CBA Alberta Referendum Info Hub

Constitutional

BALLOT QUESTION 6

Do you support the Government of Alberta working with the governments of other willing provinces to amend the Canadian Constitution to have provincial governments, and not the federal government, select the justices appointed to provincial King's Bench and Appeal courts?

There are currently three provincial courts operating in Alberta: i) the Alberta Court of Justice (previously the "Provincial Court"); ii) the Alberta Court of King's Bench; and iii) the Alberta Court of Appeal. The first is an "inferior court" and the other two are both a "superior court".

The federal government appoints judges to the Alberta Court of King's Bench and the Alberta Court of Appeal by virtue of s 96 of the *Constitution Act, 1867*, which provides that the Governor General appoints judges of the "Superior" courts. Appointments are made by the federal cabinet, with the Prime Minister recommending names for chief justices and the federal Minister of Justice recommending the names of all other superior court justices. The federal government also pays judges of superior courts, including judges of the Alberta Court of King's Bench and the Alberta Court of Appeal, by virtue of s 100 of the *Constitution Act, 1867*.

Accordingly, the province of Alberta currently has no jurisdiction to appoint judges to the superior courts in Alberta – namely, the Alberta Court of King's Bench and the Alberta Court of Appeal. However, the province does appoint and pay the salary of judges of "inferior" courts like the Alberta Court of Justice by virtue of s 92(4) of the *Constitution Act, 1867*.

Provinces also have jurisdiction by virtue of s 92(14) of the *Constitution Act, 1867* over the "Constitution, Maintenance, and Organization of Provincial Courts", including superior provincial courts. The effect is that Alberta has the power to determine the number of judges appointed to the Alberta Court of King's Bench and the Alberta Court of Appeal, though only the federal government can decide whom to appoint.

Amending s 96 of the *Constitution Act, 1867* to allow provinces to appoint superior court judges would require a constitutional amendment pursuant to Part V of the *Constitution Act, 1982*.

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BALLOT QUESTION 7

Do you support the Government of Alberta working with the governments of other willing provinces to amend the Canadian Constitution to abolish the unelected federal Senate?

The Senate of Canada is established as part of the legislative branch of the federal government, Parliament consisting of both the House of Commons and the Senate, by virtue of Part IV of the *Constitution Act, 1867*. Senators are appointed by the Governor General by virtue of s 24 of the *Constitution Act, 1867*.

Amending the Constitution of Canada to abolish the Senate would require the unanimous consent of Parliament (both the House of Commons and the Senate itself) as well as all of the provinces by virtue of s 41(e) of the *Constitution Act, 1982*.

BALLOT QUESTION 8

Do you support the Government of Alberta working with the governments of other willing provinces to amend the Canadian Constitution to allow provinces to opt out of federal programs that intrude on provincial jurisdiction such as health care, education and social services, without a province losing any of the associated federal funding for use in its social programs?

Parliament possesses a federal "spending power" which has been inferred from a number of its enumerated powers under s 91 of the *Constitution Act, 1867*. This spending power allows the federal government to attach conditions to provincial grants and withhold the money if the province fails to meet the conditions. An example is the *Canada Health Act*, RSC 1985, c C-6, which requires that a province's health care insurance plan meet certain criteria to qualify for continued federal cash contributions.

BALLOT QUESTION 9

Do you support the Government of Alberta working with the governments of other willing provinces to amend the Canadian Constitution to better protect provincial rights from federal interference by giving a province's laws dealing with provincial or shared areas of constitutional jurisdiction priority over federal laws when the province's laws and federal laws conflict?

In instances where a provincial law and a federal law conflict, the federal law currently prevails. This rule is set out explicitly in the *Constitution Act, 1867* with respect to certain matters of concurrent jurisdiction, such as the interprovincial export of various resources under s 92A(3)) and agriculture and immigration under s 95. In most instances, however, the

question of priority in cases of conflict is dealt with through the judicially created doctrine of "federal paramountcy".

Federal paramountcy renders a valid provincial law "inoperative" (i.e., of no force) to the extent it is in conflict with a valid federal law. A court will find a conflict in two instances: 1) it is impossible to comply with both the provincial law and the federal law simultaneously; or 2) compliance with the provincial law would frustrate the purpose of the federal law.

Amending the Constitution of Canada to give provincial laws priority over federal laws in cases of conflict would require using the "general amending procedure" under s 38 of the *Constitution Act, 1982*. Such amendments to the Constitution of Canada must be authorized by resolutions of the Senate, the House of Commons, and legislative assemblies of at least seven provinces whose population represents, in the aggregate, at least half of the current population of all the provinces.

BALLOT QUESTION 10

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?

Alberta became a province of Canada in 1905 when the federal government passed the *Alberta Act*. A province cannot *unilaterally* secede from Canada or dictate the terms of a proposed secession. However, secession of a province is legally possible by constitutional amendment pursuant to Part V of the *Constitution Act, 1982*.

If a clear majority of Albertans on a clear question vote for secession, this would impose obligations on the federal government to engage in discussions with Alberta about the potential act of secession as well as its possible terms.

Ballot Question 10 would not be a clear question in favour of secession, triggering obligations to negotiate. Rather it asks whether Albertans want to stay in Canada, or whether the government should pursue secession by formulating a "clear question" and holding a future referendum that would trigger the obligation to negotiate.