CBA Alberta Referendum Info Hub

Aboriginal & Treaty Right

This document addresses the legal landscape arising from the upcoming October 19, 2026, referendum on whether Alberta should pursue independence. Consideration of Alberta's possible secession from Canada remains highly contentious and legally uncertain in the context of its impact on rights protected under section 35(1) of the *Constitution Act*, 1982. The purpose of this document is to provide an overview of several court cases (*Sylvestre* I, II, III and *Athabasca Chipewyan First Nation*) which examined whether citizen-initiated referendums on Alberta secession could proceed under the Alberta *Citizen Initiative Act* (CIA). The central legal question in these decisions was whether such referendum proposals contravene sections 1-35.1 of the *Constitution Act, 1982*, particularly Charter rights and Treaty rights.

The Alberta independence question that will be asked of citizens in the October 19, 2026, referendum is as follows:

Should Alberta remain a province of Canada, or should the Government of Alberta commence the legal process required under the Canadian Constitution to hold a binding provincial referendum on whether or not Alberta should separate from Canada?

- *Option 1: Alberta should remain a province of Canada*.
- *Option 2: The Government of Alberta should commence the legal process required under the Canadian Constitution to hold a binding provincial referendum on whether or not Alberta should separate from Canada*

Quebec Secession Reference and the *Clarity Act*:

The Supreme Court of Canada's (SCC's) decision in *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217 established the legal framework for determining the conditions under which a province could secede from Canada. The SCC indicated that, when there is a clear majority vote on a clear question in favour of provincial secession, there is democratic legitimacy for the secession initiative which requires the Federal Government and the rest of the provinces to enter negotiations and discuss the terms of secession. Additionally, the SCC suggested that Members of the Legislative Assembly, as elected representatives of the people, can legally pursue provincial secession negotiations without taking their cue from a referendum. However, secession is not guaranteed to result from these negotiations. The requirement of negotiations means that a province cannot on its own, despite a clear referendum result, unilaterally secede. Principles such as federalism, the rule of law, the

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rights of individuals and minorities, and the operation of democracy in the other provinces and Canada as a whole, must guide the negotiations.

The SCC in *Reference re Secession of Quebec* left it to political actors to determine what constitutes "a clear majority on a clear question" under which a future referendum vote may be taken. The federal *Clarity Act* offers some guidance. Section 2(2) of the *Clarity Act* provides that the House of Commons, in considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, shall take into account the size of the majority of votes cast in favour of secession, the percentage of eligible voters voting in the referendum, and any other matters or circumstances it considers to be relevant.

***Citizen Initiative Act*, SA 2021, c C-13.2 and *Referendum Act*, RSA 2000, c R-8.4:**

The CIA is Alberta's main statutory framework that allows citizens to propose initiatives, including legislative, policy, or constitutional questions to be put to a referendum. The Chief Electoral Officer (CEO) is an officer under the CIA authorized to issue petitions for a referendum. Section 2(4) of the CIA, as it stood previously, prohibited initiative petitions that contravened sections 1 to 35.1 of the *Constitution Act,* 1982, and allowed the CEO to determine if the proposal contravened the sections 1 to 35.1 of the *Constitution Act,* 1982 or refer the proposal to the courts to make that determination.

Section 2.2 of the CIA indicates that when the CEO has determined that the technical requirements for a proposed initiative have been made under section 2 of the CIA, they must then provide a copy of the application to the Minister. Section 16 of the CIA goes on to provide that once the Minister has received a constitutional referendum proposal from the CEO, they must refer the proposal to the Lieutenant Governor in Council for the purpose of a constitutional reference in accordance with the *Referendum Act*.

The *Referendum Act* is the legislation that allows the Lieutenant Governor in Council to order that a referendum to be held on questions relating to the Constitution of Canada or relating to possible changes to the Constitution of Canada. Section 4(1) of the *Referendum Act* dictates that when the majority of ballots vote the same way on a referendum question, the result is binding on the province. Section 4(2) provides that the province must take steps within its competence to implement the results of the referendum. However, section 4(3) does not require the province to implement the results of a referendum if doing so would contravene sections 1 to 35.1 of the *Constitution Act, 1982*.

The Sylvestre Decisions (2025 ABKB Decisions):

Mitch Sylvestre proposed a constitutional referendum under the CIA asking if Alberta should become independent. The CEO referred the question to the Court of King's Bench to determine if it contravened the Constitution as required by CIA section 2(4).

In Sylvestre I, the Court rejected Sylvestre's application to strike the CEO's referral of his question to the Court. Sylvestre argued that the referral was premature, an abuse of process or an affront to democracy. In addition, Sylvestre argued that conducting a referendum was merely asking a question and thus could not be unconstitutional. The Court found that the CEO referral to the Court was not premature or an abuse of process, because under the CIA, the CEO had 30 days upon receiving Sylvestre's proposal to refer the question to the Courts. In addition, the Court found that section 2(4) concerns the substance of proposals, not merely the act of asking questions. This meant that the Court had to determine whether the substance of Sylvestre's question, whether Alberta should become independent, contravened the Constitution.

Sylvestre II addressed intervention applications, with the Court allowing multiple First Nations to intervene because Alberta independence directly engaged their Aboriginal and Treaty rights. The Court emphasized that Aboriginal and Treaty rights issues cannot be adjudicated without First Nations' participation.

In Sylvestre III, the Court concluded that Alberta independence, the substance of Sylvestre's question, would contravene both Charter and Treaty rights. Regarding Charter rights, an independent Alberta would eliminate guaranteed rights, replacing them with uncertain future protections. Specific Charter contraventions include those to democratic rights (section 3), mobility rights (section 6), and minority language rights (section 23). The Court found that international borders would impair section 35 Treaty rights by dividing traditional territories of First Nations whose lands extend beyond Alberta. The Court accepted that under the common law concepts of property law and international law, and the Cree law principles of wahkohtowin (kinship relationships) and witaskewin (neighborliness), First Nations are not required to accept Alberta as a replacement to Canada as a treaty party. The numbered treaties created a relationship with Canada specifically, and First Nations can withhold consent to any transfer of obligations to an independent Alberta.

Subsequent Legislative Enactments and other developments following the Sylvester Decisions:

On December 11, 2025, the Legislative Assembly of Alberta amended the CIA, removing section 2(4) which prohibited proposals contravening the Constitution. Additional amendments were the removal of the requirement that an application cannot be the same or substantially similar to a proposal that, within the last 5 years, was the subject of an unsuccessful referendum or initiative vote, and the ability to refer questions about citizen's initiative proposals to the court. Further, there was an amendment deeming applications to have never been made if they were submitted before the amendments came into force and the CEO has not issued a citizen initiative petition.

On December 8, 2025, the CEO formally rejected Sylvestre's proposal asking Albertans to vote for Alberta Independence. Sylvestre filed a second proposal that was substantially the same as the first. Due to the amendments made to the CIA, the CEO accepted this second proposal.

Transitional provisions in the current amended CIA provide in 71.1(1) that: "An application for the issuance of an initiative petition made before the coming into force of this section for which an initiative petition has not been issued under section 3(3)(a) as of the coming into force of this section is deemed to have never been made."

Athabasca Chipewyan First Nation v Alberta (Chief Electoral Officer), 2026 ABKB 375 (*ACFN Decision*):

Following the decision of the CEO to accept Sylvestre's second referendum proposal, the ACFN and the Blackfoot Nations of Alberta applied for judicial review of the CEO's decisions and sought a declaration that the transitional provisions in the CIA were unconstitutional. The Court quashed the CEO's decision.

The Court concluded that because the CEO rejected Sylvestre's first proposal, this brought that proposal to an end and thus could not also be characterized as an initiative petition that under the transitional provisions, "has not been issued". The first proposal was not pending when the amendments came into force.

Additionally, because the first proposal was rejected due to contravening the constitution, the Court found that the CEO erred by approving the second proposal as they were substantially the same question. The CEO still had to consider principles of the constitution of the question despite section 2(4) being removed from the CIA.

Furthermore, the Court also decided that the CEO had jurisdiction to consider if a referendum proposal engages the duty to consult. The CEO had to consider whether a proposal was a legislative, policy, or constitutional proposal. This meant that the CEO had to identify and categorize if a referendum proposal engaged the Constitution. Determining whether a proposal engaged the Constitution is a legal question and this provided the implied jurisdiction to the CEO to decide questions of law. The implied jurisdiction to decided questions of law is broad enough to include consideration of the duty to consult if there is no intention that the legislature intended to exclude this jurisdiction from the CEO's power.

The duty to consult has been interpreted and defined through a series of SCC decisions over the past 20+ years. It is a settled legal principle that the duty to consult is triggered when the elements from the *Haida* test are satisfied:

- When the Crown has real or constructive knowledge of an Aboriginal or Treaty Right;
- There is contemplated Crown conduct; and

- There are potential adverse effects on the right arising from the Crown conduct.

The Court found that the duty to consult was triggered in this instance because:

- The Crown had actual knowledge of treaty rights that were engaged by the second proposal as the Court in *Sylvestre* made findings regarding the rights and interests protected by the numbered treaties,
- The CEO decision constituted as Crown conduct, and
- A requirement of the Alberta government to implement Alberta secession without the prior involvement of Indigenous peoples has the potential to adversely affect Treaty Rights.

Athabasca Chipewyan First Nation v Alberta (Chief Electoral Officer), 2026 ABCA 216 and subsequent developments following the ACFN Decision:

On May 28, in what Premier Danielle Smith described as a response to the *ACFN Decision* and the public will – reflected, in part, in the signatures the appellant says were collected – Alberta directed that a non-binding referendum be held on October 19, 2026. The non-binding referendum will ask Alberta voters to choose whether Alberta should remain in Canada, or whether Alberta "should commence the legal process required under the Canadian Constitution to hold a binding provincial referendum on whether or not Alberta should separate from Canada".

Mitch Sylvestre submitted the signature papers to the CEO, but because of the A*CFN Decision*, no steps were taken under the CIA to verify the signatures he submitted. Sylvestre asked the Alberta Court of Appeal to stay the *ACFN Decision* and to permit the CEO to complete the process set out in the CIA to verify the signatures. If the signatures were verified and in sufficient number, the CEO would refer the proposal to the Lieutenant Governor in Council for the purpose of a constitutional referendum in accordance with the *Referendum Act*.

A stay is a temporary order that delays the legal enforceability of a judicial decision pending the determination of an appeal of that decision. It is not a determination on the legal merits of an appeal. An application for a stay is based on a well-established three-part test that requires the Court consider: (1) whether the issues on appeal raise serious questions, meaning they are not frivolous or vexatious; (2) whether, absent a stay, there will be irreparable harm, which is harm that cannot be cured if the appeal is later successful; and (3) whether the balance of convenience (weighing of relative harms of granting or refusing a stay, including impacts to the public) favours granting a stay.

The Court of Appeal concluded that Alberta and Mitch Sylvestre identified three serious questions to be determined on appeal:

1. That the Chambers judge reached a conclusion that is contrary to the language of the *Referendum Act* and the CIA;

2. That the Chamber's Judge erred in determining the CEO's Jurisdiction, specifically that the CEO had the ability to consider the duty to consult; and
3. That the Chambers Judge erred by interpreting the transitional provisions in the CIA as not applying to Sylvestre's first proposal.

The Court of Appeal found that to the extent that there is harm associated with delaying Sylvestre's proposed question from being advanced to a referendum, the referendum conducted on October 19 would address and resolve that harm. Additionally, the Court of Appeal concluded that Sylvestre would suffer irreparable harm if the signature verification process did not take place until the final resolution of this legal dispute because accurate verification will become more difficult as time passes. Delaying the verification process until the resolution of the legal dispute also cannot be quantified in monetary terms and is not addressed by the October 19 referendum.

The Court of Appeal has not yet made a decision on the merits of appeal, including the three "serious questions to be determined".