# Court of King's Bench of Alberta

**Citation: Chief Electoral Officer of Alberta v Sylvestre, 2025 ABKB 476**

**Date:** 20250814
**Docket:** 2503 15116
**Registry:** Edmonton



Between:

**Chief Electoral Officer of Alberta**

Applicant

- and –

**Mitch Sylvestre and Minister of Justice of Alberta**

Respondents

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

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## I. Introduction

[1] Mitch Sylvestre (the "Referendum Proponent") wants to hold a referendum to ask if Alberta should become an independent country. He submitted a constitutional referendum proposal to the Chief Electoral Officer of Alberta (the "CEO") on July 4, 2025. One of the threshold requirements for approval of a constitutional referendum proposal under the *Citizen Initiative Act*, SA 2021, c C-13.2 ("*CIA*") is that the proposal not contravene sections 1 to 35.1 of the *Constitution Act, 1982*.[1] The CEO can either decide this question as part of the application vetting process or he can "state a question in the form of special case" for the Court of King's

[1] Rather than repeating the wording of the *Citizen Initiative Act* s 2(4) that "[a]n initiative petition must not contravene sections 1 to 35.1 of the *Constitution Act, 1982*", I will simply refer to the *Citizen Initiative Act* requiring a constitutional referendum proposal to be constitutional. In using this shorthand, I am not implying that any broader question of constitutionality is engaged than stated in s 2(4).

Bench to answer pursuant to the *CIA*. The CEO referred the question of the constitutionality of the Referendum Proponent's proposal to the Court.[2]

[2] The Referendum Proponent asked the Court to strike out the reference and insisted that his application be heard before the Court considered the CEO's suggestion that *amici curiae* (friends of the court) be appointed and a process established for intervenors to apply to participate in the proceeding. Hearing the application to strike at the outset as the Referendum Proponent requested meant that it was effectively unopposed because the Attorney General of Alberta took no position and the CEO, who was nominally opposed to the application, made no oral submissions.

[3] A party seeking to strike an action must establish that it is plain and obvious that the action has no merit. This is well-known in normal civil litigation to be a high threshold; however, improper proceedings can be, and are, struck all the time. The Referendum Proponent is asking the Court to break new ground because an Alberta court has never struck out a statutory reference. The bar is especially high in the present case because there is no one arguing the opposite view. Our court system is premised on cases being presented in an adversarial fashion and works best when competent parties present opposing positions. An application that is *ex parte* or unopposed places additional burdens on the applicant and the Court to consider whether there are contrary arguments that might be advanced by interested parties who are not present.

[4] The Referendum Proponent calls the CEO's referral to the Court premature, an abuse of process, and an affront to democracy. It is none of those things. The *CIA* empowers the CEO to make a referral to the Court and requires that any referral be made upfront before approval of a constitutional referendum proposal and before signature gathering begins. The referral to the Court may result in delay, but it reinforces the legitimacy of the referendum process by ensuring that unconstitutional questions are not put to a vote. Democracy flourishes when citizens have clear and accurate information; the process under the *CIA* fosters the conditions for "the clear expression of the will of the population of [the] province"[3] by dispelling the cloud of unconstitutionality that might otherwise hang over a referendum.

## II. The CEO's Reference Pursuant to the *CIA*

### A. Legislative Background and Statutory Framework

[5] The *CIA*, enacted in 2021, and the *Referendum Act*, RSA 2000, c R-8.4 provide a framework for citizens to submit legislative and policy proposals to the Legislative Assembly for consideration and possible referral to the voters of Alberta in a referendum and to submit constitutional proposals to be put to the voters of Alberta in a referendum. This reference concerns a constitutional referendum proposal, not a legislative or policy proposal, so the following discussion focuses on the rules for constitutional referendum proposals.

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[2] The term "reference" is usually reserved for references made by Parliament or a provincial legislature to an appellate court. The present case is different because it is a reference to a superior court by an administrative decision-maker pursuant to a statutory power. The *CIA* states that the CEO may "state a question in the form of a special case" but all parties used the term "reference" as a convenient way to describe the proceeding. For ease of expression, I will use the term "reference" too. For a comprehensive treatment of references, see Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart Publishing, 2019).

[3] *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 at s 1(3) ("*Clarity Act*").

[6] Pursuant to *CIA* s 2, an elector may apply to the CEO "for the issuance of an initiative petition." The applicant must provide contact and other basic information as well as a statement of the subject matter of the application. The statement of the subject matter of the application must be "clear and unambiguous." Section 2(1)(f) provides that an application for an initiative petition for a constitutional referendum proposal must also include:

> a proposed question relating to the Constitution of Canada or relating to or arising out of a possible change to the Constitution of Canada that, in the opinion of the Chief Electoral Officer, is factually accurate, states the question in such a way as to require a "yes" or "no" answer and is otherwise suitable to be put to the electors at a constitutional referendum.

[7] *CIA* s 2(4) states that "[a]n initiative petition proposal must not contravene sections 1 to 35.1 of the *Constitution Act, 1982*." *Constitution Act, 1982* ss 1-34 are commonly known as the *Canadian Charter of Rights and Freedoms* and s 35 and 35.1 concern Aboriginal and treaty rights. *CIA* s 2(4) protects against a constitutional referendum proposal contravening individual and group rights; it is not concerned with structural changes to the constitution that do not affect individual or group rights.

[8] *CIA* s 2.1 empowers the CEO to refer questions, including whether a proposal is unconstitutional, to the Court of King's Bench. The time for the CEO to determine whether a constitutional referendum proposal satisfies the requirements of *CIA* s 2 and an initiative petition should issue is suspended while the reference to the Court is in progress. Within 30 days of the Court deciding the reference question, the CEO must determine whether the requirements of *CIA* s 2 have been satisfied.

[9] Once an initiative petition for a constitutional referendum proposal is issued by the CEO, the applicant has 120 days to collect signatures supporting the initiative petition. Within 21 days of the applicant submitting the signatures in support of the initiative petition, the CEO must determine if the initiative petition has satisfied the signature threshold.

[10] If the CEO determines that the initiative petition has met the signature threshold, he must submit the successful constitutional referendum proposal to the Minister of Justice. The Minister must, in turn, refer the proposal to the Lieutenant Governor in Council. Then "[a] referendum must be held on or before the date fixed for the next general election....": *CIA* s 16 [emphasis added].

[11] *CIA* s 1(4) may have a bearing on the interpretation of the foregoing sections but that was not argued by the Referendum Proponent. *CIA* s 1(4) provides that nothing in the relevant sections "shall be interpreted to deprive the Crown, the Legislature, the Legislative Assembly or a committee or member of the Legislative Assembly of the full exercise of any prerogative, right, immunity, privilege or power of the Crown, Legislature, Legislative Assembly, committee or member."

[12] The *Referendum Act* states that a referendum "held on any question relating to the Constitution of Canada or relating to or arising out of a possible change to the Constitution of Canada" is binding on the Government of Alberta. Section 4 provides that:

> 4(1) If a majority of the ballots validly ordered under section 1 vote the same way on a question stated, the result is binding, within the meaning of subsection (2), on the government that initiated the referendum.

> (2) If the results of a referendum are binding, the government that initiated the referendum shall, as soon as practicable, take any steps within the competence of the Government of Alberta that it considers necessary or advisable to implement the results of the referendum. [emphasis added]

[13] A key plank in the Referendum Proponent's position is that the referendum he seeks is consultative and not binding on the Government of Alberta. Without deciding the correct interpretation of the *CIA* and *Referendum Act*, I am satisfied that it is arguable that those statutes can be read to create obligations on the Government of Alberta in respect of a citizen-initiated referendum that are legally binding in some sense. Whether as a matter of constitutional law a provincial government can bind itself to hold a referendum and to honour the result and whether that should inform the interpretation of these statutes was not argued. The extent to which Alberta is bound to hold and then honour the results of a referendum are important points that would benefit from more robust argument.

### B. The *CIA* Requirement for Consistency with the Constitution in Context

[14] The Referendum Proponent, citing public statements by the Attorney General, asserts that the CEO's referral of the question of the constitutionality of his proposal to the Court is unusual or improper. I will address the interpretation of s 2.1 of the *CIA* later in these Reasons, but it is helpful at this juncture to put the *CIA* vetting mechanism in context. Administrative or judicial review of the constitutionality of a referendum question is not only common across democratic jurisdictions but is viewed as good practice.

[15] Alberta is the only province in Canada that has a statute that facilitates citizen-initiated referenda on constitutional matters. However, there are some states in Europe that permit citizen-initiated referenda. The European Commission for Democracy Through Law, commonly known as the Venice Commission, published a *Code of Good Practice on Referendums* (Study No. 371/2006) that provides at page 12 as follows with respect to the "substantive validity of texts submitted to a referendum":

> Texts submitted to a referendum must comply with all superior law (principle of the hierarchy of norms).
>
> They must not be contrary to international law or to the Council of Europe's statutory principles (democracy, human rights and the rule of law).

The *Code of Good Practice on Referendums* goes on to say at page 12 that referendum texts that do not have procedural validity or substantive validity "may not be put to the popular vote."

[16] The *Code of Good Practice on Referendums* provides at page 10 that there must be "an effective system of appeal" for all legal matters related to a referendum. The initial appeal mechanism may be an electoral commission or a court competent to address the questions of procedural and substantive validity, but the final appeal must be to a court.

[17] In Canada, Quebec follows this approach in its *Referendum Act*, CQLR, c C-64.1 by creating a Conseil du référendum comprised of three judges of the Court of Quebec to adjudicate all matters relating to a referendum though there is no statutory requirement for procedural and substantive validity.

[18] The *Code of Good Practice of Referendums* states at page 11 that "the review of the validity of texts [by an electoral commission or court] should take place before the vote..."

[emphasis added]. Court review of a proposal to determine if it is unconstitutional as contemplated in Alberta's *CIA* is consistent with international legal norms reflected in the *Code of Good Practice on Referendums*.

[19] Europe is not the only place where the content of a referendum proposal must be legal or constitutional for it to be put to a vote. The *Massachusetts Constitution*, Article XLVIII, § 2 provides as follows:

> No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

[20] Responsibility for determining if an initiative petition complies with the law, including the *Massachusetts Constitution*, is assigned to the Attorney General. A challenge to the Attorney General's decision to certify an initiative petition and enjoin the initiative may be reviewed by the Supreme Judicial Court of Massachusetts *de novo*: see, for example, ***Weiner v Attorney Gen***, 144 NE (3d) 886 at 892 (Mass Sup Ct 2020).

[21] The possibility of a court addressing the constitutionality of a referendum in advance of a vote is not hypothetical or an academic thought experiment. The question of the Scottish Parliament's jurisdiction to hold a referendum on independence was referred by the Lord Advocate to the UK Supreme Court pursuant to her reference power under the *Scotland Act*: ***Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998*** [2022] UKSC 31. Though the question referred by the Lord Advocate concerned the division of powers between the Scottish Parliament and the UK Parliament in the *Scotland Act* it was, in essence, a constitutional question. The UK Supreme Court held that the bill authorizing the proposed independence referendum was outside the jurisdiction of the Scottish Parliament.

### C. The CEO's Reference to the Court

[22] On July 4, 2025, Elections Alberta received an Application for a Citizen Initiative Petition from the Referendum Proponent. The subject of the Application is an "Alberta Sovereignty Referendum." The question posed is:

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

[23] The letter from Mr. Rath, counsel to the Referendum Proponent, to the CEO attached an Appendix which explained that the Referendum Proponent's petition was a "constitutional referendum proposal." Mr. Rath contrasted the Referendum Proponent's constitutional referendum proposal with a competing referendum proposal which he characterized as "a policy question, not a constitutional one."

[24] On July 28, 2025, the CEO wrote to the Chief Justice of the Court of King's Bench stating a special case to the Court pursuant to *CIA* s 2.1. The special case stated the following questions:

> 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

[25] The CEO filed an Originating Notice the next day. The Originating Notice requested the following relief:

> (a) provide direction for the hearing of the reference question, including, the evidence, potential amicus curiae; notice to potential intervenors, and timelines for next steps to be determined by the Justice assigned to hear the matter;
>
> (b) answer the question stated and provide the opinion of the Court as to whether the Proposal conforms with the requirements of section 2(4) of the CIA; and
>
> (c) any other direction or relief that the Court may order.

[26] The CEO takes no position on the merits of the special case referred to the Court.

## III. The Referendum Proponent's Application to Strike the Reference

### A. The Notice of Application

[27] The Referendum Proponent asks the Court to strike the CEO's reference to the Court on the grounds that it is "premature, unnecessary, and potentially unconstitutional, as it imposes legal and financial barriers on the exercise of core democratic rights protected under ss 1 and 3 of the *Charter*."

[28] The Referendum Proponent, in the same Notice of Application, asks the Court to grant:

> A declaration that the constitutional referendum question submitted under Mitch Sylvestre's Application for a Citizen Initiative Petition *viz.*: "Do you agree that the Province of Alberta shall become a sovereign country and cease to be a province in Canada" (the "**Proposal**") does not contravene s.2(4) of the *Citizens Initiative Act,* or ss. 1-35.1 of the *Constitution Act,* 1982.

> An order directing the Chief Electoral Officer to approve the Proposal and issue the initiative petition in accordance with the *CIA.*

[29] The Referendum Proponent's application for a declaration that his proposal is constitutional runs counter to his position that the CEO's referral of the question of the constitutionality of the proposal is premature. The Referendum Proponent's request for a declaration of constitutionality is, in effect, a joinder of issue or an admission that the question of constitutionality is not premature and is properly before the Court.

[30] The Referendum Proponent asks that the Court direct the CEO to approve the constitutional referendum proposal. To approve the proposal, the CEO must determine, amongst other things, if the statement of subject-matter is "clear and unambiguous" and if the "proposed question relating to the Constitution of Canada or relating to or arising out of a possible change to the Constitution of Canada that ... is factually accurate, states the question in such a way as to require a "yes" or "no" answer and is otherwise suitable to be put to the electors at a constitutional referendum": *CIA* s 2(1)(f). These things are on hold while the Court considers the reference. The Court is not in the business of giving directions to administrative officials when there is no reason to believe that they are failing to carry out their duties diligently in good faith. The CEO should be given an opportunity to do his job before being directed by the Court to do anything. When this point was made to counsel for the Referendum Proponent in oral argument, he withdrew the request for a direction to the CEO.

### B. The Standard for Striking Proceedings

[31] The Referendum Proponent seeks to strike the reference pursuant to Rule 3.68 of the *Alberta Rules of Court*, Alta Reg 124/2010. Rule 3.68 permits the Court to strike claims that are so defective that it is clear at the pleading stage that they cannot succeed or that are otherwise frivolous, improper, or an abuse of process. A party moving to strike an action must persuade the Court that it is "plain and obvious" that the claim will fail or that it should otherwise be struck: ***Ernst v Alberta Energy Regulator***, 2017 SCC 1 at para 148; ***Lameman v Alberta***, 2013 ABCA 148 at para 12.[4]

[32] There is no precedent in Alberta for a statutory reference to the Court by an administrative official being struck out. With that said, the Federal Court has struck statutory references from administrative officials. Justice Gibson observed in ***Section 4 of the Patented Medicines (Notice of Compliance) Regulations (Re)***, 2002 FCT 1000 at para 20 that even though there was no express power in the Federal Court Rules to strike statutory references to the court, references may be struck on the same basis as the Federal Court Rules equivalent to Alberta Rule 3.68. Justice Tremblay-Lamer in ***Air Canada v Canada (Commissioner of Official Languages)***, (1997) 144 FTR 161 at para 11, aff'd (1999), 241 NR 157 (FCA) explained that a statutory reference may be struck if it is "an exceptional case in which it [is] plain and obvious that the impugned pleading was without merit."

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[4] Justice Whitling in ***Métis Nation of Alberta Association Fort McMurray Métis Local Council 1935 v Alberta***, 2021 ABQB 282 at paras 48-50 correctly observes that ***Lameman*** cites Fraser CJA's dissent in ***Reece v Edmonton (City)***, 2011 ABCA 238 at paras 128-29 instead of Slatter JA's majority decision which questioned the "plain and obvious" standard for abuse of process at para 14 and suggested that the appropriate question was whether the question of abuse of process could be fairly decided on the record before the Court. The uncertainty over the standard is not determinative in the present case as I would reach the same conclusion regardless.

[33] The Referendum Proponent complains that the CEO did not plead any facts or provide any reasons why the constitutional referendum proposal might be unconstitutional. This complaint is without merit. A reference made by an administrative official pursuant to a statute is different from regular adversarial litigation. The requirement under the *CIA* is that the CEO state a legal question, not that he plead facts as is the case for litigants in the normal course. The CEO did what was required by the *CIA* to refer a question to the Court.

[34] The usual analysis under Rule 3.68 for striking actions must be adapted to the peculiar context of a reference. The Rule 3.68 power to strike an action where the pleadings do not disclose a cause of action must be understood to go to the nature of the question asked by the administrative official, not to whether facts supporting an alleged cause of action are pleaded. The relevant questions for the Court to consider are:

(a) Is the reference question a legal question?

(b) Is the answer to the reference question plain and obvious such that a hearing on the merits is not required? and

(c) Is the reference itself or the content of the reference question an abuse of process?

[35] The first question is basic. Courts answer legal questions, not political or policy questions: Lorne Sossin and Gerard Kennedy, *Boundaries of Judicial Review* (Toronto: Thomson Reuters, 2024) at 359-63, 372; ***WV v MV***, 2024 ABKB 174 at paras 82-87. Justice Mainville in ***Henderson v Procureur général du Québec***, 2021 QCCA 565 at para 84, citing ***Reference Re Canada Assistance Plan (BC)***, [1991] 2 SCR 525 at 545, explained that a court may decline to answer a reference question:

(i) if 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) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.

[36] The question that the *CIA* permits the CEO to pose to the Court is a legal question because it asks whether a proposal contravenes *Constitution Act, 1982* ss 1-35.1. Though the subject of the question is unusual because a referendum is not an everyday event, this is the type of question that courts answer all the time. The Court in ***Reference re Secession of Quebec*** [1998] 2 SCR 217 at para 28 observed that the questions posed concerning the secession of Quebec "may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them." Like in ***Reference re Secession of Quebec***, the question before this Court is a legal question of political significance, but that does not make it a political question.

[37] The second question posed above is important because an administrative official may refer a question to the Court that is settled or for which the answer is otherwise plain and obvious. Where that happens, it is inefficient and possibly prejudicial for affected parties and the Court to conduct a full hearing.

[38] Lastly, the act of referring a question to the Court or the content of a question may be an abuse of process. The Court has the inherent power to ensure that its process is not used for improper or collateral purposes: ***Toronto (City) v CUPE, Local 79***, 2003 SCC 63 at para 37. Abuse of process in this sense can mean that the referring official had bad intentions, but it also includes well-intentioned but improper use of the Court's process: ***Reece*** at para 19.

[39] The Referendum Proponent makes arguments in favour of striking the reference which can be grouped into two rough categories. First, the Referendum Proponent argues that the reference is premature and unconstitutional. These arguments are, in essence, about abuse of process because they contend that the reference should not or, as a matter of constitutional law, could not have been made. Second, the Referendum Proponent argues that it is plain and obvious that the constitutional referendum proposal is not unconstitutional such that the Court may strike the reference on a peremptory basis without proceeding to a full hearing on the merits.

### C. Is the Reference an Abuse of Process?

#### i. Prematurity

[40] The Referendum Proponent's argument that the CEO's referral to the Court is premature has no merit. He submits that "no signatures have been collected. No vote is scheduled. No governmental action has been taken. Whether the proposal will proceed depends entirely on future, uncertain outcomes." All of that is true. The Referendum Proponent goes on to assert that "[r]equiring court intervention at the application stage ... risks making the process prohibitive for ordinary citizens." He cites ***Borowski v Canada (Attorney General)***, [1989] 1 SCR 342 for the proposition that courts "should not decide hypothetical, speculative, or academic questions unless absolutely necessary." Again, this is true.

[41] The problem with the Referendum Proponent's submission is that it overlooks the scheme and text of the *CIA*. Section 2.1(4), which was added by amendment three months ago, provides that "[t]he Chief Electoral Officer must state a question in the form of a special case to the Court under subsection (1) no later than 30 days after the date on which an elector applied for the issuance of an initiative petition" [emphasis added]. This means that if the CEO wishes to refer a constitutional question to the Court, he may do so only at the application stage. He cannot wait until the issue is ripe in the eyes of the Referendum Proponent. To question the timing of the referral is to question the choice of the Legislative Assembly, not that of the CEO.

[42] There is no explanation offered by MLAs of the governing party in the debates in the Legislative Assembly as to why the *CIA* was amended to limit the ability of the CEO to make a referral to the Court to the application stage. Possible reasons include that legal certainty at an early stage: (a) saves a referendum proponent from spending money on gathering signatures for a proposal that is illegal or unconstitutional; (b) avoids public expenditure on a referendum that is illegal or unconstitutional; (c) mitigates the risk of litigation to enjoin the referendum process at a stage where the referendum proponent, the Government, and potentially other interested parties have made significant expenditures on the referendum; and (d) mitigates the risk of protracted post-referendum litigation.

[43] The value of early determination of the constitutionality of a referendum proposal may be illustrated by an example of what can happen when there is no such power. Colorado held a citizen initiative referendum in 1992 on a proposal to amend the state constitution to prevent any municipality from adopting measures to protect lesbian, gay, and bisexual persons from discrimination. The citizen initiative was approved by voters, and litigation ensued for the next four years. The US Supreme Court struck down the amendment to the state constitution that resulted from the referendum in ***Romer v Evans***, 517 US 620 (1996) on the grounds that it violated the equal protection clause of the 14th Amendment to the US Constitution. A process for the determination of the constitutionality of a referendum proposal at an early stage, such as

that in Alberta's *CIA*, could have spared the people of Colorado an unnecessary and divisive political debate, public and private expenditure on an unconstitutional referendum question, and public and private expenditures on protracted post-referendum litigation.

[44] Whatever the Legislative Assembly's reasons for limiting the CEO's power under *CIA* s 2.1 to refer a constitutional referendum proposal to the Court to the application stage may be, that choice must be respected. The CEO's referral is not premature; it happened when the Legislative Assembly directed it to happen.

### ii. Constitutionality of the Referral

[45] The Referendum Proponent asserts that the CEO's referral of his proposal to the Court is itself unconstitutional because it infringes his democratic rights and the democratic rights of Albertans pursuant to *Charter* s 3. The Referendum Proponent submits that the CEO's referral to the Court "imposes legal and financial barriers on the exercise of core democratic rights protected under ss. 1 and 3 of the *Charter*." He further asserts that "preventing citizens from [making a constitutional referendum proposal], through legal ambiguity or judicial gatekeeping, may infringe the very *Charter* rights it purports to protect. S. 3 of the *Charter* guarantees the right of every citizen to meaningful participation in the democratic process. S. 1 of the *Charter* protects that right from unjustified infringement."

[46] The problem with the Referendum Proponent's argument is that *Charter* s 3 guarantees rights only in provincial and federal elections. The Supreme Court of Canada has taken a textual approach to the interpretation of *Charter* s 3, limiting its protection to provincial and federal elections. On several occasions, the Supreme Court of Canada has held that *Charter* s 3 protection does not extend to referenda or municipal elections: ***Haig v Canada (Chief Electoral Officer)***, [1993] 2 SCR 995 at 1033; ***Siemens v Manitoba (Attorney General)***, 2003 SCC 3 at para 42; ***Baier v Alberta***, 2007 SCC 31 at para 59; ***Toronto (City) v Ontario (Attorney General)***, 2021 SCC 34 at para 45.

[47] When I pointed out this line of cases to counsel for the Referendum Proponent in oral argument, he resiled from the position and said that this was something that he might not have advanced if he had had more time to prepare for his application to strike. I appreciate counsel's candour and do not hold it against him because anyone who makes a career of standing before courts on urgent matters will eventually make such a misstep. But this is an excellent illustration of why a motion to strike advanced under significant time pressure is not suitable for disposing of potentially important questions.

## D. Is the Answer to the Reference Question Plain and Obvious?

[48] The Referendum Proponent's submission that conducting a referendum cannot breach constitutionally protected rights has three aspects. First, he submits that the mere asking of a referendum question cannot contravene constitutional rights. He goes so far as to say that "[t]he suggestion that asking a question could be unconstitutional is so ridiculous as to require little or no argument." This requires me to consider whether *CIA* s 2(4) is about the constitutionality of asking a question or if it is about the constitutionality of the substance of what is proposed. Second, he asserts that the constitutional referendum process is non-binding and, as such, cannot contravene constitutional rights. He submits that the process for a constitutional referendum proposal, if all statutory hurdles are cleared, has no legal consequence because the Government of Alberta retains the discretion to do nothing. Third, he contends that the ***Reference re***

***Secession of Quebec*** is dispositive because it holds that a province may conduct a referendum on secession and that the only consequence of a vote in favour of secession is a political negotiation. He further contends that a political negotiation cannot violate constitutional rights unless and until an agreement is reached. He says it is not certain that an agreement on secession will be reached and, if so, the contents of any agreement cannot be known until it is reached.

### i. Is *CIA* s 2(4) About the Act of Asking a Question or the Substance of a Proposal?

[49] To consider the Referendum Proponent's argument that the mere asking of a referendum question cannot be unconstitutional, I must consider what is meant by *CIA* s 2(4), which provides that "[a]n initiative petition proposal must not contravene sections 1 to 35.1 of the *Constitution Act, 1982*." Section 2(4) is about a "proposal", but it is not obvious whether that means the question itself or the substance of what the question proposes.

[50] A court must ascertain the meaning of a statutory provision using what the Supreme Court of Canada calls the "modern principle of statutory interpretation" set out in ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] SCR 27 at para 21 and recently restated in ***Piekut v Canada (National Revenue)***, 2025 SCC 13 at paras 42-50. The modern principle commands courts to consider text, context, and purpose.

[51] The Referendum Proponent's interpretation of the *CIA* – that s 2(4) applies to the act of asking a question – is an assertion. The Referendum Proponent did not explain or justify his interpretation of *CIA* s 2(4) with reference to the modern principle of statutory interpretation. An assertion may be a legitimate approach in the court of public opinion, but in a court of law legal methodology matters. The analysis that follows shows that an alternative interpretation of *CIA* s 2(4) is available using the modern principle of statutory interpretation.

[52] Text is the starting point for statutory interpretation because it "specifies ... the means chosen by the legislature to achieve its purposes": ***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; see also, Mark Mancini, "Start With the Text" presented at the University of Alberta, Faculty of Law, *Vavilov* at 5 Conference, June 19, 2025. Attention to context is important because words take meaning from their surroundings. Context should be understood primarily to mean the scheme and structure of the statute itself: ***Clearview AI Inc v Alberta (Information and Privacy Commissioner)***, 2025 ABKB 287 at paras 64-68. The purpose of a statute and the purpose of a specific provision may be different. For example, a legislature may enact a statute to seek to achieve a broad purpose but contain within the statute certain limitations to protect countervailing interests. Use of the primary purpose of a statute in interpretation cannot be allowed to brush aside secondary purposes that may shape or limit how the primary purpose is to be achieved: see generally, Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59 Alta L Rev 919.

[53] The text of *CIA* s 2(4) says that an "initiative petition proposal" must not contravene certain constitutional rights. The text of the *CIA* does not say that the asking of a referendum question must not contravene certain constitutional rights. A plain reading of *CIA* s 2(4) is that it is concerned with the constitutionality of the substance of a constitutional referendum proposal.

[54] Some assistance in interpreting *CIA* s 2(4) can be gained by looking to context, including the broader scheme of the statute and how related parts of the statute function. The *CIA* creates

three categories of proposals: policy proposals, legislative proposals, and constitutional referendum proposals. The proposals are distinguished by their subject matter and potential effects. What distinguishes a constitutional referendum proposal from a policy proposal or legislative proposal is that a constitutional change is proposed, not a legislative or policy change.

[55] *CIA* s 2(3) requires that legislative proposals "not exceed the jurisdiction of the Legislature." This is a requirement that legislative proposals respect the division of powers set out in *Constitution Act, 1867*. The CEO has the power pursuant to *CIA* s 2.1 to refer the question of whether a legislative proposal is within the jurisdiction of the Legislative Assembly to the Court for determination. The critical point here is that the *CIA* is concerned with whether the substance of what is proposed is within the jurisdiction of the Legislature, not whether the mere asking of the question is within the jurisdiction of the Legislature. *CIA* s 2(4) is framed in the same way as s 2(3); it is concerned with the substance of a proposal, not the act of asking a question.

[56] The high-level purpose of the *CIA*, as the Referendum Proponent and Attorney General submit, is to allow regular Albertans to bring forward important policy, legislative, and constitutional proposals for consideration by their fellow citizens. But *CIA* s 2(4) also is aimed at achieving a secondary purpose; namely, to ensure that Albertans are not asked to consider an unconstitutional proposal. Preventing an unconstitutional proposal from being put to voters is consistent with international norms of good referendum practice, avoids unnecessary private and public expenditures, and prevents the public from becoming engaged in an unnecessary and potentially divisive debate over something that cannot happen as a matter of constitutional law.

[57] The modern approach to statutory interpretation allows for the continued use of traditional rules of statutory interpretation where appropriate: ***Piekut*** at para 47. When interpreting a statute, a court should give each section its proper scope and meaning. A statutory provision should not be interpreted in such a way as to render it meaningless: Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: Lexis Nexis Canada, 2022) at 211; see also, ***Pepa v Canada (Citizenship and Immigration)***, 2025 SCC 21 at para 102 and ***R v Precision Diversified Oilfield Service Corp***, 2018 ABCA 273 at para 49. Interpreting *CIA* s 2(4) as concerning the constitutionality of the act of asking a referendum question as opposed to the substance of the constitutional referendum proposal would, as the Referendum Proponent argues, never result in a finding of unconstitutionality. This would render *CIA* s 2(4) meaningless. The Legislative Assembly's decision to impose a requirement that constitutional referendum proposals not contravene constitutional rights and to empower the CEO to refer questions of constitutionality to the Court implies that a constitutional referendum proposal could be unconstitutional. An interpretation that renders *CIA* ss 2(4) and 2.1 meaningless is to be avoided.

[58] I have shown in the preceding analysis that *CIA* s 2(4) may be interpreted to apply to the substance of a constitutional proposal. Since this is a motion to strike, I have not found that this is the only or correct interpretation of *CIA* s 2(4). What is clear, however, is that if the Referendum Proponent wants to show that his interpretation of *CIA* s 2(4) should be preferred, he must do so using the modern principle of statutory interpretation. Asserting the meaning of a statute without doing the work to demonstrate why that meaning should be preferred will not carry the day.

### ii. Is a Constitutional Referendum Non-Binding?

[59] The Referendum Proponent submits that a referendum is not legally binding on the Government of Alberta and, as such, the substance of his constitutional referendum proposal cannot contravene constitutional rights. He argues that after the CEO submits a copy of the constitutional referendum proposal to the Minister of Justice "[i]t is ultimately up to the Government of Alberta to decide whether to hold a referendum, and any such referendum would be advisory, not binding. No constitutional amendment or action is compelled at this or any future juncture." In effect, he argues that even if his proposal would be unconstitutional if implemented, it is not unconstitutional because the Government of Alberta can just ignore the referendum result. There are two responses to this argument. First, the referendum may be legally binding in some sense and further argument is required to settle that question. Second, the question of the constitutionality of a proposal is separate from the question of whether the Government of Alberta is obliged to implement a proposal. *CIA* s 2(4) arguably requires consideration of the constitutionality of a proposal, not whether the proposal must be implemented if approved by voters.

[60] Earlier in these Reasons, I reviewed the statutory framework for making a constitutional referendum proposal and for conducting a constitutional referendum. The *CIA* compels the Minister of Justice to deliver the constitutional referendum proposal to the Lieutenant Governor in Council "for the purpose of a constitutional referendum in accordance with the *Referendum Act*." After this, the *CIA* states that a referendum "must" be held on or before the next general election. Whether this imposes an obligation on the Government to conduct a referendum is debateable. The *Referendum Act* provides that the result of a constitutional referendum is binding. But there is room for argument as to what binding means in the context of the *Referendum Act* and whether, as a matter of constitutional law, the Government of Alberta can bind itself to hold a constitutional referendum and then bind itself to implement the result. There is uncertainty on the face of the relevant statutes and there was no argument on whether the Government of Alberta may, as a matter of constitutional law, bind itself to conduct a referendum and to implement the result of a referendum. Thus, it is not plain and obvious at this stage of the proceedings that a constitutional referendum proposal is advisory and non-binding. More argument on this issue is required before a decision can be made.

[61] *CIA* ss 2(4) and 2.1 can be understood as protection against the Government of Alberta becoming bound in a political sense to an unconstitutional objective. Even if a referendum is, in a narrow legal sense, non-binding, it may be binding on the Government of Alberta in a political sense: ***Haig*** at 1066 *per* Iacobucci J, dissenting; ***Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union*** [2017] UKSC 5 at para 125; ***Miller, R (on the application of) v The Prime Minister*** [2019] UKSC 41 at para 7. A citizen-initiated referendum that is binding in a political sense conscripts a government to a constitutional objective that is not of its choosing. In turn, this means that the constitutionality of a constitutional referendum proposal is important. Without the safeguards in ss 2(4) and 2.1, the *CIA* would permit citizens to foist unconstitutional objectives on the Government of Alberta.

[62] As explained in the preceding section of these Reasons, the question to be considered pursuant to *CIA* s 2(4) is arguably whether the substance of the proposal is constitutional. The Government of Alberta's legal obligation to implement the constitutional referendum proposal is a different question. As with the Referendum Proponent's argument that the mere asking of a question cannot be unconstitutional, to interpret *CIA* s 2(4) as not applying because a referendum

cannot be legally binding on the Government of Alberta (if that is correct) would similarly render the provision meaningless.

### iii. Is *Reference re Secession of Quebec* Dispositive?

[63] Before I consider the Referendum Proponent's arguments rooted in ***Reference re Secession of Quebec***, I must address its force as a precedent. ***Reference re Secession of Quebec*** is one of the Supreme Court of Canada's most important decisions. The Court held that a province has no unilateral right to secede from Canada, explained some of the foundational principles of the constitution, and gave important guidance as to how those principles should inform the conduct of negotiations in the event of a clear majority in a provincial referendum voting in favour of secession. But there are important limitations on the usefulness of ***Reference re Secession of Quebec*** in the present case. The questions asked of the Supreme Court were asked in the abstract because there was no pending referendum. The conceptual frame of reference for the Court was the 1995 Quebec referendum, which featured a convoluted question and lacked any statutory mechanism for vetting the constitutionality of the issue that was put to a vote. Further, the Court did not receive any evidence concerning Aboriginal and treaty rights and was accordingly constrained in its ability to offer anything other than broad generalities on the subject.[5] The Referendum Proponent assumed that the ***Reference re Secession of Quebec*** was binding on this Court in all respects, but this is something that cannot be assumed and requires proper argument and consideration.

[64] The Referendum Proponent submits that the ***Reference re Secession of Quebec*** held that a province may hold a referendum on secession. Accordingly, he contends that any administrative or judicial restraint of a referendum is illegitimate and unconstitutional. This submission has no merit. First, if the Government of Alberta wishes to hold a referendum on secession under the *Referendum Act*, it may do so without the CEO being required to decide on the constitutionality of the subject of the referendum or having the power to refer that issue to the Court. The only constraint on the Government of Alberta initiating a secession referendum of its own under the *Referendum Act* is political, not legal. Second, the limits on constitutional referendum proposals in the *CIA* are legal restraints imposed by the Legislative Assembly. The authority to constrain the scope of citizen-initiated constitutional referenda is within the jurisdiction of the province and the limits in the *CIA* on what may be proposed by citizens are a valid exercise of that jurisdiction.

[65] The Referendum Proponent argues that ***Reference re Secession of Quebec*** stands for the principle that the provinces have no unilateral legal right to separate from Canada and that the only obligation arising after a pro-secession vote is a political duty for Canada and the provinces to negotiate. Accordingly, the Referendum Proponent submits that, as a practical matter, the substance of his proposal is not secession but secession negotiations. The existence of a duty to negotiate cannot be unconstitutional, he contends, because a negotiation cannot infringe constitutional rights unless and until it results in an agreement. Whether an agreement would be reached and the terms of such an agreement cannot be known at the stage at which the *CIA* requires the CEO or the Court to determine the question of constitutionality.

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[5] The Court permitted the Grand Council of the Crees and the Chiefs of Ontario to participate as intervenors, but there is no indication on the docket (https://www.scc-csc.ca/cases-dossiers/search-recherche/25506/) that affidavit evidence was filed.

[66] A difficulty with understanding the Referendum Proponent's constitutional referendum proposal as being, in a practical sense, about negotiations is that counsel for the Referendum Proponent explained that it was framed to comply with the *Clarity Act*. The *Clarity Act* s 1(4) provides that "a clear expression of the will of the population of a province that the province cease to be part of Canada could not result from (a) 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...." The *Clarity Act*, in essence, says that without a solemn commitment to secede, there is no obligation for the other parties to the Confederation bargain to negotiate an exit. This weighs in favour of understanding the substance of the constitutional referendum proposal to be Alberta independence, rather than a mandate for negotiations that may or may not result in Alberta independence.

[67] Even if the focus of the constitutionality inquiry is on Alberta independence, the argument that the terms of Alberta independence cannot be known before they are negotiated and, therefore, it cannot be known if such terms will contravene constitutional rights makes some sense. The Referendum Proponent argues that the democratic process and subsequent negotiation process should be allowed to unfold and, if the issue of the terms of Alberta independence infringing constitutional rights arises later, it can be dealt with then. A counterargument to this is that minorities inevitably will be squeezed in a political process driven by a majoritarian desire to establish Alberta as an independent state. Leaving consideration of constitutional rights to the end of the process once a deal has been concluded may result in them being given short shrift. Even if all the details of Alberta independence cannot be known, parties may argue that the Court may be able to give guidance on constitutionality based on the difference between Alberta being a province within Canada and being an independent state based on the assumption that Alberta will have the typical characteristics of independent states.

### iv. Are There Plausible Arguments that Constitutional Rights May be Contravened?

[68] To start with, it is not clear what *CIA* s 2(4) asks the CEO or the Court to determine. Normally in constitutional litigation, a party commences a proceeding alleging a rights limitation. The Court's focus is then usually on the specific rights limitation alleged by the plaintiff, not on hypothetical rights limitations.[6] The difference here is that the *CIA* asks in the abstract whether a constitutional referendum proposal contravenes *Constitution Act, 1982*, ss 1-35.1. The Court's mandate is further obscured by the fact that *Constitution Act, 1982*, s 1 is not a provision that can be alleged to be infringed or contravened because it permits the federal or provincial government, as the case may be, to justify limits on rights. This lack of clarity is problematic because in the first version of Bill 51 (2021), which would become the *CIA*, s 2(4) replicated s 1 of the *Constitution Act, 1982* by including the words "in a manner that is not demonstrably justified in a free and democratic society." The Referendum Proponent did not address this issue in the context of the application to strike, but argument on this point will be required for a decision to be made on the merits of the reference.

[6] The exceptions include s 7 challenges to commodification of sexual activity offences under the *Criminal Code* (See ***R v Anwar***, 2020 ONCJ 103 at paras 139-141) and s 12 challenges to mandatory minimum sentences (See ***R v Hills***, 2023 SCC 2 at paras 40-41, 51, 67-75). See also Debra M Haak, "The Case of the Reasonable Hypothetical Sex Worker," (2022) 60:1 Alta L Rev 205 at 207.

[69] The Referendum Proponent made succinct submissions as to why the constitutional referendum proposal question did not contravene *Constitution Act, 1982*, ss 1, 3, 6, 7, 15, 24, and 35. The example of *Charter* s 6, mobility rights, illustrates why it is not plain and obvious that the Referendum Proponent's proposal is constitutional. Mobility rights guarantee the right of citizens to "enter, remain in and leave Canada." They further permit citizens "to move to and take up residence in any province; and to pursue the gaining of a livelihood in any province." Alberta independence arguably puts these rights at risk as Canada would be an independent sovereign country and would presumably determine the terms of entry into Canada and the right to work in Canada. There are, no doubt, contrary arguments that the Referendum Proponent could make, but it cannot be said at this stage that it is plain and obvious that he will succeed.

[70] The Referendum Proponent argues that other rights, most notably Aboriginal and treaty rights, must be respected in negotiations between Alberta and Canada. The example of the Athabasca Chipewyan First Nation ("ACFN"), who assert in their application for leave to intervene in this proceeding that their traditional territory would be severed by an international border if Alberta seceded, was put to counsel for the Referendum Proponent in oral argument. He conceded that if Alberta maintained its current boundaries, it was true that the ACFN's traditional territory would be bisected by an international border. However, he argued that the ACFN's Aboriginal and treaty rights would be protected in a negotiation over the terms of secession. This is a version of the argument that until the terms of Alberta independence are known, no assessment of constitutionality can be made.

[71] Leaders of Alberta First Nations were prominent opponents of the Government's recent amendments to the *CIA* to make it easier for referendum proponents to meet the signature threshold requirement. MLA Brooks Arcand-Paul and others stated in debates in the Legislative Assembly that First Nations' primary concern was an Alberta independence referendum and the potential impact of Alberta independence on their Aboriginal and treaty rights: Alberta, Legislative Assembly, *Alberta Hansard*, 31-1, (6 May 2025) at 3239 (Rob Miyashiro); Alberta, Legislative Assembly, *Alberta Hansard*, 31-1, (13 May 2025) at 3412 (Brooks Arcand-Paul); Alberta, Legislative Assembly, *Alberta Hansard*, 31-1, (14 May 2025) at 3495 (Brooks Arcand-Paul). The Minister of Justice responded to these concerns by proposing an amendment to the *Referendum Act* that protects Aboriginal and treaty rights that are recognized and affirmed by *Constitution Act, 1982*, s 35. When the Minister explained the amendment to the *Referendum Act* in the Legislative Assembly, he made a direct connection to the existing requirement that a constitutional referendum proposal made pursuant to the *CIA* be constitutional. He said as follows:

> 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.
>
> Alberta, Legislative Assembly, *Alberta Hansard*, 31-1 (14 May 2025) at 3494.

[72] The statements made by the Minister in the Legislative Assembly show that the Government was aware that First Nations were concerned that Alberta independence could contravene their Aboriginal and treaty rights and that it was the Government's view that the mechanisms for addressing such concerns were the *CIA* and the newly added *Referendum Act* s 8.11(3).

[73] On this motion to strike, the Court did not have the benefit of hearing from *amici curiae* or intervenors. The Court can only speculate as to how Alberta independence might contravene constitutional rights. And, at this stage, the Court cannot even speculate how Alberta independence might contravene Aboriginal and treaty rights apart from the points raised by ACFN in their intervention application materials. There is enough in the submissions of the Referendum Proponent and in the debates in the Legislative Assembly to indicate that the question of whether Alberta independence would contravene constitutional rights is not frivolous and is an appropriate one for judicial consideration.

## IV. *Amici Curiae*

[74] The CEO made the constitutional reference to the Court but advised that "[a]s the administrative decision maker who will ultimately be tasked with determining whether the Application complies with section 2 of the *Citizen Initiative Act*, the Chief Electoral Officer takes no position on the merits of the question posed to the Court." The Referendum Proponent submits that "the CEO's counsel and the Respondent's counsel are fully capable of making submissions on the constitutionality of the Proposal." But the question is not whether the CEO's counsel is *capable* of making submissions; rather, the salient question is whether the CEO *should* make partisan submissions.

[75] Independent election and referendum administration is one of the hallmarks of a well-functioning democracy. Independent election and referendum administration enhances the legitimacy of democratic processes by insulating them from political interference and manipulation. The corollary of independence is that that an independent election and referendum official like the CEO must be impartial and objective. Madam Justice Crighton, writing for the majority in ***Anglin v Resler***, 2020 ABCA 184 at para 27, observed that "the Chief Electoral Officer can only achieve its public purpose by operating independently and the Chief Electoral Officer cannot be seen as acting 'on account' of the government." Consistent with these principles, the CEO has not taken a position on the constitutionality of the Referendum Proponent's proposal and instead recommended that the Court appoint *amici curiae* to ensure that all perspectives on the issue are represented before the Court.

[76] Healthy perspective on the CEO's decision not to take a position can be gained by considering the realistic alternative to referring the question of constitutionality to the Court. The CEO could simply have decided the question of constitutionality himself as part of his decision to approve or reject the Referendum Proponent's application. If he had done that, any affected party – *i.e.* any voter in Alberta – could commence judicial review proceedings. In

judicial review proceedings, the administrative decision-maker is a party but generally refrains from taking a substantive position on the merits of the judicial review: ***Ontario (Energy Board) v Ontario Power Generation Inc***, 2015 SCC 44 at paras 41-62. Had the CEO decided the question of the constitutionality of the proposal, in any judicial review proceedings arising from his decision, he would almost certainly not take a position.

[77] Macy Mirsane explains in "The Roles of Amicus Curiae (Friend of the Court) in Judicial Systems with Emphasis on Canada and Alberta" (2022) 59:3 Alta L Rev 669 at 673 that there are three situations where *amicus curiae* are appointed: (1) "where there is a matter of public interest of importance which could affect many other persons"; (2) "to prevent injustice"; and (3) "to represent an unrepresented litigant."

[78] The leading cases on when *amicus curiae* should be appointed and the role of *amicus curiae* come from criminal law: ***Ontario v Criminal Lawyers' Association of Ontario***, 2013 SCC 43 at paras 44-48 and ***R v Kahsai***, 2023 SCC 20 at paras 37-39. Justice Karakatsanis, writing for the Court in ***Kahsai,*** explained at para 36:

> The power to appoint *amicus curiae* flows from the inherent jurisdiction of superior courts to manage their own procedure to ensure a fair trial. This jurisdiction empowers a superior court judge to appoint *amicus* when the judge believes doing so is required for the just adjudication of a case. [citations omitted]

[79] Apart from affirming the Court's power to appoint *amicus curiae*, criminal cases offer little guidance as to how the Court should proceed in the present circumstances. Relevant principles can, however, be inferred from how the Supreme Court of Canada has used *amicus curiae* in cases of significant public interest. For example, in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 *amici curiae* were appointed to assist the Court by advancing arguments about how administrative law could be improved. *Amici curiae* were appointed in ***Reference re Senate Reform***, 2014 SCC 32 and in ***Reference re Secession of Quebec***. The Court explained why *amicus curiae* was appointed in ***Reference re Secession of Quebec*** in a press release dated July 14, 1997:

> The Court has decided, as it has done on many other occasions, to appoint an *amicus curiae* in this matter in view of the complexity of the issues raised and the fact that some aspects of these issues would not otherwise be argued by the parties who have intervened in the reference. In order to clarify what is frequently misunderstood, such counsel, traditionally called "a friend of the court", does not represent a party but is tasked with assisting the court and arguing issues or matters on which the Court wishes to hear representations that parties to the reference would not otherwise put forward.

[80] What the Court left unsaid in its press release was that *amicus curiae* were required for the legitimacy of the reference because Quebec refused to participate. As a result, the *amicus curiae* advanced arguments that were consistent with Quebec's opposition to the reference process and the substance of the reference questions. Partisan *amicus curiae* have been appointed in other public interest cases such as the ***Reference re Genetic Non-Discrimination Act***, 2020 SCC 17 where *amici curiae* were appointed to argue against the federal and provincial attorneys general who all took the same position on the constitutionality of the legislation in issue (at para 19).

[81] A critical question to be considered before deciding if *amici curiae* should be appointed in a case of significant public interest is whether the parties take adversarial positions. Where the parties are not adversarial, the Court must also consider whether intervenors could provide the balance required for the Court to understand the relevant issues and decide the case.

[82] The Attorney General for Alberta wrote to the Court to advise that Alberta's position on the merits of the reference is that "the proposal is not unconstitutional, and therefore [should] be approved and permitted to proceed." Alberta's position aligns with the Referendum Proponent. The Attorney General for Canada was served by the CEO, but did not appear on the motion to strike. The only available inference at this stage of the proceedings is that Canada does not intend to take a position on the merits of the reference. None of the parties to the reference will argue that the constitutional referendum proposal is unconstitutional.

[83] The present case is one of significant public interest in Alberta and, depending on the outcome, may lead to a referendum and secession negotiation process that will affect the rest of Canada. For the integrity and legitimacy of the democratic process, it is important that all arguments and perspectives on the issues are brought before the Court. There are two ways that the Court can proceed. First, the Court can appoint *amici curiae* before hearing applications to intervene. This is what was done in ***Reference re Senate Reform*** and ***Vavilov***. The advantage in appointing *amici curiae* now is that they will commence work immediately. Second, the Court can defer a decision on the appointment of *amici curiae* until after a decision has been made on applications to intervene. This is what was done in ***Reference re Secession of Quebec***. An advantage of this approach is that if there are intervenors who represent a wide range of positions, it may narrow the scope for *amici curiae* or make appointment of *amici curiae* unnecessary. A downside of this approach is that appointment of *amici curiae* after deciding intervenor applications will extend the pre-hearing timeline.

[84] The Referendum Proponent is concerned that the delay caused by the court process undermines the purpose of the *CIA*. I share this concern and am committed to expediting the reference process to the extent possible consistent with procedural fairness. One step that will assist in expediting the reference process is the prompt appointment of *amici curiae* so that they may get to work now rather than weeks or months after intervenor applications are decided. Accordingly, *amici curiae* shall be appointed.

[85] To assist the Court, counsel for the CEO (not the CEO himself) identified Matthew Woodley and Eric Adams as potential *amici curiae*. Mr. Woodley and Professor Adams indicated to counsel for the CEO that they are available to act as *amici curiae* and have no conflicts with the parties that preclude them from acting. The Referendum Proponent opposes the appointment of *amici curiae* but takes no position with respect to the appropriateness of these proposed *amici curiae*. I am satisfied that the proposed *amici curiae* are suitable and can provide valuable assistance to the Court. Mr. Woodley is a leading practitioner with significant experience in administrative and constitutional law and Professor Adams is a distinguished constitutional scholar.

[86] The role of *amici curiae* in this case is like that in ***Reference re Secession of Quebec***. The mandate of the *amici curiae* is to articulate the best arguments that the Referendum Proponent's proposal is unconstitutional. But the *amici curiae* are to remain objective. This means that they must advise the Court of any weaknesses in the arguments they make. More importantly, they shall provide the Court with their independent conclusion as to the

constitutionality of the proposal even if, contrary to the arguments they have made, that conclusion is that the proposal is constitutional.

## V. Intervenors

[87] The CEO submitted that the Court should outline a process for applications to intervene to ensure that the reference may advance in an orderly and timely fashion. The question of intervenor applications is not hypothetical as several parties have either filed applications for leave to intervene or signalled their intention to make such application.

[88] Intervenors are common in public interest appellate litigation, especially at the Supreme Court of Canada, but are exceptional in the Court of King's Bench. Though rarely used, the Court has the power to allow intervenors and broad discretion to set the terms of participation for intervenors. Rule 2.10 provides:

> On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

[89] The Court of Appeal's test for intervention in appeals was restated by Justice Slatter in ***VLM v Dominey Estate***, 2023 ABCA 226 at para 2 as follows:

> (1) whether the proposed intervenor has a particular interest in, or will be directly and significantly affected by the outcome of the appeal, or (2) whether the intervenor will provide some special expertise, perspective, or information that will help resolve the appeal.

[90] Justice Slatter explained that a Court must also consider other factors in deciding whether to permit an intervenor to participate in a proceeding. The Court must weigh,

> whether the presence of the intervenor is necessary for the court to properly decide the matter; whether its presence will be useful, different or bring particular expertise to the appeal; whether the intervenor's interest will not be fully protected; and whether the intervention will cause delay or prejudice, or widen the dispute between the parties, or transform the court into a political arena: ***VLM*** at para 2.

[91] I will use the Court of Appeal test for intervention to assess intervention applications in the present case. During oral argument, I also advised those present of other considerations that will guide my assessment of intervention applications. First, it is unfair to the Referendum Proponent and the people of Alberta for the court process to take any longer than necessary. As such, intervenors must satisfy the Court that their participation will not delay the hearing of the reference. This puts a premium on things like litigation experience and representation by competent counsel. Second, because the reference concerns a democratic process where every adult citizen in Alberta has the right to vote, the number of affected individuals is enormous. By setting a process for intervenor applications, the Court is not inviting every adult citizen in Alberta to intervene. To ensure that the court process is manageable, intervenors will be chosen that represent a broad spectrum of perspectives on the issues before the Court. Potential intervenors are encouraged to work with similarly situated individuals and organizations under the same umbrella. The Court is committed to keeping the number of intervenors to a manageable number to ensure that the reference may be completed within a reasonable

timeframe. Third, evidence is not typically received in reference proceedings. The Court, however, has the discretion to receive evidence from an intervenor pursuant to Rule 2.10. Without deciding the point, it appears to me at this stage that the only potential intervenors who could assist the Court by providing evidence are First Nations. Potential First Nations intervenors who seek to adduce evidence to support their assertion of Aboriginal and treaty rights must describe the nature and extent of the proposed evidence so that the Court may determine if the evidence should be permitted and, if so, what limits are appropriate.

[92] Following the practice of the Supreme Court of Canada, there will be no oral hearing of intervenor applications unless the Court directs. I cannot follow the Supreme Court of Canada's practice of not providing reasons since all decisions of the Court of King's Bench may be appealed to the Court of Appeal and it is my obligation to provide an account of my reasoning so that it may be evaluated on appeal. Accordingly, I will provide succinct reasons for my decisions in respect of all leave to intervene applications.

[93] A case management meeting to determine a litigation plan for the reference, including the process for intervenor applications will take place immediately after these Reasons have been given. The timelines for intervening will be tight and peremptory. The CEO shall publish a description of the intervention process on the Elections Alberta website, issue a press release containing the same information, and purchase advertisements in each of the *Calgary Herald*, *Edmonton Journal*, and *APTN News* for the same purpose.

## VI. Conclusion

[94] A referendum on Alberta independence that could lead to the break-up of Canada is serious business. The question of the constitutionality of the constitutional referendum proposal requires a full hearing where a broad range of perspectives on the issue can be presented to the Court. The Referendum Proponent's motion to strike is dismissed because I conclude that it is not plain and obvious that the constitutional referendum proposal is constitutional. The incomplete and shifting arguments advanced by the Referendum Proponent and the lack of any party to present opposing arguments at this early stage of the litigation leave me no alternative. The argument on the motion to strike indicates to me that there are legitimate arguments to be made on both sides of the issue before the Court. The citizens of Alberta deserve to have these arguments made properly and heard in full; democracy demands nothing less.

Heard on the 7th day of August, 2025.
**Dated** at the City of Edmonton, Alberta this 14th day of August, 2025.

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

**Appearances:**

M. Joseph Redman & Gwendolyn Stewart-Palmer KC
for the Chief Electoral Officer of Alberta

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

Nicholas Trofimuk
for the Attorney General for Alberta