attention to the text and does not justify a meaning that cannot be supported by the text: see *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 42 where Rowe J, writing for the majority, emphasized that a decision-maker must have regard to text, context, and purpose and the *Interpretation Act*, RSC 1985, c I-21. The *Interpretation Act* does nothing to alter the principles of statutory interpretation laid down by the Supreme Court of Canada and reviewed in the preceding paragraphs because in every one of those cases either a provincial interpretation statute or the federal interpretation statute applied: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at para 24.

[62] The Treaty 8 First Nations of Alberta submit that the *CIA* should be interpreted using the principle in *Nowegijick v The Queen*, [1983] 1 SCR 29 at 36 which holds that “treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in

favour of the Indians.” But the *CIA* is not a statute relating to First Nations, it is a statute of general application. *CIA* s 2(4) applies to rights held by everyone – *Charter* rights – and rights only held by First Nations – Treaty rights. The rule of law demands that *CIA* s 2(4) has a single meaning that does not change depending on whose rights are alleged to be contravened. Accordingly, I find that the *Nowegijick* principle is of no assistance in interpreting the *CIA*.

[63] The foregoing principles of statutory interpretation would not be necessary if every law passed by Parliament and the provincial legislatures was a model of coherence and clarity. But that is regrettably not our reality. Sometimes laws are poorly written and other times they are applied to situations not anticipated by the drafters. In either circumstance or when both circumstances occur together, a court must do its best to make sense of the law. The analysis of the *CIA* in the following sections attempts to do just that. But it is important to recognize that no interpretation of the *CIA* offered by the parties or intervenors is perfect and the Court’s task is to settle upon the one that makes the most sense using the principles of interpretation that have been outlined.

c. What does it Mean to “Contravene” Sections 1-35.1 of the *Constitution Act, 1982*?

[64] The first interpretive question concerns the meaning of the word “contravene” in *CIA* s 2(4). There is no real disagreement over the meaning of “contravene” so the components of statutory interpretation outlined above will not be explored as intensively they will when the meaning of “initiative petition proposal” is considered in the next section.

[65] The *Amici Curiae* submit that the word “contravene” should be given its ordinary meaning which is “[t]o go counter to, to transgress, infringe”: *Oxford English Dictionary Online* (Oxford: Oxford University Press, 2025) “contravene.” Contravene when used in relation to constitutional rights means the same thing as infringe: see, for example, *R v McGregor*, 2023 SCC 4 at para 1. Neither the Referendum Proponent nor Alberta disagrees with this understanding of the word contravene. Their arguments are that the proposed constitutional referendum proposal does not contravene *Constitution Act, 1982*, ss 1-35.1. Those arguments are addressed later in these reasons.

[66] The real difficulty is not with the interpretation of the word “contravene”; rather, it is with the analytical approach required of the Court to determine whether a constitutional referendum proposal contravenes *Constitution Act, 1982* ss 1-35.1. Whether a law infringes *Charter* rights and Treaty rights first requires a court to consider if there has been a limitation of a protected right and then ask if the limitation is justified. Courts have been loose with terminology, sometimes referring to a limit on a right as an infringement and then proceeding to the justification analysis: *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 40 (“*Frank 2019*”). Other times, courts say a right has been infringed only after the justification analysis has found a limit to be unreasonable. There is nothing to be gained by wading into this semantic debate but it may be observed that the disagreement shows that there are two possible analytical approaches required by the word contravene as used in the *CIA* s 2(4). Does it require only limitation analysis, or does it also require justification analysis?

[67] Since the text does not provide a definitive answer, it is necessary to consider context. The first contextual consideration is how the *CIA* is structured and the implications of that structure for rights infringement analysis. The *CIA* provides that the CEO or the Court must decide the question in *CIA* s 2(4) prior to authorizing the referendum proponent to gather

signatures. At this stage of the process, what is being considered is a citizen's proposal, not state action to implement the proposal. When the *CIA* requires consideration of the question in *CIA* s 2(4), the Government of Alberta is not committed either legally or politically by a "yes" vote to the citizen's objective.

[68] The *Amici Curiae* and the intervenors submit that the timing of the consideration of the question in *CIA* s 2(4) means that only a limited inquiry is possible. Under both *Oakes* and *Sparrow*, the state bears the burden of justification. But until the state takes steps to implement the citizen's proposal, it cannot bear a justificatory burden. The evidential record before the Court illustrates the problem – Alberta has not adduced any evidence, explained how the Referendum Proponent's objective might be achieved, or offered any justification of the possible means of achieving the Referendum Proponent's objective.⁵ The *Amici Curiae* and the intervenors submit that this means that the Court must ask only if there has been a *prima facie* contravention of *Constitution Act, 1982* ss 1-35.1. In other words, *CIA* s 2(4) directs the Court to engage in only the first half of the usual rights infringement analysis.

[69] Alberta agrees with the *Amici Curiae* and the intervenors that the Court should engage only in a high-level review, but Alberta asserts that such a high-level review could include consideration of whether there is an obvious justification for a rights violation. An obvious justification could be one that has already been decided by a court. Alberta says that its high-level standard of review should lead the Court to conclude that the Referendum Proponent's proposal may go ahead.

[70] Alberta relies on *Allan v British Columbia (Chief Electoral Officer)*, 2010 BCSC 1174 where Chief Justice Bauman considered whether a citizen's initiative proposal made pursuant to the *Recall and Initiative Act*, RSBC 1996, c 398 ("*RIA*") to eliminate British Columbia's harmonized sales tax ("HST") was within the legislative competence of British Columbia. Bauman CJ concluded that the subject matter of the initiative proposal was within British Columbia's legislative competence even though the initiative proposal could not be unilaterally implemented by British Columbia because to do so also required changing an agreement with the Federal Government and an amendment to the *Excise Tax Act*, RSC 1985, c E-15. Bauman CJ concluded at para 38 "I am here saying that on its face the draft Bill satisfies s. 2 of the *RIA*. Its legal effect, if adopted, is not for this Court at this time to opine upon or resolve." Based on this, Alberta submits that the form and consequences of Alberta independence or even if it will happen are unknowable at this stage, so the legal effect of Alberta independence should not be considered.

[71] *Allan* does not assist with understanding how the Court should proceed in the present case. In *Allan* the court was asked to opine on whether British Columbia had the legislative competence to do what the citizen initiative proposed. There is no question that a province has the jurisdiction to tax goods and services in the province. The fact that the initiative proposal in *Allan*, if it had been successful, would have required British Columbia and the Federal Government to unwind their harmonized sales tax agreement and for the Federal Government to

⁵ The procedural order issued after *Sylvestre I* only contemplated that First Nations intervenors might adduce evidence. Had Alberta or any other party suggested that they wished to adduce evidence, their position would have been considered.

make consequential amendments to the *Excise Tax Act* was irrelevant to the question of whether taxing goods and services in the province was within the jurisdiction of the Legislature.

[72] The analysis required by *CIA* s 2(4) is different. The requirement in *CIA* s 2(4) that an initiative petition proposal not contravene *Charter* and Treaty rights is not concerned with legislative competence. Alberta may advance constitutional amendments on any subject it wishes but, as I explain below at para 112, *CIA* s 2(4) provides that citizens may not propose initiatives that subtract from the rights protections in *Constitution Act, 1982* ss 1-35.1. The Court is required by *CIA* s 2(4) to consider if an initiative petition proposal contravenes *Charter* and Treaty rights; the impact of an initiative petition proposal on *Charter* or Treaty rights is not something that can be characterized as “legal effects” following from or external to an initiative petition proposal.

[73] The third contextual consideration is that the Legislative Assembly assigned the *CIA* s 2(4) assessment in the first instance to the CEO. The CEO may refer the question to the Court but, pursuant to *CIA* s 2.2(2), he is still responsible for determining if the requirements of *CIA* s 2, including *CIA* s 2(4), have been met within 30 days of the Court deciding the special case. The CEO is responsible for election and referendum administration and is not required to have experience with or expertise in constitutional law, nor is it the CEO’s role to hold court-like hearings and receive sworn evidence. The incompatibility of the CEO’s role with the process demanded by the *Oakes* and *Sparrow* justification analysis weighs in favour of the assessment required by *CIA* s 2(4) being restricted to determining if *Charter* or Treaty rights have been limited, not whether such limitations are justified.

[74] The fourth contextual consideration is that the original version of *CIA* s 2(4) used the language from *Constitution Act, 1982* s 1 from which the Supreme Court of Canada developed the *Oakes* test as follows:

An initiative proposal must not contravene sections 1 to 35.1 of the *Constitution Act, 1982* or otherwise limit or adversely impact the rights protected under sections 1 to 35.1 of the *Constitution Act, 1982* in a manner that is not demonstrably justified in a free and democratic society. [Emphasis added].

[75] The underlined text in the original version of *CIA* s 2(4) quoted above was removed by an amendment prior to passage of the *CIA* in 2021. The obvious inference to take from the removal of this text is that the Legislative Assembly only wanted the CEO or the Court to consider *prima facie* contravention, not to conduct the justification analysis it took out of *CIA* s 2(4). Contrary to this inference is Minister Madu’s explanation that the words removed from *CIA* s 2(4) were unnecessary because they were “redundant.” In other words, he understood the provision without the deleted words to mean the same thing as it had with the deleted words. Since Minister Madu’s statement is contrary to the normal implications of the amendment that he introduced, something more than an assertion concerning the effect of the amendment is required. Put simply, without some sort of explanation, his statement cannot be given any weight.

[76] The first stage of *Charter* analysis and Treaty rights analysis – sometimes referred to as the *prima facie* infringement analysis – asks if a *Charter* right or Treaty right has been limited by state action. Chief Justice Dickson explained in *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at para 97 that the limitation of a *Charter* right must be something more than “trivial or

insubstantial” before it is a *prima facie* infringement. Similarly, for a Treaty right to be infringed on a *prima facie* basis there must be a “meaningful diminution” of a Treaty right. This excludes only insignificant interferences with a Treaty right: *R v Morris*, 2006 SCC 59 at paras 52-53. These are the inquiries required by *CIA* s 2(4).

[77] The foregoing contextual analysis is supported by the purpose of *CIA* s 2(4) which, as is explained in the next section, is to screen out proposals that would, if implemented, contravene existing rights protections in *Constitution Act, 1982* ss 1-35.1. That purpose is best served by understanding *CIA* s 2(4) as a screen that catches *prima facie* limitations of rights, not an interpretation that demands a robust justification analysis. The text of *CIA* s 2(4) supports such an interpretation.

VIII. Does *CIA* s 2(4) Require that Holding a Referendum Not Contravene *Charter* and Treaty Rights or Does it Require that Alberta Independence Not Contravene *Charter* and Treaty Rights?

a. Text

[78] The critical provision of the *CIA* that must be interpreted is s 2(4) which provides that “[a]n initiative petition proposal must not contravene sections 1 to 35.1 of the *Constitution Act, 1982*.” The stakeholders take different views on the meaning of “an initiative petition proposal.” But that disagreement does not mean that the phrase is ambiguous.

[79] The term “initiative petition proposal” is not defined in the *CIA*. The CEO and others submit that the term “initiative petition proposal” must refer to the substance of what is proposed which, in this case, is Alberta independence. The Referendum Proponent agrees but submits that the substance of what is proposed is a constitutional referendum on Alberta independence, not Alberta independence itself because that is not something that can be unilaterally implemented. This is a subtle evolution in the Referendum Proponent’s position from *Sylvestre I*.

[80] Based on the text of *CIA* s 2(4), the proposal in the present case could be either Alberta independence or the holding of a constitutional referendum on Alberta independence. The competing interpretations of *CIA* s 2(4) offered by the stakeholders are both plausible readings of the text. Context and purpose must now be considered to ascertain the meaning of *CIA* s 2(4).

b. Internal Context

[81] Do the structure of the *CIA* and the meaning of adjacent provisions weigh in favour of one of the two competing interpretations of *CIA* s 2(4)?

[82] The *CIA* s 1(f) definition of “initiative petition” refers to *CIA* s 2 which sets out in subsection (1) that an initiative petition concerns a legislative proposal, a policy proposal, or a constitutional referendum proposal. The only reasonable interpretation of “initiative petition proposal” is that it is an umbrella term that includes the three types of proposals.

[83] A consistent approach to the concept of a proposal in the *CIA* is appropriate even though the *CIA* treats the different types of proposals differently. Any of the proposals may end up being the subject of an initiative vote or referendum, but the only way that a constitutional referendum proposal may proceed is via a referendum. Policy proposals and legislative proposals are not put to an initiative vote or referendum if the policy or legislation is first adopted by the Legislative Assembly. The different processes that the different types of

proposals must go through to be adopted does not mean that a different approach to understanding the subject matter of the different types of proposals is warranted. The subject matter or substance of a policy proposal is the proposed policy. The subject matter or substance of a legislative proposal is the proposed legislation. The subject matter or substance of a constitutional referendum proposal is the proposed constitutional change. The fact that a referendum is contingent in the case of policy and legislative proposals and mandatory for constitutional referendum proposals does not alter the approach to understanding what the substance of a proposal is.

[84] *CIA* s 2(4) contemplates that it is possible that an initiative petition proposal, including a constitutional referendum proposal, could contravene *Constitution Act, 1982*, ss 1-35.1. The Referendum Proponent's interpretation that the subject matter of a constitutional referendum proposal is a constitutional referendum would render *CIA* s 2(4) meaningless in respect of constitutional referendum proposals. The Referendum Proponent was unable to explain how the conduct of a constitutional referendum could ever contravene *Constitution Act, 1982*, ss 1-35.1. If the drafters of the *CIA* had wanted to exempt constitutional referendums from *CIA* s 2(4), that would have been easy to do. The consequence of the Referendum Proponent's interpretation of *CIA* s 2(4) – the practical nullification of the provision – suggests that it is not the correct interpretation.

[85] *CIA* s 2(5) confirms that the subject matter of a constitutional referendum proposal is the proposed constitutional change, not the holding of a constitutional referendum. *CIA* s 2(5) prohibits duplicative initiative votes and referendums, including constitutional referendums, within a five-year period. *CIA* s 2(5) requires the CEO to determine if a proposal is “the same or substantially similar to” a previous proposal that has gone to an initiative vote or referendum. This means that the subject matter of the different types of proposals must be comparable. By way of example, under *CIA* s 2(5) the CEO may be required to consider if the subject matter of a policy proposal is the same or substantially similar to a constitutional referendum proposal. In this regard, the Referendum Proponent's written submissions described the “potential consequences” of Mr. Lukaszuk's policy proposal and the Referendum Proponent's constitutional referendum proposal as “essentially identical.”⁶ The Referendum Proponent's interpretation – that the subject matter of a constitutional referendum proposal is a constitutional referendum, not the planned constitutional change – means that a policy proposal or legislative proposal could never be the same or substantially similar to a constitutional referendum proposal. Such an interpretation is contrary to the text and logic of *CIA* of s 2(5) which, by requiring a determination of similarity or dissimilarity by the CEO, contemplates that it is possible that the subject matter of different types of proposals, including constitutional referendum proposals, could be similar.

c. External Context

[86] Though external context should be given less weight in statutory interpretation, it is worthwhile to observe that this is not the first time that Alberta has had citizen initiative legislation. Alberta had citizen initiative legislation from 1913 to 1958: *The Direct Legislation Act*, SA 1913, c 3. The legislation was used only a few times and only in relation to the prohibition of alcohol. The *Direct Legislation Act* precluded consideration of any proposed legislation which, in the opinion of the Attorney General, was not “within the legislative

⁶ Mr. Lukaszuk's policy proposal advanced the question: “Do you agree that Alberta should remain in Canada?”

jurisdiction of the Legislature of Alberta.” This meant that a referendum proposing unconstitutional legislation was not permitted.

[87] The *Amici Curiae* point out that similar prohibitions on citizen initiatives on unconstitutional legislation, matters contrary to international law, and existing constitutional rights are found in citizen initiative legislation around the world: see, for example, the Swiss Constitution: *Constitution Fédérale* [Cst] [Constitution] 18 April 1999, RO 101, art 139(3); Alaska’s initiative and referendum legislation: AK Stat tit 15 §§ 15.45.010 and 15.45.040 (2024); the Massachusetts Constitution: MA Const art XLVIII, § 2; and the Mississippi Constitution: MS Const art 15, § 273(5). Screening provisions in other jurisdictions are concerned with the subject matter of a citizen-initiated referendum – the specific legislative or constitutional proposal – not the holding of a referendum itself. But these provisions all have different wording than *CIA* s 2(4). What I take from the comparative review of international citizen-initiated referendum laws presented by the *Amici Curiae* is that *CIA* s 2(4) is not unusual.

[88] The international examples show that some restrictions on the subject matter of citizen proposals are concerned with legislative competence and others are concerned with excluding questions about minority rights and fundamental values from the citizen initiative process. *CIA* s 2(3) is an example of a provision that is concerned with legislative competence, but does not apply to constitutional referendum proposals. *CIA* s 2(4) is not concerned with legislative competence; it is concerned with the protection of minority rights and fundamental constitutional rights.

[89] There are two reasons for understanding *CIA* s 2(4) in this way. First, it allows constitutional referendum proposals that would alter some parts of the constitution even though Alberta does not have the legislative competence to carry such proposals to a conclusion because actions of the federal government and governments of other provinces are required. The second reason for understanding *CIA* s 2(4) this way is that Alberta has the power to adopt legislation that contravenes *Charter* ss 2 and 7-15 if it invokes the notwithstanding clause. *CIA* s 2(4) treats ss 2 and 7-15 the same way as other rights in *Constitution Act, 1982* ss 1-35.1 that Alberta has no power to contravene. This supports the view that the most sensible way to understand *CIA* s 2(4) is that it is intended to preclude citizens from making constitutional referendum proposals which, if implemented, would diminish constitutionally protected rights. The power to initiate referendums that propose constitutional changes to curtail rights protections is reserved to the Legislative Assembly.

[90] The process of enacting the *CIA* started with the Select Special Democratic Accountability Committee (the “Special Committee”), which included members from the governing United Conservative Party and the opposing New Democratic Party. The Special Committee conducted meetings in 2020 which were open to the public to observe by video. The Special Committee received oral and written submissions from experts, stakeholders such as Elections Alberta, and members of the public. The Special Committee noted in its Final Report at page 13 that “the most significant detractor from the use of citizens’ initiatives is the fear that the will (or ‘tyranny’) of the majority may be used as a means to harm the rights and freedoms of a minority group”: Legislative Assembly of Alberta, Select Special Democratic Accountability Committee, *Final Report – Citizens’ Initiatives and Recall* (Edmonton: SSDAC, November 2020), online: <assembly.ab.ca/docs/default-source/committees/da/final-report---citizens'-initiatives-and-recall.pdf>. The Special Committee concluded:

The Committee discussed how best to balance its desire to give Albertans as much breadth as possible to bring forward a wide variety of initiatives while at the same time ensuring that the rights of minorities, as enshrined in the Constitution, are protected. The Committee acknowledged that many minority rights are addressed in sections 1 to 35.1 of the *Constitution Act, 1982*, and that, therefore, minority rights could be protected if citizens' initiative topics were prohibited from contravening any of those provisions. [Emphasis added].

[91] The Special Committee's use of the term "topic" suggests that what was contemplated in the *CIA* was the substantive issue put before voters, not the holding of a referendum. Again, this is of limited assistance because the Special Committee is not the whole Legislative Assembly, the specific legislation was not before the Special Committee, and the Special Committee's remarks may have been directed more at legislative initiatives than constitutional initiatives.

[92] The Referendum Proponent highlights statements by MLAs that he considers favourable and submits that the *CIA*'s "legislative history is determinative." But he is wrong because many things were said by both government and opposition MLAs in the debates in the Legislative Assembly prior to the passage of the *CIA* and it is easy to cherry pick quotations to support whichever position one prefers.

[93] The Referendum Proponent points to one UCP MLA who said that "we have the right to govern ourselves, ... we cannot be told that this section of the Constitution, because it was implemented in 1982, is immutable and untouchable" ("Bill 51, Citizen Initiative Act", Committee of the Whole, *Alberta Hansard*, 30-2 (2 June 2021) at 5161-62 (Dan Williams)) as evidence that *CIA* s 2(4) allows citizen initiatives to change *Constitution Act, 1982* ss 1-35.1. He also relies on statements of Minister Madu that do not provide any insight into the meaning of *CIA* s 2(4).

[94] Though little weight should be given to legislative debates, an exchange between NDP MLA Rakhi Pancholi (Edmonton-Whitemud) and Minister Madu, the sponsor of Bill 51 which became the *CIA*, is the clearest indication in the legislative debates as to what the Government thought *CIA* s 2(4) meant. Ms. Pancholi addressed two points relevant to the present case in the debate on Bill 51 on June 2, 2021: *Hansard* at 5159-5161. First, she said that it was her understanding that the Special Committee, of which she was a member, recommended that citizen initiatives that proposed amendments to *Constitution Act, 1982* ss 1-35.1 would not be permitted. Second, she asked "whose determination is it that the initiative petition is contravening sections 1 to 35.1 of the [*Constitution Act, 1982*?]" Minister Madu responded as follows (*Hansard* at 5163):

The bill is clear that an initiative petition under Bill 51, if this Assembly deems it necessary to pass this particular bill, would not contravene sections 1 to 35.1 of the Constitution Act. It's there.

The Member for Edmonton-Whitemud also asks: in the event that there is a conversation around any of these things, who will decide? Who will determine? Again Bill 51 provides an answer to that particular question, and I would expect the Member for Edmonton-Whitemud to also know that it is in the bill. If she doesn't know, I'm going to read it to her. Section 2(10) reads:

The Chief Electoral Officer may, with respect to a legislative proposal, a policy proposal or a constitutional referendum proposal, state a question in the form of a special case to the Court seeking the opinion of the Court as to whether the proposal conforms to the requirements of subsections (3) and . . .

Guess what?

. . . (4), as applicable.

So, all of those, you know, ramblings about section 2(4) and the desire of this Bill 51 to strip the people of their Charter rights from sections 1 through 35.1 are completely not true and misleading. Not true.

[95] To summarize, Minister Madu’s answers to Ms. Pancholi were twofold: (1) *CIA* s 2(4) is the provision that prevents proposals that contravene *Constitution Act, 1982* ss 1-35.1 from being approved; and (2) the CEO may ask the Court for an opinion whether a proposal contravenes *Constitution Act, 1982* ss 1-35.1.

[96] The Referendum Proponent also looks to the legislative debates that preceded passage of the *ESAA 2025*, which contained amendments to the *CIA*, where the question of separation was raised. Of course, those comments were made in the context of the proposed amendment to reduce the number of signatures that must be collected, not with reference to the existing *CIA* s 2(4), which was not affected by the amendments. Statements made in legislative debates in 2025 cannot shed any light on what was intended when *CIA* s 2(4) was enacted in 2021. Courts are bound to give effect to the intent of the legislature at the time the statute was enacted: ***Telus Communications Inc v Federation of Canadian Municipalities***, 2025 SCC 15 at para 32; ***R v Big M Drug Mart***, [1985] 1 SCR 295 at 335.

[97] The Referendum Proponent raises two other contextual arguments. First, the Referendum Proponent argues that *CIA* s 2(4) should not be interpreted to apply to the constitutional amendment that is proposed because that results in differential or inconsistent treatment of questions that are essentially the same. He submits that *CIA* s 2(4) “effectively subjects one citizen’s lawful initiative to judicial scrutiny while allowing another, potentially equally constitutionally significant, initiative to bypass the same legal process.” What the Referendum Proponent is getting at with this argument is that Mr. Lukaszuk’s policy proposal, which is the inverse of the Referendum Proponent’s constitutional referendum proposal, is not subject to *CIA* s 2(4). Why, he asks, should a proposal to stay in Canada be treated differently than a proposal to leave Canada?

[98] The answer is obvious. Mr. Lukaszuk’s stay in Canada policy proposal does not have any constitutional consequences, let alone contravene *Constitution Act* ss 1-35.1 because adoption of his policy proposal as he has framed it is a validation of the *status quo*. It requires Alberta to do nothing of constitutional significance. By contrast, the Referendum Proponent’s constitutional referendum proposal, if approved, would set Alberta on the path contemplated in the *Clarity Act* that could lead to independence. The *CIA* treats proposals that jeopardize constitutional rights differently from proposals that do not affect constitutional rights at all. There is nothing wrong with this; indeed, it makes perfect sense.

[99] Second, the Referendum Proponent submits that if a referendum on Alberta independence “can be lawfully initiated by the government outside of the *CIA*, it would be illogical to treat the

same question as unconstitutional merely because it originated from citizens.” He submits that statutes should be interpreted to avoid absurd consequences like this: *Pepa v Canada (Citizenship and Immigration)*, 2025 SCC 21 at para 102; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 27. The Legislative Assembly put the s 2(4) screening mechanism in the *CIA* and not the *Referendum Act*, RSA 2000, c R-8.4. There is nothing illegal about this nor can the wisdom of that choice be second guessed by the Court. If the Referendum Proponent thinks that it is unreasonable or unfair that citizen-initiated constitutional referendum proposals are subject to *CIA* s 2(4) when there is no similar restriction on a government-initiated referendum under the *Referendum Act*, he must make that case to the Legislative Assembly.

d. Purpose

[100] The purposes of both the *CIA* and *CIA* s 2(4) must be considered. *Sylvestre I* explained at para 56 that “[t]he high-level purpose of the *CIA* ... is to allow regular Albertans to bring forward important policy, legislative, and constitutional proposals for consideration by their fellow citizens.” Justice Angotti agreed with this characterization of the purpose of the *CIA* in *Lukaszuk v McClure*, 2025 ABKB 570 at para 65. Some of the participants in these proceedings stated the general purpose of the *CIA* using different words, but none of the general purposes stated were different in a meaningful way. Disagreement instead centered on the specific purpose of *CIA* s 2(4) and the extent to which the general purpose of the *CIA* should inform interpretation of *CIA* s 2(4).

[101] The Referendum Proponent submits that the “*CIA* must be interpreted in alignment with its purpose” which he submitted is “to facilitate meaningful citizen participation in matters of public and constitutional significance.” Accordingly, he argues, *CIA* s 2(4) should be interpreted as a narrow exception. He contends that “section 2(4) of the *CIA* is only meant to prevent unconstitutional proposals that do not contemplate changes to the constitution through a lawful amendment process” [Emphasis in original]. Later he submitted that “[s]ection 2(4) is intended as a safeguard against patently unconstitutional proposals, not to preclude citizens from posing constitutional questions or initiating referenda on issues that can only be resolved through constitutional amendment.” Much to the same effect, Alberta submits that *CIA* s 2(4) exists to screen out “unimplementable” constitutional referendum proposals.

[102] The Referendum Proponent offered an example of what he said would be an impermissible legislative proposal under *CIA* s 2(4) because it was obviously unconstitutional. The Referendum Proponent submitted *CIA* s 2(4) is meant “to prevent the government from being forced to entertain a referendum on a question that would compel it to consider something clearly contravening the *Charter*, such as ‘Do you agree that Alberta should immediately revoke the voting rights of all residents over 60?’” Both the Referendum Proponent and Alberta argue that if the question was restated and posed as a constitutional referendum proposal – “Do you agree that the *Constitution Act, 1982* s 3 should be amended to prohibit citizens over 60 years old from voting?” – it would not run afoul of *CIA* s 2(4) because it could be implemented through a constitutional amendment. The idea that simply restating a constitutionally offensive proposal as a constitutional amendment circumvents the *CIA* s 2(4) screening mechanism and renders it toothless.

[103] The Referendum Proponent and Alberta submit that it is wrong to understand the effect of restating constitutionally offensive proposals as constitutional amendments to be the nullification of *CIA* s 2(4). They point to *CIA* s 2(2)(f) which they say indicates that there are

two kinds of constitutional referendum proposals: (a) constitutional questions; and (b) constitutional amendments. They submit that *CIA* s 2(4) has a role to play in screening out impermissible constitutional questions, not constitutional amendments. This is just another way of making the argument addressed in the previous paragraph. It is just too cute to say that *CIA* s 2(4) screens out a proposal to limit the voting rights of Albertans over 60 years old, but it does not screen out a proposal to amend the constitution to take away the same rights.

[104] The difficulty with the Referendum Proponent and Alberta's characterization of the purpose and effect of *CIA* s 2(4) is that it would exempt constitutional referendum proposals that must be implemented by way of constitutional amendment – which, as a practical matter, amounts to all constitutional referendum proposals – from *CIA* s 2(4), which is contrary to the plain text of the provision that says it applies to all types of proposals.

[105] The *Amici Curiae*'s characterization of the purpose of *CIA* s 2(4) is, in my opinion, correct. The *Amici Curiae* submit that the purpose of *CIA* s 2(4) is to provide what they call a “constitutional screen” that “ensures that initiative petitions do not recommend proposals which would contravene the rights and freedoms guaranteed by sections 1 to 35.1 of the *Constitution Act, 1982*.” The *Amici Curiae* submit that the *CIA* s 2(4)'s purpose – to screen out proposed referendums that would violate constitutional rights – is not subject to any implied exceptions such as the exception for referendums proposing constitutional amendments as posited by the Referendum Proponent and Alberta.

e. Charter Values, the Unwritten Principle of Democracy, and Statutory Interpretation

[106] The Referendum Proponent submits that to “suppress citizen-led initiatives on fundamental constitutional issues would strike at the heart of democracy itself, undermining representative government, political engagement, and the legitimacy of our constitutional order.” He goes on to argue that the *CIA* should be interpreted to “align” with the unwritten constitutional principle of democracy or the *Charter* value of democracy.⁷ Accordingly, he contends, the Court should prefer a reading of *CIA* s 2(4) that permits a constitutional referendum on Alberta independence because that would promote democratic dialogue and the expression of democratic preferences.

[107] Democracy is a contested normative concept that has many dimensions. The Referendum Proponent's argument that permitting a constitutional referendum proposal on Alberta independence is democratic is reasonable. But so too is the *Amici Curiae*'s argument that permitting a constitutional referendum on something that will contravene constitutional rights is anti-democratic because it allows majority preferences to trample minority rights. Democracy does not weigh more heavily for one interpretation or another in the present case.

[108] The problem with the Referendum Proponent's position is that it expresses a political opinion that the democratically elected legislature has rejected. There is no right to have a referendum, whether initiated by a citizen or at all. Alberta *chose* to provide citizens with the right to make constitutional referendum proposals but also *chose* to place limits on that right. The fact that the Referendum Proponent does not like the government's choice is irrelevant to the Court's interpretive function in this case.

⁷ The unwritten principle of democracy and the *Charter* value of democracy are the same thing, and both are better understood as a meta-purpose that informs the interpretation and application of the Constitution.

[109] The most democratic thing that a court can do when interpreting a statute is to find the meaning intended by the democratically elected legislature. Everything about *CIA* s 2(4), starting with the text, indicates that the Legislative Assembly intended the provision to limit the use of constitutional referendum proposals where such proposals would have the effect of diminishing *Charter*, Aboriginal, and Treaty rights. Respect for the choice of the democratically elected legislature in this case requires the Court to give meaning to that limitation.

f. Conclusion – *CIA* s 2(4) Applies to the Proposed Constitutional Change

[110] To understand how *CIA* s 2(4) operates, it is first necessary to take a step back and look at our constitutional architecture. Broadly speaking, there are two main kinds of provisions in the constitution. There are structural provisions that provide for the institutions of government and the division of powers between levels of government. Most of the structural provisions are found in the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5 (the “*Constitution Act, 1867*”). And then there are constitutional rights – individual and group rights – which are mostly found in the *Constitution Act, 1982*. Some provisions, like the democratic rights in *Constitution Act, 1982* ss 3-5 for example, have both structural characteristics and function as rights: see Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the *Charter*” (2013) 51:1 Osgoode Hall LJ 251 at 262-65. Of less significance for present purposes are the interpretive provisions that guide how courts understand the other parts of the constitution.

[111] *CIA* s 2(4) permits constitutional referendum proposals that propose changes to the structural provisions of the constitution in the *Constitution Act, 1867*. For example, a citizen initiative may propose to change the number of seats in the Senate allocated to Alberta or the equalization formula or which level of government makes criminal law. *CIA* s 2(4) is not an obstacle to a citizen-initiated referendum that seeks to change the constitutional structure without affecting constitutional rights.

[112] *CIA* s 2(4) prohibits constitutional referendum proposals that contravene *Constitution Act, 1982* ss 1-35.1. What does this mean? The best interpretation of *CIA* s 2(4) is that it prevents constitutional referendums on proposals that would, if implemented, contravene the constitutional rights protected by *Constitution Act, 1982*. As a practical matter, this means that a constitutional referendum proposal may propose to add to, but not subtract from, *Constitution Act, 1982* ss 1-35.1.

IX. Does the Fact that Alberta Independence Can be Implemented Only After Negotiations with Canada and Other Stakeholders Mean that it Cannot Contravene Sections 1-35.1 of the *Constitution Act, 1982*?

[113] The short answer is “no”. But the fact that Alberta independence can be implemented only after negotiations with Canada and other stakeholders has important implications for the analysis to be undertaken.

[114] The Referendum Proponent and Alberta stress that the *Secession Reference* held that a province may not unilaterally secede from Canada and that secession may take place only after negotiations with Canada, other provinces, and First Nations. They submit that this means that, even with a “yes” vote, Alberta independence will not necessarily occur and, even if it does, the parameters of Alberta independence cannot be known. Alberta summarized its argument as follows:

- (a) Secession is a legal act requiring an amendment to the Constitution of Canada;
- (b) Secession referendums have no direct legal effect;
- (c) A referendum in favour of secession does not necessitate nor lead inexorably to secession;
- (d) Secession may not ensue if rights are not respected; and
- (e) No particular outcome to negotiations can be assumed.

[115] Alberta's points are accurate statements of the law that emerged from the *Secession Reference* and were to some extent codified in the *Clarity Act*. The conclusion that Alberta and the Referendum Proponent draw from this is that a constitutional referendum proposal cannot contravene *Charter* or Treaty rights.

[116] The fact that it is impossible to know what negotiated terms for Alberta independence might look like does not distinguish secession from any other proposed constitutional amendment. Most constitutional amendments are the product of multilateral negotiations. Think, for example, of the two most significant attempts to amend the constitution since 1982, the Meech Lake Accord and the Charlottetown Accord. Even straightforward amendments such as, for example, an amendment to strip convicted criminals of the right to vote or an amendment to add poverty to the prohibited grounds of discrimination in *Constitution Act, 1982* s 15 would not be implemented on a "yes" vote in a referendum and would require action by the Alberta government, federal government, and governments of other provinces. The amending formula in the *Constitution Act, 1982* s 38 requires most constitutional amendments to be approved by the Senate and House of Commons and the legislative assemblies of two-thirds of the provinces representing at least 50% of the population of all the provinces. Other amendments with more limited effect may be accomplished bilaterally through action of the Federal Government and the government of the affected province: *Constitution Act, 1982* s 43. As such, most constitutional amendments that could be passed by a province are, as a legal matter, contingent, and, as a practical matter, subject to negotiation. The only difference between secession and a garden variety constitutional amendment is the stakes.

[117] The Referendum Proponent emphasized that his proposal is just a method to assess the mood in Alberta for secession or to "gauge the democratic sentiment of his fellow citizens." This position is undercut by his counsel's confirmation that the proposal question was drafted to comply with the requirements under the *Clarity Act*. If the proposal was solely to determine if Albertans would be interested in the process of secession from Canada, there would have been no need to have it match the language of the *Clarity Act*. A question about Alberta independence triggers the process contemplated under the *Clarity Act* starting with the House of Commons' assessment of the clarity of the question pursuant to *Clarity Act* s 1(1).

[118] The Referendum Proponent argued that if his proposed referendum on Alberta independence is successful it will only prompt negotiations with Canada that could well lead to nothing, and all that the referendum really seeks to determine is whether Albertans are interested in having such negotiations, therefore *CIA* s 2(4) cannot be triggered. Of course, there is no language in the Referendum Proponent's proposed question about the referendum only seeking a

mandate for negotiations because *Clarity Act* s 1(4) demands that an independence referendum ask a clear question about independence with no obfuscation about negotiation.

[119] The subject matter of the Referendum Proponent's constitutional referendum proposal is Alberta independence because that is what is required to trigger the *Clarity Act* which he has confirmed is his intention. A vote in favour of the Referendum Proponent's Alberta independence question is not just a vote to negotiate, it is a vote to secede from Canada because without that the *Clarity Act* does not require negotiations.

[120] *CIA* s 2(4) is a statutory screening mechanism that seeks to prevent unconstitutional proposals from being put forward. The reality is that almost all constitutional referendum proposals are incapable of unilateral implementation and are contingent on negotiations and/or the actions of the government of Alberta, other provincial governments, and the federal government.⁸ The logic of Alberta's position is that, in effect, *CIA* s 2(4) cannot apply to constitutional referendum proposals which I have already found to be an unreasonable interpretation of *CIA* s 2(4).

X. Does the Fact that Alberta Independence Would be Implemented Through a Constitutional Amendment Mean that it Cannot Contravene Sections 1-35.1 of the Constitution Act, 1982?

[121] Alberta and the Referendum Proponent argue that because Alberta independence must be implemented through a constitutional amendment, it cannot contravene *Charter* or Treaty rights. Alberta's argument starts from the premise that "one part of the Constitution cannot abrogate another part of the Constitution": *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 30; *Reference re Bill 30, An Act to Amend the Education Act (Ont)*, [1987] 1 SCR 1148 at para 60; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House Assembly)*, [1993] 1 SCR 319 at 373, 390. Because one part of the constitution cannot contravene another part of the constitution, Alberta contends that something that is added to the constitution by a lawful amendment cannot contravene *Charter* or Treaty rights. Alberta submits that "[w]hat matters is that the ultimate legal action required within Canada's constitutional framework to effect secession – namely, a constitutional amendment – cannot contravene the Constitution."

[122] Just as with its previous argument, the logic of Alberta's position means that a constitutional referendum proposal that proposed a constitutional amendment, which effectively means all constitutional referendum proposals, could never be subject to the *CIA* s 2(4) screening mechanism. This argument has no merit. My analysis from the previous section applies and need not be repeated here.

[123] Furthermore, Alberta's argument does not address the issue before the Court. *CIA* s 2(4), as I explained earlier, is a screening mechanism imposed on citizen initiatives by Alberta. *CIA* s 2(4) permits constitutional referendum proposals that add to constitutional rights protections and prohibits constitutional referendum proposals that subtract from constitutional rights protections.

⁸ A constitutional referendum proposal that sought to only amend the constitution of Alberta could be accomplished unilaterally because *Constitution Act, 1982* s 45 provides that "the legislature of each province may exclusively make laws amending the constitution of the province." For a recent discussion of unilateral amendments, see generally, Emmett Macfarlane, "Provincial Constitutions, the Amending Formula, and Unilateral Amendments to the Constitution of Canada: An Analysis of Quebec's Bill 96" (2023) 60:3 Osgoode Hall LJ 655.

The analysis required by *CIA* s 2(4) is quite different from how, in the absence of a statutory screening mechanism, a court would approach a claim that an amendment to the constitution was itself unconstitutional.⁹

[124] Alberta chose not to give citizens the power to propose to take away *Charter* and Treaty rights through the citizen initiative process. Though Alberta seems to regret this decision now, its objective at the time was to ensure that the citizen initiative process could not be used to propose to take away *Charter* and Treaty rights that, among other things, prevent minority groups and viewpoints from being oppressed.

XI. Does Alberta Independence Contravene *Constitution Act, 1982* Because it Means There Will be a New Constitutional Order?

[125] The *Amici Curiae* contend that Alberta independence, if it means anything, means replacement of the Canadian constitution with a new Alberta constitution. That, in turn, means that, post-independence, *Constitution Act, 1982* ss 1-35.1 will not apply in Alberta. The disappearance of those rights, the *Amici Curiae* submit, means that Alberta independence, whatever its form may be, must contravene *Charter* and Treaty rights.

[126] *CIA* s 2(4) requires me to take the substance of a constitutional referendum proposal – in this case, Alberta independence – as a fact and ask if that contravenes *Constitution Act, 1982* ss 1-35.1. The *Amici Curiae* submit that the secession of a province entails a “clear repudiation of the existing constitutional order,” and requires “radical and extensive” constitutional amendments: *Secession Reference* at paras 88 and 84. Though the Supreme Court of Canada did not comment on *Charter* rights in the *Secession Reference*, there can be no doubt that the *Charter* would not apply in an independent Alberta because its territorial application is limited to Canada: *R v Hape*, 2007 SCC 26 at para 69. Likewise, *Constitution Act, 1982* s 35 and 35.1 would not bind an independent Alberta.

[127] The Referendum Proponent hypothesized that the constitution of an independent Alberta could replicate the rights found in *Constitution Act, 1982* ss 1-35.1 and could even retain the Supreme Court of Canada as the final court of appeal, just as Canada did with the Judicial Committee of the Privy Council for many years after Confederation. Leaving aside whether this suggestion is plausible, there is no way of knowing what the constitution of an independent Alberta will look like.

[128] The *Amici Curiae*’s argument is reminiscent of the conclusion of Justice Lesage in his decision on an application to enjoin the 1995 Quebec referendum. Lesage J held in *Bertrand v Quebec (Procureur General)*, [1995] RQJ 2500, 127 DLR (4th) 408 at paras 65-67:

The actions taken by the Government of Quebec in view of the secession of Quebec are a repudiation of the Constitution of Canada. If such secession were to occur, the Canadian Charter of Rights and Freedoms, which is part of the Constitution of Canada, would cease to apply to Quebec and the plaintiff would no longer be able to demand compliance therewith.

⁹ Whether a constitutional amendment can be unconstitutional is a subject of academic debate. See, for example, Richard Albert, “The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada” (2015) 41:1 Queen’s LJ 143 and Emmett Macfarlane, “The Unconstitutionality of Unconstitutional Amendments” (2022) 45:1 Man LJ 198.

It is not my job to pass judgment on the degree of probability that the government's objective will be achieved. It is enough to note that its efforts affect the very foundations of Canada's political institutions and deny the plaintiff Bertrand, like the other citizens of Quebec, the protection that the Constitution of Canada gives them for the enforcement of their fundamental rights and freedoms. The promise to substitute a charter of human rights and freedoms in a forthcoming constitution is not equivalent to the constitutional guarantee that each Canadian presently enjoys.

The constitutional change proposed by the Government of Quebec would result in a break in continuity in the legal order, which is manifestly contrary to the Constitution of Canada.... [Emphasis added].

[129] The *Amici Curiae* and Lesage J are correct. The fact that an independent Alberta would have a new and different constitutional order necessarily means that Alberta independence contravenes *Constitution Act, 1982*, ss 1-35.1. The Referendum Proponent is correct that it would have been more straightforward for the *CIA* to expressly prohibit a referendum on independence. But as noted earlier, the debates prior to the adoption of the *CIA* in 2021 did not indicate that a secession referendum was contemplated. The best interpretation of the *CIA* is that the Referendum Proponent's constitutional referendum proposal for Alberta independence contravenes *Constitution Act, 1982* ss 1-35.1 by proposing a derogation of rights that will occur irrespective of what replaces those rights.

XII. Does Alberta Independence Contravene Specific *Charter* Rights?

a. The Normal Attributes of Independent Sovereign Countries

[130] The *Amici Curiae* argue that if an independent Alberta has the normal attributes of an independent sovereign state, that will contravene the democratic rights and mobility rights in *Constitution Act, 1982*. Even though the terms of Alberta independence cannot be known, the *Amici Curiae* submit that an independent Alberta must be assumed to have the normal characteristics of an independent sovereign state; otherwise, Alberta would not be independent. Put simply, independence must be understood to mean genuine independence, not some sort of half-baked sovereignty-association. The *Amici Curiae* submit that it is possible to conclude that certain rights will be contravened even without knowing what the constitution for an independent Alberta contains so long as it is assumed that Alberta and Canada have the normal attributes of an independent sovereign country. The key attributes of independent sovereign states that will be considered are the power to determine who is a citizen and the rights that attach to citizenship, and the power to control territory including who and what crosses borders.

[131] To address this argument, it is necessary to consider if it is appropriate to make assumptions about the rights that would be protected by the constitution of an independent Alberta. I am not prepared to assume that the constitution of an independent Alberta will offer less in terms of rights protections than *Constitution Act, 1982* ss 1-35.1. To make such an assumption would be inappropriate conjecture. A more modest assumption – that an independent Alberta would have the normal characteristics of an independent state – is reasonable and takes the constitutional referendum proposal at face value.

[132] An independent state is the supreme authority within its territory: *Island of Palmas*, (1928) 2 RIAA 829 at 838-39, online: <legal.un.org/riaa/cases/vol_II/829-871.pdf>:

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.

This basic principle was recognized by the Supreme Court of Canada in *Hape* at para 59 where Justice Lebel, writing for the majority, observed, “a state has plenary authority to exercise prescriptive, enforcement and adjudicative jurisdiction over matters arising and people residing within its borders.”

[133] To assume, for example, that Alberta and Canada as independent states will have the power to control their borders is uncontroversial as it is one of the criteria for statehood under customary international law: *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, USTS No 881, 165 LNTS 19, art 1; *Montana Band v Canada*, 2006 FC 261 at para 483, aff’d 2007 FCA 218; Malcolm N Shaw, *International Law*, 8th ed, (Cambridge: Cambridge University Press, 2017) at 157. The *Amici Curiae* submit, and I agree, that even though Canada is not a formal party to the *Montevideo Convention*, its principles are part of customary international law and therefore part of Canada’s domestic law through the doctrine of adoption: *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at paras 86-87. Likewise, it is reasonable to assume that Alberta and Canada as independent states will have the power to determine the parameters of citizenship in their respective states as that is already something that Canada does: *Citizenship Act*, RSC 1985, c C-29. In turn, the power to determine the parameters of citizenship affects the ability of individuals to assert constitutional rights attached to citizenship.

[134] The modest assumption that has been made with respect to the nature of an independent Alberta narrows the analysis required to determine if the Referendum Proponent’s constitutional referendum proposal contravenes *Constitution Act, 1982* ss 1-35.1 to those rights that might plausibly be affected by Alberta independence: democratic rights, mobility rights, minority language rights, and Treaty rights. There is no merit in considering other protected constitutional rights such as the fundamental freedoms, the rights of accused persons, and equality because those are not necessarily affected by Alberta having the normal characteristics of an independent state and, as has already been explained, it is inappropriate to assume that the constitution of an independent Alberta will afford lesser rights protections than the *Constitution Act, 1982*.

b. Democratic Rights and Mobility Rights

[135] Alberta independence could result in Albertans losing their *Charter* democratic rights in relation to Canadian elections and institutions of government. Democratic rights are set out in *Charter* ss 3-5. For present purposes, the democratic rights that must be considered are the right to vote and the right to stand for election, which are as follows:

3 Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[136] Alberta independence must be understood to mean that Alberta would no longer be allocated seats in the Canadian House of Commons. However, since Canada allows ex-patriate citizens to vote, it is conceivable that Albertans could maintain the right to vote in Canadian elections: *Frank 2019*. But where exactly they would vote cannot be known as there would no longer be federal electoral districts in Alberta. Without knowing how or where Albertans would vote in Canadian elections after Alberta independence, even if they maintained the nominal right to vote it cannot be said that their right to vote is guaranteed in substance. Retaining democratic rights in relation to Canada would also be contingent on Canada allowing Albertans to retain Canadian citizenship. Moreover, there would be no guarantee that Albertans would have democratic rights comparable to the existing *Charter* ss 3-5 in relation to whatever government institutions may exist in an independent Alberta.

[137] Mobility rights, like democratic rights, are tied to citizenship, though permanent residents of Canada enjoy some mobility rights. The mobility rights in *Charter* s 6 are as follows:

- 6(1) Every citizen of Canada has the right to enter, remain in and leave Canada.
- (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
 - (a) to move to and take up residence in any province; and
 - (b) to pursue the gaining of a livelihood in any province.
- (3) The rights specified in subsection (2) are subject to
 - (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
 - (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
- (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

[138] As noted earlier and as will be discussed in more detail in the context of Treaty rights below, both Canada and Alberta will have the power as independent sovereign states to control their borders and who may enter, reside, and work in the respective countries. Whether Albertans retain mobility rights that allow them to enter, reside, and work in Canada is contingent on Canada allowing Albertans to retain Canadian citizenship.

[139] Both democratic rights and mobility rights are tied to citizenship. Whether Albertans would be permitted to maintain Canadian citizenship post-independence cannot be known. However, the decision as to whether Albertans would maintain Canadian citizenship and constitutional rights attached to citizenship would be Canada's alone. Canada, as an independent country, would have the power to determine who is and is not a citizen and, by extension, who has democratic rights and who does not. Albertans would have no guarantee of ongoing Canadian citizenship. Many countries do not permit dual citizenship: see, for example, India:

Act No. 57 of 1955, *Citizenship Act*, 1955, 30 December 1955, as amended, art 9. By way of further example, it must be noted that when Singapore seceded from Malaysia the Malaysian constitution was amended to remove citizenship from citizens of Singapore: *Agreement relating to the separation of Singapore from Malaysia as an independent and sovereign State*, 7 August 1965, UNTS No 8206 (Malaysia and Singapore), at Annex “B” A Bill Intituled “An Act to Amend the Constitution of Malaysia and the Malaysia Act” art 12.

c. Language Rights

[140] *Charter* ss 16-23 outline language rights that have the effect in Alberta of protecting the minority francophone community. These rights provide that federal laws are published in English and French, that English or French may be used in courts established by Parliament which includes the Alberta Court of King’s Bench and Court of Appeal of Alberta, and that subject to certain criteria everyone has the right to receive services from the federal government in either English or French. Similarly, where numbers warrant, members of the francophone minority have the right to have their children educated in French in Alberta.

[141] Upon Alberta becoming independent, there would cease to be courts in Alberta established by the Parliament of Canada. Perhaps the Court of King’s Bench and Court of Appeal would continue to exist but that is not assured. There is no guarantee that francophones would have the right to be heard in French in courts in an independent Alberta. Further, there is no guarantee that Alberta in providing the government services formerly provided by Canada would do so in French. Alberta’s current practice is not to publish its laws in French and there is no reason to believe that if upon independence it acquired the former jurisdiction of the federal government it would publish its new laws on those subject matters in French: *Languages Act*, RSA 2000, c L-6. An independent Alberta might continue to offer French language education where numbers warrant but that would not be guaranteed. There can be no doubt that Alberta independence contravenes *Charter* ss 16-23.

[142] In addition, *Charter* s 23(2) protects the right of members of the francophone minority in Alberta to move to other predominantly English-speaking provinces and enrol their children in French schools. The purpose of *Charter* s 23(2) has been recognized by the Supreme Court of Canada to “provide continuity of minority language education rights, to accommodate mobility and to ensure family unity”: *Solski (Tutor of) v Quebec (Attorney General)*, 2005 SCC 14 at para 30. This right would be imperilled by Alberta independence for the same reasons as *Charter* s 6 mobility rights discussed above.

XIII. Treaty Rights

a. Preliminary Matters

[143] Given the conclusion in the preceding section that the Referendum Proponent’s constitutional referendum proposal contravenes the *Charter* in several ways, the CEO’s special case could be answered without addressing Treaty rights. There is, however, no reason to prioritize the *Charter* question over the Treaty rights question. These reasons could have just as easily started with Treaty rights as both questions are properly before the Court and have been argued in full. As explained earlier, the Court’s job is to decide the issues put before it by the parties. If the Court of Appeal disagrees with the analysis on the *Charter* question, there is practical value in having decided the Treaty rights question. Further, as *Hansard* shows, First Nations have been staunch opponents of the use of the *CIA* to facilitate a referendum on Alberta

independence, and nine First Nations or groups of First Nations have intervened in this case. To now decide that the Treaty rights question need not be answered because the outcome on the *Charter* question suffices to determine the CEO's special case would be unfair.

[144] The analysis of the Treaty rights issue that follows is different than the analysis of the *Charter* analysis in the previous section. To start with, no evidence was filed by the parties or the intervenors in relation to the *Charter* issues. The argument around the *Charter* turned on questions of law which relied on very limited assumed facts. But evidence is required for consideration of Treaty rights because Treaty rights, unlike *Charter* rights, are not specified in the *Constitution Act, 1982*. As the discussion that follows explains, the Treaty rights incorporated by reference through *Constitution Act, 1982* s 35 must be assessed contextually having regard to, amongst other things, the history surrounding the formation of the relevant Treaty and the culturally mediated perspectives of the parties. In addition, evidence concerning how First Nations live and exercise their Treaty rights is relevant to the question of whether and to what extent there is an infringement. The lengthier discussion of Treaty rights is a consequence of their nature, not an indication that they are more important than *Charter* rights.

b. Introduction

[145] Two associations representing the First Nations of two of the three main Numbered Treaties in Alberta plus seven individual First Nations or alliances of First Nations intervened in this proceeding. The First Nations intervenors are united in their view that Alberta independence would contravene Treaty rights by severing the relationship between Canada and First Nations located in Alberta. Though they are united in this position, there are nuanced differences in how the intervenors express their arguments. Some of the First Nations also contend that the inevitable consequences of Alberta independence – international borders, for example – will contravene their Treaty rights by impairing their mobility throughout the territories of the relevant Numbered Treaties. To assist readers visualize the overlapping treaty and provincial boundaries, there is a map attached as an appendix to these reasons that shows the areas covered by the historic treaties between Canada and First Nations, including the Numbered Treaties in issue in this case.

[146] The Referendum Proponent and Alberta submit that the constitutional referendum proposal cannot contravene Treaty rights. Alberta goes farther to suggest that the question does not require consideration of Treaty rights because the question is limited to if *Constitution Act, 1982* s 35 is contravened and does not extend to whether the Treaty rights recognized and affirmed by *Constitution Act, 1982* s 35 are contravened. The Referendum Proponent further argues that the ***Secession Reference*** and *Clarity Act* require negotiations with First Nations prior to the secession of a province. They submit that it is inappropriate to assume that the outcome of such negotiations would have a negative impact on Treaty rights. And even if some First Nations remained opposed to Alberta secession after negotiations, the Referendum Proponent says that Treaty rights are not absolute and may be subject to reasonable and demonstrably justified limits pursuant to ***Sparrow***. The Referendum Proponent further contends that Treaty rights “will maintain their full legal status whether held by Canada or a future independent Alberta.”

[147] The following discussion focuses on the two main arguments advanced by the First Nations intervenors which are: (1) that the replacement of Canada with an independent Alberta

as a party to the Numbered Treaties contravenes Treaty rights; and (2) the international borders that would inevitably accompany Alberta independence contravene Treaty rights.

[148] Other arguments were advanced that will not be considered in detail. For example, the *Amici Curiae* and some First Nations intervenors observed that Canada is a party to the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN Doc A/RES/61/295 (“UNDRIP”) and has passed implementing legislation: *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. They also note that Canada has recognized First Nations inherent right to self-government and have adopted some legislation to facilitate Indigenous self-government: *An Act respecting First Nations, Inuit, and Métis children, youth and families*, SC 2019, c 24. These things, which may be characterized as the recognition of *Constitution Act, 1982* s 35 rights, will be lost if Alberta were to become independent, especially given that Alberta has not adopted UNDRIP. In addition, Samson Cree First Nation asserted that its Aboriginal rights, including its longstanding claim that it did not surrender title to its Traditional lands or subsurface rights when it signed Treaty 6, would be contravened by Alberta independence. The fact that these arguments are not addressed in more detail should not be taken to be a judgment on their merit; rather, the scope of this proceeding was limited in several ways including a limit on the volume of evidence permitted, and out of necessity this decision only deals with the best developed arguments.

c. The CIA and Treaty Rights

[149] First Nations have been amongst the most vocal opponents of the use of the citizen initiative process for the purpose of achieving Alberta independence. Opposition MLAs communicated the concern of First Nations earlier this year in debates over the *ESAA 2025*. Minister Amery addressed those concerns as follows (Alberta, Legislative Assembly, *Alberta Hansard*, 31-1 (14 May 2025) at 3494):

I propose to amend the new section 8.11 of the *Referendum Act* to add a new subsection (3) that would read as follows:

Nothing in a referendum held under this Act is to be construed as abrogating or derogating from the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed by section 35 of the *Constitution Act, 1982*.

The proposed House amendment is in addition to the current, already existing requirement in 2(4) of the *Citizen Initiative Act* that states that,

An initiative petition proposal must not contravene sections 1 to 35.1 of the *Constitution Act, 1982*.

Alberta’s government has heard concerns from First Nations regarding how a referendum question may impact existing treaties between First Nations and the Crown. We are listening and we recognize the importance of protecting treaty rights, which is why we’re proposing this amendment. [Emphasis added].

[150] Alberta in its written submissions argues that *CIA* s 2(4) refers to *Constitution Act, 1982* s 35, not Treaty rights. Because *Constitution Act, 1982* only recognizes and affirms pre-existing rights, Alberta submits that the constitutional referendum proposal cannot contravene *Constitution Act, 1982*. Alberta’s submission explains that *CIA* s 2(4), “does not permit a consideration of treaty rights or aboriginal rights in and of themselves, but rather whether the

Proposal would contravene s 35 of the *Constitution Act, 1982*. Section 35 does not create any rights but recognizes and affirms rights that otherwise exist.”

[151] Alberta’s argument is, in effect, that because *CIA* s 2(4) refers to *Constitution Act, 1982* s 35 instead of the underlying Treaty rights, an initiative petition proposal can never contravene *Constitution Act, 1982* s 35 unless it proposes to cease to recognize and affirm Treaty rights. The absurdity of this argument can be illustrated with an example. Imagine that a group of citizens think that it is unfair that First Nations can hunt for food without a license. They come up with two initiative proposals to achieve the purpose of empowering Alberta to require First Nations hunters to have a license. The first initiative petition proposal would amend the *Constitution Act, 1982* to remove s 35 or cease to recognize and affirm the Numbered Treaties. On Alberta’s reading, this proposal would not be allowed by *CIA* s 2(4) because it contravenes *Constitution Act, 1982* s 35. The second initiative petition proposal seeks to give Alberta the power to require First Nations to have a license to hunt. According to Alberta, the second proposal would not be caught by *CIA* s 2(4) because it only contravenes Treaty rights not *Constitution Act, 1982* s 35.

[152] These questions were explored further during oral argument. Counsel for Alberta was asked: could a citizen, based on Alberta’s general argument that all constitutional referendum proposals that propose a constitutional amendment are permissible under *CIA* s 2(4) because a constitutional amendment can never contravene the constitution, propose to amend the *Constitution Act, 1982* to remove s 35? He replied that a constitutional referendum proposal to remove *Constitution Act, 1982* s 35 would not be screened out by *CIA* s 2(4) if Alberta’s position was accepted. The result of Alberta’s arguments is that *CIA* s 2(4) provides no effective protection for Aboriginal and Treaty rights.

[153] The requirement in *CIA* s 2(4) that a constitutional referendum proposal not contravene *Constitution Act, 1982* s 35 can only be understood as a requirement that a constitutional referendum proposal not contravene the underlying Treaty rights. *Constitution Act, 1982* s 35 differs from *Charter* rights in that it “recognizes and affirms” Aboriginal and Treaty rights instead of specifying those rights. The obvious reason for this is that Aboriginal and Treaty rights are too numerous and varied to articulate succinctly in a constitutional instrument. Indeed, there is also risk in trying to re-state pre-existing rights because a restatement has the potential to invite disagreement over which articulation of a right is correct. More to the point, as a drafting matter, it would have been unwise to attempt to specify all Aboriginal and Treaty rights because many of them were contested in 1982 and continue to be contested today. Out of necessity, *Constitution Act, 1982* s 35 “recognized and affirmed” Aboriginal and Treaty rights instead of specifying them.

[154] The reference to *Constitution Act, 1982* s 35 in *CIA* s 2(4) should be understood to be a shorthand way of referring to Aboriginal and Treaty rights. This allows *Charter* rights and Aboriginal and Treaty rights to be treated the same for the purpose of the analysis required by *CIA* s 2(4). As explained earlier, the purpose of *CIA* s 2(4) is to provide a constitutional screen to make sure that initiative petition proposals do not propose to contravene or subtract from the rights protections in *Constitution Act, 1982* ss 1-35.1. For *Constitution Act, 1982* s 35, this means that it must be asked whether the constitutional referendum proposal contravenes Treaty rights.

[155] Alberta's argument is not just wrong, it is dishonourable. The Justice Minister cannot stand in the Legislative Assembly in May citing *CIA* s 2(4) as a protection for Treaty rights and then send his lawyers into Court in November to make a technical argument that *CIA* s 2(4) is not protection for Treaty rights. Reconciliation demands that governments do better than this.

d. The Numbered Treaties and the Creation of Alberta

[156] Before the question of whether Alberta independence would contravene the Numbered Treaties is considered, it is necessary to review the historical and legal context in which the Numbered Treaties were formed. This background is necessary to explain why the Treaties remain legally significant today and to provide historical context to assist with interpretation.

[157] The legitimacy of contemporary society in the prairie provinces rests on two distinct but entwined legal pillars. First, shortly after Confederation, Canada acquired the United Kingdom's claim to the Hudson's Bay watershed, which the British and Canadians called Rupert's Land, and the lands beyond that which they called the North-western Territory. The terms on which Canada acquired Rupert's Land and the North-western Territory expressly contemplated the second pillar, which was agreement with First Nations regarding settlement and compensation for lands that would be lost to settlement. The Numbered Treaties are the agreements between Canada and First Nations concerning the settlement of what would become Manitoba, Saskatchewan, and Alberta.

[158] The Hudson's Bay Company, pursuant to its *Royal Charter* issued in 1670 by King Charles II, held a trading monopoly in Rupert's Land and operated as a quasi-government making and enforcing laws within those parts of the territory that it controlled: *Caron v Alberta*, 2015 SCC 56 at para 12. The *Royal Charter* had no regard for the rights of the inhabitants of Rupert's Land and presumed the United Kingdom's entitlement to Rupert's Land. The Hudson's Bay Company also operated beyond Rupert's Land in the North-western Territory and what would become British Columbia.

[159] From the moment of Confederation, the vision of Canada as a transcontinental state required the acquisition of Rupert's Land and the North-western Territory. The *Constitution Act, 1867* s 146 contemplated the admission of "Rupert's Land and the North-western Territory ... into the Union." After appeals from Canadian officials, the UK Parliament adopted the *Rupert's Land Act, 1868*, 31-32 Vict, c 105 (UK) which provided a framework for the Hudson's Bay Company to surrender its claim to Rupert's Land.

[160] The 1869 Rupert's Land Deed of Surrender between the Hudson's Bay Company and the United Kingdom set out the consideration to be provided to the Hudson's Bay Company in exchange for relinquishing its claim to Rupert's Land: Schedule C to the *Rupert's Land and North-Western Territory Order* (UK) 1870, reprinted in RSC 1985, Appendix II, No 9, *Constitution Act, 1871* (UK), 34-35 Vict, c 28, s 4 (the "*Rupert's Land Order*"). The Deed of Surrender also acknowledged the right of the Indigenous inhabitants of Rupert's Land to compensation for the loss of their lands to settlement. The same acknowledgement is found in the *Rupert's Land Order* which is identified in the Schedule to the *Constitution Act, 1982* as being part of the constitution of Canada. This is a critical point because it is, in effect, a recognition by the United Kingdom and Canada that First Nations had an interest in the lands that they had traditionally occupied.

[161] When the Hudson's Bay Company surrendered its territorial claims in 1870, with the notable exception of the District of Assiniboia (which is now the area of southern Manitoba surrounding Winnipeg) in most of the lands over which it nominally presided, it did not enforce its law with respect to Indigenous persons outside the immediate vicinity of its forts and trading posts. The Supreme Court of Canada noted that when Canada became the "titular owner" of Rupert's Land and the North-western Territory "the reality on the ground was more complex": *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at 25. This was certainly true in 1870 of the lands that would become Alberta where there were only a handful of small non-Indigenous enclaves attached to Hudson's Bay Company forts and trading posts and Church missions. In 1870, throughout most of what would become Alberta, First Nations governed themselves as they always had according to their own customs and laws.¹⁰ Professor Kent McNeil in "Sovereignty and the Aboriginal Nations of Rupert's Land" (1999) 37 *Manitoba History* 2 explained the situation on the prairies in 1870 this way at 6-7:

So when the Hudson's Bay Company surrendered Rupert's Land back to the British Crown and the Crown transferred it to Canada in 1870, what territory actually passed? At the most, only the territory that had been effectively possessed and controlled by the Company. For the most part, in 1870 the Aboriginal nations in the Hudson [Bay] watershed were still independent, and if anyone was in possession and control of most of the territory, they were. In short, they were the real sovereigns and owners of the land in most of Rupert's Land in 1870.

[162] But neither was the sovereignty of the First Nations of the western prairies and boreal woodlands undisputed; it was contested amongst the different First Nations and challenged by the presence of the Hudson's Bay Company, the arrival of the earliest settlers, and American

¹⁰ Sir George Simpson, Governor-in-Chief of Rupert's Land and the Hudson's Bay Company, testified before the UK House of Commons Select Committee on the Hudson's Bay Company on March 8, 1857 as follows:

1749 You exercise no authority whatever over the Indian tribes?

None at all.

1750 If any tribe were pleased not to live as the tribes did live before the country was opened up to Europeans; that is to say, not using any article of European manufacture or trade, it would be in their power to do so?

Perfectly so, we exercise no control over them.

1751 Do you mean that, possessing the right of soil over the whole of Rupert's Land, you do not consider that you possess any jurisdiction over the inhabitants of that soil?

No, I am not aware that we do. We exercise none, whatever right we possess under our charter.

1752 Then is it the case that you do not consider that the Indians are under your jurisdiction when any crimes are committed by the Indians upon the Whites?

They are under our jurisdiction when crimes are committed upon the Whites, but not when committed upon each other; we do not meddle with their wars.

United Kingdom, House of Commons, *Report from the Select Committee on the Hudson's Bay Company; Together with the Proceedings of the Committee, Minutes of Evidence, Appendix and Index*, (London: HMSA, 1858).

traders. Cree nations, including many of those now party to Treaty 6, and the Blackfoot Confederacy, most of whom are now parties to Treaty 7, engaged in warfare in the 1860s culminating in the Battle of Belly River on October 25, 1870. They made peace at Wetaskiwin the following year. American traders established Fort Hamilton, later called Fort Whoop Up, in what is now Lethbridge in 1869 and then, in 1873, a different group of American traders murdered a significant but disputed number of Assiniboine, including Elders, women, and children, camped near Fort Walsh in what is now Saskatchewan close to the Alberta border: Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on Which They are Based, and Other Information Relating Thereto* (Toronto: Willing & Williamson, 1880) at 234. This has become known as the Cypress Hills Massacre. For more on the historical background discussed in this paragraph, see generally: Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Dorothy First Rider, and Sarah Carter, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996) at 7-9 and 206-24. One of the authors, Dorothy First Rider, provided an affidavit in this case on behalf of the Kainai Nation. See also, *Jim Shot Both Sides v Canada*, 2019 FC 789 ("**Shot Both Sides FC**") at paras 117-124 and *R v Hirsekorn*, 2010 ABPC 385 at paras 43-109, aff'd 2011 ABQB 682, aff'd 2013 ABCA 242. The appeal of *Shot Both Sides FC* proceeded only on the limitations issue and did not contest the facts found by the trial judge.

[163] Reminders of this uncertain time are all around us today if you take the time to look. Pictographs at Writing-on-Stone Provincial Park, a UNESCO World Heritage site, show a battle between the Cree and Blackfoot in the 1860s. The sites of Fort Whoop Up and the Battle of the Belly River are a short walk from the courthouse in Lethbridge. The site of the Cypress Hills Massacre, now a National Historic Site administered by Parks Canada, is just a quick detour to the south of Highway #1 on the drive from Medicine Hat to Swift Current. And there is a monument memorializing the 1871 peace between the Cree and Blackfoot in a park in Wetaskiwin.

[164] Alexander Morris, Lieutenant Governor of the Northwest Territories and the lead negotiator for Canada of Treaty 6 for Canada, later wrote a book titled *The Treaties of Canada*. As background to explain the origin of Treaty 6, Morris included a letter written by W.J. Christie, Chief Factor in charge of Saskatchewan District for the Hudson's Bay Company. Christie wrote on April 13, 1871 to report on a meeting that he had with Cree Chiefs at Edmonton House: *Treaties of Canada* at 169. He noted the difficult circumstances of the First Nations with the decline of the Bison herds and their concern over Canada's intentions. The Chiefs demanded gifts to demonstrate Christie's and Canada's goodwill. He observed that had he not complied with their demands "there would have been the beginning of an Indian war...": *Treaties of Canada*, at 170.

[165] Christie's message reflects the tenuous nature of Canadian sovereignty in 1871 in what would become Alberta, including the inability of Canada to enforce its laws. With reference to a proclamation banning the sale of liquor to First Nations, he observed:

[W]ithout any power to enforce these laws, it is almost useless to publish them here; and I take this opportunity of most earnestly soliciting, on behalf of the Company's servants, and settlers in this district, that protection be afforded to life

and property here as soon as possible, and Commissioners be sent to speak with the Indians on behalf of the Canadian Government.

...

I think that the establishment of law and order in the Saskatchewan District, as early as possible, is of most vital importance to the future of the country and the interest of Canada, and also the making of some treaty or settlement with the Indians who inhabit the Saskatchewan District.

Treaties of Canada at 170.

[166] Canada responded to the complex and challenging situation in the western prairies and boreal woodlands with the creation of the North-West Mounted Police in 1873 and subsequent deployment of the force in 1874 to the territory that would become Alberta. Following shortly on the heels of this attempt to bring peace and order to the region, Canada sent a team of treaty commissioners to negotiate what would become Treaty 6 and Treaty 7. Treaty 6 was negotiated and agreed upon at Fort Pitt and Fort Carlton in 1876 and Treaty 7 was negotiated and agreed to at Blackfoot Crossing in 1877. Treaty 6 is between Canada and mostly Cree First Nations and covers an area of what is now central Saskatchewan and central Alberta. Treaty 7 is between Canada and the First Nations of what is now southern Alberta including the Blackfoot (Siksika, Kainai, and Piikani), the Stoney Nakoda, and the Tsuu'tina. Treaty 8, with Dené and Cree First Nations covering northern parts of what are now Saskatchewan, Alberta, and British Columbia as well as southern parts of the Northwest Territories, followed in 1899.

[167] The western prairies and boreal woodlands in the 1870s were a place of conflicting and overlapping sovereignties. Having secured the United Kingdom's imperfect claim to Rupert's Land and the North-western Territory, Canada's objective in the Numbered Treaties was to secure the consent of the First Nations for the settlement of the western prairies and boreal woodlands. The preamble to Treaty 6 explains that Her Majesty sought to "open up for settlement, immigration and such other purposes" the Treaty lands and "to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty...." For present purposes, it is not necessary to delve any deeper or to consider what was meant by the words of surrender contained in the Numbered Treaties. It is enough to observe that a crucial part of the bargains contained in the Numbered Treaties was First Nations' consent for non-Indigenous peoples to settle on the land.

[168] The consent of First Nations in the Numbered Treaties conferred legal and political legitimacy on the settlement of the western prairies and boreal woodlands. The consent of First Nations must be understood to be, from a legal perspective at least, a necessary condition for the creation of the Province of Alberta nearly three decades after Treaty 6 and Treaty 7.

e. What is the Legal Nature of the Numbered Treaties?

[169] Canadian law uses labels and categories to make sense of things. But Treaties with First Nations have defied categorization. The Supreme Court of Canada has resorted to the Latin phrase *sui generis* to describe Treaties: *Ontario (Attorney General) v Restoule*, 2024 SCC 27; *R v Desautel*, 2021 SCC 17; *R v Badger*, [1996] 1 SCR 771; *R v Sioui*, [1990] 1 SCR 1025; *Simon v The Queen*, [1985] 2 SCR 387. This label provides little guidance to legal analysis because it just means that Treaties are "unique" or "of their own kind." To say that Treaties are their own

kind of thing is true, but sheds no light on what interpretive approach to take or what legal rules apply to Treaties. There is now a considerable body of law concerning Treaties with First Nations and we should just recognize them as First Nations Treaties without any further appellation.

[170] Treaty is the word that we use for an agreement between independent sovereign countries; it is an international agreement: *Restoule* at para 70, citing *Simon v The Queen* at 404 and 410; *Sioui* at 1038 and 1043; *Badger* at para 41. A difficulty with this is that when the Numbered Treaties were signed Canada was not fully sovereign as it did not have complete authority over its external affairs until the *Statute of Westminster, 1931* (UK), 22 & 23 Geo V, c 4. Likewise, First Nations on the western prairies and in the boreal woodlands lived in small groups defined by fluid kinship-based social and political structures and overlapping territories that did not have the characteristics of a state individually or collectively. Justice Lamer, as he then was, in *Sioui* at 1038 considered a treaty formed a century before the Numbered Treaties and explained “relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens.” This remained true in the era of the Numbered Treaties. The Numbered Treaties, then, exist in a liminal space between international treaties and domestic agreements. The use of the word “treaty,” however, indicates that the parties to these agreements saw each other to be, in some sense, sovereign in ways analogous to independent states.

[171] Courts have sometimes likened historic treaties between Canada and First Nations to contracts. For example, in a case concerning hunting rights under Treaty 8, Justice Cory, writing for the majority, observed that: “[t]reaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties.” *Badger*, at para 76; quoted with approval in *Shot Both Sides v Canada*, 2024 SCC 12 at para 38 (“*Shot Both Sides SCC*”). But the Supreme Court’s jurisprudence makes it clear that treaties between Canada and First Nations are more than just contracts. Justice Jamal held in *Restoule* at para 96 that, “[h]istoric Aboriginal treaties are not contracts; they are ‘far more’ than contracts.”

[172] Justice O’Bonsawin explained in *Shot Both Sides SCC* at para 39 that treaties are “vital, living instruments of relationship.” Though a contract can be the basis for a relationship, often contracts are understood to be transactional or impersonal tools of commerce. Professor Dwight Newman has suggested that the word “covenant” is preferable to “contract” to describe treaties with First Nations because it captures a sense of solemnity and spirituality that is consistent with how many First Nations view treaties: Dwight Newman, “Contractual and Covenantal Conceptions of Modern Treaty Interpretation,” (2011) 54 SCLR (2d) 475. Regardless of how historic treaties between Canada and First Nations are categorized, the Numbered Treaties in issue in the present case must be understood to provide the First Nations parties as much or more protection than an ordinary contract. To say that a treaty is not a contract cannot justify First Nations having lesser rights than they would if it were a contract.

[173] Rights specified in or flowing from the Numbered Treaties are recognized and affirmed by *Constitution Act, 1982* s 35 but the constitutional status of the Numbered Treaties themselves is not clear. Justice O’Bonsawin, writing for the Court in *Shot Both Sides SCC* opened by writing at para 1: “[t]reaties between the Crown and Indigenous peoples are fundamental to Canada’s history and constitutional landscape.” Later, she observed at para 39, “[c]ourts, legislatures, and academic commentators have consistently acknowledged this significance:

‘treaties represent an Indian Magna Carta.’” To compare something to the Magna Carta is to say, in effect, that it is a foundational constitutional document. Justice Jamal, writing for the Court in *Restoule*, held at para 200 that treaties “are *sui generis* agreements that form ‘part of the constitutional fabric of this country.’”

[174] The acquisition of the United Kingdom’s claim to Rupert’s Land and the North-western Territory and the subsequent diplomacy with First Nations that resulted in the Numbered Treaties were two parts of a single strategy to establish the legal foundation for settlement of the prairies and boreal woodlands of what is now Western Canada. As Justice Cory put it in a case concerning Treaty 6, the Numbered Treaties “formed the basis for peace and the expansion of European settlement.”: *R v Sundown*, [1999] 1 SCR 393 at para 24.

[175] Western Canada is a constitutional palimpsest. Like a manuscript that has been overwritten or a canvas that has been reused, the map of Western Canada is defined by two sets of lines, one laid on top of the other. The irregular boundaries of the Numbered Treaties were laid down first and follow natural features of the land. The mostly straight boundaries that mark out the western provinces were laid down after. Both sets of lines have constitutional significance, but neither is more important than the other.

f. Treaty Interpretation Principles

[176] The Numbered Treaties were meant to establish a relationship that would continue in perpetuity: *Restoule* at paras 13, 284; *Shot Both Sides SCC* at para 1. This reality demands a more flexible approach to interpretation than is found in contract law: *Restoule* at para 96. The approach to interpreting the Numbered Treaties must also recognize that they were not negotiated between parties with equal bargaining power. The First Nations who signed Treaty 6 and Treaty 7 in 1876 and 1877 were reeling from a recent smallpox epidemic and the devastation of their primary food source, the once plentiful Bison herds: James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Indigenous Life* (Regina: University of Regina Press, 2019) at 79-98. The power imbalance between Canada and First Nations in the historic treaties is addressed in interpretation through the concept of the honour of the Crown: *Restoule* at para 71.

[177] The principles of interpretation of historic treaties between First Nations and Canada need not be explored any further because Justice McLachlin, as she then was, succinctly outlined them in her dissent in *R v Marshall*, [1999] 3 SCR 456 at para 78. Her principles of treaty interpretation were quoted by Jamal J in *Restoule* at para 79 and he confirmed at para 81 that “Justice McLachlin’s legal framework in *Marshall* reflects the current state of the law.” Her principles of historic treaty interpretation are as follows:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories.
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.

5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time.
7. A technical or contractual interpretation of treaty wording should be avoided.
8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic.
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context. [Citations omitted].

[178] With these interpretation principles stated, it is appropriate to turn to the application of these principles to the two ways that the First Nations intervenors allege that Alberta independence would breach the rights guaranteed by the Numbered Treaties and, by extension, *Constitution Act, 1982 s 35*.

g. Does Alberta Independence Contravene the Numbered Treaties by Changing the Parties?

[179] The question of whether Alberta independence contravenes the Numbered Treaties by changing the parties must start with consideration of who the parties to the Numbered Treaties are. The First Nations parties are known, so the pertinent question is what it means for a treaty to be signed in the name of the Crown.

[180] The First Nations intervenors submit that Alberta independence would change the fundamental nature of the Numbered Treaties by effectively removing Canada as a party. The First Nations submit that if Alberta was independent, it would sever or significantly impair the treaty relationship between Canada and First Nations located in Alberta. Canada, even if it remained a party to the Numbered Treaties, would be unable to fulfill its treaty obligations in the part of the tracts of the Numbered Treaties in an independent Alberta. The First Nations intervenors submit that, even if Alberta was prepared to step in to fulfill Canada's role in respect of the Numbered Treaties, they are not required to accept Alberta as the party to the Numbered Treaties. The First Nations also submitted that the succession of an independent Alberta to the Numbered Treaties as posited by the Referendum Proponent would be problematic because the boundaries of Alberta and the tracts of the Numbered Treaties are not co-extensive which means that, for Treaties 6 and 8, in different parts of the treaty territories there would be a different political entity responsible for fulfilling treaty obligations.

[181] The Referendum Proponent argues that the party to the Numbered Treaties is the Crown and that following Alberta independence the relationship would continue with the Alberta Crown. The Crown, according to the Referendum Proponent, is divisible and an independent Alberta would continue to have a Crown in the same way that Canada has a Crown following its independence from the United Kingdom. This argument was made even though the Referendum Proponent acknowledged that an independent Alberta would be free to determine for itself if it would become a republic. The Referendum Proponent further argued that Alberta independence

was not an obstacle to a continuing treaty relationship between Canada and First Nations within an independent Alberta.

[182] The Referendum Proponent argues that “[Treaty] obligations are tied to the Crown itself ... and are not diminished by constitutional or political change under the Constitution of Canada. Accordingly, treaty rights will maintain their full legal status, whether held by Canada or a future independent Alberta.” The Referendum Proponent submits that the Crown of an independent Alberta would be a legitimate successor to both the current Crown in right of Canada and Crown in right of Alberta. The Referendum Proponent’s argument is, in essence, that upon Alberta independence any obligations of the Canadian Crown pursuant to the Numbered Treaties will pass to the Alberta Crown.

[183] The Referendum Proponent submits that Alberta independence would be analogous to the devolution of power from the United Kingdom to Canada that began with the implementation of responsible government in the mid-nineteenth century and was completed with the patriation of the constitution in 1982. Just as treaties with First Nations that were originally with the Imperial Crown were devolved to the Canadian Crown, so too could treaties with the Canadian Crown be devolved to an independent Alberta Crown.

[184] The Referendum Proponent relies on *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others* [1982] 2 All ER 118 (“*Indian Association of Alberta*”). Lord Denning held that the Crown was no longer indivisible and that there was a separate Crown for each Dominion and province: *Indian Association of Alberta* at 129. He further held that obligations that once were the obligations of the Imperial Crown, including First Nations treaties, became obligations of the Crown in right of Canada. Lord Kerr concurred in the result but expressed doubt that First Nations treaties were made with the Imperial Crown and suggested that they would have been made with the “developing governments” of the colonies or, later, Canada: *Indian Association of Alberta* at 133. He further explained that “independence” was “wholly irrelevant” to which political entity was responsible for the rights and obligations of the Crown within its territory and that, so far as Canada was concerned, it had been responsible for the rights and obligations of the Crown in its territory since 1867: *Indian Association of Alberta* at 135. Lord May agreed with Lord Kerr holding, “the rights granted to the Alberta Indians by the relevant Treaty were granted to them by the Crown in right of Canada and not by the Crown in right of the United Kingdom”: *Indian Association of Alberta* at 142.

[185] The First Nations intervenors make two distinct arguments in response to the Referendum Proponent. First, they argue that the Crown is indivisible and the Crown of an independent Alberta could not succeed to the Numbered Treaties. Second, they argue that, as a practical matter, Canada is the primary obligor pursuant to the Numbered Treaties and that Alberta independence would effectively remove Canada as a party to the Numbered Treaties for First Nations situated in Alberta.

[186] All the Numbered Treaties are with the Crown. Chief Justice McLachlin, interpreting Treaty 3, which is worded similarly to the Numbered Treaties in issue in this case, held in *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 39 that it was “between the Crown – a concept that includes all government power – and the Ojibway.” She went on to conclude that the reference to Canada in Treaty 3 was simply a reflection of the fact that at the time of Treaty 3, the lands in question had not yet been included within Ontario’s

boundaries. Once the lands were within Ontario, the constitutional division of powers determined which level of government could exercise the Crown's rights pursuant to Treaty 3. The idea in *Grassy Narrows* is that the Crown is a single abstract entity whose powers, in the context of Canada's federal arrangement, are exercised by either the federal government or provincial governments depending on the constitutional division of powers. Professor Nigel Bankes put it this way, "*Grassy Narrows* stands for the proposition that a province like Alberta only has the power to take up lands under one of the numbered treaties by virtue of being part of the federal State of Canada": Nigel Bankes, "Provincial Referendum Legislation, Citizen-Led Secession Proposals, and Non-Derogation Clauses," (11 June 2025), online: <ablawg.ca/2025/06/11/provincial-referendum-legislation-citizen-led-secession-proposals-and-non-derogation-clauses/>.

[187] Professor McNeil has criticized *Grassy Narrows* as being inconsistent with Lord Denning's decision in *Indian Association of Alberta* and a long line of Canadian jurisprudence: see generally, Kent McNeil, "The Obsolete Theory of Crown Unity in Canada and its Relevance to Indigenous Claims" (2015) 20:1 Rev Const Stud 1. He explains at 23 that "the notion of the Crown as a single abstract entity with legal personality as a corporation sole made some sense in England, but with the creation of the Canadian federation in 1867 and the subsequent development of the Commonwealth, the notion became conceptually and practically unworkable." Professor McNeil's critique is interesting, but the Court is bound by *Grassy Narrows* to treat the Crown as an indivisible entity, though the level of government that may exercise its rights and obligations is determined by the constitutional division of powers.

[188] The conclusion in *Grassy Narrows* that the Crown is indivisible means that the Referendum Proponent's devolution theory must be rejected. The obligations under the Numbered Treaties cannot be assumed by an independent foreign state (e.g. an independent Alberta) even if that state is a constitutional monarchy with King Charles III or his heirs and successors as the nominal head of state.

[189] Though *Grassy Narrows* dictates the rejection of the Referendum Proponent's position as a matter of law, the First Nations' argument regarding the practical loss of Canada as a party to the Numbered Treaties is far more compelling. The Numbered Treaties, notwithstanding anything said in *Grassy Narrows*, are a bargain between Canada and First Nations, not any of the provinces and First Nations even if, by operation of the constitutional division of powers, provinces both are bound by the Numbered Treaties and may exercise rights pursuant to the Numbered Treaties. This is certainly true of Treaties 6, 7, and 8 which were formed prior to the existence of Alberta.

[190] The text of the Numbered Treaties indicates that obligations of the Crown will be satisfied by the Government of Canada. For example, Treaty 6 states that it is "between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners... and the Plain and Wood Cree and other Tribes of Indians..." Though there is some inconsistency in the language used in Treaty 6, most of the obligations to First Nations are stated to be the responsibility of "Her Majesty's Government of the Dominion of Canada." There are some differences in the wording of Treaty 6 and the other Numbered Treaties, but all the Numbered Treaties make it clear that, as a practical matter, the *de facto* party is Canada because Canada must perform the obligations under the Numbered Treaties.

[191] *Constitution Act, 1867* s 91(24) assigns responsibility for “Indians, and Lands reserved for the Indians” to the Government of Canada. Consistent with this assignment of responsibility, the Government of Canada plays a significant role in relation to First Nations including as the primary obligor pursuant to the Numbered Treaties. The *Natural Resources Transfer Agreement* Being Schedule 1 to the *Constitution Act, 1930* (UK), 20-21 Geo V, c 26, reprinted in RSC 1985, App II, No 26 (“*NRTA*”) is a good illustration of this practical reality:

All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof. [Emphasis added].

[192] Even though the Crown is the formal party to the Numbered Treaties, Canada has played a critical role as the primary obligor under the relevant Numbered Treaties for nearly 150 years in the cases of Treaties 6 and 7. The First Nations intervenors submit that, irrespective of legal formalities, the dissolution or significant impairment of the Treaty relationship with Canada as primary obligor that would result from Alberta independence would violate the Numbered Treaties. To evaluate this argument, there are three matters that must be considered: (1) how does the common law treat the substitution of a party to a contract? (2) how does international law treat the substitution of a party to a treaty? and (3) how does Indigenous law treat the substitution of a party to a treaty? I have framed these questions using the word “substitution” because the removal of a party without consent or substitution is a clear breach that does not require analysis.

[193] The benefit of a contract may be assigned, but the burden of a contract may not be assigned without consent: *Lounsbury Company Limited v Duthie and Sinclair*, [1957] SCR 590 at 596-597; *Simex Inc v Imax Corporation*, (2005), 206 OAC 3 at para 45; HG Beale *et al*, eds, *Chitty on Contracts*, 32nd ed (London, UK: Sweet & Maxwell, 2015) at 1544-45. The basic rule in common law and equity is that in a contract between A and B, A’s obligations cannot be assigned to C without the consent of B: *Lounsbury* at 596-97. “Everybody has a right to choose with whom he will contract and no-one is obliged without his consent to accept the liability of a person other than him with whom he made his contract”: HG Beale *et al*, *Chitty on Contracts* at 1544-45.

[194] For certain kinds of contractual rights (*e.g.* debt) this rule has been modified by statute: see *e.g.* *Law and Equity Act*, RSBC 1996, c 253, s 36; *Judicature Act*, RSA 2000, c J-2, s 20. At common law, the only way for a change of parties to a contract to occur was through novation. Novation in a technical sense is the formation of a new contract: *National Trust Co v Mead*, [1990] 2 SCR 410 at 427. Novation requires that three conditions be met: (1) the new obligor must assume the obligations of the original obligor; (2) the obligee must accept the new obligor as the person bound to perform the obligations under the contract; and (3) the obligee must accept the new contract in full satisfaction and substitution for the old contract, *i.e.*, the original

obligor must be released from its obligations: *National Trust Co v Mead* at 426; Angela Swan, Jakub Adamksi, & Annie Y Na, *Canadian Contract Law*, 4th ed, (Toronto: LexisNexis, 2018) §3.11.

[195] If the Numbered Treaties were contracts, First Nations could withhold their consent to the assignment of obligations from Canada to an independent Alberta. Further, since this was the common law rule in effect at the time of the formation of the Numbered Treaties, this is important contextual evidence as to what the treaty commissioners negotiating for Canada would have believed the consequences or effect of their agreement to be. The impact of the common law on the Canadian treaty commissioners in this respect parallels the effect of Cree law on the perspective of the Cree Chiefs who signed Treaties 6 and 7, as discussed below.

[196] Just like an ordinary contract, an international treaty may be amended only by agreement of the parties: *Vienna Convention on the Law of Treaties*, Can TS 1980 No 37 (entered into force 27 January 1980) art 39. A party may withdraw from or terminate a treaty only in accordance with the terms of the treaty or with the consent of all the parties to the treaty: *Vienna Convention on the Law of Treaties*, art 54. If the Numbered Treaties were international treaties, First Nations could withhold their consent to Canada's withdrawal or to an independent Alberta succeeding to Canada's position as primary obligor.

[197] The Numbered Treaties are intercultural agreements where the negotiators for each side brought different assumptions and understandings to the table. Accordingly, the interpretation of the Numbered Treaties demands that “[i]n determining the signatories’ respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties”: *Marshall* at para 78. An essential part of First Nations culture that must be considered when interpreting the Numbered Treaties is their law. First Nations law was the prism through which they made sense of the reciprocal obligations created by the Numbered Treaties. Whatever else the Numbered Treaties may be, they memorialize inter-cultural moments, where each side made sense of what was happening using their own cultural tools, mainly their separate legal understandings of what it meant to make an agreement or treaty.

[198] Dr. Darcy Lindberg, a law professor at the University of Victoria, provided an affidavit outlining relevant principles of nêhiyaw (Cree) law. His evidence includes useful information concerning Cree governance and social organization at the time of the Numbered Treaties and the Cree law principles applicable to treaties. Regrettably, no similar evidence was provided regarding Dené or Blackfoot law, though evidence before the Court concerning the peace treaties made between the Cree and the Dené and the Cree and the Blackfoot suggests that there were some commonalities among the various First Nations, at least with respect to the law and practice of treaty-making.

[199] The Supreme Court outlined the correct approach to expert evidence in *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 19. Dr. Lindberg's evidence is relevant for reasons already explained and necessary because it is beyond the knowledge and competence of the Court. There is no applicable exclusionary rule. And there is no question that Dr. Lindberg is qualified; his *curriculum vitae* shows that he has published extensively in respected legal journals and written chapters in books concerning Cree law published by leading university presses. There were no objections to his evidence.

[200] Dr. Lindberg explained that the Cree of Western Canada are often divided into Plains Cree (paskwâwiyiniw) and Woodland Cree (sakâwiyiniw). The Plains Cree live mostly in the

central prairies and the Woodland Cree inhabit the boreal woodlands in the central and northern parts of Manitoba, Saskatchewan, and Alberta. Though the Plains Cree and Woodland Cree signed different treaties in Alberta – most of the First Nations parties to Treaty 6 are Plains Cree and many of the First Nations parties to Treaty 8 are Woodland Cree – they are all members of the larger Cree society (nêhiyawak), speak the same dialect of the Cree language (nêhiyawewin), share cultural practices, and adhere to the same legal principles.

[201] Dr. Lindberg explains that the concept of a “tribe” is not a useful way to understand Cree social and political organization. The defining feature of Cree society is “[f]luid kinship, rather than political or ethnic unity.” Dr. Lindberg explained that “Woodland Cree and Plains Cree societies have always been intermarried and thus have long-lasting kinships between each sub-society.” Sturgeon Lake Cree Nation (“SLCN”), Mikisew Cree First Nation (“MCFN”) and Onion Lake Cree Nation (“OLCN”) working together in this case is an example of the ongoing co-operation between Plains Cree and Woodland Cree First Nations.¹¹

[202] The most important principle of Cree law that relates to the present case is wâhkôtowin which means “to relate to, or kinship.” Dr. Lindberg explained:

At the time of treaty making (1876 and 1899) wâhkôtowin was the primary governing principle that organized Cree societies, the Plains Cree and Woodland Cree included. The general structure of Cree communities at the time was based on kinship; individual families and larger family clusters made up nations/tribes under the leadership of an okimaw (or leader) or okimawak (leaders). Wâhkôtowin, with its inherent sub laws and rules, ensured good living in these communities.

[203] Where no natural familial ties exist, Cree following the principle of wâhkôtowin would use what is called “fictive kinship” to place individuals or institutions within a kinship order. The Cree deployed the idea of fictive kinship in diplomacy and treaty relationships. A famous example of this was the Blackfoot Chief Crowfoot’s ceremonial adoption of the Cree Chief Poundmaker in 1873 as a further consolidation of the peace between the Blackfoot and the Cree: Treaty 7 Elders *et al*, *The True Spirit and Original Intent of Treaty 7*, at 9. The use of fictive kinship in treaty-making by the Anishinaabe and the Crown was noted in *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at paras 43-47.

[204] The Cree First Nations dealing with Canada and its distant monarch thought that they were establishing a fictive kinship relationship when they entered the Numbered Treaties. And there can be little doubt that the treaty commissioners acting on behalf of Canada understood that. David Liard, the Lieutenant-Governor of the North-west Territories and a treaty commissioner at the time of Treaty 8 used the term “Great Mother” to describe Queen Victoria to the First Nations when negotiating Treaty 8: see the correspondence of Liard quoted in Richard Daniel, “The Spirit and Terms of Treaty Eight” in Richard T Price, *The Spirit of the Alberta Indian Treaties*, 3rd ed (Edmonton: University of Alberta Press, 1999) 66 at 68. This way of describing the monarch can only have been intended to appeal to First Nations’ understanding of treaties through the lens of kinship. Cree oral history also holds that one of the treaty commissioners explained that the treaty relationship would make him a cousin of the Cree.

¹¹ OLCN is not an intervenor, but the materials filed by SLCN and MCFN indicate that OLCN has provided support. See also, *Sylvestre II* at para 41.

[205] A second principle of Cree law, wîtaskêwin, is relevant to treaty-making. Dr. Lindberg explained that between individuals, wîtaskêwin may be understood to mean “neighbourliness.” But wîtaskêwin has a different connotation when applied to communities and governments. He observed that, “[i]n a community-to-community context, it ensures good relations when territories are shared or are bordering each other. In a government-to-government context, it creates firm responsibilities on land-sharing, respect for each government’s autonomy, and binds each government to a relationship based on political respect and renewal.”

[206] Dr. Lindberg’s evidence is that wîtaskêwin when applied to inter-community or inter-governmental relations has a territorial dimension. He cited the example of the treaty between the Cree and Dené made at Peace Point in what is now Wood Buffalo National Park that “set territorial rights and obligations around the Peace River,” and the treaty between the Cree and the Blackfoot that “set territorial rights and obligations around the Battle River.” Just like those treaties, Dr. Lindberg explains, Treaty 6 and Treaty 8 define the territorial extent of the relationship between the First Nations signatories and Canada. The text of the Numbered Treaties provides for First Nations to exercise certain rights throughout the treaty tracts and, Dr. Lindberg explains, “[a]ccording to Cree law, a whole treaty territory must be considered in any legal action involving the treaty.”

[207] The breaking of a Cree law is referred to as pâstâhowin. Pâstâhowin is “transgressing outside of the boundaries individuals, individuals, families, societies, and governments are entitled to.” Dr. Lindberg further explained that “[i]n the context of wâhkôtowin, it is commonly understood that a person creates a situation of pâstâhowin by not fulfilling obligations to the kinship or relationship they are obligated to.” A verbal transgression is a form of pâstâhowin that is called pâstâmowin. These principles, according to Dr. Lindberg, inform the Cree understanding of Treaties 6 and 8.

[208] Alberta independence, according to Dr. Lindberg, would be contrary to Cree law. He stated:

it is my opinion that governmental kinship, by way of the familial relationship it suggests, does not contemplate the unilateral replacement of one treaty partner with another. Or to put another way, the Crown could not be replaced by a separate government, or government representative. In the familial sense, it is impossible to replace an individual within a kinship order.... This would transgress Crown treaty promises and certainly would be committing a pâstâhowin. The replacement of a fundamental treaty partner after at least 126 years of political and governmental kinship defies Cree legal logic, even by analogy.

[209] He further explains that holding a referendum on independence for Alberta before engaging in a deliberative process complete with Cree ceremonialism is not permitted because “discussions, plans, intentions to break, change, amend or alter the relationship is creating a pâstâmowin as it is contemplating a transgression of Cree law through speech.”

[210] There is no expert evidence from the Blackfoot First Nations comparable to that of Dr. Lindberg, but their history of treaty-making reviewed in the evidence of Ms. First Rider and *The True Spirit and Original Intent of Treaty 7*, at 7-11 shows that Treaty 7 was one of many treaties or alliances formed by the Blackfoot Confederacy in the nineteenth century. Most of the treaties were with other First Nations such as the Sioux in 1810 and the Mandan in the 1830s, but in

1855 the Blackfoot Confederacy entered a written treaty with the United States which is known as the Lame Bull Treaty: *Shot Both Sides FC* at para 118; *Treaty Between the United States and the Blackfoot and Other Tribes of Indians*, 17 October 1855, 11 Stat. 657.

[211] Ms. First Rider explained that the Blackfoot concept of treaty-making is called Innaihtsiini. The Blackfoot way of treaty-making involves a sacred oath and is symbolized by “smoking a sacred pipe and through the exchange of gifts to sanction the agreement which can never be broken.” According to Ms. First Rider, the Blackfoot understood Treaty 7 “to be a sacred peace agreement and the basis of a relationship of mutual obligation between [the Blackfoot] and the Crown, which included an agreement to share certain portions of Blackfoot Traditional Territory.”

[212] The treaties of the Blackfoot Confederacy, like those of the Cree, had a territorial dimension with the Blackfoot Confederacy being renowned for excluding others from their territory: *R v Hirsekorn*, 2013 ABCA 242 at para 35 (“*Hirsekorn CA*”). And the practice of fictive kinship can be seen in Chief Crowfoot’s adoption of Chief Poundmaker. Like treaties in Cree law, according to Ms. First Rider the treaties of the Blackfoot nations “could never be broken once made”: see also, Treaty 7 Elders, *The True Spirit and Original Intent of Treaty 7*, at 7. Consistent with this understanding, the Lame Bull Treaty, art 1 stated that it was to be “perpetual”.

[213] Contract law, international law, Cree law, and what may be inferred from the Blackfoot history and practice of treaty-making all point to the same conclusion – consent is required to change a party to the Numbered Treaties. Moreover, it is consistent with the clear intent of Canada and First Nations in each of the Numbered Treaties to create a relationship that would last in perpetuity. Both First Nations and treaty commissioners said that the treaty relationship was meant to last as long as the sun shines, the grasses grow, and the rivers flow. Lieutenant-governor Morris put it this way when he spoke to the Chiefs when negotiating Treaty 6, “I told you what I was promising was not for to-day or to-morrow only, but should continue as long as the sun shone and the river flowed. My [spoken] words will pass away and so will yours, so I always write down what I promise, that our children may know what we said and did”: *The Treaties of Canada* at 208.

[214] Alberta independence would contravene the Numbered Treaties both as a matter of law and as a practical matter by removing Canada and substituting an independent Alberta as the entity responsible for fulfilling treaty obligations. As explained earlier, whether this contravention could be justified pursuant to *Sparrow* cannot be addressed in this case.

h. Would Alberta Independence Contravene the Numbered Treaties by Dividing the Treaty Tracts with an International Border?

[215] The First Nations intervenors submit that if Alberta was an independent state that would mean that its borders with Canada would become international boundaries. The division of the treaty tracts and the traditional lands of First Nations by international boundaries, they contend, would significantly impair their ability to exercise their Treaty rights. Treaty 6 crosses the Alberta-Saskatchewan border, Treaty 7 is mainly in Alberta but includes a small part of Saskatchewan, and Treaty 8 extends across Saskatchewan, Alberta, British Columbia, and the Northwest Territories.

[216] The discussion that follows focuses mostly on Treaty 8 because the evidence of the Athabasca Chipewyan First Nation (“ACFN”) and the MCFN best illustrates the challenges that international borders would pose to the exercise of Treaty rights. While the focus of the following discussion is on Treaty 8, I accept the evidence of Grand Chief Dejarlais who testified that “[m]any members of Frog Lake First Nation and other Treaty 6 First Nations continue to exercise these constitutionally protected rights throughout Alberta and Saskatchewan.” The circumstances of OLCN whose reserve lands lie on both sides of the Alberta-Saskatchewan border and the Duncan First Nation and SLCN whose reserves are in Alberta and claim that their respective traditional lands extend into British Columbia are noted. The Blackfoot First Nations’ also claim that their traditional territory extends into southern Saskatchewan and British Columbia and submit that proponents of resource and infrastructure projects in these areas have recognized this by engaging in consultation.

[217] ACFN and MCFN live on reserves in the vicinity of the Peace-Athabasca Delta and Lake Athabasca in the northeast corner of Alberta. ACFN has eight reserves in the area and MCFN has nine reserves in the area. ACFN are Dēnesuliné people, a sub-group of the Dené, who have relationships with other Dēnesuliné and Dené First Nations in Alberta, British Columbia, and the Northwest Territories. The MCFN are Woodland Cree who have relationships with the broader Cree society that is spread across the central and northern parts of Manitoba, Saskatchewan, and Alberta. Being in the northeastern corner of Alberta, both ACFN and MCFN have historically used and continue to use lands in Alberta, Saskatchewan, and the Northwest Territories. ACFN provided the most substantial and detailed evidence concerning historical and continuing land use.

[218] ACFN Chief Adam deposed that Dené from across Alberta, Saskatchewan, and the Northwest Territories “were, and remain, connected through an expansive network of kinship ties.” He explained that the ACFN traditionally lived in the vicinity of the Peace-Athabasca Delta and lived off the bounty of the land. Central to this way of life was moving around their territory to take advantage of different hunting and gathering opportunities in different seasons. One of the most important reasons ACFN moved around its territory was to follow the migration patterns of the woodland and barrenland caribou. Chief Adam explained that the ACFN’s traditional nomadic practices were called the “Seasonal Round.” According to Chief Adam, the Seasonal Round continues in modified form to this day.

[219] ACFN’s Executive Director, Dené Lands and Resource Management, Lori Cyprien provided evidence of ACFN members’ contemporary use of Treaty 8 lands. Ms. Cyprien’s map of ACFN member activities shows significant activity around Lake Athabasca in Saskatchewan and some activity extending north into the Northwest Territories. Ms. Cyprien stated that ACFN members have many cabins and longstanding campsites in Saskatchewan and the Northwest Territories that are used to support their activities. She further explained, “ACFN hunters routinely cross provincial and territorial borders in canoes, quads, snowmobiles or pickup trucks with their rifles, shotguns and ammunition.” According to Chief Adam, provincial and territorial borders do not have a material impact on how ACFN members exercise their Treaty rights.

[220] Both ACFN and MCFN emphasized in argument that mobility into parts of Treaty 8 in Saskatchewan and the Northwest Territories is especially important today given that significant parts of the southern portion of their traditional lands near Fort McMurray have been taken up for oilsands development and are no longer suitable for hunting and fishing. As MCFN Chief Billy-Joe Tuccaro put it, “[o]ur Nation is the largest in the oil sands area. We have suffered

disproportionate impacts from industrial development, authorized by Alberta, including on our people's health.”

[221] Chief Adam deposed that it is his understanding from ACFN Elders that the First Nations who gathered at Fort Chipewyan to negotiate Treaty 8 would not have signed the treaty if the treaty commissioners had not promised that they could maintain their way of life, including moving throughout their traditional lands to continue their traditional pursuits of hunting and fishing. Sir Clifford Sifton, Superintendent General of Indian Affairs confirmed this in the *Report of Commissioners for Treaty No. 8* (Winnipeg: 1899):

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed.... [W]e had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.

We assured them that the treaty would not lead to any forced interference with their mode of life.... [Emphasis added].

[222] Both Chief Adam and Chief Tuccaro deposed that their understanding based on their First Nations' respective oral histories of Treaty 8 is that it preserved their right to move throughout their traditional lands pursuing their traditional way of life. Indeed, that is exactly what Treaty 8 says:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [Emphasis added].

[223] The rights of First Nations to exercise their rights throughout treaty territories was confirmed in *Frank v The Queen*, [1978] 1 SCR 95. Mr. Frank was a member of the Little Pine First Nation (“LPFN”), which is a Treaty 6 First Nation, and resided on the LPFN reserve near North Battleford, Saskatchewan. Mr. Frank killed a moose near Nordegg, Alberta, which is on Treaty 6 lands. He was arrested and charged under *The Wildlife Act*, RSA 1970, c 391 s 16 by Alberta officials for unlawfully possessing moose meat. Alberta argued that the *NRTA* limited the Treaty 6 right to hunt to those First Nations members resident in Alberta. Dickson J, as he then was, writing for the Court held at 103 that the *NRTA* did not “fragment treaty areas by provincial boundaries.” He went on to observe that “[i]t is perhaps of interest that of the eleven numbered treaties that were entered into by the Government of Canada with the Indians, virtually all cross provincial boundaries.”

[224] Though there is no evidence in this case that provincial boundaries affect the exercise of Treaty rights, the Supreme Court of Canada has recognized that, in some circumstances, provincial boundaries can infringe Aboriginal rights: *Newfoundland and Labrador (Attorney General) v Uashaunuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4. Chief Justice Wagner and Justices Abella and Karakatsanis held for the majority at para 49, “[w]e do not

accept that the later establishment of provincial boundaries should be permitted to deprive or impede the right of Aboriginal peoples to effective remedies for alleged violations of these pre-existing rights.” There is no principled reason why Treaty rights should be treated differently than the Aboriginal rights considered in *Uashaunnuat*. Indeed, if provincial boundaries can infringe Aboriginal and Treaty rights, it stands to reason that international boundaries can do so as well.

[225] International boundaries are indisputably more significant barriers to mobility and the exercise of Treaty rights than provincial boundaries. The Government of Canada has recognized the negative impact of existing international borders on Indigenous communities. Immigration, Refugees and Citizenship Canada (IRCC) published a report titled *Indigenous Mobility and Canada’s International Borders: Reflecting back and looking forward* in 2024 (Ottawa: IRCC, 2024). IRCC observed at page 6:

The introduction of colonial borders has seriously affected First Nations, Inuit and Métis living on their traditional territories. Legislation and policy related to borders and mobility rights have an important impact on:

- families
- governance
- traditional practices
- language preservation
- kinship
- cultural ties
- economic opportunities

The challenges caused by existing borders for First Nations identified by IRCC include many of the concerns cited by ACFN, MCFN, and other First Nations in this case.

[226] Before the westward expansion of non-Indigenous settlement, the Blackfoot Confederacy controlled territory called Nitawahsin that stretched from the Yellowstone River in the south in what is now Montana and Wyoming to the North Saskatchewan River in the North: *Shot Both Sides FC* at paras 62-65; *Hirsehorn CA* at para 35. This territory was divided by the creation of the Canada-US border along the 49th parallel by the Treaty of 1818 and its enforcement starting later in the 19th century. The result of the drawing of the Canada-US border is that the fourth member of the Blackfoot Confederacy, Amskapi Pikuni (sometimes known as the South Peigan or Blackfeet), are situated on a reserve in Montana. Herman Many Guns of the Piikani Nation explained as follows:

The boundary line between Canada and the United States was fixed without any consideration of how it may affect the Blackfoot Nations, and specifically, the fact that *Aapatohsipiikani* [North Peigan] and *Amskapi Pikuni* [South Peigan] would be split based upon their location at the time the border was implemented. The imposition of the international border wholly ignored the existence of *Nitawahsin* and the rights of Blackfoot peoples to travel freely throughout Blackfoot Territory.

[227] Mr. Many Guns further deposed that, among other negative impacts, the Canada-US border has “greatly affected” “family and kinship relationships” and impaired economic development. Both Mr. Many Guns and Kendall Panther Bone of Siksika Nation attest that the members of their nations have encountered difficulties crossing the Canada-US border with ceremonial items. These are concrete examples of what IRCC observed and what First Nations in this case fear from the imposition of international boundaries as a consequence of the secession of Alberta.

[228] The Referendum Proponent argues that the Supreme Court of Canada recognized in *Desautel* that First Nations located outside Canada can exercise Aboriginal and Treaty rights in Canada. While it is true that *Desautel* stands for the proposition that First Nations located outside Canada may exercise Aboriginal and Treaty rights in Canada, the Court left undecided the question of whether Canada’s right to control its borders means that a First Nations member seeking to exercise Aboriginal and Treaty rights in Canada may be denied entry: *Desautel* at para 66. Further, the Court said, “the question of whether the appropriate framework is sovereign incompatibility or infringement/justification under *Sparrow* should be left for another day....”: *Desautel* at para 66.

[229] A normal characteristic of an independent sovereign state is that it controls its territory, including its borders: *Montevideo Convention*; *Montana Band* at para 483. Chief Justice Dickson explained in *R v Simmons*, [1988] 2 SCR 495 at 528 “sovereign states have the right to control both who and what enters their boundaries.” As a practical matter, this means that an independent sovereign state may control who crosses its borders and the terms on which they are permitted to cross. Common border controls include visa requirements, exclusion of convicted criminals, prohibitions on carrying certain kinds of goods (e.g. some food products, firearms, etc.), medical restrictions, customs duties or tariffs on carried goods, and other restrictions. Rather than imagine potential border restrictions, the following analysis proceeds on the assumption that the way that Canada’s international borders are administered today is the way that a hypothetical Canada-Alberta international border would be administered, at least on the Canada side.

[230] Canada’s and Alberta’s consistent position in litigation with First Nations over at least the last three decades has been that *Constitution Act, 1982* s 35 rights do not trump Canadian sovereignty and do not afford First Nations rights contrary to Canada’s absolute right to control ingress and egress from Canada: *Desautel* at para 66; *Mitchell v MNR*, 2001 SCC 33 at para 61. Though the Supreme Court of Canada has noted this position, it has avoided deciding whether it is correct.

[231] The Numbered Treaties, as discussed earlier, confirm the right of First Nations to move around the Treaty tracts for the purpose of, among other things, hunting and fishing. As such, any constraint on mobility to pursue such activities imposed by an international border between an independent Alberta and Canada on First Nations’ mobility rights would contravene the Numbered Treaties. The modest assumption that an independent Alberta and Canada, like typical independent sovereign countries, would control who crosses their borders, and taking notice of the negative impact of existing international borders on Indigenous people’s ability to engage in activities are protected by the Numbered Treaties, leads to the inevitable conclusion that an independent Alberta would contravene the Numbered Treaties.

[232] Of course, it is possible that Canada and an independent Alberta would enter a treaty to permit First Nations to move freely between the countries to exercise their rights under the Numbered Treaties. But rights under a treaty between independent countries are different from and less certain than constitutional rights. A good example of this is the Jay Treaty signed between Great Britain and the United States in 1794. The United States honours the Jay Treaty and permits First Nations persons born in Canada to enter the United States for study, employment, and other purposes. This right is codified in the *Immigration and Nationality Act*, 8 USC 1101 at §289. Canada's position is that the Jay Treaty was abrogated by the War of 1812. The Supreme Court of Canada in *Francis v The Queen*, [1956] SCR 618 side stepped the question of whether the Jay Treaty had been abrogated but held that rights under the Jay Treaty are not enforceable against Canada because there is no implementing legislation.

[233] Even if an independent Alberta and Canada entered a treaty to facilitate First Nations to exercise their rights under the Numbered Treaties, enforcement of the Alberta-Canada treaty would be different than how Treaty rights are enforced today. Put simply, enforcing Treaty rights recognized and affirmed by the constitution in domestic courts is much easier than trying to enforce rights conferred by an international agreement in a foreign country.

i. What if Reserve Lands Remain in Canada Post-Secession?

[234] Before leaving the question of infringement of Treaty rights, it is necessary to briefly address the argument of the Kainai Nation that is premised on the Kainai Nation and its Blood Reserve remaining in Canada following Alberta secession. Based on this premise, the Kainai Nation posits that Alberta secession will cause the end of the treaty relationship with Alberta, not Canada and that the transformation of reserve boundaries into international boundaries must be considered. The Kainai Nation emphasizes that Alberta plays a critical role in fulfilling Treaty responsibilities and that Alberta actions have significant impact on the Kainai Nation and its exercise of Treaty rights. The Kainai Nation cites as an example its current litigation against Alberta and others concerning water rights and projects affecting water courses important to the Kainai Nation. The Kainai Nation also fear that international borders around their reserve would return them to something like the Pass System that existed from the late 19th century through to the early 1950s “which required Blood Tribe members to obtain written permission from an Indian Agent before leaving the Reserve, even for essential activities like trading, visiting family, or participating in ceremonies.” For more on the Pass System, see *Cowichan Tribes v Canada (Attorney General)*, 2025 BCSC 1490 at paras 3312-3316.

[235] Two Indigenous intervenors in the *Secession Reference*, the Grand Council of the Crees and Makivik Corporation, argued that large parts of northern Quebec where many Indigenous people live would remain in Canada if Quebec seceded from Canada: Peter Radan, “‘You Can’t Always Get What you Want’: The Territorial Scope of an Independent Quebec” (2003) 41:4 Osgoode Hall LJ 629 at 631. The Supreme Court of Canada did not address the substance of those arguments but observed at para 96 that “[n]obody seriously suggests that our national existence ... could be effortlessly separated along what are now the provincial boundaries of Quebec.” The Court’s comments in the following paragraph indicate that it considered boundary matters to be something for negotiations following a successful independence referendum. The Court then noted that it “need not speculate as to what would then transpire.”

[236] The modest assumption that is appropriate to make in the present case is that if Alberta secedes from Canada it will take with it the whole territory within its boundaries and that Alberta will have the normal attributes of an independent sovereign nation. Though it is possible that through post-referendum negotiations First Nations reserves, and perhaps even parts of First Nations' traditional territories may remain in Canada, that is not something that can be known now and is not appropriate to consider as part of this case. The decision to decline to consider the scenario raised by the Kainai Nation should not be taken to be an indication that Alberta is indivisible or that the concerns of the Kainai Nation are without merit.

j. Duty to Consult and Post-Referendum Negotiations

[237] Several of the First Nations intervenors argued that Alberta has a duty to consult with First Nations before conducting a referendum on Alberta independence. A duty to consult “arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal [or Treaty] right or title and contemplates that conduct might adversely affect it”: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35; *Saskatchewan (Environment) v Métis Nation – Saskatchewan*, 2025 SCC 4 at para 52.

[238] The Treaty 6 Confederacy submitted that a referendum on Alberta independence is conduct that might adversely affect Treaty rights and that Alberta has a duty to consult First Nations prior to a referendum. They further submit that Alberta cannot evade its duty to consult by allowing a referendum on Alberta independence to be brought forward by a citizen through the *CIA*. They rely on *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14, leave to appeal to SCC ref'd, 35236 (19 September 2023) where it was held at para 37 that “[s]tatutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist.” This statement was quoted with approval by Justice Karakatsanis in *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 46.

[239] The Referendum Proponent, as noted earlier, submits that the appropriate time for First Nations interests to be considered and for consultation to take place is after a successful independence referendum as prescribed by the *Secession Reference* and the *Clarity Act*. The Referendum Proponent emphasizes that the *Clarity Act* s 3(2) dictates negotiations after a referendum and does not allow a constitutional amendment for secession to be proposed by a Minister of the Crown “unless the Government of Canada has addressed, in its negotiations, ... the rights, interests and territorial claims of the Aboriginal peoples of Canada...”

[240] The Referendum Proponent also relies on the *Secession Reference* at para 139 to bolster the argument that all negotiations would take place after a referendum vote in favour of secession. It is important to note, however, that the *Secession Reference* was decided before *Haida* and the many duty to consult cases that have followed it and, as such, offers no guidance on whether there would also be a duty to consult prior to the holding of the referendum or what the content of that duty would be.

[241] The Treaty 6 Confederacy object to post-referendum consultation because they say at that time, as a practical matter, “[t]he Crown will ... be locked into a decision to separate before any consultation with First Nations has occurred, violating the section 35 rights of Treaty 6 First Nations.” The Treaty 6 Confederacy also submits that a referendum on Alberta independence without clarity concerning First Nations' Treaty rights is anti-democratic. They submit that, “[w]ithout meaningful consultation Albertans would be deprived of the information necessary to

make an informed decision in a referendum. Voters cannot understand the implications of separation for First Nations' constitutionally protected rights or for Alberta's ongoing legal and constitutional obligations."

[242] The question of whether Alberta has a duty to consult with First Nations before holding a referendum on independence is beyond the scope of the special case stated by the CEO. The Court is required to decide if the Referendum Proponent's constitutional referendum proposal, Alberta independence, contravenes *Constitution Act, 1982* ss 1-35.1. Whether holding a referendum on independence gives rise to a duty to consult and when such consultations must occur is beyond the scope of this case and must be left undecided.

XIV. Conclusion

[243] The structure of the *CIA* required me to take Alberta independence as a fact and to consider if that contravened *Constitution Act, 1982* ss 1-35.1. This is artificial because, of course, Alberta independence as a legal matter may be accomplished only through the amendment process set out in *Constitution Act, 1982*. Since taking Alberta independence as a fact has the same effect as unilateral secession considered in the *Secession Reference*, the outcome of this case should not be a surprise to anyone. The *Secession Reference* held that unilateral secession was unconstitutional, though for different reasons than considered in the present case.

[244] The Referendum Proponent's constitutional referendum proposal contravenes *Constitution Act, 1982* ss 1-35.1 because independence would require the replacement of the Canadian constitution, including the identified sections, with a new Alberta constitution. *Constitution Act, 1982* guarantees the rights in the *Charter*. What will replace *Charter* rights in an independent Alberta cannot be known, so if Alberta were to become independent it could not be said that *Charter* rights are guaranteed in the sense provided for in *Constitution Act, 1982* s 1. To find, as this decision has found, that the constitutional referendum proposal contravenes *Constitution Act, 1982* because it does not guarantee the rights specified therein does not mean that a constitution for an independent Alberta would be inferior to the *Constitution Act, 1982*, only that it would be different.

[245] Treaty rights are "recognized and affirmed," not "guaranteed" and they are incorporated by reference, not specified. These are distinctions without a difference. Perhaps an independent Alberta would adopt a provision like *Constitution Act, 1982* s 35 and recognize and affirm Treaty rights but, for the reasons explained above, Alberta cannot succeed to the Numbered Treaties without the consent of First Nations. Moreover, this decision has concluded that the transformation of provincial and territorial borders into international borders would contravene the Numbered Treaties by significantly impairing the exercise of Treaty rights by First Nations.

[246] The Referendum Proponent suggests that it is unjust for First Nations to have a veto over whether Alberta becomes independent. He argues:

[T]he position of the First Nations Intervenors is that a proposal can never be brought forth to gauge the democratic sentiment of fellow citizens regarding independence by any citizen, or even the Government of Alberta, because of aboriginal or treaty rights. It is an inherently political argument.... Such a proposition amounts to an asserted veto over citizen-led initiatives or any independence referendum. [Emphasis added].

[247] This case has not decided that First Nations have a veto over Alberta independence nor has it considered whether or at what stage of the referendum process Alberta might have a duty to consult with First Nations. Treaty rights would be contravened by Alberta independence, but whether such contraventions might be justified has not been considered because that is not required by *CIA* s 2(4). Further, as both the *Secession Reference* and *Clarity Act* contemplate, following a vote in favour of independence, there would be a process of negotiation between Canada and the provinces where First Nations would have a seat at the table. The strength of the various parties' bargaining positions, including the question of whether First Nations have something like a veto, was beyond the scope of the questions before the Court and cannot be assessed at this time.

[248] Regardless of the undecided legal questions of whether contraventions of Treaty rights may be justified or if First Nations hold a veto over Alberta independence, there can be no reasonable objection to First Nations having an important voice in any discussion of Alberta independence. First Nations' consent to non-Indigenous settlement in what is now Alberta, memorialized in the Numbered Treaties, led to the creation of Alberta and continues to confer legitimacy on Alberta. First Nations, as founding partners in the creation of Alberta, cannot be ignored or bypassed as Alberta contemplates its future whether that is as part of Canada or not.

[249] Nothing in this decision should be understood to mean that the constitution cannot be amended or that Alberta cannot hold a referendum on separation. This decision only stands for the proposition that Alberta in the *CIA* did not give citizens the power to initiate a referendum on the question of independence from Canada.

XV. Epilogue

[250] Late yesterday afternoon, Alberta wrote to the Court to advise that Bill 14: *Justice Statutes Amendment Act, 2025* ("*JSAA 2025*") had just been tabled in the Legislative Assembly. *JSAA 2025*, amongst other things, seeks to amend the *CIA* to repeal s 2(3) which requires legislative proposals to be within the jurisdiction of the Legislative Assembly, s 2(4) which is the section at issue in the present case, and s 2.1 which gives the CEO the power to state a special case to the Court as was done in the present case. *JSAA 2025* s 71.1(3) provides that any existing "special case is discontinued without costs to any party...." Alberta's letter explains that "once this legislation takes legal effect, this Action will be discontinued." The legal consequence of discontinuing this proceeding prior to a decision would be to silence the Court. Legislating an end to litigation is extraordinary. Even the Referendum Proponent who stands to benefit from Alberta's actions wrote to the Court last night expressing concern that "the Legislature is interfering in a duly convened judicial process."

[251] The proceeding continued today because *JSAA 2025* has not been passed by the Legislative Assembly and proclaimed into law. The case remains a live controversy until *JSAA 2025* is law. Further, there was no efficiency to be gained in declining to hear the Blackfoot First Nations intervenors who were ready to make their submissions. To refuse to hear the Blackfoot First Nations intervenors who had worked under significant time pressure and incurred considerable expense to deliver evidence and written argument to the Court would bring the administration of justice into disrepute. They asked for and were granted their day in court before Alberta decided to change the law, and it was only fair that they have it regardless of the pending legislation.

[252] To be clear, Alberta has the legislative authority to change the *CIA* as it appears intent on doing so in the *JSAA 2025*. But attempting to change a new law that was amended earlier this year after the many participants in this matter have made significant expenditures of time and money to litigate on an accelerated basis is contrary to the rule of law. Justice Brown in *Uber Technologies Inc v Heller*, 2020 SCC 16 at para 111 explained that “the rule of law, ... at a minimum, guarantees Canadian citizens and residents ‘a stable, predictable and ordered society in which to conduct their affairs’”: quoting the *Secession Reference* at para 70. The rule of law plays a critical role with respect to the democratic process where stability of the governing legal regime enhances legitimacy and public confidence in the outcomes of elections and referendums. Changing legislation to circumvent a valid legal process commenced by the independent officer of the Legislative Assembly responsible for administering democratic processes is the antithesis of the stable, predictable, and ordered society that the rule of law contemplates, and democracy demands.

[253] Legislating to pre-emptively end this court proceeding disrespects the administration of justice. We are in an age of scarce government resources that is as evident in the court system as it is anywhere. Alberta set up a process pursuant to *CIA* s 2.1 that conscripted the Court to determine a question of public importance and this case was given priority over the needs of other justice system participants. Only after the parties, intervenors, and the Court invested many days inside and outside of the courtroom to bring this case to an expeditious conclusion, did Alberta decide to change the law. Alberta’s cavalier disregard for court resources and lack of consideration for the parties and First Nations intervenors who participated in this proceeding in good faith is disappointing to say the least.

[254] Contrary to the pending *JSAA 2025* s 71.1(3), this case cannot be discontinued, and the Court cannot be silenced because the case has been decided. These reasons are delivered despite the anticipated change to the law because reason giving *is* democratic. This case concerned a matter of importance to the public and these reasons are the product of the significant investment of the diverse group of stakeholders who participated in this proceeding. The public is entitled to the fruits of this process that has been conducted largely at their expense so that if they are asked to vote on Alberta independence, they have a tool that may help them make sense of the legal dimensions of the secession of Alberta from Canada.

Heard between the 19th day of November and 21st day of November, 2025 in Edmonton, Alberta and the 5th day of December, 2025 in Calgary, Alberta.

Dated at the City of Calgary, Alberta this 5th day of December, 2025.



Colin C.J. Feasby
J.C.K.B.A.

Appearances:

M. Joseph Redman, Gwendolyn J. Stewart-Palmer KC, & William W. Shores
for the Chief Electoral Officer of Alberta

Jeffrey R.W. Rath and Eva Chipiuk
for Mitch Sylvestre

Nicholas Trofimuk
for the Minister of Justice of Alberta

Kerry Boyd and Katherine Creelman
for the Attorney General of Canada

Matthew A. Woodley & Eric M. Adams
Amici Curiae

Bruce McIvor, Kate Gunn, Darryl Korell, & Melissa Rumbles
for the Treaty 8 First Nations of Alberta

Garry Laboucan, Glenn Epp, Inez Agovic, & Eric Pentland
for Development Foundation of Treaty Six Confederacy

Kevin Hille and James Shields
for Athabasca Chipewyan First Nation

W. Tibor Osvath, KC
for Samson Cree First Nation

Orlagh J. O’Kelly and Francco De Luca
for Mikisew Cree First Nation and Sturgeon Lake Cree First Nation

Caireen E. Hanert, Alison J. Gray, & Kristina Dmitrov
for Piikani Nation

Mary Locke Macauley and Kendra Shupe
for Siksika Nation

Paul Reid & Kiran Fatima
for Kainai Nation

Appendix – Map of Historic Treaties

