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Provincial Referendum Legislation, Citizen-Led Secession Proposals, and Non-Derogation Clauses

By: Nigel Bankes

Bill Commented On: Bill 54, *Election Statutes Amendment Act*

In the dying hours of this last Legislative Session the Minister of Justice, Mickey Amery introduced a series of amendments (Amendment # A6, adopted May 14, 2025 and Hansard at 3494) to Bill 54, the *Election Statutes Amendment Act.* This is the Bill that will make it easier for parties to call for a citizen-led secession reference. One of the amendments related to proposed changes to the province's *Referendum Act*, RSA 2000, c R-8.4. The amendment (the non-derogation clause or amendment) purports to clarify that:

> 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.*

Bill 54 (292 pages) will amend a whole series of statutes, including the *Alberta Pension Protection Act*, the *Alberta Senate Election Act*, the *Alberta Taxpayer Protection Act*, the *Citizen Initiative Act* (*CIA*), the *Election Finances and Contributions Disclosure Act*, the *Local Authorities Election Act*, the *Recall Act*, and the *Referendum Act.* The non-derogation clause only applies, and then only in a limited way, to the provisions of the *Referendum Act*, it does not apply to any of the other statutes amended by Bill 54, including the *Citizen Initiative Act*.

This post deals with the interaction between the *Referendum Act* and the *Citizen Initiative Act* and addresses five questions.

First, what is the *Referendum Act* and how does it interact with the *Citizen Initiative Act*? Second, how will Bill 54 amend the *Referendum Act* and the *Citizen Initiative Act*? Third, what is the text that has already been proposed for a referendum on secession? Fourth, would steps to implement such a resolution be consistent with the treaty rights of Alberta First Nations? And finally, is the non-derogation clause now included in Bill 54 an adequate legal response to the concerns that have been raised by First Nations, see here, here and here.

Robert Hamilton has also provided valuable commentary on Bill 54 examining the constitutional arguments of Indigenous Nations against secession proposals here.

What is the *Referendum Act* and its interaction with the *Citizen Initiative Act*?

The existing *Referendum Act* (i.e. prior to the new amendments entering into force) so far as relevant allows the Lieutenant Governor in Council (i.e. cabinet) to call for a referendum on a constitutional or a non-constitutional question. If the referendum is on a constitutional question the result is binding (s 4(1)) meaning that "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." (*Referendum Act*, s 4(2)) In the case of a referendum on a non-constitutional question, cabinet may prescribe at the outset whether the result is to be binding or not (ss 5.1 and 5.2(2)).

As for the existing *CIA* (i.e. prior to the new amendments entering into force), and again so far as is relevant, section 2 of the *CIA* permits an elector to apply to the Chief Electoral Officer for the issuance of an initiative petition concerning (a) a legislative proposal, (b) a policy proposal, or (c) a constitutional referendum proposal (a CRP).

A CRP must be framed in such a way as to require a yes or no answer. Section 6 provides that a CRP must be supported by the signatures of "at least 20% of the total number of electors in the Province entitled to sign those signature sheets" and that threshold of 20% must be reached "in at least 2/3 of all electoral divisions." (emphasis added) In addition, such a petition "must not contravene sections 1 to 35.1 of the *Constitution Act, 1982*" (s 2(4)). Insofar as no petition or CRP could itself contravene any section of the Constitution (since, as a matter of law, such a proposal could not contravene anything) this perhaps should be interpreted in the sense of posing the question whether, were the petition to be adopted and implemented, would it contravene sections 1 – 35.1 of the *Constitution Act, 1982*.

Section 2(10) of the current *CIA* allows the Chief Electoral Officer (CEO) to refer to the Court of King's Bench a special case to determine if a petition meets the requirements of the Act, including section 2(4). However, even if the CEO does not avail themselves of that opportunity there is nothing to prevent a party that can establish standing from seeking judicial review of the CEO's decision to accept a petition, if that person considers that the petition does not meet all necessary preconditions including section 2(4). While section 2(4) seems to offer some real protection against citizen-initiated petitions and resulting referendums it is worth noting that the provision does not apply to referendums that are initiated by the government of its own motion. Thus, while section 2(4) can be used to derail a citizen led initiative there is no similar constraint on a referendum initiated by the government.

If the CEO accepts the CRP, and if the CRP achieves the prescribed threshold of support, the CEO must provide the CRP to the Minister who "shall refer the constitutional referendum proposal to the Lieutenant Governor in Council for the purpose of a constitutional referendum in accordance with the Referendum Act." (*CIA*, s 16(1))

How will Bill 54 amend the *Referendum Act* and the *Citizen Initiative Act*?

Bill 54 will amend the *CIA* so as to lower the threshold for a qualifying CRP petition. The amendment does this in two ways as can be seen in the new section 6(2):

> (2) The signature sheets for the initiative petition must be signed by a total number of electors equal to at least 10% of the total number of votes cast in the previous general election.

First, the amendment adopts a common 10% threshold rather than the 20% previously reserved for constitutional matters. Second, the 10% is no longer calculated by reference to eligible voters but by reference to the "total number of votes cast in the previous general election." For clarity there is no longer a requirement that this threshold of support be demonstrated in two thirds of electoral divisions. For the 2023 general election, Elections Alberta reports that that 1,777,321 votes were cast, for a turnout of 59.5 percent.

Bill 54 also amends the provisions dealing with the power of the Chief Electoral Officer to seek the advice of the Court as to whether a proposal conforms to the requirements of the Act. These requirements are now deleted from section 2 and included as a new section 2.1 which specifies strict timelines and prescribes that the person initiating the petition shall have party status in any proceedings. Practically speaking the constrained timelines under which the CEO must operate should also serve as a warning to other interested parties that they should be prepared to file quickly for judicial review notwithstanding the general six-month limitation period in the Rules of Court should the CEO elect not to seek the advice of the Court. Either way, the express contemplation of judicial intervention by the legislature makes untenable any argument to the effect that such issues should be treated as non-justiciable (see, by contrast, the discussion below of the *Clarity Act*).

Bill 54 also amends some of the details of the *Referendum Act* but none of those details seem to make significant changes for the purposes of CRPs. The one potentially significant amendment to the *Referendum Act*, the inclusion of a non-derogation provision, is considered in a later section of this post.

The bottom line is this: under the new rules ten per cent of eligible voters in the province (calculated by reference to the number of voters who actually voted in the last election) can effectively require the province to conduct a referendum on a qualifying constitutional question.

The Proposed Secession Question

On May 11, Jeff Rath, a lawyer with the Alberta Prosperity Project (APP) made public a possible text for a referendum question on secession:

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

This question (the APP Secession Question) invites two additional inquiries: (1) Is the APP Secession Question a CRP for the purposes of the *Referendum Act* and the *CIA*? And (2) Is the APP Secession Question a clear question for the purposes of the (federal) *Clarity Act*?

Is the APP Secession Question a CRP for the purposes of the Referendum Act and the CIA?

It bears emphasising that this question is purely a question of statutory interpretation. Neither the *Referendum Act* nor the *CIA* define a CRP although section 2(2)(f) of the *CIA* suggests that it must be "a proposed question relating to the Constitution of Canada or relating to or arising out of a possible change to the Constitution of Canada." Nor do the *CIA* or the province's *Interpretation Act* define the term the "Constitution of Canada". Absent such a definition in a provincial statute (and perhaps in any case) it seems appropriate to refer to (and indeed defer to) the definition of the "Constitution of Canada" found in section 52(2) of the *Constitution Act, 1982* to the effect that

> (2) The Constitution of Canada includes
>
> (a) the *Canada Act 1982*, including this Act;
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> (b) the Acts and orders referred to in the schedule; and
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> (c) any amendment to any Act or order referred to in paragraph (a) or (b).

While this definition is framed in inclusive rather than exhaustive terms (i.e., "includes" rather than "means") it is surely significant that the definition is framed in terms of particular instruments and not general concepts. Accordingly, it is far from clear that the question as proposed by Mr. Rath falls within the concept of a CRP as that term is used in the *CIA*. A more definitive answer would require a detailed application of the rules of statutory interpretation including an appreciation of context: see, most recently *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15 (CanLII). However, it does follows that I am also sceptical as to whether the duelling referendum question proposed by Thomas Lukaszuk qualifies as a CRP within the meanings of the Act. Here is the text of that proposal: "Do you agree that Alberta must remain within Canada and any form of separation must be rejected?"

The only example that we have of a constitutional proposal to date is the referendum on equalization (2021). The question in that referendum was framed as follows:

> Should section 36(2) of the *Constitution Act, 1982* – Parliament and the government of Canada's commitment to the principle of making equalization payments – be removed from the constitution?

Finally, the suggestion that the questions referenced above might be "duelling" invites consideration of section 2(5) of the *CIA* which provides that:

> (5) An application must not relate to a proposal that in the opinion of the Chief Electoral Officer is the same as or substantially similar to
>
> (a) …
>
> (b) subject to subsection (4) [quoted above], a proposal that is the subject of another initiative petition, or would result in a conflict with the outcome of another initiative petition, if
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> (i) the initiative petition signing period for that other initiative petition has not ended, or

(ii) the signature sheets for that other initiative petition have been submitted to the Chief Electoral Officer in accordance with section 6 but that other initiative petition has not been completed by way of an initiative vote, constitutional referendum or otherwise resolved under that section and Division 4 or Part 2, as applicable.

Presumably the purpose of this provision is to ensure that the electorate is not put to the risk of adopting resolutions that mandate conflicting outcomes. While individual well-informed voters should be able to respond to that risk by voting accordingly (e.g. in the present case voter A might maintain a consistent position by voting "yes" to the Lukaszuk petition and "no" to the AAP Secession Question; voter B might adopt the reverse position), there is the risk that a majority of voters in their wisdom could vote in favour of both resolutions which would put the government of the day in an invidious position, especially if each of the two resolutions were to be "binding"!

This suggests that if the CEO were to accept Mr. Lukaszuk's CRP (Mr. Lukaszuk apparently filed his CRP on May 22, 2025) the CEO would, as part of considering the admissibility of the AAP Secession Question, also need to assess whether the two questions present as a conflict in the sense addressed above. If that is the conclusion, the CEO would need to reject the AAP Secession Question (on the assumption that it was filed second in time after Mr Lukaszuk's CRP).

Is the APP Secession Question a clear question for the purposes of the federal Clarity Act?

While this is a second order question, it is important to address this issue now since it provides important context for considering how the AAP Secession Question will be viewed in the federal context, as well the possible outcomes of a vote on such a question. It is particularly important to note that one provision of the *Clarity Act* will be triggered immediately should the CEO choose to accept a CRP framed along the lines of the AAP Secession Question and should an appropriate resolution be adopted in the Legislative Assembly.

Parliament adopted the *Clarity Act*, (the full name of the statute is *An Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 26) in response to the opinion of the Supreme Court of Canada in the *Quebec Secession Reference*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217. It will be recalled that the Governor in Council referred three questions to the Court:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to affect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to affect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to affect the secession of Quebec from Canada unilaterally, which would take precedence in Canada? (Finding no conflict, it was not necessary for the Court to address this question.)

In its consideration of the first question, the Court concluded that there was no unilateral right of secession but that the democratic principle which informs our Constitution requires that "the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire." (at para 88) Should that expression of democratic will take the form of a referendum then "The referendum result… must be free of ambiguity both in terms of the question asked and in terms of the support it achieves." (at para 87) (i.e., "a clear majority on a clear question" (at para 100)). But the Court was equally of the view that the judicial branch was not competent to determine what might constitute a clear majority on a clear question. "Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other." (at para 100) This was the impetus for the *Clarity Act*.

In addition to a lengthy preamble which summarizes the key points of the Supreme Court's opinion, the *Clarity Act* has but three sections. Section 1 addresses the clear question issue, section 2 the clear result issue, while section 3 addresses the need for a constitutional amendment. I will focus here on the clear question issue – section 1.

Subsection 1(1) requires the House of Commons to determine by way of a resolution whether a proposed question is clear. The House is directed to do so "within thirty days after the government of a province tables in its legislative assembly or otherwise officially releases the question that it intends to submit to its voters in a referendum relating to the proposed secession of the province from Canada". Subsections 3 – 5 offer additional directions. Thus, subsection 3 directs the House to consider "whether the question would result in a clear expression of the will of the population of a province on whether the province should cease to be part of Canada and become an independent state." Subsection (4) in turn directs that such an intention cannot be discerned if "a referendum question … 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", or if the referendum question "envisages other possibilities in addition to the secession of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population of that province on whether the province should cease to be part of Canada."

The House is also directed to take into account:

> … the views of all political parties represented in the legislative assembly of the province whose government is proposing the referendum on secession, any formal statements or resolutions by the government or legislative assembly of any province or territory of Canada, any formal statements or resolutions by the Senate, any formal statements or resolutions by the representatives of the Aboriginal peoples of Canada, especially those in the province whose government is proposing the referendum on secession … (s 1(5))

And if the House responds in the negative, subsection 6 directs that "The Government of Canada shall not enter into negotiations on the terms on which a province might cease to be part of Canada …".

In sum, the issue of whether or not Mr. Rath's question is a clear question for the purposes of the federal *Clarity Act* is not a justiciable question. However, the adoption of a Resolution by the Legislative Assembly along the lines of the AAP Secession Question will trigger the House of Common process outlined above.

As for the second question, the Court was of the opinion that "whatever be the correct application of the definition of people(s) in this context (the Court did not reach a conclusion on this point (at para 125 and see also at para 138)), their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession." This was because, while the Court recognized that a people might have a right to external self-determination (i.e. unilateral secession) where that people is subject to alien subjugation, domination or exploitation, that was not plausibly the case for Quebec within the federal state of Canada (at paras 136 – 138).

The Court concluded this section of its opinion with the following comments relating to the rights of Indigenous peoples:

> We would not wish to leave this aspect of our answer to Question 2 without acknowledging the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Quebec to unilateral secession. In light of our finding that there is no such right applicable to the population of Quebec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the aboriginal peoples in this Reference. (at para 139)

Which leads us to the question of how Indigenous treaty rights might affect any proposed CRPs under the *Citizen Initiative Act* and any discussion of secession in Alberta. Robert Hamilton has commented on the implications of this paragraph in an earlier post and I offer additional comments below.

Secession and the Treaty Rights of First Nations

The lands included within what is now the Province of Alberta are subject to the terms of five different treaties between the Crown and First Nations. These are principally (in terms of geographical area) Treaty 6 (1876), Treaty 7 (1877) and Treaty 8 (1899) - but also Treaty 4 (1874, an area east of Medicine Hat) and Treaty 10 (1907, an area east of Cold Lake). See the map at the end of this post. All of these treaties were negotiated by the Dominion (federal) government, and all but Treaty 10 were negotiated before Alberta existed as a Province (1905, but the transfer of administration and control of natural resources deferred to 1930). While there is some precedent for a province (Ontario) being involved in historic treaty negotiations (Treaty 9, the James Bay Treaty, 1905 and the Williams Treaties of 1923) that was not the case for Treaty 10.

Since Alberta is not a party to any of these numbered treaties it is important to understand the legal implications of these treaties for Alberta. The case that most clearly addresses this issue is the decision of the Supreme Court of Canada in *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 (CanLII). That decision involved Treaty 3 negotiated in 1873 and specifically some of the territory subject to Treaty 3 that originally lay outside the boundaries of the province of Ontario. These federal lands were brought into Ontario by the 1912 boundary extension legislation (*Ontario Boundaries Extension Act*, SC 1912, c 40) The principal issue in the case was whether Ontario could assume the power "to take up" lands subject to the treaty i.e., give third parties Crown grants and resource rights within the treaty area. The unanimous Court held that Ontario could exercise this power without needing Canada's support. In doing so the Court emphasised that the treaty was negotiated by the Crown:

> The promises made in Treaty 3 were promises of the Crown, not those of Canada. Both levels of government are responsible for fulfilling these promises when acting within the division of powers under the *Constitution Act, 1867*. Thus, when the lands covered by the treaty were determined to belong to the Province of Ontario, the Province became responsible for their governance with respect to matters falling under its jurisdiction by virtue of ss. 109, 92(5) and 92A of the *Constitution Act, 1867*, subject to the terms of the treaty. It follows that the Province is entitled to take up lands under the treaty for forestry purposes. (emphasis added) (at para 35)

The power however is not unlimited:

> In exercising its jurisdiction over Treaty 3 lands, the Province of Ontario is bound by the duties attendant on the Crown. It must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests. These duties bind the *Crown*. When a *government* — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question. (emphasis in original) (at para 50)

The Court went on to say:

> Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway of their rights to hunt, fish and trap, and communicate its findings to them. It must then deal with the Ojibway in good faith, and with the intention of substantially addressing their concerns (*Mikisew*, at para 55; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010, at para 168). The adverse impact of the Crown's project (and the extent of the duty to consult and accommodate) is a matter of degree, but consultation cannot exclude accommodation at the outset. Not every taking up will constitute an infringement of the harvesting rights set out in Treaty 3. This said, if the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise (*Mikisew*, at para 48). (at para 52)

The Court also took the view that the boundary extension legislation which included this particular area of federal territory within the boundaries of Ontario did not amend the treaty: "The 1912 Legislation altered which level of government would have authority in terms of taking up the land. It did not modify the treaty or change its partners." (at para 49)

While each of the numbered treaties has a distinct negotiating history, and while Alberta's territorial rights depend on the terms of the *Natural Resources Transfer Agreement* (1930) (NRTA) rather than boundary extension legislation, it seems clear that *Grassy Narrows* stands for the proposition that a province like Alberta only has the power to take up lands under one of the numbered treaties by virtue of being part of the federal State of Canada. Alberta has no power to amend the terms of a numbered treaty, nor can it unilaterally arrogate to itself party status; neither can it legislate in relation to a numbered treaty (*The Queen v. Sutherland et al.*, 1980 CanLII 18 (SCC), [1980] 2 SCR 451). Insofar as the APP Secession Question claims to withdraw Alberta from the political and constitutional authority of the state of Canada it is inconsistent with the terms of the numbered treaties and as such inconsistent with s 35 of the *Constitution Act, 1982* and therefore an ineligible petition under s 2(4) of the *CIA*. It is perhaps also worth noting that Alberta's title to Crown lands under the NRTA is a qualified title in the sense that it is subject to "any interest other than that of the Crown in the same" (NRTA, s 1 and mirroring the language of s 109 of the *Constitution Act, 1867*). We know that this phrase encompasses an unextinguished Indigenous title (*Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 at para 175) but it is also possible that it embraces some continuing treaty rights (see *St. Catherine's Milling and Lumber Company v. The Queen*, 1888 CanLII 209 (UK JCPC) noting at 60 (AC) that post-treaty Canada "still possesses exclusive power to regulate the Indians' privilege of hunting and fishing".)

It may also be useful to sketch the position under international law. It is clear that all peoples have a right of self-determination as a matter of customary international law and also as reflected in numerous international instruments including the International Covenant on Civil and Political Rights and the United Nations Declaration on the Rights of Indigenous Peoples. The right of self-determination includes the right of a people to freely determine their political status (UNDRIP, Article 3). The people of Alberta are not a "people" for the purposes of international law, but Indigenous peoples are. A proposal by electors in Alberta to secede from the state of Canada without the consent of Indigenous peoples living in this territory is inconsistent with the right of self-determination of those Indigenous peoples. Provincial statutes should be interpreted in a manner that is consistent with Canada's obligations under international law: *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 (CanLII). Accordingly, the *CIA* should be interpreted as excluding a petition that is inconsistent with those obligations.

Can a non-derogation clause address the above concerns?

In introducing the non-derogation amendment to the *Referendum Act* Mr. Amery noted that:

> 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. (Hansard at 3494)

Mr. Amery also acknowledged that this would be in addition to the existing section 2(4) of the *CIA* discussed above. The question for present purposes is whether the proposed non-derogation clause represents an effective response to the concerns raised by First Nations. For reasons developed below I conclude that it is not an effective response, and that the current section 2(4) of *CIA* offers more effective protection – at least where a referendum is proposed as part of a citizen initiative.

Non-derogation clauses are not new. They were for a time routinely included in federal statutes, and occasionally in Alberta statutes. For example, Premier Smith's *Alberta Sovereignty Within a United Canada Act*, SA 2022, c A-33.8 included a non-derogation clause:

> 2 Nothing in this Act is to be construed as
> …
>
> (c) abrogating or derogating from any existing aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Non-derogation clauses have been subject to a number of criticisms. First, insofar as they are simply interpretive clauses (nothing is to be *construed*) they cannot offer substantive protection. Second, they are unnecessary insofar as a mere statute cannot infringe constitutionally protected rights (*Constitution Act, 1982*, s 52) – at least unless such an infringement can be constitutionally justified (*R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075). And third, they are framed negatively and as such fail to address the positive obligations that the Crown may have (for example, the positive obligation of diligent implementation of treaty promises: *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 (CanLII) and ABlawg post here). This latter concern informed the 2024 amendment to the federal *Interpretation Act*, RSC 1985, c I-21, that established that:

> 8.3 (1) Every enactment is to be construed as upholding the Aboriginal and treaty rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

Other jurisdictions such as British Columbia have adopted similar legislation. Thus, section 8.1 of the *Interpretation Act*, RSBC 1996, c 238 (adopted in 2022) provides that:

> (2) For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the *Constitution Act, 1982*.
> (3) Every Act and regulation must be construed as being consistent with the Declaration [the United Nations Declaration on the Rights of Indigenous Peoples].

For a discussion of this provision, see *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 (CanLII) and related ABlawg commentary here. By their nature these provisions apply to *all* statutes - as and when relevant. There is no similar general legislation in Alberta.

The non-derogation clause now included in the *Referendum Act* is more limited than the clauses included in the federal and BC *Interpretation Acts*. For ease of reference, I reproduce the text again:

> 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.*

First, the formulation adheres to the older and negative framing of such clauses – there is no commitment to upholding aboriginal and treaty rights. Second, the provision applies only to the referendum itself. It says nothing about the steps that might subsequently be taken to implement the results of such a referendum. And third, as with all such clauses, it is simply an interpretive provision that can do little to blunt express language with a contrary intent. For example, how might one interpret the APP Secession Question in a way that does *not* abrogate or derogate from Aboriginal or treaty rights given the implications of Alberta becoming a sovereign country and no longer a province of Canada? Perhaps one can get there in the same way as in the international law argument referenced above in the context of the right of self-determination, but it is not clear to me that this route is available given that the non-derogation refers to the interpretation of the referendum itself rather than the empowering legislation.

In sum, I conclude that the new non-derogation clause provides little if any comfort to Treaty Nations concerned about the implication of a secession referendum. I conclude that the existing section 2(4) of the *CIA* offers more effective protection since it offers an opportunity to stop a citizen-initiated referendum in its tracks where a proposed CRP may prejudice aboriginal or treaty rights. That said, and as noted earlier, section 2(4) is confined to a citizen-initiated CRP; section 2(4) provides no protection whatsoever where the referendum proposal is initiated under sections 1 – 3 of the *Referendum Act* without reference to the *CIA*.

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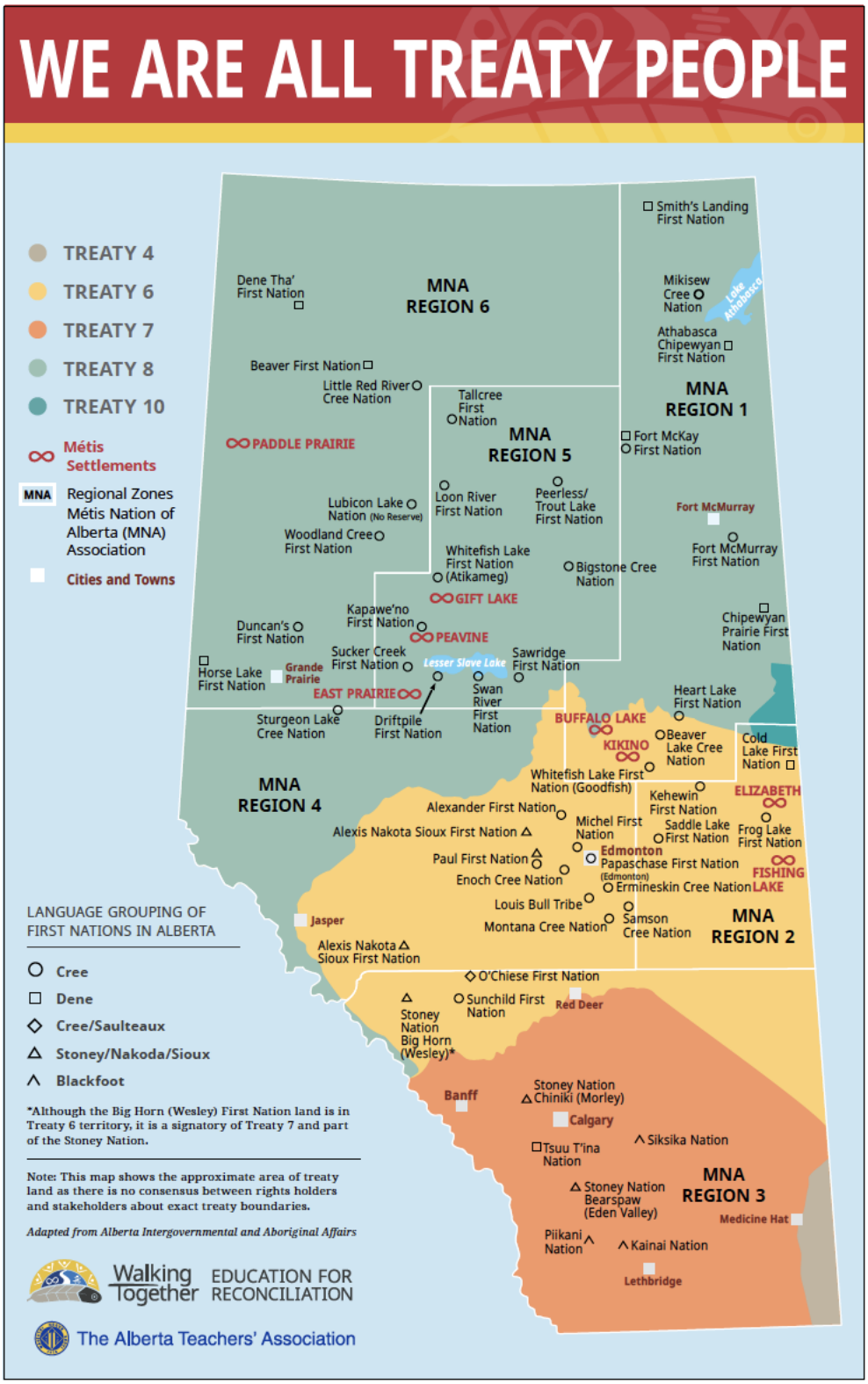
Map of Alberta Treaties:



Map source: https://www.albertaschoolcouncils.ca/public/download/documents/57314

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